Law of Tortious Prenatal Death Since Roe v. Wade, The

David Kader

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THE LAW OF TORTIOUS PRENATAL DEATH SINCE ROE V. WADE

David Kader

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I. INTRODUCTION

Rights and protections legally afforded the unborn child are of ancient vintage.1 In equity,2 property,3 crime,4 and tort5 the unborn has received and continues to receive a legal personality. The evolution of the unborn's status in law has been exceedingly atomistic, however, with each doctrinal

1. If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine.
Exodus 21: 22-23.


3. Note, supra note 2, at 999-1000.
4. Id. at 1001-03.
5. Id. at 996-99.

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category evolving with little reference to the others, the result being that no harmonizing theory for the legal personality of the unborn has developed. Indeed, whatever coherence or dissonance exists in the law remains for the most part unrevealed.

Two separate, modern legal developments—one in tort, the other in abortion law—provide an opportunity to begin the descriptive and prescriptive work on a legal theory for the unborn. The opportunity exists primarily because the current tort and abortion developments pit seemingly disparate visions of the unborn against each other, and because the evolution in both areas is not yet complete.

The ideological history of prenatal injury law, and the more recent development of prenatal death law has consistently moved toward the affirmation of the unborn as a "person" in the law, with a parallel history evidenced in criminal abortion legislation. With the United States Supreme Court's abortion decision of 1973, holding inter alia that the unborn is not a "person" under the fourteenth amendment to the United


One foeticide statute, 1876 Ga. Laws 113 (repealed 1968), defined the killing of a "quick" child as murder. Inclusion of a fetus within the term "person" has also been justified by analogy to statutes prohibiting abortion and statutes requiring that a stillborn must be disposed of like any other body. See Britt v. Sears, 150 Ind. App. 487, 496, 277 N.E.2d 20, 26 (1971).

7. Comment, Wrongful Death and the Unborn: An Examination of Recovery after Roe v. Wade, 18 J. Fam. L. 99 (1973-1974), is an adequate summary of decisions before Roe v. Wade, but the analysis of the impact of Roe v. Wade is cursory and speculative—the Comment was written before any post-Roe decisions. Note, Tort Recovery for the Unborn Child, 15 J. Fam. L. 276 (1976-1977), contains synopses of some of the cases, including several decided after Roe v. Wade, and apparently concludes that the reasoning of Roe v. Wade is an obstacle to recovery and should be ignored. Id. at 298-99.

8. See Kader, Civil Liability for the Infliction of Prenatal Harm, in Trauma in Pregnancy (H. Buchsbaum ed. 1979).

Two additional articles, when read together, provide a rich look at the doctrinal evolution of liability for prenatal harm. See Gordon, The Unborn Plaintiff, 63 Mich. L. Rev. 579 (1965); Winfield, The Unborn Child, 4 U. Toronto L.J. 278 (1942) (also published in 8 Cambridge L.J. 76 (1942)).

10. See notes 15-48 and accompanying text infra.
States Constitution, the legal profile for the unborn found the label "person" fitting for some purposes but not for others. Hence, a seeming paradox exists: the law permits the imposition of liability for fetal death or injury negligently caused, but on the other hand, also permits immunity from liability for harm intentionally caused and maternally desired. This apparent incongruity has played a part in spawning a number of state court wrongful death decisions involving the unborn. Unfortunately, the United States Supreme Court's decision has been employed in inconsistent fashion by the state courts, thereby introducing new uncertainty into an area long plagued with ambiguity. It is precisely these state decisions that are the focus of this Article.

The purpose of this Article is to analyze the post-Roe v. Wade wrongful death cases involving the unborn and offer a corrective commentary on the confusions and inconsistencies which exist. This Article is intended as a contribution to the needed effort to develop the meaning of "person" in the law, and to derive a legal personality for the unborn.

II. A Sketch of Prenatal Harm Before Roe v. Wade

The noncriminal legal treatment in the United States of harm wrongfully inflicted on the unborn involves cases of maternal traumatic experience, usually in circumstances of birth or vehicular accident. In almost all of the older cases, and many of the more recent ones, the woman,

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12. The fourteenth amendment reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis added). For state court interpretations of the same word, as used in wrongful death statutes, see notes 41-48 and accompanying text infra.


14. Roe v. Wade has been cited in decisions allowing recovery and in decisions denying recovery. See notes 56-70 and accompanying text infra. It is not necessarily the propositions cited, but the decisions they are used to support, which are inconsistent.

15. This Article is limited to the civil law's response to prenatal harm. Thus, there is no direct consideration of the criminal law's response, nor of postnatal or preconception wrongs. The latter is a new and rapidly developing area of tort law. See Note, Wrongful Birth in the Abortion Context—Critique of Existing Case Law and Proposal for Future Actions, 53 Den. L.J. 501 (1976).

in the sixth, 17 seventh, 18 or eighth 19 month of pregnancy, or even overdue to deliver, 20 was injured in an automobile accident and within a few days delivered a stillborn infant. The mother may or may not have survived. A second pattern emerges in a few of the older cases, 21 and in an increasing number of the more recent ones, 22 where the fetus has died during or shortly before an anticipated normal delivery allegedly because of the negligence of the attending physician or hospital personnel. Cases which fit neither of these fact patterns are rare. While the fact patterns, though tragic, are monotonous in their similarity, the judicial response to claims for recovery are not. The late Professor Prosser has seen in this part of tort history "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." 23 The well-settled rule referred to by Prosser denied recovery for injuries or death if the harm was inflicted in utero.

While recovery for wrongful death is a legal theory of only about one hundred and fifty years antiquity, and recovery for prenatal injury is a theory of even more recent vintage, it is by now well established that a child born alive can recover for prenatal injury, before or after viability, and that the survivor of such a child can recover for its wrongful death resulting from such injury. The major area of contemporary conflict is recovery for the wrongful death of the stillborn, resulting from injury either before or after viability, and the major question is whether a fetus

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17. See generally Pehrson v. Kistner, 301 Minn. 299, 222 N.W.2d 334 (1974); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964). Cf. Orange v. State Farm Mut. Ins. Co., 443 S.W.2d 650 (Ky. 1969) (affirming that a fetus is a "person" within the terms of an automobile insurance policy exclusion; the mother had attempted to recover from her insurance company for the death of the fetus).


21. See generally Verkennes v. Cornia, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954).


TORTIOUS PRENATAL DEATH is a “person” within the meaning of the wrongful death statutes. It is only in this context that a majority of jurisdictions in the United States

24. The following table and accompanying notes illustrate the logical and historical sequence of the expansion of recovery for prenatal injury. Acceptance of any of the lettered propositions would also indicate acceptance of those propositions higher in the same column and those to the left in the same row.

Logical and Historical Sequence—Who Can Recover For Injury When

<table>
<thead>
<tr>
<th>A.</th>
<th>Born alive can recover for injury after birth</th>
</tr>
</thead>
<tbody>
<tr>
<td>B.</td>
<td>Survivor of born alive can recover for injury after birth</td>
</tr>
<tr>
<td>C.</td>
<td>Born alive can recover for injury after viability</td>
</tr>
<tr>
<td>D.</td>
<td>Survivor of born alive can recover for injury after viability</td>
</tr>
<tr>
<td>E.</td>
<td>Survivor of stillbirth can recover for injury after viability</td>
</tr>
<tr>
<td>F.</td>
<td>Born alive can recover for injury after conception</td>
</tr>
<tr>
<td>G.</td>
<td>Survivor of born alive can recover for injury after conception</td>
</tr>
<tr>
<td>H.</td>
<td>Survivor of stillbirth can recover for injury after conception</td>
</tr>
<tr>
<td>I.</td>
<td>Born alive can recover for injury (to mother) before conception</td>
</tr>
<tr>
<td>J.</td>
<td>Survivor of born alive can recover for injury (to mother) before conception</td>
</tr>
<tr>
<td>K.</td>
<td>Survivor of stillbirth can recover for injury (to mother) before conception</td>
</tr>
</tbody>
</table>
have not yet permitted recovery. At the present time, twenty-four states and the District of Columbia allow recovery,25 thirteen states deny recov-

A. This is a typical personal injury action. A cause of action is recognized in all jurisdictions.

B. This is a typical wrongful death action. A cause of action was first recognized by Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93, and is now recognized in all jurisdictions.

C. The question of recovery under these circumstances was answered in the negative in Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), and in the affirmative in Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). A cause of action is now recognized in all jurisdictions.

D. The question of recovery under these circumstances was answered in the affirmative in Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953), and Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951). A cause of action is now recognized in all jurisdictions.

E. This Article is primarily concerned with the question of recovery under these circumstances. This proposition cannot be accepted only if proposition D has already been accepted. But while all jurisdictions have accepted proposition D, not all have accepted proposition E. Acceptance of proposition D is necessary, but not sufficient, condition to the acceptance of proposition E. The jump from D to E may be made casually (or, in fact, the distinction ignored, as in Mitchell v. Couch, 285 S.W.2d 901, 905 (Ky. 1955)), or very carefully (as in Mone v. Greyhound Lines, Inc., 368 Mass. 854, 358-59, 331 N.E.2d 916, 918-19 (1975)).


G. There is little case law in this area, but the acceptance of propositions B (all jurisdictions), D (all jurisdictions), and F (most jurisdictions) necessitates the acceptance of this proposition. Consequently, it may be assumed that most jurisdictions recognize a cause of action under these circumstances.

H. This Article is also concerned with the question of recovery under these circumstances. The best known decision allowing recovery is Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955). The plurality opinion in Presley v. Newport Hosp., 117 R.I. 177, 355 A.2d 748 (1976), would also allow recovery under these circumstances. Additionally, the acceptance of propositions E and F logically dictates the acceptance of this proposition. Perhaps half of the jurisdictions can be expected to recognize a cause of action under these circumstances. Conversely, however, if Roe v. Wade dictates rejection of proposition H but not of proposition E (see discussion supra), then propositions G and F may have to be rejected.

I. The leading case allowing recovery under these circumstances is Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976) (in 1965 the mother [Rh- blood type] was given a blood transfusion [Rh+ blood type], and the error was discovered in 1975 when the woman was pregnant; a brain-damaged child was born in 1974), aff'd, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

J. No case authority, but acceptance of proposition I (Renslow case) and proposition B (all jurisdictions) would dictate acceptance of this proposition.

K. No case authority, but acceptance of proposition I (Renslow case) and proposition E (approximately half of the jurisdictions) would dictate acceptance of this proposition.


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ery, and the remaining thirteen states have not yet considered the question.

To facilitate an analysis of the impact of *Roe v. Wade* on tort prenatal death law, a survey of the major judicial justifications for and against recovery for the stillborn is presented. These criteria mirror those found in *Roe v. Wade* and it is this identity of criteria that invites the use of *Roe v. Wade* in the prenatal death cases.


Under the language of most of the state wrongful death statutes recovery is only possible if the death was suffered by a "person." In some early cases, the judgment that the unborn were "persons" under the statutes stood alone as the expressed justification for the court's protective result. More recently courts have supplemented the fundamental legal conclusion with additional reasons, such as the biological independence of the fetus, or the need to effect the remedial or policy purposes of the legislation. Frequently coupled with the aforementioned academic arguments are related arguments of logic or justice. One argument queries: if in all jurisdictions recovery is allowed for wrongful death if the child is born alive, why not allow recovery if there is a stillbirth rather than a live birth? It is contended that to hold otherwise would be illogical, with this supportive hypothetical a favorite foil: if unborn twins are injured at the same point in time in the same accident, causing one to be stillborn and the other to die after a live birth, should recovery be allowed for the death of the latter but not the former? It is also argued that if recovery is allowed for in-

28. The first decision allowing recovery, Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949), is virtually devoid of logical argument. See also Mitchell v. Couch, 285 S.W.2d 901, 904 (Ky. 1955).


juries which do not result in death (as is the case in all jurisdictions), to
deny recovery for injuries which do result in death is unjust for "the greater
the harm inflicted the better the opportunity for exoneration of the
defendant."33 More generally, it has been judged that to deny recovery
would be either to declare a wrong without providing a remedy,34 or to
sanction rather than deter the wrongful act.35

Given advances in medical science,36 some of the arguments historically
used to deny recovery are now obsolete.37 The argument in the leading
historic case38 denying recovery, that the fetus is part of the mother and
has no separate existence prior to birth, has been discredited. The last
decision to rely on such a proposition is now almost thirty years old.39

Modern, more commonly invoked arguments denying recovery re-
volves around the statutory nature40 of the prenatal death cause of

Cal. Rptr. 97 (1977). The same constitutional question was avoided in O'Neill v.
Morse, 385 Mich. 130, 133, 188 N.W.2d 785, 785 (1971).

(1975); White v. Yup, 85 Nev. 527, 536, 458 P.2d 617, 622 (1969); Stidam v. Ash-
Hosp., 117 R.I. 177, 184, 365 A.2d 748, 752 (1976); Baldwin v. Butcher, 155 W.
Ins. Co., 34 Wis. 2d 14, 20, 148 N.W.2d 107, 110 (1967).
34. Rainey v. Horn, 221 Miss. 269, 281, 72 So. 2d 434, 439 (1954); White v.
Yup, 85 Nev. 527, 536, 458 P.2d 617, 622 (1969); Kwaterski v. State Farm Mut.
(allowing recovery under a statute providing for only punitive damages). Cf.
Leccese v. McDonough, 361 Mass. 64, 270 N.E.2d 399 (1972) (denying recovery
under a comparable punitive statute; later overruled by Mone v. Greyhound
Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975) (allowing recovery under a
compensatory statute)).
36. See generally Note, The Impact of Medical Knowledge on the Law Re-

37. See RESTATEMENT OF TORTS § 869 (1939); RESTATEMENT (SECOND) OF
TORTS § 869 (1979). To the extent that RESTATEMENT (SECOND) § 869 states the
traditional view denying recovery, it has been rendered obsolete by subsequent
decisions.
The same proposition was also adopted to an uncertain extent in Egbert v. Wenzl,
199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977) ("We . . . adhere to the rule of
law previously established in Drabbels, in 1951.").
40. There are two other weighty arguments for denying recovery. First,
wrongful death statutes commonly provide that a survivor may bring an action
if the decedent, at the time of his death, could have brought an action for his
injuries, or if the decedent, at the time of the injuries, could have brought an
action. See generally State ex rel. Hardin v. Sanders, 538 S.W.2d 336 (Mo.
Banc 1976); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Lawrence v. Craven
Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969). Such statutory language has been
held to preclude recovery for the wrongful death of a fetus, who could not have
brought an action in his own behalf. The term "minor child" in a wrongful death
statute, together with a statutory method of calculating minority, was held to ex-
clude a fetus in Norman v. Murphy, 124 Cal. App. 2d 95, 97, 268 P.2d 178, 179
action. Given the statutory derogation of the common law, some courts require strict construction of the relevant language of the statute, which can and does result in the holding that the unborn is not a "person." The supporting analysis in these decisions does not explore the biological, philosophical, or theological dimensions of "personhood," but instead simply contends that the legislatures of the mid-1800's which enacted the wrongful death statutes did not intend to create a cause of action for the death of an unborn fetus. Arguing the opposing viewpoint, other courts have held that the common law was not frozen by the enactment of wrongful death statutes and any prior understanding of the term "person" ought not necessarily control. Moreover, it has been held that where the statute was enacted in an era of limited knowledge of prenatal life, the exclusion of the unborn from statutory coverage cannot be assumed to be a product of any conscious legislative intent. The rebuttal is found in those court

But recovery has been allowed under identical statutory language. See Moen v. Hanson, 85 Wash. 2d 997, 999, 537 P.2d 266, 267 (1975).

Second, by the process of statutory analogy, it has been argued that to allow recovery for wrongful death would be inconsistent with homicide statutes which require that the victim have been born alive. See Eich v. Town of Gulf Shores, 293 Ala. 95, 101, 300 So. 2d 354, 359 (1974) (Merrill, J., dissenting); Justus v. Atchison, 19 Cal. 3d 564, 578-79, 555 P.2d 122, 131-32, 139 Cal. Rptr. 97, 106-07 (1977). See also Wrongful Death—California Supreme Court Declined to Extend the Cause of Action for Wrongful Death to Unborn Children, 16 J. Fam. L. 842 (1977-1978) (commenting on Justus v. Atchison), where the author stated:

"In the criminal law of California, where the legislature has chosen to extend its protection to the unborn, it has unequivocally so stated. The court reasoned that the corollary of this is that when the legislature speaks generally of persons "it impliedly but plainly excludes such fetuses." Had the legislature at any time in the history of the statute meant to include fetuses among the class of potential wrongful death victims, it would have amended the statute."

Id. at 846 (footnotes omitted).


See Id. Accord, Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977) ("We express no opinion with respect to the existence of the fetus as a person in either the philosophical or scientific sense. We hold only that the Legislature did not exhibit the intention to include a viable fetus within the scope of our wrongful death statute.") (emphasis added). See also O'Neill v. Morse, 385 Mich. 130, 139-50, 186 N.W.2d 785, 789-95 (1971) (Black, J., dissenting).


holdings which defer to the legislature to alter longstanding traditional understandings, especially where legislative inaction is deemed to imply satisfaction with prior decisions denying recovery.

Two major nonstatutory reasons for denying recovery center on difficulties in proving causation and damages. Proving causation involves demonstrating the factual “but for” causal link between the wrongful act and prenatal harm. While some courts find this evidentiary burden reason enough to frustrate recovery, others recognize that modern medical science has facilitated the proof of causation, or more fundamentally that difficulty of proof is no basis for denying the cause of action at the pleading stage. Proving damages presents difficulties in evaluating the


48. Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977); Hamby v. McDaniel, 559 S.W.2d 774, 776-77 (Tenn. 1977), But see Torts—Wrongful Death—Right of Action for the Wrongful Death of a Viable Fetus in Tennessee—Recent Decision and Statutory Response, 45 TENN. L. REV. 545 (1978), where it was explained:

As a direct response to the Hamby holding, the Tennessee General Assembly recently amended Tennessee Code Annotated section 20-607 to include an unborn fetus that was viable at the time of injury within the definition of “person” for purposes of the statute.

TENN. CODE ANN. § 20-607 (Supp. 1977), as amended by 1978 Tenn. Pub. Acts ch. 742, § 1, provides in part: “For purposes of this section, the word ‘person’ shall include a fetus which was viable at the time of injury. A fetus shall be considered viable if it had achieved a state of development wherein it could reasonably (sic) be expected to be capable of living outside the uterus.”

Id. at 546 & n.4.


51. Hatala v. Markiewicz, 26 Conn. Supp. 358, 361, 224 A.2d 406, 408 (Super. Ct. 1966) (“the right to bring an action is clearly distinguishable from the ability to prove the facts”).

52. In addition to the major damage rationale stated in the text, others have been advanced. One court has pointed out that if the mother has her own cause of action for her own injuries, the jury will inevitably include the loss of the child in damages, and to allow a separate wrongful death action would result in an “unjustified bounty” to the plaintiff, or in punitive damages contrary to the intent of the statute. Endrez v. Friedberg, 24 N.Y.2d 478, 484, 248 N.E.2d 901, 904, 301 N.Y.S.2d 65, 69 (1969). It has been speculated that the jury will ignore the fact that pecuniary loss is less in the case of a stillbirth than in the case of an infant born alive, the latter resulting in deformities, increased parental responsibilities, and added cost. The answer to this contention is that “redundant” recovery can be avoided by joinder of actions or precise jury instructions. See Mone v. Greyhound Lines, Inc., 368 Mass. 354, 359, 331 N.E.2d 916, 919 (1975). This procedural suggestion is considered by one commentator to be an effective solution which “provides adequate protection for the defendant from outrageous recoveries without unnecessarily restricting the plaintiff's distinct causes of action.” Torts—Wrongful Death—Recovery for Wrongful Death of a Stillborn Fetus Examined, 21 VILL. L. REV. 994, 999 (1976).
pecuniary loss associated with the death of an unborn. This rationale is probably the most common used by the courts for denying recovery. The central premise of the rationale is that the younger the decedent, be it child or unborn, the more speculative the award of any damage amount. Upon this premise rests the judicial conclusion that the legislature is free to draw the line at live birth, a reflection of an intent to frustrate speculative damage awards.

III. The Years Since Roe v. Wade

In the seven years since Roe v. Wade, courts in nineteen states have examined or re-examined the question of recovery for the wrongful death of a stillborn fetus; a number have done so with reference to Roe v. Wade, but no dominant application has emerged. It might be expected that courts which have reconsidered and affirmed positions taken before Roe v. Wade would place little reliance on it. Of the two state courts which reaffirmed their position of allowing recovery, one did not cite Roe v. Wade at all, and the other only to limit recovery. Of the seven states which reaffirmed their position of denying recovery, four did not cite Roe v. Wade and the other three relied on it for the proposition that a fetus, even if viable, is not a "person" within the fourteenth amendment or in the law generally.

Similarly, it might be expected that Roe v. Wade would be relied upon as an important variable in those decisions where a previous position was overruled or the question was of first impression for the state

53. Wrongful death statutes are intended to compensate for pecuniary loss, which includes the financial loss suffered by persons standing in a close relationship to the deceased, i.e., the value of an existing social relationship beneficial to the plaintiff. See generally Justus v. Atchison, 126 Cal. Rptr. 150, 155 (Cal. Ct. App. 1975), vacated, 19 Cal. 3d 554, 555 P.2d 122, 130 Cal. Rptr. 97 (1977).


55. Cardwell v. Welch, 25 N.C. App. 390, 393, 213 S.E.2d 382, 384 (1975). The simple answer is that it is not necessary for the legislature to draw any line; the jury is competent to decide the value of the relationship lost. For example, small awards, on the order of $5,000, are common for the wrongful death of a child born alive.


court. Such an expectation finds only equivocal support in the relevant decisions. Two states which denied recovery before *Roe v. Wade* now allow recovery, whereas one state which seemingly allowed recovery before *Roe v. Wade* now denies it. In none of these three law altering decisions was *Roe v. Wade* cited. In the seven states in which the matter was of first impression *Roe v. Wade* was cited three times: in two decisions among the six allowing recovery, the case was cited for the proposition that the state has a substantial interest in the potential life of a viable fetus; in the one decision denying recovery, it was cited for the proposition that a fetus is not a "person."  

The irrelevance of *Roe v. Wade* to the question of recovery for the wrongful death of a stillborn fetus may be inferred from the numerous post-*Roe* decisions which do not rely on it in any respect, a position explicitly recommended by one judge. Since *Roe v. Wade* was not a wrongful death case, it did not directly address the question of recovery for such.


It did, however, address important aspects of the legal status of the unborn, both within the context of the abortion controversy, and in reference to other areas of law, including torts. These discussions are matters of relevance not only to those decisions relying upon Roe v. Wade, but also for the development of a coherent theory of the unborn. Hence, Roe v. Wade is only irrelevant to the question of recovery for the wrongful death of a stillborn fetus in the strictest sense.

The significance of Roe v. Wade for prenatal death cases has been acknowledged in a number of state court decisions which have typically relied upon Roe v. Wade for three distinct propositions:

1. Recovery should be denied because a fetus is not a "person," either within the meaning of the Fourteenth amendment or in the law generally.

2. Recovery should be limited to only the death of a viable fetus because at that developmental state the state's interest becomes sufficiently compelling to warrant protection.

3. Recovery should be allowed because the state has a substantial interest in prenatal life.

Before commenting upon each use made of Roe v. Wade, it is important to address the mistaken discussion within Roe on the legal status of the unborn in tort law.

The United States Supreme Court, in Roe v. Wade, expressed no opinion on whether recovery for the wrongful death of a stillborn fetus was consistent or inconsistent with its abortion conclusions, nor need it have. Instead of any such advisory opinion, the Supreme Court, as support for its assessment of the legal status of the fetus not warranting recognition as a "person" in the law, discussed prenatal death recovery under state law. The discussion was perfunctory, and unfortunately largely

67. 410 U.S. at 162-63.


71. In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth. The law has been similarly reluctant to accord legal rights to the unborn except in narrowly defined situations, such as when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.3, at 1028-31 (1956); W. PROSSER, supra note 23, at 355-58; Infants—Unborn Children—Liability for Injuries Negligently Inflicted on Viable Unborn
inaccurate, and should not be relied upon as the correct view of the law at the time of Roe v. Wade.

Only one sentence and one footnote deal directly with the question here under consideration. One of the two references cited in footnote sixty-five of the Supreme Court's opinion does not at all support the Court's contention that recovery is generally opposed by the commentators; the Note in 46 Notre Dame Lawyer, referred to in the Roe v. Wade footnote, does not oppose recovery. It opposes abortion and the liberalization of abortion laws as inconsistent with recovery for wrongful death and other legal rights of the unborn, which it in fact supports. The other authority cited is Prosser. If the text of the treatise is cited as opposing wrongful death recovery, such citation is clearly erroneous. Prosser simply states the law as developed in state court decisions, and does not in any sense "oppose" recovery. Quite to the contrary, Prosser supports recovery for prenatal injury when the infant is born alive, and is noncommittal in the case of a stillbirth. If the Supreme Court is not citing the text of Prosser, it must be citing the footnotes and the authorities cited therein. If that is the case, such citation is still erroneous, if only because the footnotes in Prosser are incomplete. In footnote thirty-six of his treatise, Prosser cites five decisions denying recovery; two of these have since been overruled, albeit after Roe v. Wade, one by decision and the other by statute. But Prosser omits six other decisions, prior to 1971, also denying recovery.

Child, 63 HARV. L. REV. 173 (1949). The traditional rule has been changed in almost every jurisdiction. See notes 17-27 and accompanying text supra. See also cases cited in W. PROSSER, supra, at 336-38, 338 n.36; Annot., 15 A.L.R.3d 992 (1967).

72. See Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 NOTRE DAME LAW. 349 (1971), which reads in part:

The law of torts provides even more striking examples. Will the pregnant woman who is hit by a negligent driver while she is on her way to the hospital to have an abortion still have a cause of action for the wrongful death of her unborn child? If so, how is it possible for the law to say that a child can be wrongfully killed only hours before he can be rightfully killed? Absurd as it may seem, this is the present state of the law in some jurisdictions, and it does no good to say that the inconsistencies can be abated simply by refusing all recovery for prenatal injury or death because negligent death or injury to a child whose mother does not want an abortion clearly is a recognizable wrong for which there must be just compensation.

Is the unborn child any less a person when, instead of being killed by an automobile, he is killed by a doctor in the performance of an abortion? Seldom has the law been confronted by such an obvious contradiction.

Id. at 369.

73. W. PROSSER, supra note 23, at 337-38.

74. Id. at 338.


77. Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); Acton v. Shields, 386 S.W.2d 363 (Mo. 1965); Endress v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.5.2d...
Similarly, in footnote thirty-seven, Prosser cites five decisions allowing recovery, all of them still good law, but he omits nine other decisions prior to 1971 allowing recovery, including some of the early and leading cases.78

Thus, as of 1971, the publication date of Prosser's treatise, the division of case authority was fourteen to eleven favoring recovery, not five to five as indicated in the Prosser footnotes.79 Even by 1971, there was a "slight" majority of jurisdictions (thirteen to eleven) allowing recovery. Had the Supreme Court done further research it would have found that between 1971 (Prosser) and 1973 (Roe v. Wade), courts in five additional jurisdictions had considered the question, four of them allowing recovery80 and only one denying recovery,81 indicating the clear modern trend which has not abated since Roe v. Wade.

Prosser's treatment of scholarly authority, and the Supreme Court's reliance thereon, is comparable to his treatment of the case authority. In footnote thirty-six, following a list of cases denying recovery, Prosser cites seven law review articles, implying that they likewise oppose recovery.82 The Supreme Court apparently accepted that implication, concluding that a majority of the commentators opposed recovery. While three of the articles do in fact approve of decisions denying recovery,83 one other article is not relevant to the question,84 and three argue for recovery for wrongful death of a stillborn fetus.85 Several law review articles arguing

82. W. Prosser, supra note 23, at 338 n.36.
85. Del Tufo, Recovery for Prenatal Torts: Actions for Wrongful Death, 15 RUTGERS L. REV. 51 (1960) (advocates a cause of action for the wrongful death of a stillborn fetus); Note, Prenatal Injuries—Actions for Wrongful Death—Damages, 18 Me. L. REV. 105 (1966) (advocates recovery for the wrongful death of a stillborn fetus resulting from previability injury) ("to deny recovery would be against the best interests of society and its heavy dependence on the family relation-
against recovery are omitted from the citation.\textsuperscript{86} The two articles cited by Prosser as supporting recovery do not really do so.\textsuperscript{87} Prosser also ignores the authority supporting recovery cited in the 1949 \textit{Verkennes v. Cornelia} decision.\textsuperscript{88} Additional authority which the Supreme Court might have cited as opposing recovery are dated, and no longer compelling in light of subsequent decisions.\textsuperscript{89} The Supreme Court also overlooked

\begin{quote}
ship"; \textit{id.} at 117); Legislation, \textit{Prenatal Injuries and Wrongful Death, 18 Vand. L. Rev. 847 (1965)} (advocates legislation in Tennessee to amend the wrongful death statutes to allow recovery for the wrongful death of a stillborn fetus, whether viable or not at the time of the injury; some years later, in the wake of another Tennessee decision denying recovery, the Tennessee legislature did in fact amend the statute to allow recovery for the wrongful death of a viable fetus; \textit{see note 48 supra}).
\end{quote}


88. 229 Minn. 365, 370, 38 N.W.2d 838, 841 (1949). The court summarized the authority as follows:

\begin{quote}
\end{quote}

89. 2 F. HARPER & F. JAMES, \textit{supra} note 71, \textit{§} 18.3, at 1031 (cautiously opposed recovery); \textit{Restatement of Torts § 869 (1939)} (was an accurate summary of the law 10 years prior to \textit{Verkennes v. Cornelia}, 229 Minn. 365, 38 N.W.2d 838 (1949), but became obsolete by the 1970's). Section 869 to the \textit{Restatement of Torts} reads:

\begin{quote}
\textit{§ 869. HARM TO UNBORN CHILD}

A person who negligently causes harm to an unborn child is not liable to such child for the harm.

Comment:

a. The rule stated in this Section is applicable only to unintended harms to the mother or to the child. It prevents recovery by the child after its birth for any of the consequences of negligent conduct before birth. On the other hand, in an action by the mother for a tort which has caused her physical harm, damages can be included for the pain, suffering and mental distress caused by the death of the child before birth or immediately afterwards.

A person designated by statute to maintain an action for causing death can not maintain an action for a negligent act committed before the birth of a child which causes the death of the child either before or after birth.

Caveat: The Institute takes no position upon the question whether there is liability to a child hurt while unborn by a person who intentionally or recklessly and without excuse harms the mother or child.
persuasive arguments in the two-year interim between Prosser and Roe v. Wade. 90

IV. THE IMPACT OF ROE V. WADE: THE THREE PROPOSITIONS

A. The Meaning of “Person”

Stated most broadly, the proposition for which Roe v. Wade has most often been cited in wrongful death cases is that a fetus is not a “person,” and therefore recovery should be denied. 91 The meaning of “person” assumes central place in the abortion-prenatal death interface; in both areas of law the word requires application, either under the fourteenth amendment, or under the wrongful death statutes. Therefore, as a threshold matter, a proper understanding of the role of Roe v. Wade in the tort cases requires an accurate reading of the meaning of “person” in Roe v. Wade.

The Supreme Court’s comment that “the unborn have never been recognized in the law as persons in the whole sense” 92 is a descriptive synthesis concerning past decisions and not a rule of law determinative of future decisions. The relevant holding in Roe v. Wade was that “the word ‘person’, as used in the Fourteenth Amendment, does not include the unborn.” 93 Courts which have cited Roe v. Wade in denying recovery have been careful to note the contextual basis of the holding, and nowhere has it been suggested that the holding compels denial of recovery in the prenatal death context.

Indeed, it cannot be claimed that the decision in Roe v. Wade compels denial of recovery, for it is commonplace that a single word may mean different things in different contexts. 94 In fact, the very meaning of “per-

90. See, e.g., Note, The Estate of an Unborn Child Has a Cause of Action for Wrongful Death, 70 Mich. L. Rev. 729 (1972) (lengthy note advocating extension of recovery to a nonviable fetus; this position was subsequently rejected in Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975)).
92. 410 U.S. at 162.
93. Id. at 158.
94. See Torts—Wrongful Death—A Viable Fetus Is a “Person” for Purposes of the Rhode Island Wrongful Death Act, 46 U. Conn. L. Rev. 266 (1977), where the writer commented:

In Ohio, for example, a viable unborn child is a ‘person’ for purposes of the wrongful death statute (Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959)), but is not a ‘person’ for purposes of the vehicular homicide statute (State v. Dickinson, 23 Ohio App. 2d 259, 263 N.E.2d 253

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son" within the fourteenth amendment has embraced entities both within and without the human gene pool. Hence, the word, in both its fourteenth amendment context and its wrongful death context, is an attribution that bestows upon the annotated a legal personality entitled to certain rights or benefits. Understood in this manner, the superficial variance in definition for the word becomes less troublesome. The foregoing may strike of truisms, as the conclusion that the word "person" may mean something different in varying contexts does not constitute an argument that it should. Roe v. Wade neither prohibits nor compels consistency of interpretation of the meaning of "person" as between the fourteenth amendment and wrongful death statutes.

To resolve the acknowledged ambiguity of the statutes, the primary state court rationale employed in sustaining inclusion of the unborn within the meaning of "person" in a wrongful death statute rests on the desire to effectuate the remedial statutory purpose. In so doing the interest-based analysis for revealing the legal meaning of "person" becomes apparent. Exclusion of the unborn from personage under the fourteenth amendment served to advance a woman's constitutional right to privacy, whereas exclusion under a wrongful death statute serves only to immunize a wrongdoer from liability. While the woman's claim receives recognition, no social purpose or value is supported by recognizing the tortfeasor's.

Id. at 273 n.44.

The only opinion citing Roe v. Wade to allow recovery, but then noting its holding that a fetus is not a "person" within the fourteenth amendment is the majority opinion in Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974). The Libbee court found that the fetus had rights even though it was not a "person" under the fourteenth amendment, and held that the term "person" in the Oregon Constitution meant something different from the same term in the fourteenth amendment. Id. at 267, 518 P.2d at 640.

95. See Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886) (holding that a corporation can qualify as a "person" under the fourteenth amendment).


97. Query whether the Supreme Court's discussion of the meaning of "person" in the fourteenth amendment clarifies the intent of a state legislature in using the same word in a wrongful death statute. While the narrow holding of Roe v. Wade does not necessitate an equivalent interpretation in a wrongful death statute, it may have some weight by analogy. In Roe v. Wade, the Court noted that the word "person" is used not only in the fourteenth amendment, but in some 15 or 20 other places in the Constitution. "But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application." 410 U.S. at 157. The California Supreme Court has taken this idea one step further and noted that the legal equivalence of a fetus and a person born alive is the exception, not the rule, and that the legislature, when it speaks of "persons," "impliedly but plainly excludes such fetuses." Justus v. Atchison, 19 Cal. 3d 504, 505, 565 P.2d 122, 123, 199 Cal. Rptr. 97, 107 (1977).


Finally, it should be noted that the enactment dates of many of the wrongful death statutes share the nineteenth century home of the fourteenth amendment. This time identity has led some courts to contend that the legislatures of the last century could not have "entertained any intent at all" to include the unborn within a wrongful death statute, mainly because of the limited medical knowledge of the time. One judge has concluded that it must be presumed that the word "person" shares the same meaning in both constitutional and statutory contexts.\(^{101}\) There is a certain circularity in all of this, perhaps inevitable. *Roe v. Wade* relies upon nineteenth century legislation for evidence that the fetus was not considered nor intended to be a "person" in the law, and modern prenatal death decisions in turn cite the conclusion of *Roe v. Wade* for the same proposition.

B. *The Viability Criteria*\(^{102}\)

It has been argued that if, by the holding in *Roe v. Wade*, a state is prohibited from criminally punishing the intentional termination of viable fetal life, except to protect the health of the mother, it is likewise prohibited from allowing civil recovery for the negligent termination of such life.\(^{103}\) In the only decision so holding, the Michigan Court of Appeals, denying a survival action on behalf of a stillborn viable fetus which was injured in its third month of prenatal development, stated:

> If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at the same stage. There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.\(^{104}\)


\(^{102}\) This discussion assumes, perhaps incorrectly, that "viability" is itself a meaningful distinction. Considerable discontent with the concept has been expressed. Viability is fixed in neither time nor space. It has been recognized that medical science is pushing back the time of viability so that a fetus which is not viable in 1980 might well, under the same circumstances, be viable in 1990. Similarly, a fetus which is viable in a large urban area where sophisticated medical treatment and facilities are available would perhaps not be viable, at the same stage of development, in an impoverished rural area. The United States Supreme Court stated in *Roe v. Wade* that viability "usually" occurs between the 24th and 28th week, 410 U.S. at 160, but later struck down a state attempt to incorporate that generalization into its abortion law. See Colautti v. Franklin, 439 U.S. 379 (1979). It thus appears that viability must be determined on a case by case basis. The Illinois Supreme Court has gone so far as to hold that the viability of a 14-week-old fetus is a question for the jury. Green v. Smith, 71 Ill. 2d 501, 505-06, 377 N.E.2d 37, 39 (1978).


The court argued that a strong conflict would arise if a third party could be held liable for negligently causing the death of a three-month-old fetus while a pregnant woman has a constitutional right to intentionally bring about the same result. Fears of the implications of such a holding, in light of the trend toward relaxation of the doctrine of intrafamilial immunity, provided a partial basis for the court's reluctance to recognize a cause of action in this situation.\textsuperscript{105} In view of these potential problems, the court felt that the issue was best left to the legislature.\textsuperscript{106} \textit{Roe v. Wade} is thus used to reach the same conclusion—allowing recovery for injury after viability, but denying it for injury before viability—that has been reached independently, both before\textsuperscript{107} and after\textsuperscript{108} \textit{Roe v. Wade}.

While \textit{Roe v. Wade} may or may not \textit{compel} denial of recovery for the wrongful death of a nonviable fetus, it surely \textit{allows} such denial. The decision has not, and cannot, be cited for the proposition that recovery should be allowed regardless of viability. The only decision allowing recovery in such circumstances was decided long before \textit{Roe v. Wade}, and is now suspect.\textsuperscript{109} Opinions since \textit{Roe v. Wade} advocating recovery either ignore \textit{Roe}\textsuperscript{110} or distinguish it.\textsuperscript{111} The significance of \textit{Roe v. Wade} to recovery for the wrongful death of a nonviable fetus thus comes down to the perceived conflict or logical inconsistency noted in \textit{Toth v. Goree}.

Such inconsistency cannot be dismissed lightly if \textit{Roe v. Wade} is to be an integral part of a coherent theory of the legal status of the unborn.

The perception of inconsistency may, however, result from an over-emphasis on equating the status of the objects of an action, and insufficient emphasis on distinguishing the actors involved. The inconsistency may thus be justified, if not erased, by recognition of the different interests of the actors involved. The viability or nonviability of the fetus may be determinative if the question is the woman's right to terminate its existence in the exercise of her individual right to privacy. But it is certainly not

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105. \textit{Id.} at 304 n.8, 237 N.W.2d at 301 n.8.
\end{flushright}
determinative, or even relevant, if the question is the ability of the tortfeasor to escape liability for his acts. As one author has noted, "The loss incurred by the mother of a three-month-old fetus should be no less compensable than that of the mother of a seven-month-old fetus."113

If the woman's right to abortion and the fetus' right to be free from tortious injury are both accepted as socially desirable, then it may be necessary to accept some inconsistency and conclude that prenatal life will be protected against intentional or negligent interference, absent some compelling countervailing interest on the part of another. Indeed, one commentator has opined that the courts should get on with the business of compensating survivors, and "should be concerned more with the dominant purpose of the statute than with the broad philosophical, theological, and moral questions with which the Supreme Court dealt with in Roe v. Wade."114

Nor would troublesome inconsistency in the legal status of the unborn be eliminated by denying recovery for the wrongful death of a nonviable fetus; it would simply be shifted. Most jurisdictions allow recovery for injury before viability by either the child or the survivor of a child born alive.115 Perfect consistency with Roe v. Wade would require denial of recovery in these cases as well, an unacceptable and drastically regressive step in the evolution of tort law. The requirement of viability has already been abandoned to allow recovery by a surviving child,116 or by the beneficiaries of a child born alive.117 Furthermore, it is probably both desirable and inevitable that the viability requirement will likewise be abandoned to allow recovery by the beneficiary of a stillborn,118 notwithstanding any implications of Roe v. Wade to the contrary.

C. The State Interest in Prenatal Life

The third way in which the Roe decision has been used in wrongful death of fetus cases is to support the expansion of recovery on the theory that the state has an interest in prenatal life. The Roe decision, in its reasoning, concluded that the state "has still another important and legitimate interest in protecting the potentiality of human life."119 This interest of the state is present in wrongful death just as it is in abortion; the question to be answered is what limitations, if any, are to be placed on the state's pursuit of its interest?

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114. Id. at 278.
115. See note 24 and accompanying text supra.
116. See note 24 and accompanying text supra. This is the jump from Proposition C to Proposition F on the table set out in note 24 supra.
117. See note 24 and accompanying text supra. This is the jump from Proposition D to Proposition G on the table set out in note 24 supra.
118. See note 24 and accompanying text supra. This is the jump from Proposition E to Proposition H on the table set out in note 24 supra.
119. 410 U.S. at 162.
The importance of this reliance on the Roe decision, while proper, may in fact be of rather limited importance. Before Roe v. Wade several jurisdictions came to the conclusion that there should be recovery for the wrongful death of a viable fetus, and since Roe v. Wade several more jurisdictions have decided to allow recovery for the wrongful death of a fetus without any reliance on the Supreme Court case. But still, this holding may be used to expand recovery for wrongful death of fetuses, and more importantly, it may be used to rebut the arguments of those attempting to use Roe v. Wade to limit such recovery.

Roe v. Wade has been cited twice for the proposition that recovery should be allowed because the state has a substantial interest in prenatal life and its preservation. For example, the Alabama Supreme Court upheld an action for the wrongful death of an eight- and one-half-month-old stillborn fetus. The court reasoned that Roe recognized that the state's obligation to preserve life extends to prenatal life, and that, at least after the first trimester of pregnancy, a state's interest in and duty to protect prenatal life exists so long as the state does not unnecessarily intrude upon the pregnant woman's constitutional right of privacy. Both citations to Roe v. Wade are almost parenthetical, however, and not essential to the holdings, as if the courts were unsure of the nature and scope of the state interest invoked by the Supreme Court.

While Roe v. Wade referred to an "important and legitimate interest in protecting the potentiality of human life," which becomes "compelling" at the point of viability and which justifies state prohibition of abortions in the third trimester, the nature and extent of that interest is not made clear. When the interest is first mentioned, it is in conjunction with the state's interest in the health of the mother and the maintenance of medical standards, interests which are not directly involved in the question of recovery for the wrongful death of a stillborn viable fetus. When the interest in prenatal life is finally divorced from other interests, no supporting reason is given for that interest.

The interest may exist, and may be asserted, from the point of conception, so long as there is no conflict with the woman's right to

120. See note 25 and accompanying text supra.
121. See note 25 and accompanying text supra.
124. Id. at 99, 300 So. 2d at 357. The dissenting opinion of Judge Maher in Toth v. Goree, 65 Mich. App. 296, 312-13, 237 N.W.2d 297, 305-06 (1975) (Maher, J., dissenting), similarly found that absent any countervailing privacy interest of another person, the holding of Roe v. Wade was inapplicable and did not support either a live birth or a viability requirement.
125. 410 U.S. at 162.
126. Id. at 163.
127. Id. at 154, 159.
128. Id. at 163.
privacy. But it is not made clear why the state interest becomes "compelling," to the extent that it can outweigh the woman's right to privacy, at the point of viability, rather than before viability. The Court simply states, in one short paragraph, that the fact that "the fetus then presumably has the capability of meaningful life outside the mother's womb" provides the "logical and biological justifications" for state regulation after that time. It seems consistent and reasonable that this interest is present as much when the harm to the prenatal life occurs negligently as it is when an abortion decision is involved.

Roe v. Wade does not hold that a state must assert such an interest in prenatal life and its protection. In Roe v. Wade, the state of Texas did in fact do so, but the opinion implies that the state may, if it is interested in protecting fetal life, and if it chooses to do so, assert that interest.

By denying wrongful death recovery, the state court is simply declining to assert an interest which is optional, even in the context of abortion. While all states have in fact chosen to assert an interest in prenatal life to protect it from intentional termination, nothing in Roe v. Wade compels that choice. Therefore, if protection from intentional interference is not mandatory, the protection from negligent interference cannot be mandatory.

Roe v. Wade did not, of course, invent the notion of a state interest in prenatal life and its protection, and it is naive to think that state court judges could not, and did not, come up with the same notion independent of Roe v. Wade. Such an interest was certainly recognized before Roe v. Wade and taken into consideration, explicitly or not, both in decisions allowing recovery and in those denying recovery. Thus, if Roe v. Wade does not make the state interest mandatory and determinative, state courts are simply left in the same posture of balancing interests as before. Nor does it necessarily follow that if a state asserts the interest so as to punish intentional interference, i.e., abortion, that it must likewise do so to punish negligent interference, i.e., wrongful death. In other areas of tort law, certain interests are protected from intentional interference but not from negligent interference, and no logical inconsistency is perceived.

V. SUMMARY OF THE POST-ROE DECISIONS

By looking at all of the cases decided since Roe v. Wade, several observations can be made concerning recovery for the wrongful death of a fetus and the effect of the Roe decision on such actions. While this area is still

129. See Eich v. Town of Gulf Shores, 293 Ala. 95, 100, 300 So. 2d 354, 357 (1974).
130. 410 U.S. at 163. This language was quoted in Libbee v. Permanente Clinic, 268 Or. 258, 267, 518 P.2d 636, 640 (1974).
131. 410 U.S. at 163-65.
133. Those areas include defamation, assault, and emotional distress.
developing and the future is uncertain, the following ideas can be seen emerging from the cases already decided:

1. The courts have used *Roe* in three different ways in decisions concerning recovery for the wrongful death of fetuses. First, in an attempt to deny recovery, the courts have used *Roe* to support the argument that there should be no recovery because the fetus is not a "person" within the fourteenth amendment. Second, in an effort to limit recovery to viable fetuses, the decision has been used to support the argument that recovery should be allowed only when the fetus is viable because that is when the state’s interest in prenatal life becomes "compelling" according to *Roe*. Finally, in an effort to expand recovery, the decision has been used to support the argument that recovery should be allowed because according to *Roe* the state does have an interest in prenatal life.

2. As before *Roe*, there is still a general trend towards allowing recovery for the wrongful death of a viable fetus. This is evidenced by the three jurisdictions which have reversed their previous position and now allow recovery, and by the six jurisdictions which have addressed the issue as a matter of first impression and decided to allow recovery.134

3. There has been no substantial setback or reversal in the trend for allowing recovery for the wrongful death of a viable fetus. Only one state which allowed recovery before *Roe* may now deny it, and of the seven jurisdictions facing this question as a matter of first impression only one denied recovery.135

4. There is still some resistance to allowing recovery. Since *Roe*, decisions in nine jurisdictions have held that there can be no recovery for the wrongful death of a fetus.136 This resistance has also been evidenced in several dissenting opinions.

5. The viable-nonviable distinction is still adhered to in all the cases referred to previously. The courts are unwilling to follow the development in recovery for prenatal injury which has abandoned this distinction.

From the constitutional standpoint, *Roe v. Wade* held that the state’s interests in preserving the health and life of the pregnant woman, and in protecting the potentiality of life represented by the unborn, did not become sufficiently compelling to justify state interference with the woman’s constitutionally protected right to terminate her pregnancy until at least after the end of the first and second trimesters, respectively.137 The hold-

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135. See note 64 supra.

136. See cases cited note 26 supra.

137. 410 U.S. at 162-63.
ing and reasoning of *Roe* implicitly recognizes the existence throughout pregnancy of a legitimate state interest in protecting "the potentiality of life" represented by the unborn, and defines the extent to which the state can further that interest without unduly infringing the pregnant woman's constitutionally protected right to terminate her pregnancy.\(^{138}\) *Roe v. Wade* does not purport to limit the state's efforts to protect "the potentiality of life" represented by the unborn in any other context. Consequently, a state is free to recognize the independent legal existence of the unborn for the purposes of tort liability, both in the injury and wrongful death context, without running afoul of the holding of the case. *Roe v. Wade* should be interpreted to limit the state's freedom in this area only by prohibiting the state from recognizing and enforcing liability where it would either interfere with the woman's privacy right to terminate her pregnancy or endanger her health or life. Thus, for example, *Roe v. Wade* would presumably prohibit the state from recognizing a wrongful death action in a case of legal abortion.

The woman's privacy interest and the state's interest in preserving the health and life of the pregnant woman are the only two interests which *Roe v. Wade* held to override the state's interest in protecting prenatal life. The woman's privacy interest overrides the state's interest in protecting prenatal life throughout the first two trimesters, while the state's interest in preserving the health and life of the pregnant woman predominates over the state's interest in protecting prenatal life throughout pregnancy. Indeed, it can be argued that awards for wrongful prenatal death, when so confined as not to apply to situations involving legal abortions, actually help vindicate the woman's constitutionally protected right of privacy in the pregnancy context. Assuming that the woman's right to terminate her pregnancy is but an aspect of her overall right to determine the outcome of her pregnancy, she would also have a constitutionally protected right to continue the pregnancy to delivery free from state interference not necessary to further its compelling interests in protecting the health and life of the woman and in protecting the potentiality of life represented by the unborn. While the Constitution would not prohibit purely private interference with the woman's right to continue her pregnancy to term, it also would not, under *Roe v. Wade*'s reasoning, prohibit a state from protecting that right by recognizing and enforcing money judgments for harm caused by interference with the woman's right. Thus, at least in the context of the wrongful death action, which generally benefits the parents of the deceased child, recognition of a right to sue for the

\(^{138}\) The opinion does not assert that the state has no legitimate interest in protecting the potentiality of life represented by the unborn fetus until after the beginning of the third trimester. Rather, it implicitly recognizes a legitimate state interest in protecting prenatal life throughout pregnancy, and holds that the state's interest does not become compelling *vis-à-vis* the pregnant woman's privacy interest in terminating her pregnancy until the end of the second trimester. See id. at 152-56, 162-63.
death of the fetus—both before and after birth—would have the effect of protecting the woman's constitutionally protected right to continue her pregnancy to term. Of course, the counterargument would question whether, if the purpose is to protect the woman's right to carry her unborn child to term, it would be more appropriate to recognize a cause of action by the woman on her own behalf rather than on behalf of the dead fetus, as the injury is technically to the woman rather than the fetus. That is, the injury is to the woman's privacy interest in continuing her pregnancy to delivery.

At least in instances in which the aborted fetus had not reached viability, such recognition of a cause of action would interfere with the woman's right to terminate her pregnancy at a stage prior to the point at which the state's interest in protecting "potential life" was sufficiently compelling to override the woman's privacy interest, and would therefore run afoul of Roe v. Wade. Since after viability the state's interest in protecting the "potentiality of life" represented by the unborn is so compelling that the state may prohibit abortion with the threat of criminal prosecution, except in instances where the health or life of the pregnant woman is at stake, the state would presumably be free to protect the viable fetus' potentiality of life by recognizing a wrongful death action for its abortion so long as the abortion were not performed to preserve the health or life of the woman. This follows from Roe v. Wade's reasoning that after viability the state's interest in protecting the potentiality of life represented by the unborn viable fetus becomes paramount over the woman's privacy interest in terminating her pregnancy, and is preceded in importance only by the state's compelling interest in preserving the health and life of the already living pregnant woman. Since Roe v. Wade holds that the state may further its compelling interest in protecting the potentiality of life represented by the unborn by making abortion a crime except when performed to preserve the health or life of the woman, Roe v. Wade presumably leaves the state free to protect the viable fetus by recognizing tort liability for its injury or death except to the extent that such recognition would endanger the health or life of the pregnant woman.

To summarize, the reasoning and holding of Roe v. Wade would seem to allow a state to recognize and enforce tort liability: (1) for the death or injury of a previable fetus or embryo to the extent that, in the first two trimesters, such recognition would neither infringe the pregnant woman's overriding privacy right to terminate her pregnancy, nor endanger the state's interest in preserving the health and life of the pregnant woman;

139. Because of the delicate balance between the state's interests in preserving the health and life of the pregnant woman and in protecting the potentiality of life represented by the viable fetus, this may be a subject more properly dealt with by the legislature. The obvious problem is that the physician should not lightly be forced to confront the prospect of a suit for wrongful death in the situation where abortion is not necessary, for example, to save the woman's life, yet would eliminate an arguable danger to her health.
and (2) for the death or injury of a viable fetus, to the extent that such recognition would not endanger the compelling state interest in preserving the health or life of the pregnant woman.

The preceding discussion has attempted to show that if any conflict or inconsistency exists between the recognition of the independent legal existence of the unborn for the purposes of tort liability for injury or death, and the constitutional right of the woman to terminate her pregnancy as defined in *Roe v. Wade*, such conflict or inconsistency is superficial at best. A close examination of the interests at stake in each context reveals that not only is a system of tort liability for harm to the unborn readily accommodated within the constitutional framework established in *Roe*; indeed, such a system, if properly tailored, can actually enhance the state's ability to protect those interests recognized by the Court as legitimate and compelling in certain situations.  

140. It is possible that this entire process of reconciling the wrongful death acts with *Roe v. Wade* is better left to the legislature, at least in those states which have not decided whether their wrongful death statutes cover the stillborn fetus. See generally Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 379-81, 304 N.E.2d 88, 94-95 (1973) (Ryan, J., dissenting); Toth v. Goree, 65 Mich. App. 296, 287 N.W.2d 297 (1975); *Torts—Wrongful Death—Recovery for Wrongful Death of a Stillborn Fetus Examined*, 21 VILL. L. REV. 994, 1004-05 (1976).