Person or Thing - In Search of the Legal Status of a Fetus: a Survey of North Carolina Law

Tony Hartsoe
What is the status of a fetus in North Carolina? This the primary question addressed by Mr. Hartsoe as he analyzes and critiques the case law and statutory enactments which deal with this question. While there is some case law and statutory authority on point, Mr. Hartsoe concludes that there is an overall paucity of law which defines the legal status of a fetus and, furthermore, the law that does exist is inconsistent. As such, Mr. Hartsoe examines the legal status of a fetus in North Carolina in the areas of wrongful death, prenatal injury, criminal law, wrongful life, wrongful birth, and wrongful conception. After analyzing relevant cases and statutes, Mr. Hartsoe explores the rationales used by courts in developing case law in each area. Further, Mr. Hartsoe then suggests changes in this law and examines the problems inherent in maintaining the different legal statuses of a fetus. In closing, Mr. Hartsoe provides a comprehensive bibliography in each area with practical notes that should unequivocally aid the practitioner who delves into these areas.

I. Introduction

North Carolina has seldom litigated the status of the fetus in any context. Like most states, it has followed the common law until this century. When wrongful death statutes became prevalent, the tide turned in favor of recognizing a child’s cause of action for injuries received in the womb. Scientific recognition

* Mr. Hartsoe is a litigation associate at Womble Carlyle Sandridge & Rice in Winston-Salem, North Carolina. Mr. Hartsoe practices in the areas of Workers’ Compensation, Insurance Defense, Civil Rights, and Constitutional Law. Mr. Hartsoe received his J.D. from Washington University School of Law.
that human life begins at conception has given courts and legislatures reason to reexamine the law as it applies to the unborn, especially in the areas of tort and criminal law. Federal abortion law, beginning with *Roe v. Wade*,¹ set the stage for direct conflict between federal constitutional law and state law attempting to protect the unborn child. As further scientific advances in the area of reproductive technology continue to proliferate, the status of the law as it concerns the unborn will fall more frequently into question as the rationales for different legal policies conflict. Accordingly, knowledge of the legal rationales for either allowing or denying actions for prenatal injuries, wrongful death, wrongful life, wrongful birth, wrongful conception, and criminal murder prosecutions is essential to not only understanding these types of cases, but also in forging the proper trail for the development of the law in other closely related areas.

This Article examines the legal status of a fetus in North Carolina in the areas of wrongful death, prenatal injury, criminal law, wrongful life, wrongful birth, wrongful conception. After analyzing cases and statutes relevant to each area, the Article explores the rationales used by courts in developing the case law in each area. The Article also suggests changes in this law and examines the problems inherent in maintaining the different legal statuses of the fetus among the various areas of law, suggesting the law answer the primary question of when a fetus becomes a person, before any meaningful discussion of the law can be maintained.

II. NORTH CAROLINA ACTION FOR WRONGFUL DEATH

A. Historical Background

At common law, the death of a human being could not be complained of as an injury.² Not until the enactment of The Fatal Accidents Act of 1846, more commonly known as Lord Campbell's Act, was the common law rule rejected. The Act provided the first civil legal remedy for wrongful death, and it read:

[W]henever the death of any person is caused by the wrongful act, neglect or default of another, in such a manner as would have entitled the party injured to have sued had death not ensued, an

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¹. 410 U.S. 113 (1973).
action may be maintained if brought within twelve months after his death in the name of his executor or administrator for the benefit of certain relatives.\(^3\)

The Act created a trend that was followed by every jurisdiction. Each state now provides a statutory remedy for wrongful death, patterned largely on the language of Lord Campbell's statute.\(^4\) While these statutes provided a remedy for the wrongful death of a "person," none were interpreted immediately to include an unborn child. States routinely denied any civil legal remedies to unborn children in any form until 1946, when the District Court for the District of Columbia recognized for the first time a cause of action on behalf of a viable\(^5\) fetus who after suffering prenatally inflicted injuries, was born alive.\(^6\) Recognition of an unborn child's right to be born free from wrongful injury has led to the recent recognition of right to be born.

Thirty-seven states and the District of Columbia now recognize a cause of action on behalf of an unborn child either negligently or intentionally killed in utero.\(^7\) Nine states which have

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3. Prosser, supra note 2, at 902.


5. Viability is defined as the "[c]apability of living; the state of being viable; usually connotes a fetus that has reached 500 g in weight and 20 gestational weeks." Stedman's Medical Dictionary 1556 (5th ed. 1982).


considered the question whether a fetus is a "person" under their wrongful death statutes, have answered in the negative. The remaining four states have yet to consider the question and, thus, do not currently recognize a cause of action for the wrongful death of a fetus. In those states that do recognize a cause of action for the wrongful death of a fetus, the great majority require the fetus to have been viable at death before the action may accrue.

North Carolina's Wrongful Death Act (hereinafter "the Act"), codified in section 28A-18-2 of the North Carolina General Statutes only recently has been interpreted to provide a cause of action for the wrongful death of a viable fetus. Prior to 1969, North Carolina's wrongful death law was expressed in two different statutes. The first, section 28-173 of the North Carolina General Statutes, provided the basis of the cause of action itself and allowed recovery for the death of a person brought about by a wrongful act, neglect or default of another. And section 28-174


9. These states are Arkansas, Colorado, Maine, and Wyoming.


12. Section 28-173 provided:

Death by wrongful act; recovery not assets; dying declarations.— When the death of a person is caused by wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the persons or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount
referred to the types of damages collectible in a wrongful death action under section 28-173. Section 28-174 provided:

Damages recoverable for death by wrongful act.—The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.\textsuperscript{13}

Under these statutes, the North Carolina Supreme Court twice considered and twice denied a cause of action for the wrongful death of a fetus.\textsuperscript{14}

The North Carolina Supreme Court first addressed the issue whether a cause of action for the wrongful death of a stillborn fetus existed under the state's wrongful death statute,\textsuperscript{15} in Gay v. Thompson.\textsuperscript{16} Baby Gay, the plaintiff, was a viable fetus of eight months gestation at the time he was stillborn. The administrator of the child's estate brought the suit, alleging wrongful death under the Wrongful Death Act.\textsuperscript{17}

Dr. Thompson, the defendant, was the doctor in charge of Baby Gay's prenatal care and generally there had been no complications associated with the pregnancy. In fact, the court found that on August 23, 1962, Baby Gay was normal for a child of eight months gestation, and he was capable of a separate existence outside of his mother's womb, provided proper medical care be administered to him and his mother.\textsuperscript{18} The complaint alleged the defendant negligently and prematurely induced labor, causing an acute infection of Mrs. Gay's uterus which precipitated both her recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

15. See supra note 12 and accompanying text.
17. Id.
18. Gay, 266 N.C. at 395, 146 S.E.2d at 425.
death as well as Baby Gay's. The plaintiff sought fifty thousand dollars in damages for the death of Baby Gay.\textsuperscript{19}

The court\textsuperscript{20} in Gay addressed the issue as: "whether there is a right of action under our wrongful death statute, G.S. §§ 28-173, 28-174, by the administrator of a stillborn child who died as a proximate result of tortious injuries to his mother and himself while \textit{en ventre sa mere},\textsuperscript{21} when the child was viable at the time of the injuries."\textsuperscript{22} Noting several prior cases that had interpreted the Wrongful Death Act, the court in Gay again held the Act confined recovery to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death," and the clear language of section 28-174 of the North Carolina Statutes made the existence of such damages a prerequisite to bringing a wrongful death action.\textsuperscript{23} Thus, according to the court in Gay, "negligence alone, without pecuniary injury resulting from such death," did not create a cause of action.\textsuperscript{24}

In Gay the court, after citing authorities on both sides of the issue, held "there can be no evidence from which to infer 'pecuniary injury resulting from' the wrongful prenatal death of a viable child \textit{en ventre sa mere}; it is all mere speculation."\textsuperscript{25} Accordingly, the court refused to recognize a cause of action for the wrongful death of an unborn child under the Act.

The court in Gay specifically did not rule on the issue of whether the Act would recognize a viable fetus as a "person," as that term was used in the statute.\textsuperscript{26} The court also did not mention the issue of viability. The Gay court did, however, distinguish the cause of action for prenatal injuries\textsuperscript{27} suffered by an unborn child who subsequently is born alive, from the cause of action for the wrongful death of a child who instead is stillborn. The former was a creature of the common law; the latter was a purely statu-

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\item Id. at 395, 146 S.E.2d at 426.
\item Justice Parker wrote the opinion for the court. Id.
\item Id. The phrase "\textit{en ventre sa mere}" means "in its mother's womb." \textsc{Black's Law Dictionary} (6th ed. 1990).
\item 266 N.C. at 398, 146 S.E.2d at 426.
\item Id. at 398, 146 S.E.2d at 428.
\item Id. (quoting Collier v. Arington's Ex'rs, 61 N.C. 356 (1868)).
\item Id. at 400, 146 S.E.2d at 429.
\item Id. at 402, 146 S.E.2d at 431.
\item This was the first time the North Carolina Supreme Court had ever indicated a cause of action would lie in North Carolina for prenatal injuries. Id. This language would be the foundation upon which such a cause of action would be established in Stetson, 274 N.C. 152, 161 S.E.2d 531.
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tory creation. Oddly, however, the court in Gay never noted why this distinction bore any significance in deciding this issue.

B. Stetson v. Easterling

The case of Stetson v. Easterling, placed the issue of fetal wrongful death in a new light, but it held to old conclusions. In Stetson, the plaintiff was the estate administrator of a child who allegedly had been tortiously injured while in the womb, subsequently born alive, and who then died approximately three months later as a result of prenatally inflicted injuries. Factually, the case was one involving the question of a child’s right to recover for prenatal injuries which subsequently led to his death.

The plaintiff, however, sued for damages under the same Wrongful Death Act which was in effect when Gay was decided. The Stetson court framed the issue as whether a child who had lived only a few months could maintain a cause of action for wrongful death which allegedly resulted from prenatal injuries caused by the negligence of the defendants. The first step in the Stetson court’s decision was to determine whether the plaintiff would have a cause of action had he lived, a requirement under the wrongful death statute. Since the injuries complained of were inflicted while the plaintiff was still in utero, the issue was whether the plaintiff, had he lived, would have stated a valid cause of action in North Carolina when he sought to recover for prenatal injuries. The Stetson court, noting this was a case of first impression, answered in the affirmative.

Picking up where Gay had left off, the Stetson court, noting copious authority in support of its position, quoted from its language in Gay, stating: “Since the child must carry the burden of infirmity that results from another’s tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on

28. Id. at 398, 146 S.E.2d at 429.
30. Id.
31. 274 N.C. at 155, 161 S.E.2d at 532.
32. Id.
33. See supra notes 11-26 and accompanying text.
34. Stetson, 274 N.C. at 155, 146 S.E.2d at 533.
35. Id.
36. Id.
the ground of actionable negligence."37 The court in Stetson, therefore, adopted the language of Gay as authoritative in North Carolina.38

The Stetson court addressed next the issue of whether the plaintiff could sue for wrongful death which resulted from these prenatally inflicted injuries.39 The court first noted that a wrongful death claim in North Carolina was governed strictly by statute and that what the plaintiff had alleged was a wrongful death claim and not a survivorship claim for the pain and suffering of the decedent.40 Quoting the language of Gay once again, the Stetson court went from a statement of the rule that damages for wrongful death may not be assessed on the basis of sheer speculation and that only provable pecuniary loss is recoverable, to a finding that "[h]ere, as in Gay, it would be 'sheer speculation' to attempt to assess damages as of the time of the alleged negligently inflicted fatal injuries."41 Stated simply, the Stetson holding was more a statement that the wrongful death statute in North Carolina required strict proof of the actual existence of pecuniary damages proximately caused by the plaintiff's death, regardless of age. The court's language was ambiguous on this point as it did not clarify whether the court saw the cause of action for wrongful death arising at the time the injuries were inflicted or at the time of death.42 This would have been an important distinction in a case where the plaintiff's injuries were prenatally inflicted, but death did not occur until after the child was born and lived for a year or more. The point in time at which the Stetson court would not deem the issue of damages to be "too speculative" as a matter of law is unclear.

37. Id. at 146, 161 S.E.2d at 533-34, quoting Gay v. Taylor, 266 N.C. 394, 398, 146 S.E.2d 425, 429 (1966).

38. Id. Gay was the genesis of the prenatal injury cause of action in North Carolina. See supra notes 16-28 for a full discussion of this case.

39. Id. It is interesting to note that the same court found the issue of whether the plaintiff could sue for prenatally inflicted injuries to be a threshold issue in this case, when it had not even mentioned this issue in the Gay case.

40. Id. Two causes of action were available, one for survivorship which awarded as general assets to the decedent's estate damages for the decedent's pain and suffering as well as his medical and burial expenses, and one for wrongful death which allowed recovery of only pecuniary loss suffered by the next of kin due to the decedent's death. Id. at 156, 161 S.E.2d at 534.

41. Id.

42. Id.
In *Stetson*, Justice Lake, joined by Justice Higgins, dissented from the majority’s finding the damages too speculative to allow a cause of action to stand. Justice Lake cited *Russell v. Windsor Steamboat Co.* because of its similarity. The court in *Russell* allowed recovery for the wrongful death of a five month old baby after finding that the plaintiff could recover substantial damages on the case as alleged in the complaint. Justice Lake pointed out the *Russell* court allowed the action after admitting “[i]n the very nature of things, a child five months old has no present earning capacity, and has not reached a sufficient state of development to furnish any indication of his probable earning capacity in the future, other than the fact of being a healthy boy. This is all we know of him, or ever can know.” Justice Lake found these facts indistinguishable from the ones in *Stetson* since the plaintiff had pled the decedent had been healthy prior to the injury. Thus, the dissent pointed to a rather significant weakness in the court’s damages analysis in both *Stetson* and *Gay*. The *Stetson* court again passed over the issue of whether a viable fetus was a “person” under the Act, and, in fact, the court never even mentioned the issue. It would have appeared that personhood was a threshold issue under the Act, as the court would never have needed to decide whether a fetus could adequately prove his pecuniary damages if it first found that a fetus was not a “person” under the Act. If the fetus did not come within the statute, damages would be irrelevant. The *Stetson* court’s silence on this crucial issue left the door open for the legislature to rewrite the wrongful death statute in such a way that would allow a fetus a cause of action.

43. 126 N.C. 961, 36 S.E. 191 (1900).
44. *Stetson*, 274 N.C. at 146, 161 S.E.2d at 534 (emphasis added).
45. Id.
46. Many of the states that have denied a cause of action for the wrongful death of a fetus have done so on the basis of the court’s interpretation of the statute’s use of the word “person” not to include a fetus. See, e.g., Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); see also Sheldon R. Shapiro, Annotation, Right to Maintain Action or to Recover Damages for Death of Unborn Children, 84 A.L.R.3d 411 (1978 & Supp. §§ 3(b) and 4(b) 1985), for a complete listing of those jurisdictions which have so interpreted their state’s wrongful death statute.
C. 1969 Amendment to the Wrongful Death Act

In 1969, the North Carolina General Assembly moved to correct what it determined to be a flaw in the Wrongful Death Act. The legislature enacted the following:

Whereas, human life is inherently valuable; and
Whereas, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectually limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life. 47

This enactment allowed a wrongful death plaintiff to recover for the following damages:

Damages recoverable for death by wrongful act; evidence of damages. (a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incidence to the injury resulting in death.
(2) Compensation for pain and suffering of the decedent.
(3) The reasonable funeral expenses of the decedent.
(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
   (i) Net income of the decedent,
   (ii) Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
   (iii) Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered.
(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence.
(6) Nominal damages when the jury so finds . . . . 48

These changes to the Act's damages section effectively overruled Stetson and Gay regarding the types of damages recoverable for wrongful death. With the change in the statute, the issue of whether an action for wrongful death would lie for a fetus would be soon revisited by the courts of North Carolina.

D. Cardwell v. Welch and Yow v. Nance

Cardwell v. Welch\(^{49}\) was the first appellate case to revisit the issue of whether a fetus could maintain a wrongful death action in North Carolina. The plaintiff was a viable child of seven months gestation who was delivered stillborn, allegedly because of injuries suffered by the mother in an automobile accident.\(^{50}\) The trial court held a fetus is not a "person" within the meaning of section 28-173 of the North Carolina General Statutes and thus granted defendant's motion to dismiss.\(^{51}\) Thus, the court of appeals in Cardwell addressed the question the Supreme Court had managed to avoid in Gay and Stetson — was a viable fetus a "person" under the Wrongful Death Act?

The Cardwell court, after first noting the changes in the wrongful death statute since Gay and Stetson and the resulting need for a decision on the issue, stated the following:

> It is, of course, apparent that to state the problem, as we have, in terms of whether a viable unborn fetus is or is not a "person" is of but slight assistance in arriving at a decision of the real problem here presented, i.e., whether an action should be held to lie under the statute for the wrongful death of an unborn child.\(^{52}\)

The Cardwell court then proceeded to construe the statute to exclude an unborn child from the meaning of "person", citing both the plain language of the statute and practical considerations.\(^{53}\) The court rejected the rationale of other jurisdictions, which allowed recovery to a viable fetus, but did nothing to solve the issue and that merely relocated the problem.\(^{54}\) The Cardwell court also stated a discernable cutoff point was needed between the time of conception and live birth, and this approach had the benefit of "providing at least some degree of certainty to an other-


\(^{50}\) Id.

\(^{51}\) Id. at 391, 213 S.E.2d at 383.

\(^{52}\) Id. at 392, 213 S.E.2d at 383.

\(^{53}\) A close reading of the court's decision shows it arrived at a poor basis to support such a complicated decision. See id. at 392, 213 S.E.2d at 383. To simply say the drafters of the Act could have easily indicated they intended to include the unborn within the ambit of the term by explicitly stating such intention, and to then infer from the lack of such explicit wording regarding the unborn that the drafters must have affirmatively meant to exclude the unborn from the statute, was simply a statement, in this Author's view, of judicial opinion.

\(^{54}\) Id. at 393, 213 S.E.2d at 384.
wise highly speculative situation." Thus, the court held the word "person" as used in the wrongful death statute meant one who has become recognized as a person by having been born alive. The Cardwell court, therefore, left the matter to the legislature to determine if a change in this interpretation was necessary.

When Yow v. Nance came before the North Carolina Court of Appeals, the court relied exclusively upon its prior decision in Cardwell and summarily upheld that decision without any additional discussion of the issue. The facts of Yow were essentially the same as those in Cardwell. A viable stillborn child was suing for damages under the wrongful death statute, and the court of appeals simply stated that "[f]or the reason stated in [Cardwell], the judgment [for the defendant] is affirmed." The North Carolina Supreme Court refused to certify either case on appeal.

E. The Law at Present — DiDonato v. Wortman

Twelve years after the court of appeals, in Cardwell and Yow, held a viable fetus was not a "person" under the North Carolina wrongful death statute, the North Carolina Supreme Court confronted the issue in DiDonato v. Wortman. In a four to three decision, the DiDonato court overturned Cardwell and Yow and held a viable unborn child does have a cause of action under the wrongful death statute.

Similar to its predecessors, DiDonato involved a plaintiff administrator of the estate of a deceased viable child who was stillborn. The plaintiff alleged that the doctors providing prenatal care for the mother were negligent in failing to diagnose the mother's diabetes and in failing to deliver the child before he ran

55. Id. See Susan D. Crooks, Wrong Without a Remedy — North Carolina and the Wrongful Death of a Stillborn, 9 Campbell L. Rev. 93 (1986) (providing a discussion of why live birth provides no more certainty than viability on the issue of when a cause of action should accrue).
56. Id. at 393, 213 S.E.2d at 384.
57. Id.
59. Id. at 420. The judgment being affirmed was the lower court's dismissal of plaintiff's case upon defendant's Rule 12 motions. Id.

The *DiDonato* court noted the court of appeals’ decisions in both *Cardwell* and *Yow* had gone undisturbed by the General Assembly, but the court then warned of the dangers of inferring legislative approval of appellate court decisions based on nothing more than legislative silence. Accordingly, the court set up a two-part inquiry upon which to decide the issue. This inquiry involved an analysis of the words of the statute and the common law principles governing its application, as well as the public policy bases of the North Carolina Wrongful Death Act, which are contained in each part.

1. Statutory Construction of the Wrongful Death Act

Citing the language of the statute in full, the *DiDonato* court found the wording of the statute to be ambiguous on the issue of whether its language included a viable fetus within its meaning. The Legislature’s definition of “person,” as described in N.C. Gen. Stat. section 12-3(6), was of little assistance to the court in making this determination. The court, therefore, turned to its decisions in the area of prenatal injury and found “[i]t would be logical and consistent with these decisions, and would further the policy of deterring dangerous conduct that underlies them, to allow such claims when the fetus does not survive.”

From that axiom, the *DiDonato* court stated it was unlikely the legislature would desire to allow a fetus to recover for prenatal injury but not for prenatal injury which leads to death. Moreover, the court added the legislature had made clear its desire to

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63. 320 N.C. at 424, 358 S.E.2d at 490.
64. Id.
65. Id.
66. Id. Section 12-3(6) states “[t]he word ‘person’ shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. . . .” N.C. GEN. STAT. § 12-3(6) (1986).
68. Id.
have the word "person" include those possessing "human life." The DiDonato court found a viable fetus is "undeniably alive and undeniably human" and is "by definition, capable of life independent of its mother." The court found these facts to be some evidence that a viable fetus was a person under the statute and, while the language itself was inconclusive, the case law and the wording of the amendments to the Act both pointed toward acknowledging fetal personhood.

2. Common Law Principles Governing the Application of the Statute

The DiDonato court explained the 1969 amendments to the Wrongful Death Act largely had undercut the rationale of its decision in Gay, which had disallowed a wrongful death action for a viable fetus on the basis that pecuniary damages for a fetus were nothing more than mere speculation. Accordingly, Gay would not be controlling in this case. Instead, the DiDonato court held:

[The] language of our wrongful death statute, its legislative history, and recognition of the statute's broadly remedial objectives compel us to conclude that any uncertainty in the meaning of the word "person" should be resolved in favor of permitting an action to recover for the destruction of a viable fetus en ventre sa mere.

69. Id. The preamble to N.C. GEN. STAT. § 28A-18-2 is the same as that of the 1969 Act which states human life is inherently valuable and allowing recovery of no more than pure pecuniary losses was far from an adequate measure for human life.

70. DiDonato, 320 N.C. at 427, 358 S.E.2d at 491. Furthermore, the court found the purpose of the statute was to deter dangerous conduct and to provide a means of recovery for the death of a human being that had not existed in the common law. Wrongful death statutes in every state had overruled the common law and the DiDonato court found the North Carolina General Assembly's legislative purpose in enacting its wrongful death statute was based on "broadly remedial objectives." Id.


72. But see Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937). In Van Beeck, Justice Cardozo opined:

Death statutes have their roots in dissatisfaction with the archaisms of the [common law rule of no liability]. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be brought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system.

Id. at 350-351.

73. DiDonato, 320 N.C. at 430, 358 S.E.2d at 492-93.
With those words, a new cause of action was born.

III. Limitation of Damages

Even though the North Carolina Supreme Court, in *DiDonato*, moved forward in recognizing an unborn child's survivors had an action in law to recover for a fetus' wrongful death, the court took yet another step backward by eliminating the largest potential area of damages recoverable. Harking back to the language of *Gay*, which had been just overruled substantially, the *DiDonato* court stated that section 28A-18-2 only permitted recovery for those damages not based on sheer speculation. The court held that the law of *Gay* on the issue of awarding income-based damages to a stillborn child remained valid and, thus, the lost income damages "normally available under N.C. Gen. Stat. § 28A-18-2(b)(4)(a) cannot be recovered in an action for the wrongful death of a stillborn child." The *DiDonato* court cited a New Jersey case where the New Jersey Supreme Court held:

> On the death of a very young child . . . at least some facts can be shown to aid in estimating damages as, for example, its mental and physical condition. But . . . [i]t is virtually impossible to predict whether the unborn child, but for its death, would have been capable of giving pecuniary benefit to its survivors.

The *DiDonato* court then appeared to take judicial notice of the fact that no proof could ever be provided, irrespective of the situation, to show an unborn child, immediately prior to death, possessed the ability to make a pecuniary contribution to his family. The court simply held as a matter of law that it would always be impossible to prove with any degree of certainty that a stillborn child could ever have contributed to his family financially, and therefore, his family could not recover such damages under the wrongful death act. In essence, the *DiDonato* court slammed the door to rapidly developing technology that may in the near future

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74. Id. at 430, 358 S.E.2d at 493.
75. Id. at 432, 358 S.E.2d at 494.
76. Id. at 431, 358 S.E.2d at 493 (citing Graf v. Taggert, 204 A.2d 140, 144 (N.J. 1964)).
77. Id. at 431-32, 358 S.E. 2d at 494. In this Author's opinion the court was clearly in error here. Specifically, there were numerous published studies at the time of the *DiDonato* decision that could have been offered, along with factual diagnostic studies of the fetus in question to prove the likelihood of such a child's potential monetary contributions. The fact the court cites no medical authority for its assumption of these facts only magnifies the dubious nature of such an assumption.
change the status of what the court held to be an incontrovertible fact.

The *DiDonato* court next denied recovery of any damages for loss of services, companionship, advice and the like, which were normally available under N.C. Gen. Stat. sections 28A-18-2(b)(4)(b) and 28A-18-2(b)(4)(c). To support its holding, the court cited the same reasons used in support of its denial of pecuniary damages, specifically:

When a child is stillborn we simply cannot know anything about its personality and other traits relevant to what kind of companion it might have been and what kind of services it might have provided. An award of damages covering these kinds of losses would necessarily be based on speculation rather than reason.

The *DiDonato* court did allow, however, recovery of damages for the pain and suffering of the fetus before death, medical and funeral expenses, as well as for punitive and nominal damages.

Three justices registered dissents in the case. Justice Martin concurred in part and dissented in part. Justice Martin concurred with the majority's finding that a viable fetus was a "person" under the wrongful death statute, but he dissented from the majority's finding with respect to damages, stating "[t]he majority correctly holds that a viable unborn fetus is a 'person' within the meaning of the wrongful death statute, then inexplicably attempts to cut away part of the statutory damages provided within the statute. This the court cannot do." Justice Martin saw the fetal plaintiff as no different from any other wrongful death plaintiff, and thus he would have allowed the fetal plaintiff to recover such

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78. *Id.* at 432, 358 S.E.2d at 494.

79. *Id.*

80. *Id.* The court said it was not convinced the pain and suffering of a fetus can ever be satisfactorily proved, but in light of current technology it could not foreclose the possibility as a matter of law. *Id.* In this Author's opinion, it is clear that should the issue come up on appeal, the court will closely scrutinize the record for the weight of the medical evidence presented by both sides. On the other hand, it is unclear why the court could not have made the same finding with regard to pecuniary and loss of companionship damages.

81. *Id.* at 432, 358 S.E.2d at 494. Lastly, the *DiDonato* court addressed the issue of whether the parents of the deceased child could sue separately for their alleged mental distress caused by the loss of the child. *Id.* In answering this question the court held to allow punitive damages to be awarded in both actions would require joining the parents' actions with the wrongful death action of the child. *Id.*

82. *Id.* at 434-35, 358 S.E.2d at 495 (Martin, J., dissenting).

83. *Id.* at 436, 358 S.E.2d at 496 (Martin, J., dissenting).
damages as were proved in accordance with the law. Further, Justice Martin stated it was not for the court to bar the “plaintiff from trying to prove all damages recoverable under the statute.” Justice Martin concluded this point by finding “[i]t is not the prerogative of this court to usurp a legislative function by rewriting the statute to change the rule of damages.” He then went on to dissent from the majority’s rule requiring joinder of the parents claims, saying this is better left to discretion of the trial judge.

Justice Webb also wrote a dissenting opinion, which was joined by Justice Mitchell. Justice Webb felt it constituted error to allow a wrongful death action by a fetus where the legislature had not clearly indicated that one should exist. Justice Webb wrote that legislative silence was a helpful tool in DiDonato and should not have been dismissed by the majority. In his opinion, the legislature was surely aware of the court’s decision in Gay v. Taylor, when it revised the wrongful death statute in 1969, and thus, the legislature easily could have defined “person” to include an unborn child. The fact the legislature did not, Justice Webb argued, should be taken as clear evidence of its intent not to include the fetal plaintiff in this cause of action. Justice Webb saw further error in the majority’s restricting the types of damages allowed to the fetal plaintiff. Specifically Justice Webb stated “If there are to be wrongful death claims for unborn persons, the plaintiffs should have whatever damages they may prove under the Wrongful Death Act.”

A. Ledford v. Martin

The first case to address the wrongful death of a fetus after DiDonato was Ledford v. Martin. The plaintiff was an approximately thirty-four week old fetus that allegedly died as a result of the negligence of the doctor in charge of his prenatal care. Without making any kind of finding as to the viability of the child, the court of appeals simply cited the DiDonato case and held that

84. Id.
85. Id.
86. Id at 437, 358 S.E.2d at 497.
87. Id. at 436, 358 S.E.2d at 496 (Webb, J., dissenting).
88. Id.
89. Id.
90. Id.
91. 87 N.C. App. 88, 359 S.E.2d 505 (1987).
92. While by all medical standards this child was viable, such a determination is generally left to the fact finder.
on the facts alleged by the complaint, a cause of action existed for the fetal plaintiff. The court never expanded or contracted the law of DiDonato. It did, however, state that a physician has the same duty to the fetal patient as to its mother, explaining that "[w]hen an obstetrician agrees to take on a pregnant woman as a patient, he actually acquires two patients: mother and baby."93 As decided, Ledford left DiDonato wholly unaltered. The Ledford case may, however, have import beyond the wrongful death arena with regard to the status of a viable fetus as a "person" under various statutes.

B. Johnson v. Ruark Obstetrics & Gynecology Associates

The first case to attempt to clarify DiDonato was Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.94 The plaintiffs were the parents of a viable stillborn child who had been appointed administrators of their child's estate. Bringing the suit in the name of the child, the plaintiffs alleged the doctors responsible for prenatal care were negligent in failing to properly treat the mother's diabetic condition, and that such negligence wrongfully caused the death of the child.95 The complaint asked for both punitive and compensatory damages under the Wrongful Death Act. The suit was filed and later dismissed prior to the decision in DiDonato.96

The main issue before the Johnson court was whether the decedent had stated a cause of action under the Act. Stated another way, could DiDonato, which clearly created a cause of action under the Act for a viable fetus, be applied retroactively. The Johnson court held there was no compelling reason why DiDonato should not be applied retroactively.97

The next issue for the Johnson court was whether the plaintiff was, in fact, a viable fetus at the time of death. The court stated that if the pleadings in the case disclosed "as a matter of law that plaintiffs' intestate was not 'viable' under DiDonato, then the trial court's dismissal of the wrongful death claim must be

93. 87 N.C. App. at 91, 359 S.E.2d at 507. Viability was not mentioned by the court as a prerequisite to having this duty attach. Id.
95. Id. at 156, 365 S.E.2d at 910.
96. Id.
97. Id. at 159, 365 S.E.2d at 912, citing Cox v. Haworth, 304 N.C. 571, 284 S.E.2d 322 (1981) (holding decisions are presumed retroactive unless contrary compelling reason).
affirmed."\(^{98}\) Noting the DiDonato's court language concerning the characteristics of a viable fetus, the Johnson court further cited the long-established common law definition of viability — a fetus' capability to live independently of the mother.\(^{99}\) The court then discussed the ambiguity surrounding DiDonato's definition of viability and that DiDonato's "viable" fetus also included a nonviable fetus as well.\(^{100}\) Accordingly, in an obvious attempt to clear away such ambiguity created by DiDonato's definition of a viable fetus, the court of appeals held that the supreme court's real intent was to use the common law definition of viability as stated above.

The Johnson court went on to the United States Supreme Court's decision in Planned Parenthood of Central Missouri v. Danforth\(^{101}\) where the Supreme Court held that the determination of a fetus' viability is a question of fact, not law.\(^{102}\) Despite the Danforth holding, the Johnson court found the complaint did not allege facts that would indicate that the defendants breached their duty owed to the fetus while in utero given the fetus died at forty weeks, a gestational age well beyond the twenty to twenty-six weeks suggested by medical experts as the point viability would begin.\(^{103}\) Accordingly, the court ruled the complaint sufficiently stated a cause of action as it alleged a breach of duty after viability, a ruling which effectively avoided the issue of whether the doctor owed a duty to the nonviable fetus.\(^{104}\)

Johnson provided a clear indication of how the court of appeals was going to interpret the supreme court's definition of viability as it concerns a wrongful death action. In Johnson, the court established that a finding must first be made as to whether a complaint sufficiently alleged a decedent fetal plaintiff was viable at the time of death. The case further established the final determination of viability is one for the fact finder and in so holding,

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98. Id.
99. Id. at 159, 365 S.E.2d at 913.
100. Id.
102. Johnson, 89 N.C. App. at 161, 265 S.E.2d at 914.
103. Id. See also supra note 5.
the court of appeals also expressed its opinion that a nonviable fetus cannot sue for wrongful death in North Carolina.

C. Greer v. Parsons

*Greer v. Parsons*\(^{105}\) is the last case in North Carolina to address the issue of a fetal wrongful death claim. The mother of Kandy Greer, an eight and a half month old unborn child, sued as the Administratrix of the baby's estate, alleging the defendant's negligent operation of their automobile wrongfully caused the death of the unborn child.\(^{106}\) The parents had already settled their claims with full releases before the suit was brought. The complaint asked for punitive and compensatory damages.\(^{107}\) The issue before the *Greer* court was whether, under the Wrongful Death Act, a fetus could be awarded punitive damages, and whether the fetus' survivors could recover damages for the loss of the child's services, companionship, society, and the like.\(^{108}\)

The *Greer* court held that under *DiDonato*, the plaintiff could collect punitive damages, regardless of the fact that her parents had already settled their claims, in essence ruling that the child's claim was independent of those of the parents. The court stated the only reason for the supreme court's requirement that a parent's tort claims be joined with the child's wrongful death claim was to facilitate the fair litigation of multiple claims based on the same event. In other words, the *Greer* court wanted to prevent a double recovery. Where there was only one claim, however, joinder is irrelevant, reasoned the court, and *DiDonato* did nothing to prevent the settlement of the parents claims apart from the child's.\(^{109}\)

The *Greer* court next turned to the question of the ability of the plaintiff's survivors to recover for the loss of the stillborn's companionship, services, advice, society and the like. The *Greer* court seemed to be convinced that *DiDonato* was wrong on this point, but it was nonetheless forced to abide by the higher court's decision.\(^{110}\) The plaintiff in *Greer* had argued the Act expressly authorized the recovery of damages for the loss of a child's society, companionship, and the like, when proven, and it was not impossi-
ble to prove the nature and extent of the damages suffered. The court agreed with these contentions saying that "[t]he DiDonato decision . . . cannot be reconciled with the 'basic principle of law and equity that no man shall be permitted to take advantage of his own wrong,'" as the decision allowed tortfeasors to escape liability for the parents' loss of the companionship and society of their child. The court further pointed out that the DiDonato decision prevented the parents from trying to prove damages expressly authorized under the Act. TheGreer court found the implication that damages for a child's lost companionship and society depends entirely upon its personality, character, and other traits is far too broad. In so finding the court opined:

Everyone who has been a parent — or been around parents with young children — knows that normal parents have a unique and treasured companionship with their young children; not because of the particular characteristics or merits of the children, but because of the needs of the parents to perpetuate themselves and the children's dependency upon them.

However, theGreer court acknowledged its obligation to follow the precedent of DiDonato, and it thus affirmed the dismissal of the plaintiff's claims for these types of damages. While providing some additional guidance as to the operation of the joinder requirement, Greer did not, despite the logic of its reasoning, change the law in this area.

IV. SUMMARY OF THE CURRENT NORTH CAROLINA LAW ON WRONGFUL DEATH OF A FETUS

DiDonato v. Wortman is currently the law in North Carolina as to how the Wrongful Death Act is to be interpreted when the plaintiff is a stillborn child. According to DiDonato, a viable unborn child, through its estate, is able to state a cause of action under the Act for wrongful death. Accordingly, the fetus may

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111. Id.
112. Id. at 468, 405 S.E.2d at 924, quoting Garner v. Phillips, 229 N.C. 160, 147 S.E.2d 845 (1948).
113. Id.
114. Id. at 468, 405 S.E.2d at 924. The court's reasoning makes clear the inherent fault of the supreme court's opinion in DiDonato regarding these types of damages.
117. Id.
recover damages for pain and suffering, medical expenses, funeral expenses, and nominal and punitive damages. The fetus' survivors, however, may not recover pecuniary damages or damages for the loss of the plaintiff's companionship, comfort, guidance, or the like. Any claim a parent may have against the tortfeasor causing the plaintiff/child's death must be joined with the wrongful death claim.

The supreme court's decision in DiDonato did not specifically address the issue of viability, but it did explicitly use the words "viable fetus" in making its holding. The court of appeals tried to clarify the definition of "viability" in the Johnson case, and held that a nonviable fetus could not bring a cause of action under the Wrongful Death Act.

On the issue of damages, Gay v. Taylor is still the applicable law with respect to the speculative nature of a pecuniary damages claim made by the survivors of a stillborn fetus. DiDonato explicitly overruled two prior decisions, Yow and Cardwell, on the issue of whether a viable fetus is a "person" under the wrongful death statute. The court of appeals, in Greer, substantially questioned the logic of the supreme court's denial of loss of society damages to the fetal plaintiff making a wrongful death claim, but it did not change the law in this area.

118. N.C. Gen. Stat. § 28A-18-2(b)(2). Courts clearly will require hard evidence on this issue, but no more than reasonable proof that the decedent actually suffered pain before death as a direct result of the tortious act complained of. DiDonato, 320 N.C. at 431, 358 S.E.2d at 494.
122. DiDonato, 320 N.C. at 431, 358 S.E.2d at 494.
123. Id. at 433, 358 S.E.2d at 495.
124. Id. at 426, 358 S.E.2d at 493.
V. ANALYSIS OF THE CURRENT LAW

A. Viability requirement

*DiDonato* not only left many questions unanswered, but it raised some new issues as well. The major unanswered question is whether a nonviable fetus is a “person” under the wrongful death statute and, thus, is capable of stating a claim for wrongful death. The court of appeals in both *Yow* and *Cardwell* dealt with the question of whether a clearly viable fetus was a “person” under the Act. The *DiDonato* court also dealt with this question and overruled the court of appeals’ prior decisions, in *Yow* and *Cardwell*, by making specific reference to the fact of the viability of the plaintiff, and yet its holding only mentioned viable fetuses. The *DiDonato* court did not, however, hold that a non-viable fetus was not a “person” under the Act, nor did it limit its holding to the specific facts of that case. In fact, the *DiDonato* court, in overturning the court of appeals’ decisions in *Yow* and *Cardwell*, noted that:

A viable fetus, whatever its legal status might be, is undeniably alive and undeniably human. It is, by definition, capable of life independent of its mother. A viable fetus is genetically complete and can be taxonomically distinguished from non-human life forms. Again, this is some evidence that a viable fetus is a person under the wrongful death statute.

As pointed out by the court of appeals in *Johnson*, a nonviable fetus is also “undeniably alive and undeniably human.” It too is “genetically complete” and can be “taxonomically distinguished from non-human life forms.” The only difference between the viable and nonviable fetus is the former’s ability to survive outside the mother’s womb. Thus, it is unclear if the *Johnson* court found this singular difference compelling enough to include the viable fetus in the statute and to exclude the nonviable fetus from the same, or if the court even considered the differences between the two. Given the fact that both *Gay* and *Yow* cannot, after *DiDonato*, be claimed to decide the issue of whether a nonviable

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132. *Id.* at 427-28, 358 S.E.2d at 491.
134. *Id.*
fetus is a "person" under the statute, the question of a non-viable fetus' legal status under the Wrongful Death Act is very much an undecided issue at the supreme court level. For now, however, it is clear the court of appeals has ruled that a nonviable fetus may not sue under the Wrongful Death Act. 

In this Author's opinion, to cut off the wrongful death cause of action at viability seems an unjust and illogical standard. The majority of states allowing causes of action for fetal plaintiffs under their wrongful death statutes have imposed the viability requirement, yet there is little to recommend such a standard. The main problem with the viability requirement is that it is "impossible of practical application" because viability is "a relative matter which depends upon the period of gestation, the health and hereditary makeup of the fetus, the characteristics of the mother, and the availability and quality of prenatal medical care." Due to the variance of viability with each individual pregnancy, "its use as a criterion in evaluating potential recovery for the wrongful death of a fetus has been 'characterized as a nebulous circumstance' upon which to base the determination of independent existence . . . and an arbitrary criterion which seems 'an unnecessary and inappropriate element of recovery.'" Simply put, proving viability will be very difficult in any case and will be as speculative a proposition as proving the loss of society damages the supreme court disallowed in DiDonato. As time passes, advances in medical technology will make determination of viability even more complex.

At present, viability generally is agreed to occur at approximately twenty to twenty-six weeks of gestation. Medical

135. This fact coupled with the fact that the supreme court held in Stetson v. Easterling that a child born alive can recover for prenatally inflicted injuries regardless of viability. See Stetson, 274 N.C. 152, 161 S.E.2d 531 (1968).

136. See Johnson, 89 N.C. App. 154, 365 S.E.2d 904.


140. See Susan D. Crooks, Comment, Wrong Without a Remedy — North Carolina and the Wrongful Death of a Stillborn, 9 CAMPBELL L. REV. 93, 124 (1986); see also supra note 5.
research is in progress, however, that would enable doctors to remove a child from its mother's womb at any point after conception and transfer it to another womb, where it would continue to thrive until birth. Ectogenesis researchers are well on the way to conceiving and bringing to maturity human fetuses that have never lived inside a human body. These types of medical advances will make viability a non-factor in the spectrum of fetal development leaving the viability requirement obsolete.

In terms of equity, the viability requirement is inherently unjust. The wrong the statute was enacted to remedy is the wrongful killing of a "person," which now includes a viable fetus. If it is wrong to kill a viable child, then why is not just as wrong to kill a nonviable child? As the DiDonato court recognized, the real parties in interest in the wrongful death of an unborn child are the parents. Thus, "[t]o condition a cause of action for the wrongful death of a fetus on viability does nothing to alleviate the unfairness to parents who lose their child due to the actions of the tortfeasor who inflicted the fatal injury before the fetus was viable." Moreover, by denying recovery prior to viability, the court's standard may lead to preclusion of the worthiest claimants.

The most crucial period of fetal development is the first trimester, which is always before viability. During this period, the developing child is most vulnerable to outside influences which can cause congenital defects and even death. Injury from poor or negligent prenatal medical care, direct physical contact with the mother, drug side effects, etc., is likely to have the greatest effect during this period. Thus, it is more likely the child will die from such causes before reaching viability than if such injury was inflicted after viability. If an unborn child is a "person" under the Wrongful Death Act, surely the legislature did not intend such inequitable application of the statute.

There is no logically compelling argument to support the imposition of a viability requirement on an action for wrongful death. As already discussed, such a requirement is not more fair.

142. DiDonato, 320 N.C. at 423, 358 S.E.2d at 491.
143. See supra note 110.
145. Id.
than allowing recovery from conception on — to the plaintiff or to the defendant. Damages for the death of a nonviable child, especially under the current limitations, are no more speculative than for the viable plaintiff. Certainty as to when the cause of action actually accrues increases by a thousand percent when it accrues at conception rather than viability. If there is a fetus to kill, then there is an action for wrongful death. Additionally, allowing a cause of action from conception onward also eliminates the need to revisit the issue as medical technology advances.

The viability requirement should not be imposed on an action for wrongful death, and the court of appeals should be reversed on this issue. It remains to be seen whether the supreme court will clarify its intentions on this issue as stated in the DiDonato case.

B. Fetus as a Person

Among the questions raised by the court’s language in DiDonato is the effect that ruling will have on other areas of law concerning the fetus. The supreme court has held as a matter of law that a viable fetus is a “person” as that term is used in the wrongful death statute. It has further stated in reaching that holding that the legal basis upon which it was based points “toward acknowledging fetal personhood,” without limiting that statement to the Wrongful Death Act. In interpreting the word “person,” the DiDonato court concluded the language of the statute, its legislative history, and its broad remedial purpose all compelled the conclusion that any uncertainty as to the meaning of the term should be resolved in favor of permitting a wrongful death action by a viable fetus.

A human fetus, regardless of viability, is not a person under the North Carolina Constitution’s Article I, sections 1 and 19. This fact, however, clearly does not prohibit the legislature or the courts from deeming a human fetus a “person” under a particular statute that was enacted to accomplish a constitutionally acceptable purpose. The language of the DiDonato decision simply adds support to the position that a fetus, for the purposes of tort law at the very least, should be considered a “person” in every legal sense. The difficulty of legally recognizing a fetus as a person

146. DiDonato, 320 N.C. at 428, 358 S.E.2d at 490.
147. Id. at 423, 358 S.E.2d at 491-92.
148. Id. at 430, 358 S.E.2d at 493.
150. DiDonato, 320 N.C. 423, 358 S.E.2d 489.
in one context and not doing so in another, is discussed in further
detail below. The type of language used in DiDonato does seem to
indicate a trend towards recognition of the unborn child as a mem-
ber of society capable of possessing independent rights.151

C. Pain and Suffering Damages

Another question raised by the DiDonato decision is the level
of proof necessary to meet the court's satisfaction on the issue of
damages for the pain and suffering of the fetal plaintiff. The
DiDonato court gave little or minimal guidance on this issue when
it said it was not convinced that one could ever satisfactorily prove
a fetus had suffered pain prior to its death in utero, but at it would
allow plaintiffs to go ahead and try anyway.152 What is a trial
judge to do with this kind of standard? Did the DiDonato court
mean to setup a legal presumption that such damages were too
uncertain to award and a standard that could be rebutted only by
competent evidence on the issue? The court's language is cer-
tainly susceptible to such an interpretation. If so, what level of
proof would be needed to overcome the presumption — clear and
convincing evidence or merely some evidence that would ostensibly
meet the plaintiff's production burden? The DiDonato court
further muddies the water by saying that such damages can be
had if they can be "reasonably established,"153 yet there appears
to be no determinative standard. The medical standard for empir-
ical proof of these damages may greatly differ from the legal stan-
dard set up in the mind of the trial judge. This confusion prevents
a plaintiff from knowing how much proof she should present to the
court in order to have her claim for such damages allowed. 
Finally, the DiDonato court provides no legal framework to decide
that such damages are too speculative as a matter of law. None of
the past supreme courts or court of appeals decisions that have
held damages to be too speculative under the Wrongful Death Act
logically describe what criterion should be used to in deciding the
issue.

In the wrongful death context, it is thus difficult to know how
successful a fetal plaintiff will be in collecting pain and suffering
damages.

151. Id.
152. Id. at 432, 358 S.E.2d at 194.
153. Id.
D. Pecuniary Loss, Loss of Society, Companionship, Services, Advice and the Like

The court of appeals, along with legal scholars and commentators, have called into question the validity of the court’s rationale in DiDonato regarding loss of society damages, provided for in sections 28A-18-2(b)(4)(a)-(c) of the North Carolina General Statutes. While North Carolina is not alone in denying such damages in the case of the wrongful death of a stillborn fetus, the court’s decision to do so seems to fly in the face of the clear legislative intent and plain language of the Wrongful Death Act.

American courts that have addressed the issue of loss of society and pecuniary damages for the death of a stillborn child have taken essentially three approaches to the issue. The first is to make little or no distinction between a viable unborn child and one born alive, and the rules regarding each are the same. Following this approach, a Connecticut Superior Court reasoned that because there was no right to recover loss of society damages for the death of a child born alive, there also could be no such recovery in an action involving a viable unborn child. The Idaho Supreme Court took the same approach, but arrived at a different conclusion. The court held that where loss of society damages were available for the wrongful death of a child born alive, they were also recoverable for the death of a fetus.

The second approach is to focus on whether there has in fact been any loss of society or pecuniary loss when the fetus dies. Under this view, the California Supreme Court dismissed a claim for loss society damages involving a stillborn fetus, holding “parents of a stillborn fetus have never known more than a mysterious presence dimly sensed by random movements in the womb,” and that consequently, “the rich experiences upon which a meaningful parent-child relationship is built . . . do not begin until the

154. For convenience sake, all the damages provided for under N.C. GEN. STAT. § 28A-18-2(b)(4)(b) & (c) will be collectively referred to as “loss of society damages.”


moment of birth. The Illinois Court of Appeals also employed this view in saying that while parents may have affection for the unborn child, no recovery would be allowed until after live birth because the child could not be said to have returned that affection until that point.

The third approach in dealing with the issue of damages is that seen in DiDonato. The focus is on the speculative nature of such damages, and the increased uncertainty of their existence engendered by the unborn status of the child. While the Illinois Court of Appeals has also voiced this concern, it upheld such damages on different grounds. As discussed above, the Greer court found the DiDonato court’s reasoning behind denying such damages to the survivors of the wrongfully killed fetus to be flawed. The point is one well taken.

E. DiDonato vitiates the legislative purpose of the 1969 changes to the Act.

Unlike many wrongful death statutes in other American jurisdictions, North Carolina’s Wrongful Death Act clearly delineates the types of damages that can be recovered. Among these are compensation for the loss of services, protection, care and assistance, society, companionship, comfort, guidance, kindly offices, and advice of the decedent to the persons entitled to the damages


160. Hunt v. Chettri, 510 N.E.2d 1324 (Ill. App. Ct. 1987). It would appear that neither the members of the California Supreme Court nor the members of the Illinois Court of Appeals have ever had children of their own. A one day old baby does not “return the affection” of its parents, and it is patently ridiculous to say that the mother carrying an eight month fetus has little more attachment to her child than that received from feeling “random movements in the womb.” Further, it is an abuse of judicial authority to make such factual findings on issues of public policy without support for these conclusions either in the record or in the realm of judicial notice. In fact, the Illinois Court of Appeals later refused to rule as a matter of law that society was not in fact exchanged in the months prior to birth, and thus left the matter open to reasonable proof to be ruled on by the fact finder. See Seef v. Sitkus, 562 N.E.2d. 606 (Ill. App. Ct. 1990).

161. Smith v. Mercy Hosp. & Medical Center, 560 N.E.2d 1164 (Ill. App. Ct. 1990). The court noted the speculative nature of loss of society damages in the case of a stillborn fetus, but found that because such damages were presumed in a case involving a newborn child, the same presumption should exist in the case of the unborn child as well. Id. at 1173.

Such damages were not recoverable before 1969, when the legislature found that:

WHEREAS, human life is inherently valuable; and
WHEREAS, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectually limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life . . . .

Thus, the legislature has spoken to change the old rule of valuing human life strictly by the amount of money one was capable of making into a rule that allows the jury to place a monetary value on the multiplicity of intangible damages that are often suffered when someone wrongfully ends the life of another human being.

DiDonato’s denial of loss of society and pecuniary damages turns this legislative purpose on its ear. It allows all classes of persons to recover for such damages, except for an unborn child. Allowing recovery by the survivors of the child who is born alive but dies within minutes of birth from prenatally inflicted injuries cannot be logically reconciled with denying the same recovery to the survivors of the child who dies from the same injuries only minutes before he was to be delivered. This point is illustrated by the court’s decision in Russell v. Windsor Steamboat Co.

An action for the wrongful death of a five month old child (born alive), the court addressed “the sole question of whether more than nominal damages are recoverable for the negligent killing of an infant incapable of earning anything, without direct evidence of pecuniary damage other than sex, age and condition of health of the deceased.” The court’s opinion makes almost exactly the same observation regarding the five month old child in that case as it did about the stillborn plaintiff in DiDonato:

In the very nature of things a child [five] months old has no present earning capacity, and has not reached a sufficient state of development to furnish any indication of his probable earning capacity in the future, other than the fact of being a healthy boy. This is all we know of him or ever can know.

164. 1969 N. C. SESSION LAWS, Chapter 215, S.B. 95 (emphasis added).
165. 126 N.C. 775, 36 S.E. 191 (1900).
166. Id. at 778, 36 S.E. at 191.
167. Id. Compare this to the court’s justification for not allowing pecuniary damages in the case of a viable stillborn child in DiDonato, about which evidence had been introduced that the fetus was healthy prior to the infliction of the prenatal injury which caused its death: “When a child is stillborn we can know
Despite this observation, however, the court in *Russell* held that:

We see no distinction in the law, nor reason for distinction, between the death of a child and of an adult. The measure of damages is the same, but we frankly admit that the difficulty of its application is greatly increased in the case of an infant. Still, the jury must do the best they can, taking into consideration all the circumstances surrounding the life that is lost, and relying upon their common knowledge and common sense to determine the weight and effect of the evidence . . . we would be reluctant to admit that a human life, however lowly or feeble, had no value . . .

Upon the greater and better weight of authority, as well as our own convictions of natural justice and of public policy, we are constrained to hold that the plaintiff can recover substantial damages in the case at bar.\(^{168}\)

Cannot the same be said of a fetus who is a legal “person,” thus having equal status with the five month old plaintiff in *Russell*?

The legislature was concerned with properly valuing human life in compensating the survivors for a terrible loss caused by another’s wrongful act. Can anyone really be so heartless to say that a mother who has carried a child for months, felt its movements in her body, named it, prepared a nursery for it, shopped endlessly for just the right shade of crib bumpers and a matching mobile and shared the excitement of the expectation of motherhood with her family and friends — has lost nothing when another tortiously causes her child to die before it is born? While the mother may bring her own action for emotional distress, the purpose of the wrongful death statute in providing for such damages is wholly defeated by the court’s arbitrary decision.

Wrongful death statutes were enacted to change the harsh and illogical common law whereon it was “cheaper to kill one’s victim than to merely injure him.”\(^{169}\) The *DiDonato* court recognized that “[i]n the case of a stillborn fetus, the beneficiaries of a wrongful death action will necessarily be the child’s parents . . . .”\(^{170}\) It also recognized that in a wrongful death action those parents are seeking “compensation for the complete loss of, rather than mere

\(^{168}\) Russell, 126 N.C. at 780-83, 36 S.E. at 192.


\(^{170}\) DiDonato, 320 N.C. at 426, 358 S.E.2d at 491.
injury to, their offspring." Yet, when the court held that an action could be had for prenatal injuries in *Stetson v. Easterling*, it said nothing of limiting the same type of damages in any way. Thus, a parent who's child is severely injured *in utero*, is born alive, and then lives for years in a constant vegetative state can collect damages for loss of society, companionship, advice, and the like, while the parent whose child dies from similar injuries before he is born cannot collect any damages whatsoever for the same loss. It seems reasonable to say that the child who is alive, but comatose, provides no more companionship than the child that was never born, nor can a court know anything about the comatose child's "personality and other traits relevant to what kind of companion it might have been and what type of services it might have provided." The result is the same paradox the wrongful death statute was enacted to alleviate in the first place — meaning it still benefits the tort feasor to kill the fetus rather than to simply maim it. These same arguments have equal application with regard to pecuniary damages as well.

Finally, the court's decision severely compromises the statute's "broadly remedial objectives" when it restricts both pecuniary and loss of society damages. Absent a case where punitive damages may come into play, the only damages to be recovered for the wrongful death of a fetus are medical and funeral expenses, pain and suffering, and nominal damages. Such damages are vastly inadequate to compensate the estate of a dead child's right to life, who has his right to life wrongfully taken away by the carelessness of another. Given the preamble to the Wrongful Death Act, it is difficult to believe that the legislature would place such a low value on the human life of anyone recognized as a "person" by the same statute. This is exactly what the court has done.

**F. DiDonato provides no way of changing the law as technology changes the quality of available evidence**

*DiDonato's* total prohibition of loss of society and pecuniary damages effectively restricts the law's further growth. It is a fact

171. *Id.* at 427, 358 S.E.2d at 491.
174. *Id.* at 430, 358 S.E.2d at 493.
175. Even these damages, probably the greatest in terms of amount of the remaining damages allowed, are going to be very difficult to collect under the court's language in *DiDonato*. *Id.*
of the modern world that technology is progressing at an almost geometric rate, especially in the area of reproductive and prenatal medicine. While the DiDonato court never even mentioned the technology available at the time of the decision, a plaintiff in all likelihood will be able to produce, as technology progresses, sound evidence of a baby’s likely personality, physical makeup at birth and as an adult, intelligence, predilection to disease, and the like. As the law stands now, no matter how much of this evidence becomes available, it cannot aid a plaintiff in recovering damages for the wrongful death of a stillborn child. Certainly the court can revisit the issue at a later time, but there is no guarantee that it will. In the meantime, many plaintiffs will go without compensation for losses which are provable.

G. Denying loss of society and pecuniary damages based on their speculative nature alone is not logically sound

The mainstay of the court’s position in refusing to allow loss of society and pecuniary damages is that such damages are too speculative in nature. Because one cannot know the “personality and other traits relevant to what kind of companion” an unborn child would have been and “what kind of services” he may have provided, or how intelligent he may been, one cannot take a reasoned route to arrive at an appropriate assessment of these types of damages. First, the court never says what “other traits” would be relevant to such a determination. Thus it is difficult to know if one could make a reasoned finding as to such traits or not. Further, pecuniary, loss of society, and pain and suffering damages are all speculative in nature, according to the court, yet all wrongful death claims under the Act have elements of damages that are entirely speculative. Accordingly, the speculative nature of loss of society and pecuniary damages for a stillborn child proves an illogical reason for their denial. In fact, of these three types of damages, pain and suffering damages would be the most speculative of all as there really is no way of quantitatively proving the degree of pain suffered by a fetus; but surprisingly, of these three, pain and suffering damages are the only damages that the court has left available to the fetal plaintiff.

The crux of the court’s reasoning on this issue is that because one cannot know anything about the intangible nature of a fetus, his personality, likes and dislikes, temperament, work ethic, and

176. Id. at 432, 358 S.E.2d at 494.
the like, pecuniary and loss of society damages are even more speculative than in the usual case. The court, however, provides no support for this arbitrary finding, and it is surely not an issue of which the court can take judicial notice. The court also fails to look to precedent on the issue of speculative damages, which would have revealed its position in DiDonato as inconsistent with its past jurisprudence.

The court has held that some speculation in the calculation of damages cannot preclude damages altogether, and that:

The present monetary value of the decedent . . . will usually defy any precise mathematical computation. Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury — subject, of course, to the discretionary power of the judge to set its verdict value aside when, in his opinion, equity and justice so require.\textsuperscript{177}

The court also stated that "North Carolina cases dealing with a spouse's loss of consortium exhibit courts' increasing willingness and confidence to let juries assess damages having a somewhat intangible basis."\textsuperscript{178} Loss of consortium has been defined by the supreme court as service, society, companionship, sexual gratification, and affection.\textsuperscript{179} The court in Nicholson v. Hugh Chatham Memorial Hospital held these types of damages were not too remote to serve as the basis of a loss of consortium action.\textsuperscript{180} While it is true a spouse can offer evidence of their partner's past conduct, there is no reason why the estate of a stillborn child cannot introduce evidence of the unborn's health before death, as well as of their general family background, leaving the task of inferring the relative value and extent of services and companionship the child would have provided to his parents to the jury.

DiDonato prevents the estate from even trying to prove such damages. The court of appeals in Greer v. Parsons,\textsuperscript{181} questioning


\textsuperscript{179.} Nicholson v. Hugh Chatham Memorial Hospital, 300 N.C. 295, 266 S.E.2d 818 (1980).

\textsuperscript{180.} Id.

\textsuperscript{181.} Id. 103 N.C. App. 463, 405 S.E.2d 921 (1991).
the validity of the DiDonato rationale for denying loss of society damages, noted that:

While the companionship and associations that an adult child has with its parents does depend to some extent upon its character, personality and other traits, kinship is enduring and a parent's bond with its offspring does not vanish when the child's personality becomes displeasing or its character disappointing. Thus, for a jury to conclude that any normal parent would have enjoyed cuddling, looking after, playing with and training his or her child regardless of its characteristics would not be "sheer speculation"; instead, it would be a rational determination based upon their knowledge of human experience and the law of probabilities. Nor does the opinion take into account that the life-long experiences and insights of jurors accompany them into the box, and that they would know without proof that children bring sorrow and anxiety as well as joy to their parents and would likely appraise the loss of any child's society and companionship accordingly.\textsuperscript{182}

The court in Greer took from the jury the ability to hear evidence on the issue of loss of society and pecuniary damages, and refused to allow it to decide whether such damages had been sufficiently proven in the specific case at hand. The court substituted its will for that of the legislature, and in so doing, it acted contrary to the legislative purposes of the Wrongful Death Act. Because its position is neither supported by logic nor the law, it should be changed.

\textbf{H. Alternatives to the current law on pecuniary and loss of society damages for the stillborn child}

One possible alternative to prohibiting recovery for pecuniary and loss of society damages is to establish a legal presumption that these damages exist whenever wrongful death is proven. Illinois is a jurisdiction with such a rule. In Jones v. Karraker,\textsuperscript{183} the Illinois Supreme Court discussed this presumption of pecuniary loss in wrongful death cases involving viable fetuses.\textsuperscript{184} Pecuniary damages in that case included loss of society damages as well. Using such a system would automatically give plaintiffs a recovery unless the defendant could offer evidence to rebut the presumption that some lesser judgment should be rendered. If damages in excess of the presumed amount can be proven by com-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{182} Id. at 468-69, 405 S.E.2d at 924-25.
\item \textsuperscript{183} 457 N.E.2d 23, 24-25 (Ill. 1983).
\item \textsuperscript{184} Id.
\end{enumerate}
\end{footnotesize}
petent evidence, a jury may award such amounts. Judges can then assess whether the proof is sufficient to justify an excess award. Such an alternative would meet the need for some modicum of consistency in awarding such damages. Speculation would then virtually disappear from the process, accomplishing the remedial purposes of the statute. Another alternative would be to legislate a statutory minimum award of such damages in any case where the plaintiff prevails in a wrongful death claim for a stillborn fetus.\textsuperscript{185} Both of these proposed alternatives have the advantage of eliminating speculation and of guaranteeing at least some significant recovery for the successful plaintiff.

A third possible approach would be to place a cap on the amount of damages that could be awarded under these categories. The plaintiff would have the same burden to prove his damages as in any other wrongful death case, but the jury would be restricted from making a large award driven more by emotion than evidence, and the judge would have some guidance as to relative values of cases in view of the cap. Yet another approach would be to amend the statute to specifically include the unborn fetus\textsuperscript{186} and to overrule DiDonato. This would leave no question as to the types of damages that would be available to this class of plaintiff, and the courts, as well as plaintiffs, would have clear direction on the issue. Such an approach would also rope in activist courts.

The most obvious alternative is to simply let the process work as it does in every other wrongful death claim. The plaintiff will bear the burden of bringing evidence before the jury that will prove that pecuniary and loss of society damages were actually suffered in a particular case. Juries and courts can "look to specific known factors in assessing the compensable loss."\textsuperscript{187} Such factors may include:

1. the state of pregnancy at which stillbirth occurs;
2. the medical history of the mother with respect to previous childbirth;
3. the number of children the couple presently has;
4. whether the mother used artificial means to induce pregnancy, i.e., fertility drugs;
5. the probability of the pregnancy going to full term;
6. The statute should probably apply to all persons under a stated age recognized by the Act to have a cause of action for wrongful death. This would ostensibly remove the uncertainty from all cases where the evidence by which to calculate damages is limited by the age and experience of the decedent.

\textsuperscript{185} See Edwards, supra note 178. The statute should probably apply to all persons under a stated age recognized by the Act to have a cause of action for wrongful death. This would ostensibly remove the uncertainty from all cases where the evidence by which to calculate damages is limited by the age and experience of the decedent.

\textsuperscript{186} Such amendment could also speak to whether the Act is to cover the nonviable fetus as well.

\textsuperscript{187} See Meadows, supra note 156.
any prior history of miscarriage; (7) prenatal care of the stillborn child; and (8) parental preparation for the forthcoming child, i.e., house additions, baby crib, and any other indicia of the degree of expectation exuded by the parents.\(^{188}\)

If the jury award is contrary to the evidence produced, the judge has the discretion either to set the verdict aside, make an alternative award, or to deny such damages altogether. But where there is competent evidence, a deserving plaintiff will be allowed to recover those damages the legislature clearly intended for him to recover.

VI. PRENATAL INJURY

A. **Historical Background**

Traditionally, a child who was born alive could not recover for prenatally inflicted injuries. The unborn child was viewed to be a part of the mother, and therefore, had no separate existence until live birth.\(^{189}\) The general theory of law disallowing a fetus to recover was expressed in the landmark case of \textit{Dietrich v. Northampton}\(^{190}\) in 1884. Oliver Wendell Holmes wrote the court’s opinion in a case involving a child who died shortly after birth due to prenatal injuries. Justice Holmes opined that an unborn child was still a part of the mother and was not a separate being in its own right. Thus, any injury suffered by the unborn child was actually an injury to the mother for which she could maintain a cause of action to recover for damages.\(^{191}\) This remained the prevailing law in the United States for over sixty years.

The most common reasons given for denying recovery for prenatal injuries were: (1) the unborn child was not a “person” or legally recognized entity capable of possessing legal rights; (2) stare decisis; (3) lack of precedent; (4) the difficulty in proving causation in such cases; and finally (5) the fear of fraud.\(^{192}\) These rationales did not go without criticism, however; finally, the Federal District Court for the Dis-

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191. Id. at 17.

strict of Columbia denied the logic of the rule and held a child who was born alive could bring an action for prenatally inflicted injuries.\textsuperscript{193} In the 1946 case of \textit{Bonbrest v. Kotz},\textsuperscript{194} the court examined a medical malpractice case wherein an infant sought recovery for injuries she alleged were sustained as a result of her doctor’s negligence in delivering her.\textsuperscript{195} The court distinguished \textit{Bonbrest} from \textit{Dietrich} on the basis \textit{Dietrich} had not involved a direct injury to a viable child.\textsuperscript{196} The court then asserted that because the plaintiff was a viable fetus at the time the injuries were suffered, she was by definition a separate entity from her mother.\textsuperscript{197} Accordingly, the court found that the infant’s enjoyment of life was “sacrosanct” and “inherent” and recognized her independent right to maintain a cause of action for prenatal injuries.\textsuperscript{198}

\textit{Bonbrest} was the ripple which started a tidal wave of shifting opinion in this area of the law, resulting in the “most spectacular abrupt reversal of a well-settled rule in the whole history of torts.”\textsuperscript{199} At present, all American states, including North Carolina recognize a cause of action for prenatal injury.\textsuperscript{200}

\begin{footnotes}
\item[194] Id.
\item[195] Id.
\item[196] Id. at 140.
\item[197] Id.
\item[198] Id. at 142.
\end{footnotes}
B. North Carolina Law

The first indication that the rule in North Carolina would be to recognize a cause of action for prenatal injury was given in Gay v. Thompson. While the supreme court denied a cause of action for the wrongful death of a viable fetus, it stated in dicta: "Since the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence."202

The issue remained dormant until the 1968 case of Stetson v. Easterling. In Stetson, the court formally recognized a viable fetus which had suffered prenatal injuries could recover damages for such injuries if born alive.204

The Stetson court examined the alleged wrongful death of a viable fetus. To determine if there was a cause of action, the court first addressed the threshold issue of whether the plaintiff could have sued the defendant for his death-causing injuries had he lived.205 An affirmative answer was required by the wrongful death statute before such an action could be maintained.

The court noted this was a question of first impression in this jurisdiction, confirming that it had not actually held such an action existed in Gay v. Thompson. Citing briefly to cases and treatises listing the "[n]umerous decisions, texts and Law Review articles" which articulated the majority rule of allowing recovery for prenatal injury, the court quoted the language from Gay v. Thompson and held this statement was adopted as authoritative in this jurisdiction.207 No elaboration accompanied this declaration. Furthermore, the question of whether the plaintiff had to be


204. Stetson, 274 N.C. at 156, 161 S.E.2d at 534.

205. N.C. GEN. STAT. § 28-173 was the statutory cite in 1968.

206. Stetson, 274 N.C. at 156, 161 S.E.2d at 534.

207. Id. See supra text accompanying note 202.

208. Stetson, 274 N.C. at 155, 161 S.E.2d at 533-34.
viable at the time the injuries occurred in order to state a cause of action remained unanswered.

Since *Stetson*, no case in North Carolina has directly addressed the prenatal injury cause of action issue. In *DiDonato v. Wortman*, the Supreme Court of North Carolina simply recognized that such an action existed.\(^{209}\) Similarly, in *Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.*,\(^{210}\) the North Carolina Court of Appeals specifically witheld judgment on the issue of whether the defendants in that case owed a duty to the fetal plaintiff prior to her reaching viability or whether her achieving viability was nothing more than a condition precedent to suit under the Wrongful Death Act.\(^{211}\) Thus, *Stetson* is the controlling case on this issue in North Carolina.

C. Analysis

It is clearly the rule in North Carolina that a child who is born alive can sue to recover damages for injuries suffered while still in the womb.\(^{212}\) This, however, is where the clarity ends. From the two cases that address the issue, a single quotation represents the totality of the stated law regarding this judicially created cause of action.\(^{213}\)

1. Viability

*Stetson* does not mention whether a plaintiff must have been viable at the time the alleged injuries occured in order to state a cause of action for prenatal injuries. The court simply stated that a child, if born alive, is allowed to maintain an action on the ground of actionable negligence.\(^{214}\) Tort law, in general, has no rule on viability, and the majority of American jurisdictions hold that viability is not a factor in stating a cause of action for prenatal injury.\(^{215}\) In several jurisdictions, however, there exists case law holding the opposite.\(^{216}\) While the North Carolina Supreme

\(^{209}\) *DiDonato*, 320 N.C. at 424, 358 S.E.2d at 491.
\(^{211}\) Id. at 161, 365 S.E.2d at 914.
\(^{212}\) *Stetson*, 274 N.C. at 156, 161 S.E.2d at 534.
\(^{213}\) See supra text accompanying note 201.
\(^{214}\) The plaintiff in *Stetson* was a viable fetus at the time of injury.
\(^{216}\) Id.
Court will apparently require viability to state a wrongful death claim, this fact is of little consequence in the prenatal injury context because a wrongful death claim is purely statutory, and a prenatal injury claim arises from the common law.

Given the majority rule is that viability is not required to bring a prenatal injury action, coupled with the fact the North Carolina Supreme Court did not specifically require viability of the plaintiff when it stated the rule, viability should not be assumed to be a requirement of a prenatal injury action in North Carolina. In any event, the conglomerate of critical legal opinion, including cases, treatises and law reviews, makes clear that this is the better rule.\(^{217}\)

2. Damages

The issue of damages is also left open to debate. Given the North Carolina Supreme Court’s limitation of damages for a fetal plaintiff in a wrongful death case, its silence on this issue with regard to a claim for prenatal injury is deafening. The issues in both cases seem to be roughly the same, except that in the wrongful death context damages are delimited by statute and thus involve the exercise of statutory construction. The policy considerations, however, are identical. If a fetal plaintiff could not possibly prove he suffered concrete pecuniary damages in a wrongful death action as a matter of law, how could he prove such damages in the prenatal injury context? There are some differences, of course, given that the latter is still alive and may have ascertainable abilities and other “relevant factors” that the former does not. The problem is the court has given no indication on how it will view such issues in the prenatal injury context. Again, it should be assumed that where the court is silent on this issue, normal tort law rules apply and the plaintiff may recover any damages he can substantiably prove.

3. Contributory Negligence

North Carolina is among the small minority of states that follow a contributory negligence theory of tort law.\(^{218}\) This gives rise to the issue of whether a child making a claim for prenatal injury can be barred from recovery because of the negligent acts of his mother which contributed to his harm.\(^{219}\) The North Carolina Supreme Court has not reached this issue either. The cause of action belongs to the child, and he is the plaintiff in law.\(^{220}\) The mother's negligent actions should not serve to bar the child's action, nor should the child be able to sue the mother for negligence for such acts.\(^{221}\) North Carolina still recognizes parental immunity.\(^{222}\) Thus, the mother's negligence should be seen as irrelevant on the issue of contributory negligence and on the issue of damages given the rule of joint and several liability.

4. Malpractice claims

*Ledford v. Martin*\(^{223}\) provides that a doctor who takes on an expectant mother as a patient also has a duty to the unborn child. When that duty attaches in a prenatal injury suit is unclear. The issue would presumably revolve around the viability question.\(^{224}\) The difficulty with this issue is compounded by the lack of gui-

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221. Allowing a child to sue his mother for prenatal injury evokes a frightening scenario. While there are a few jurisdictions that allow such an action (they have abolished the family immunity doctrine), most do not allow it. A mother could be held accountable for any act that could be interpreted to have in some way harmed the child while in the womb. Poor eating habits, smoking, drinking alcohol, excessive weight gain, failure to take prenatal vitamins or get adequate prenatal care — all would be grounds for suit if a child were given the right to do so. See Deborah M. Santello, Note, *Maternal Tort Liability for Prenatal Injuries*, 22 Suffolk U. L. Rev. 747 (1988). In the criminal context, the debate becomes even more heated where district attorneys attempt to prosecute mothers under drug distribution and child abuse statutes for abusing drugs during pregnancy.


224. See supra notes 214-17 and accompanying text.
dance on the parameters of that duty. Does the doctor have equal duties to both the mother and her unborn child? If so, if it becomes medically necessary to take action in the care of one that would harm the other, what is the doctor to do to avoid liability?

The issue of informed consent also arises in this context. A doctor who fails to obtain informed consent from the mother for a procedure that causes harm to both the mother and her unborn child is likely to be liable to both the mother and the child if the child is born alive.\(^\text{225}\)

**D. A Note about Federal Law**

In *Sox v. United States*,\(^\text{226}\) a prenatal injury case was successfully brought under the Federal Tort Claims Act. In *Sox*, a United States Army vehicle negligently struck an automobile carrying a woman who was six months pregnant.\(^\text{227}\) As a result of the accident, the court found the unborn child suffered brain damage which affected her ability to see, hear, speak, comprehend, use her arms, feet and hands, and to exert any muscular control.\(^\text{228}\) As a result, the child was allowed to state a claim under the Act.\(^\text{229}\)

**VII. CRIMINAL LAW**

**A. Historical Background**

The common law of England did not recognize the killing of a unborn child as a homicide. Sir Edward Coke wrote that the killing of a quick, but unborn, child "is a great misprison, and no murder: but if the childe be born alive and dieth... this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive."\(^\text{230}\) American jurisdictions had fully accepted the English "born alive" rule by 1850.\(^\text{231}\) The rationale for the rule was based on the fact that it was, at the time, very

\(^{225}\) 62A AM. JUR. 2D Prenatal Injuries; Wrongful Life, Birth, or Conception § 7 (1990).


\(^{227}\) Id. at 467.

\(^{228}\) Id.

\(^{229}\) See infra notes 378-82 and accompanying text for a discussion regarding a fetus' ability to bring a 42 U.S.C. § 1983 civil rights claim.


difficult to establish the *corpus delecti* of the homicide of an unborn child, as it was difficult to establish when the fetus began to live, how it died, and when it died. Advancements in medical technology have completely eliminated the basis for this rationale and some states have changed the rule, either by judicial fiat or by legislative enactment.

Today, thirty states have adopted the "born alive" rule by judicial decision. North Carolina was the most recent addition to that list. The supreme courts of three states have interpreted their homicide statutes to include the killing of a viable fetus. Five states have enacted statutes which directly address the killing of a fetus as homicide, and others have passed "feti-

N.C. L. Rev. 1144, 1146 (citing Keeler v. Superior Court, 470 P.2d 617, 621 (Cal. 1970)).


236. *See* Cal. Penal Code § 187(a) (West 1988) (defining murder as "the unlawful killing of a human being or a fetus, with malice aforethought"); Ill. Rev. Stat. ch. 720, para. 9-1.2 (1994) (creating the crime of "Intentional homicide of an unborn child"); Minn. Stat. §§ 609.266-269 (1993) (establishing separate, comprehensive homicide statutes encompassing unborn children); N.Y. Penal Law § 125.00 (McKinney 1987) (including unborn child of twenty-four weeks gestational age or more within New York statutory definition of homicide);
cide" statutes that make killing a fetus a crime on the level of manslaughter.237

B. North Carolina Law

North Carolina recently addressed the issue of fetal homicide in *State v. Beale*.238 In *Beale*, the supreme court held that killing a viable but unborn fetus is not homicide within the meaning of the state's murder statute.239

The defendant, Donald Ray Beale, Jr., shot his pregnant wife in the head with a shotgun. Mrs. Beale's unborn child was full term and twelve days past its expected delivery date on the day she was shot. Mrs. Beale had been having contractions earlier that day.240 Mrs. Beale and her baby were pronounced dead on arrival at the hospital.

Mr. Beale was initially indicted on one count of murder in violation of section 14-17 of the General Statutes of North Carolina, and one count of destroying a fetus in violation of section 14-44 of the General Statutes of North Carolina.241 This indictment was later superseded by an indictment for two counts of murder under section 14-17.242 Beale moved to dismiss the count of murder of the unborn child on the basis that his acts did not constitute murder under North Carolina's murder statute.243 The supreme court chose to review the trial court's denial of Beale's motion on a writ of certiori.244

The court's task was to "determine whether the unlawful, willful and felonious killing of a viable but unborn child is murder within the meaning of N.C.G.S. § 14-17."245 The court found that

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239. *Id.* at 93, 376 S.E.2d at 4.

240. This fact is significant because it illustrates how close to being born alive Mrs. Beale's baby actually was.


242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* N.C. GEN. STAT. § 14-17 (1988) read as follows at the time of the case:

1. Murder in the first and second degree defined; punishment.
the statute did not define "murder," and thus did not offer direct guidance on whether that term encompassed the willful killing of a viable fetus. The court then noted that murder as used in the statute was defined at common law and North Carolina had adopted the common law. The common law did not recognize the killing of an unborn child as murder.

The State argued the common law rule should be abandoned, especially in light of the North Carolina Supreme Court's decision in DiDonato v. Wortman. To bolster its argument, the State cited cases in three states where high courts had abandoned the common law rule and chose to recognize the killing of an unborn child as murder under their respective homicide statutes. Citing the court's authority to alter judicially determined common law when necessary to do so in light of experience and reason, the State asserted that advances in medical technology had obviated the rationale of the "born alive" rule. The court disagreed.

The court examined the cases cited by the State in which three states had abandoned the common law rule. It found the "overwhelming majority of courts" which had considered the issue and remained with the common law rule more convincing on this point. It further found that "[t]he creation and expansion of criminal offenses is the prerogative of the legislative branch of the government. The legislature has considered the question of intentionally destroying a fetus and determined the punishment there-

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing . . . shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine . . . . All other kinds of murder . . . shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a class C felon.

The statute has since been amended and remains listed as section 14-17, with the latest amendment taking effect January 1, 1995.

246. Beale, 324 N.C. at 89, 376 S.E.2d at 1-2.
247. Id.
248. Id.
250. Beale, 324 N.C. at 90, 376 S.E.2d at 2. See also supra note 235.
251. Beale, 324 N.C. at 90, 376 S.E.2d at 2. See also supra notes 230-32 and accompanying text (statement of the rule and its rationale).
252. Beale, 324 N.C. at 90, 376 S.E.2d at 2.
253. Id. at 90-92, 376 S.E.2d at 2-4.
254. Id. at 92-93, 376 S.E.2d at 3-4.
for."255 The statute the court was referring to was section 14-44. The existence of this statute, coupled with the fact that the legislature had amended the murder statute more than once without changing its wording to encompass an unborn child, led the court to conclude that there was no clear legislative intent to change the common law rule upon which the statute was based.256

Construing the criminal statute narrowly, the court held that "any extension of the crime of murder under N.C.G.S. § 14-17 is best left to the discretion and wisdom of the legislature."257 Defendant's motion to dismiss the murder indictment for the killing of the unborn child was allowed and the lower court reversed.258

Under Beale, a person cannot be prosecuted for murder for the killing of an unborn child under section 14-17. Such a person can be prosecuted under section 14-44.

C. North Carolina Law on Abortion

North Carolina has outlawed abortion since 1881.259 Section 14-44 of the General Statutes of North Carolina reads as follows:

Using drugs or instruments to destroy unborn child.
If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be punished as a Class H felon.260

The phrase "either pregnant or quick with child" has been rendered to mean "pregnant with a child that is quick" by the North Carolina Supreme Court.261 Evidence on the question of quickening is required to convict a defendant under this statute.262 The mother cannot be prosecuted as an accomplice to the commission of this felony, even if she consents to it.263 The statute applies to any act by a party, other than the mother, committed with the

255. Id. at 92, 376 S.E.2d at 4.
256. Id. at 93, 376 S.E.2d at 4.
257. Id.
258. Id.
260. Id.
intent of killing an unborn child, unless such act falls under the protection of section 14-45.1 of the General Statutes of North Carolina.

Abortion is legal, however, when performed with the mother's consent within the first twenty weeks of gestation as long as it performed by a licensed physician in North Carolina in a hospital or clinic certified by the state.\textsuperscript{264} Nor is abortion illegal where it is procured to alleviate a substantial life-threatening risk to the mother.\textsuperscript{265} State abortion law is limited by federal case law on the subject.\textsuperscript{266}

\section*{C. Analysis}

The North Carolina Supreme Court's decision in \textit{Beale} made it clear the courts would not assume a legislative role in interpreting the murder statute. Thus, it is very unlikely any prosecutor will be successful in pursuing murder in a case involving the killing of an unborn child. Currently, the only available avenue of criminal prosecution is under section 14-44, for which the maximum penalty is ten years imprisonment, a fine, or both.\textsuperscript{267}

The result of the court's finding in \textit{Beale} does not settle well when compared with the results of \textit{DiDonato} in the wrongful death realm. If an unborn child is a "person" for purposes of wrongful death, it seems to follow logically that he is a "person" for purposes of the crime of murder as well. The court's opinion in \textit{Beale}, however, is soundly reasoned and its restraint admirable. It is the legislature's task to expand the scope of a criminal statute. Thus, it will be up to the North Carolina General Assembly to reconcile the inconsistency.\textsuperscript{268}

\begin{itemize}
\item \textsuperscript{264} N.C. GEN. STAT. § 14-45.1 (1993).
\item \textsuperscript{265} Id.
\item \textsuperscript{266} See Roe v. Wade, 410 U.S. 113 (1973), and its progeny for the scope of federal abortion law.
\item \textsuperscript{267} See N.C. GEN. STAT. § 14-1.1 (1993) for a listing of penalties assigned to each class of felony in North Carolina. Violation of § 14-44 of the General Statute of North Carolina is a Class H felony. N.C. GEN. STAT. § 14-44 (1993). Also, although there have been no cases at the appellate level which have tested this issue under section 20-141.4 of the General Statutes of North Carolina—the vehicular homicide statute—or the common law crime of manslaughter, it is very likely that on the basis of \textit{Beale} one could not be successfully prosecuted for killing a fetus in either one of these contexts.
\item \textsuperscript{268} See supra notes 253-58 (discussion of possible legislative actions that would impose a more severe penalty for the killing of an unborn child).
\end{itemize}
Historical Background

Claims for wrongful life, birth, and pregnancy are of recent vintage in the long history of tort law. It was not until abortion was a legal option to giving birth that such claims began to proliferate. Now these claims are brought with increasing frequency, and increasing success.

Wrongful life is a claim brought by, or on behalf of, a child who has been born with some type of impairment. Typically, the child will allege that the defendant, normally the mother's physician, did know or should have known before the child was born that it had the impairment and was negligent in handling that information. The crux of the claim is, had the child's parents known of the impairment, they would have aborted the child, saving it from a life filled with misery due to the impairment. In other words, the child claims that he would have been better off dead than living with the impairment.

Most wrongful life claims are predicated on one of two scenarios. The first is where the mother's physician negligently fails to diagnose a fetal impairment before birth or before the third trimester, at which time abortion is no longer an option. The second is where the physician knows there is a likelihood of impairment, or positively identifies an impairment, but fails to reveal this information to the parents or to fully inform them of their options.

Wrongful birth is a medical malpractice claim by the parents of a child born with an impairment. The complaint alleges that but for the negligence of the physician in failing to diagnose or inform them of the impairment before birth, they would have avoided conception or aborted the child. The cases fall mainly into the same two categories as the wrongful life claims, but can also include the scenario of a botched abortion.

Wrongful conception and pregnancy claims also sound in malpractice, being brought by parents who become pregnant after a negligently performed sterilization or abortion procedure. The essence of this claim is that the harm flows from the fact a child has been conceived or born against the parents' wishes.

At present, a majority of American jurisdictions have rejected claims for wrongful life. Eighteen states and the District of

270. The states whose courts have denied wrongful life claims include: Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist.
Columbia have recognized a cause of action for wrongful birth.\textsuperscript{271} An overwhelming majority of jurisdictions recognize a claim for wrongful pregnancy/conception.\textsuperscript{272} These claims present an incredible spectrum of legal questions that are beyond the scope of this article. Suffice it to say that

\begin{itemize}


\end{itemize}
these types of actions exemplify the difficulty the law encounters when its definitions and policies in one area of the law are not consistent with those in another closely related area of law.

B. North Carolina Law

North Carolina is among those jurisdictions that has rejected the wrongful life and wrongful birth claims. It does, however, recognize wrongful pregnancy/conception.

1. Wrongful Life and Birth

Thus far, the only North Carolina case dealing with these types of claims is Azzolino v. Dingfelder. The supreme court, in a case of first impression, was asked to rule on whether a child born with Down’s Syndrome could recover damages under a claim of “wrongful life,” and whether his parents could likewise recover damages under a claim for “wrongful birth.” The plaintiffs alleged that Mrs. Azzolino’s physician negligently failed to advise her and her husband properly, and incorrectly advised them with respect to the availability of amniocentesis and genetic counseling. The parents claimed that had such testing and counseling taken place, the results would have revealed the unborn child suffered from Down’s Syndrome and they would have had an abortion. Michael Azzolino, the child plaintiff, claimed he suffered damages simply by being born with Down’s Syndrome and but for the doctor’s negligence, he would never have suffered birth and life with his affliction.

In a third claim, Michael’s siblings alleged his birth forced financial and emotional hardship on the entire family and had deprived them of the society of their parents, who were now forced to spend the bulk of their time at home caring for Michael. The Azzolino court summed up the gravamen of the case: “The essence of the plaintiffs’ claims is that but for the negligence of the defendants, Michael would never have been born at all and he, his parents and his siblings would not have suffered from his affliction with Down’s Syndrome.”

The Azzolino court approached the issues separately, beginning with the wrongful life claim. Considering whether such a
cause of action would lie in this jurisdiction, the court assumed for the sake of argument that the defendants owed a duty to Michael in utero and had breached this duty and were thus the proximate cause of his birth. The court further assumed for the sake of argument the parents would have actually had an amniocentesis after proper counseling and then had Michael aborted in lieu of the Down’s Syndrome diagnosis. The question left for resolution was whether, under application of traditional tort concepts, Michael “had suffered any legally cognizable injury.” The Azzolino court disagreed with the court of appeals’ finding that it was “unwilling, and indeed, unable to say as a matter of law that life even with the most severe and debilitating of impairments is always preferable to nonexistence,” stating that “[w]e take a view contrary to that of the Court of Appeals. Therefore, we conclude that life, even live with severe defects, cannot be an injury in the legal sense.” This conclusion formed the foundation upon which the rest of the court’s decision was forged.

The court in Azzolino was not unappreciative of the difficult issues evoked by this type of case, and shared the concerns expressed by the plaintiffs. But absent “clear legislative guidance to the contrary,” the court found more compelling the view of the New York Court of Appeals in a similar case which held that “recognition of so novel a cause of action requiring, as it must, creation of a hypothetical formula for the measurement of an infant’s damages is best reserved for legislative, rather than judicial attention.” The court also noted that the overwhelming majority of jurisdictions which had considered the issue had rejected wrongful life claims, and reversed the court of appeals, holding that “such claims . . . are not cognizable at law in this jurisdiction.”

The Azzolino court next examined the parents’ claim for wrongful birth, noting immediately that courts which had considered the question had almost unanimously recognized claims for wrongful birth when the parents would have aborted the child but

278. Id.
279. Id.
280. Id.
281. Id. at 109, 337 S.E.2d at 532 (quoting Azzolino v. Dingfelder, 71 N.C. App. 289, 300, 322 S.E.2d 567, 576 (1984)).
282. Id.
283. Id. at 109-10, 337 S.E.2d at 533 (quoting Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978)).
284. Id. at 110, 337 S.E.2d at 533.
for the negligence of the defendant.\textsuperscript{285} Despite this trend, the court held that "claims for relief for wrongful birth of defective children\textsuperscript{286} shall not be recognized in this jurisdiction absent a clear mandate by the legislature."\textsuperscript{287}

In its analysis of the wrongful birth claim, the \textit{Azzolino} court again assumed a duty was owed and subsequently breached by the defendants, strictly for the sake of argument.\textsuperscript{288} The issue of proximate cause was a little stickier in this instance since even the plaintiffs admitted Michael was already in existence and genetically defective when they first met the defendants. Nevertheless, the court assumed proximate cause also existed for the sake of argument.\textsuperscript{289}

Justice Mitchell, dealing only with the issue of damages given the court's assumptions in argument, noted the only "damages the plaintiffs allege they have suffered arise, if at all, from the failure of the defendants to take steps which would have led to abortion of the already existing and defective fetus."\textsuperscript{290} Justice Mitchell found that although courts which had recognized wrongful birth actions claimed to answer the damages question through application of traditional tort analysis, to hold "the existence of a human life can constitute an injury cognizable at law . . . such a step requires a view of human life previously unknown to the law of this jurisdiction."\textsuperscript{291}

\textsuperscript{285} Id. (citing Gregory G. Sarno, Annotation, \textit{Tort Liability for Wrongfully Causing One to be Born}, 83 A.L.R.3d 15 (1978 & Supp. 1985)).

\textsuperscript{286} It appears to be a trend that writers in this area refer to children born with physical deformities, congenital diseases, or some other form of impairment as "defective children." This is disturbing. Defective has definite negative connotations in American society and use of the term in this context makes an inherent value statement with regard to how the child to which it refers is viewed. When society accepts that a human being should be viewed as "defective" it starts down the slippery slope towards making value judgments as to a minimum acceptable standard of life. Anyone that falls below that level can then be legally viewed as expendable, supported by the rationale used in wrongful life and birth cases, that even though they are now living, it would be better for them to die than to continue on with an affliction that brings their life below the minimum acceptable level. This is, of course, one of the primary rationales for euthanasia of the terminally ill, and thus, the trip down the slippery slope has already begun in some respects.

\textsuperscript{287} \textit{Azzolino}, 315 N.C. at 110, 337 S.E.2d at 533.

\textsuperscript{288} Id.

\textsuperscript{289} Id. at 111, 337 S.E.2d at 533.

\textsuperscript{290} Id. at 111, 337 S.E.2d at 534.

\textsuperscript{291} Id.
The Azzolino court reviewed the approaches of other jurisdictions which had recognized a wrongful birth action and concluded there reigned an uncertainty and lack of uniformity amongst them. Justice Mitchell wondered if this seeming confusion on the issue derived from a failure to recognize:

That the “injury” for which they seek to compensate the plaintiffs is the existence of a human life. As a result:

Although courts and commentators have attempted to make it such, wrongful birth is not an ordinary tort. It is one thing to compensate destruction; it is quite another to compensate creation. This so-called “wrong” is unique: It is a new and ongoing condition. As life, it necessarily interacts with other lives. Indeed, it draws its “injurious” nature from the predictions of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages.

The Azzolino court also recognized other problems inherent in the recognition of a claim for wrongful birth. Fraud would be of particular concern for the claim would always hinge on the testimony of the parents that they would have definitely chosen to terminate the pregnancy had they known of the unborn child’s impairments. Another concern was the ability of parents to decide which “defects” would have caused them to abort the child. The Azzolino court wondered whether parents would be allowed to recover on a claim that they would have aborted had they known that their unborn child was one sex and they wanted the other, or that the child carried a “deleterious gene” but was otherwise unimpaired. These questions were viewed as especially pertinent in light of the fact that federal case law guaranteed a woman’s right to abortion for any reason before the point of viability. The upshot of this analysis was Justice Mitchell’s conclusion:

As medical science advances in its capability to detect genetic imperfections in a fetus, physicians in jurisdictions recognizing claims for wrongful birth will be forced to carry an increasingly
heavy burden in determining what information is important to parents when attempting to obtain their informed consent for the fetus to be carried to term. Inevitably this will place increased pressure upon physicians to take the "safe" course by recommending abortion . . . . Although it is not the controlling consideration in our rejection of claims for wrongful birth, we do not wish to create a claim for relief which will encourage such results. 298

Justices Exum, Frye, and Martin dissented from the majority's opinion on the sole issue of the parents' wrongful birth claim, finding that such a claim should be recognized based on the weight of authority from other jurisdictions.

2. **Wrongful Pregnancy/Conception**

Again, North Carolina has examined this issue exactly once at the supreme court level. The court of appeals, in *Pierce v. Piver*, 299 has ruled a plaintiff states a cognizable cause of action in North Carolina when alleging pregnancy as the injury. The *Pierce* court, in a very terse opinion, simply stated the claim was one for medical malpractice sounding in tort and contract, and thus, the plaintiffs had adequately plead a cause of action. 300 Judge Wells concurred with the majority to the extent the plaintiff could legally request recovery of fees paid to the defendant, the pregnancy and delivery related expenses, and pain and suffering related to the pregnancy and birth. 301 There was no elaboration in the opinion regarding the rationale for recognizing such a cause of action, the issues raised by its recognition, or even that it was a case of first impression on the issue of whether pregnancy could be legally claimed to be an injury.

In *Jackson v. Bumgardner*, 302 the plaintiffs, a married couple, alleged medical malpractice on the part of the defendant doctor who removed an intrauterine device (IUD) from the wife during ovarian cyst surgery, allowing her to become pregnant against the couple's wishes. 303 The couple had secured the defendant's assurances before the procedure was performed that he would replace

298. *Id.* at 114, 337 S.E.2d at 535.
300. *Id.* at 113, 262 S.E.2d at 321-22.
301. *Id.* at 113, 262 S.E.2d at 322.
303. *Id.* at 174, 347 S.E.2d at 744-45.
the IUD if it were ever necessary to remove it during surgery.\textsuperscript{304} The wife delivered a healthy full-term baby.\textsuperscript{305}

Justice Frye, writing for a unanimous court,\textsuperscript{306} found the issue before the court was “whether plaintiffs’ complaint states a claim recognizable in this State for medical malpractice and breach of contract where the injury complained of is defendant’s improper failure to replace an intrauterine device, resulting in plaintiff wife’s pregnancy and the consequent birth of a healthy child.”\textsuperscript{307} Justice Frye approached the issue employing traditional medical malpractice analysis.\textsuperscript{308} Establishing that a duty is owed by a physician to a patient, and the extent of such duty under North Carolina law, the court found the facts of the case as alleged were sufficient to make out a claim for malpractice.\textsuperscript{309}

The \textit{Jackson} court bolstered its opinion by noting the vast majority of courts to have considered the issue of wrongful conception/pregnancy treated the claim exactly as it had — as indistinguishable from an ordinary medical malpractice claim.\textsuperscript{310} The defendant owed the plaintiffs a legally recognized duty to abide by their wishes in maintaining the IUD in the wife’s body, and breached this duty when he failed to do so for no medically necessary reason, proximately causing the wife to become pregnant, with the resulting damage being the medical condition of pregnancy.\textsuperscript{311}

The court in \textit{Jackson} was quick to point out that, despite defendant’s urging to the contrary, the case was distinguishable from its decision in \textit{Azzolino} on the issue of damages being claimed by the plaintiffs. \textit{Azzolino}, the court opined, was a case wherein the injury claimed was the continued existence of the deformed child. In the case at bar, the injury was the “fact of the pregnancy as a medical condition that gives rise to compensable damages . . . .”\textsuperscript{312} The court also explicitly distinguished between

\begin{itemize}
\item 304. \textit{Id.} at 174, 347 S.E.2d at 745.
\item 305. \textit{Id.}
\item 306. Justice Martin concurred in the majority’s holding that the couple could sue for “wrongful conception” and dissented from the majority’s holdings on the issue of damages and the contract claim.
\item 307. \textit{Jackson}, 318 N.C. at 174, 347 S.E.2d at 744.
\item 308. \textit{Id.} at 178, 347 S.E.2d at 747.
\item 309. \textit{Id.}
\item 310. \textit{Id.} at 179, 347 S.E.2d at 747.
\item 311. \textit{Id.} at 178, 347 S.E.2d at 747.
\item 312. \textit{Id.} at 181, 347 S.E.2d at 748 (emphasis in original).
\end{itemize}
cases alleging the defendant contributed to causing the pregnancy versus cases where the contraception method itself failed.\textsuperscript{313}

Based on this tort law analysis, the \textit{Jackson} court recognized the plaintiffs' claim of wrongful pregnancy/conception.\textsuperscript{314} The next issue was whether the husband, who had not been physically involved and could only be vicariously subjected to the medical condition of pregnancy, could collect damages for wrongful pregnancy/conception.\textsuperscript{315}

The \textit{Jackson} court held the only allowable damages in a case for wrongful pregnancy/conception were the costs associated with the pregnancy, such as hospital and medical expenses of the pregnancy, pain and suffering connected with the pregnancy, lost wages, and loss of consortium.\textsuperscript{316} The court specifically rejected any claims for damages associated with rearing the resulting child on the two-pronged theory that life could never be a legal injury and such damages were too speculative to be legally allowed.\textsuperscript{317}

The Fourth Circuit has weighed the issue of wrongful pregnancy/conception as well. In \textit{Gallagher v. Duke University},\textsuperscript{318} a diversity action applying North Carolina law, the federal appellate court reviewed a case wherein the plaintiffs were the parents of an unwanted child who was born with severe impairments.\textsuperscript{319} The impaired child also filed an action for wrongful life. The parents' claim was essentially one for wrongful pregnancy/conception.\textsuperscript{320}

The Gallagher's first child, Jennifer, suffered from severe impairments at birth and subsequently died a short time thereafter.\textsuperscript{321} Dr. Mickey, a defendant, concluded Jennifer's impairments were not genetically based. With this assessment, the staff at Duke University Hospital advised the Gallaghers their chances of

\textsuperscript{313.} \textit{Id.} at 181, 347 S.E.2d at 749.
\textsuperscript{314.} \textit{Jackson}, 318 N.C. at 182, 347 S.E.2d at 749.
\textsuperscript{315.} \textit{Id.}
\textsuperscript{316.} \textit{Id.} at 183, 347 S.E.2d at 749-50.
\textsuperscript{317.} \textit{Id.} at 182-83, 347 S.E.2d at 749-50 (citing \textit{Azzolino} and \textit{DiDonato}).
\textsuperscript{318.} 852 F.2d 773 (4th Cir. 1988).
\textsuperscript{319.} \textit{Id.}
\textsuperscript{320.} The federal district court had referred to the claim as one for wrongful birth. It is difficult, without the complaint, to know which is really more accurate. Given the facts and allegations described by the appellate court, the claim sounds more like one for wrongful conception as it is defined by North Carolina law.
\textsuperscript{321.} \textit{Gallagher}, 852 F.2d at 774-775.
having a normal baby was the same as the general population.\textsuperscript{322}

The staff also advised the plaintiffs that it was not necessary for them to be genetically tested given the negative results of Jennifer's tests. Based on this information, the couple became pregnant and was advised by the University of North Carolina Genetic Counseling Department that no amniocentesis was necessary based on Jennifer's test results.\textsuperscript{323}

The second Gallagher child, Lisa, was born with severe impairments very similar to those of Jennifer. After additional genetic testing, it was determined that Mr. Gallagher carried a defective gene which had caused the impairments in both Jennifer and Lisa.

The parents sued, alleging they would not have conceived Lisa had they known of the genetic defect.\textsuperscript{324} They prayed for recovery of the extraordinary expenses of caring for Lisa for the rest of her life, the loss of Lisa's future earnings, and for their own emotional distress.\textsuperscript{325} The district court allowed the wrongful conception claim and awarded damages on the extraordinary medical expenses that would be incurred during the parents' lifetimes.\textsuperscript{326} It denied damages for emotional distress and dismissed Lisa Gallagher's wrongful life claim.\textsuperscript{327}

The sole issue on appeal was "[d]id the district court err in concluding that a claim for relief for the wrongful birth of a genetically defective child is cognizable under North Carolina Law?"\textsuperscript{328}

The Gallagher court's analysis began with an examination of North Carolina law as expressed by Jackson v. Bumgardner.\textsuperscript{329} Based on Jackson, the Gallagher court found a cause of action had been recognized in North Carolina for wrongful conception of a healthy child.\textsuperscript{330} Given the Jackson court's analysis, the federal court in Gallagher concluded North Carolina would also recognize

\textsuperscript{322} Id. at 775.

\textsuperscript{323} Id.

\textsuperscript{324} Id. The court does not indicate the couple alleged the defendants were also negligent in not diagnosing Lisa's impairments \textit{in utero} through the use of amniocentesis and that they would have aborted her had they known of the impairments.

\textsuperscript{325} Gallagher, 852 F.2d at 775.

\textsuperscript{326} Id.

\textsuperscript{327} Id.

\textsuperscript{328} Id.

\textsuperscript{329} 318 N.C. 172, 347 S.E.2d 743 (1986).

\textsuperscript{330} Id.
a wrongful conception cause of action when the product of conception is an impaired child.\textsuperscript{331}

The \textit{Gallagher} court turned next to the question of what constituted the proper measure of damages in such a case. Again consulting \textit{Jackson}, the court noted North Carolina did not allow recovery for child rearing expenses in a wrongful conception case when the unwanted child was born healthy. The rationale for this rule was the \textit{Jackson} court’s reliance on its prior decision in \textit{Azzolino v. Dingfelder} which held that “life, even life with severe defects, cannot be an injury in the legal sense.”\textsuperscript{332} The court also held that the \textit{Jackson} court had found the “recovery of the costs of rearing a normal child should not be allowed because of the difficulty of determining the value of the offsetting benefits from the child’s life.”\textsuperscript{333}

The court proceeded to distinguish the case at bar from the facts in either \textit{Jackson} or \textit{Azzolino} on the basis that the case presented no problem of trying to offset the costs of child rearing with the benefits of having a child because “[n]o evidence of benefits was introduced. Lisa was profoundly impaired.”\textsuperscript{334} Nor was the jury shouldered with the burden of speculation on such damages because “[t]he court’s charge did not require the jury to attempt to offset the extraordinary costs of caring for Lisa by any benefits.”\textsuperscript{335} Based on the nature of Lisa’s impairments, the court held North Carolina courts would not attempt to apply any type of offset analysis to such a case.\textsuperscript{336} Accordingly, the court concluded Lisa’s case did not present the same “fatal calculation problem that \textit{Jackson} discussed.”\textsuperscript{337}

The \textit{Gallagher} court moved to the question of whether \textit{Azzolino} would preclude the Gallaghers’ cause of action and damages. Judge Butzner simply recited the facts of that case and its holding. He then noted the \textit{Jackson} court’s refusal to dismiss the Jacksons’ claim in lieu of \textit{Azzolino}, based on the differences between the nature of the claims being made in the two cases.\textsuperscript{338}

\begin{thebibliography}{99}
\bibitem{331} \textit{Gallagher}, 852 F.2d at 776.
\bibitem{332} \textit{Id.} (quoting \textit{Azzolino v. Dingfelder}, 315 N.C. 103, 109, 111, 337 S.E.2d 528, 532, 534 (1985), cert. denied, 479 U.S. 835 (1986)).
\bibitem{333} \textit{Id. See infra} notes 358-72 and accompanying text regarding the court of appeals’ liberal interpretation of this holding in \textit{Jackson}.
\bibitem{334} \textit{Gallagher}, 852 F.2d at 776.
\bibitem{335} \textit{Id.} at 777.
\bibitem{336} \textit{Id. See infra} notes 358-72 and accompanying text.
\bibitem{337} \textit{Gallagher}, 852 F.2d at 777.
\bibitem{338} \textit{Id.} (citing \textit{Jackson}, 318 N.C. at 180-81, 347 S.E.2d at 748).
\end{thebibliography}
The *Gallagher* court concluded the Gallaghers' claim was for wrongful conception, not wrongful birth, despite the district court's reference to it as such.\(^{339}\) Accordingly, the court opined that the differences between Mrs. Azzolino's claim and Mrs. Jackson's claim applied to the Gallagher's claim and, thus, their claim for wrongful conception was not barred.\(^{340}\)

The court in *Gallagher* then held that neither *Azzolino* nor *Jackson*, alone or taken together, barred the Gallaghers' claims for the extraordinary expenses of Lisa's care, and upheld the district court's judgment allowing such damages to be awarded.\(^{341}\) The court denied the Gallaghers' claim for extraordinary expenses Lisa would incur after their deaths, as the claim they were making was theirs, not hers. Based on the strength of *Ledford v. Martin*\(^{342}\) and *Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.*,\(^{343}\) the court in *Gallagher* allowed their claim for emotional distress.\(^{344}\)

### C. Analysis

A full discussion of the issues, arguments, policies and trends driving the law of wrongful life, birth, and pregnancy/conception litigation is well beyond the scope of this Article. Accordingly, the focus of this analysis section will be on what the law in these areas appears to be in North Carolina as of the date of this Article.

#### 1. Wrongful life/birth

*Azzolino* makes it very clear there is no cause of action in North Carolina for wrongful life or wrongful birth as those actions are defined in that case. *Gallagher* obstensively has no effect on the availability of either of these actions, as it dealt with a wrongful conception. Although *Azzolino* presented only one factual scenario under which a claim for wrongful life was being made,\(^{345}\) it is very likely the court would reach the same conclusion with regard to any claim based on an assertion the injury suffered by

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\(^{339}\) Id. at 777-78.

\(^{340}\) Id.

\(^{341}\) Id. at 778.


\(^{344}\) *Gallagher*, 852 F.2d at 778.

\(^{345}\) *E.g.*, but for defendant's negligence, the plaintiff's parents would have aborted him.
the plaintiff is existence versus non-existence, or in essence, that the person would have been better off dead.\textsuperscript{346}

The same is true of any claim for wrongful birth based on the assertion the parents would have aborted but for the negligence of the defendant. This is so because the court has tied wrongful birth and wrongful life claims together with a common fatal thread — both require analysis which views human existence as an injury.\textsuperscript{347} Thus, any action before the court claiming damages that arise "from the failure of the defendants to take steps which would have led to abortion of the already existing and defective fetus,"\textsuperscript{348} is likely to fail. The status of the law is unlikely to change in the near future, unless such change comes from the legislature, given the \textit{Azzolino} court's holding that absent clear legislative guidance to the contrary it would not recognize such causes of action.\textsuperscript{349}

The court in \textit{Azzolino} did not deal with the issue of whether its holding would deny parents their constitutionally protected right to control their reproduction. The Ohio Supreme Court has held a cause of action brought by parents of a child born subsequent to a negligently performed sterilization procedure on the mother was not barred by public policy because the choice to procreate is part of one's constitutionally protected right to privacy, and a court's endorsement of a judicial policy that subjects physicians to liability for malpractice in other areas, but denies such liability in those areas involving sterilization, constitutes an impermissible infringement of a fundamental right.\textsuperscript{350}

Other courts have approached this question with the presumption parents have a constitutional right to prevent the birth of a defective child and, accordingly, health care providers have a correlating duty to do what is necessary to enable parents to exer-

\begin{footnotesize}
\textsuperscript{346} See the \textit{Azzolino} court's holding that "life, even life with severe defects, cannot be an injury in the legal sense." \textit{Azzolino} v. Dingfelder, 315 N.C. 103, 109, 337 S.E.2d 528, 532 (1985), \textit{cert. denied}, 479 U.S. 835 (1986).

\textsuperscript{347} See \textit{Azzolino}, 315 N.C. at 109-11, 337 S.E.2d at 532-34.

\textsuperscript{348} \textit{Azzolino}, 315 N.C. at 111, 337 S.E.2d at 534. This would include claims for failure to diagnose genetic or other congenital disorders before birth, negligent sterilization, negligent abortion, or any other scenario making this claim.

\textsuperscript{349} \textit{Azzolino}, 315 N.C. at 109, 116, 337 S.E.2d at 532, 536.

\textsuperscript{350} Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976).
\end{footnotesize}
cise that right. There is, however, no recognized fundamental right not to be born.

The notion that parents have a privately enforceable right to be free from the negligence of health care providers, supposedly rooted in federal reproductive jurisprudence, raises a multitude of issues on several different legal planes. Suffice it to say North Carolina has not addressed the issue, and at present no cause of action for wrongful life or birth is recognized on this or any other basis.

A cause of action for wrongful pregnancy/conception is recognized in North Carolina on the basis of Jackson v. Bumgardner. Such an action, viewed by the court as nothing more than a medical malpractice claim, is defined by the facts of that case. Thus, where: (1) a plaintiff alleges her physician owed a duty to give care and counseling with regard to her reproductive functioning in a manner consistent with accepted medical standards, and, (2) the physician breached that duty (failed to diagnose genetic defects prior to conception, properly perform sterilization procedure, etc.), and, (3) as a direct result of such breach an unwanted pregnancy occurred, resulting in pain and suffering, medical expenses, lost wages, and loss of consortium—all associated with childbirth—she states a legally recognized cause of action in North Carolina. There is no requirement that the resulting child be impaired. The crux of the claim is that the alleged malpractice resulted in the injury of being pregnant.

It is important to distinguish terms at this point. Courts have tended to use the terms wrongful conception and wrongful pregnancy interchangably when there is a technical difference between the two. Wrongful conception should be used to denote

352. See Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App. 1982).
354. The use of the medical malpractice paradigm in Jackson was simply a function of the facts involved in that particular case. A wrongful conception action should be possible in any situation where it can be alleged the injury is the medical condition of pregnancy. A situation where a sex partner lies about their fertility which results in pregnancy is but one example that is outside of the medical malpractice realm. See Anne M. Payne, Annotation, Sexual Partners Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy, 2 A.L.R. 5th 5th 301 (1992); 62A Am. Jur. 2d Prenatal Injuries; Wrongful Life, Birth, or Conception § 1-180 (1990).
355. Jackson, 318 N.C. at 181, 347 S.E.2d at 748.
any claim wherein the injury claimed is becoming pregnant. Thus, by definition, it involves only pre-conception negligence. Wrongful pregnancy, on the other hand, more accurately denotes negligence in terminating an already existing pregnancy. This involves post-conception negligence. Wrongful pregnancy is distinguished from wrongful birth on the basis that the latter claims as the injury the fact that an impaired child was allowed to be born where, but for the negligence of the defendant, it would have been aborted. Wrongful pregnancy claims as the injury the fact that any child was born, whether impaired or healthy. The cause of action recognized in Jackson is more accurately called wrongful conception.

2. **Damages**

The question of what damages are available to a plaintiff asserting a cause of action for wrongful conception is where the picture starts to haze. The fog is created by the Fourth Circuit Court of Appeals' decision in Gallagher v. Duke University. In Jackson, the North Carolina Supreme Court held the only recoverable damages in such cases were those associated with the pregnancy, such as the hospital and medical expenses of the pregnancy, pain and suffering connected thereto, lost wages, and loss of consortium. The Jackson court also explicitly held plaintiffs could not recover for the costs of rearing their (unexpected) child.

The Jackson court based its denial of the child rearing costs on two tenets. The first was its belief that the rationale and holding of its prior decision in Azzolino would prohibit such recovery. The second was the court's unwillingness to impose on juries the task of offsetting the benefits from the child's life against the expense of raising him, because the results would necessarily be based on speculation and conjecture — "Who, indeed, can strike a pecuniary balance between the triumphs, the failures, the ambitions, the disappointments, the joys, the sorrows, the pride, the shame, the redeeming hope that the child may bring to

357. 852 F.2d 773 (4th Cir. 1988).
358. Jackson, 318 N.C. at 182, 347 S.E.2d at 749.
359. Id.
360. Id.
361. Id.
those who love him?"\textsuperscript{362} Thus, the state's highest court has stated as a matter of law a plaintiff bringing an action for wrongful conception cannot collect child rearing expenses as damages.

In \textit{Gallagher v. Duke University}, the Fourth Circuit Court of Appeals, however, held the exact opposite to be true where the unwanted child was born with significant impairments.\textsuperscript{363} The court correctly interpreted \textit{Jackson} to allow a wrongful conception claim where the resulting child was not born healthy.\textsuperscript{364} The cause of action does not regard the health of the resulting child as relevant. The crucial point, according to \textit{Jackson}, is that the medical condition of pregnancy is the injury that characterizes the wrongful conception action. Thus, it follows that even a plaintiff who becomes pregnant due to the defendant's negligence and then proceeds to abort the child can state a cause of action for wrongful conception to recover the cost of the abortion, as well as any other damages within the ambit of those provided for in \textit{Jackson}.\textsuperscript{365}

The federal court's finding in \textit{Gallagher} regarding child rearing damages is not in line with \textit{Jackson} and should be viewed with great suspicion. The problem with the federal court's analysis begins with its characterization of the rationale used by the \textit{Jackson} court to disallow such damages. In \textit{Gallagher}, Judge Butzner first stated the court "held... that the Jacksons could not recover the costs of rearing their healthy baby."\textsuperscript{366} He then states "[t]he Court also reasoned that recovery of the costs of rearing a normal child should not be allowed because of the difficulty of determining the value of the offsetting benefits from the child's life."\textsuperscript{367} This is inaccurate. Nowhere did the \textit{Jackson} Court make the distinction, either expressly or impliedly, between a normal child and one with impairments. This mischaracterization of part of \textit{Jackson}'s rationale for denying child rearing expenses was used by the federal court in \textit{Gallagher} to create an artificial distinction — a healthy child versus an impaired one — and the court proceeded

\textsuperscript{362} \textit{Id.} at 183, 347 S.E.2d at 750 (quoting Miller v. Johnson, 343 S.E.2d 301, 307 (Va. 1986)).

\textsuperscript{363} \textit{Gallagher v. Duke Univ.}, 852 F.2d 773 (4th Cir. 1988).

\textsuperscript{364} \textit{Id.} at 776.

\textsuperscript{365} \textit{See Beardsley v. Wierdsma}, 650 P.2d 288 (Wyo. 1982) (damages awarded for cost of abortion, mother's pain and suffering, and mother's lost wages); \textsc{Jacob A. Stein, Damages and Recovery: Personal Injury and Death Actions} § 221.1 (Supp. 1990).

\textsuperscript{366} \textit{Gallagher}, 852 F.2d at 776.

\textsuperscript{367} \textit{Id.} (emphasis added).
to disregard clearly controlling authority to make a holding contrary to the existing law of North Carolina.

Based on this distinction, the *Gallagher* court stated that, unlike the healthy child in *Jackson*, Lisa Gallagher's condition presented no problem of trying to offset child rearing costs\(^\text{368}\) with the benefits of parenthood because she was profoundly impaired.\(^\text{369}\) The clear implication is the court sees Lisa Gallagher as so impaired as to be utterly worthless to her parents in terms of giving them affection, joy, moral courage, etc. It is reprehensible that a court would be willing to make such an assessment as a matter of law. As the Virginia Supreme Court stated in *Miller v. Johnson*, and cited in *Jackson*, who indeed can strike such a balance?\(^\text{370}\) Certainly not judges who have never seen the child.

Nor should a child's ability to be of "value" to its parents have been in question in *Gallagher* to begin with. The North Carolina Supreme Court had clearly held there were two reasons not to allow child rearing damages. Child rearing damages are by definition compensation for the pecuniary cost of the existence of the child. *Azzolino* held human existence, even life cursed with severe impairments, could never be an injury in the legal sense.\(^\text{371}\) The *Gallagher* court never addressed this first reason, and *Azzolino* would not allow such damages to be awarded. Secondly, the supreme court in *Jackson* held child rearing damages, whether for a healthy child or for one suffering "severe defects," were not to be allowed.\(^\text{372}\) The federal court's finding to the contrary violates the plain language and spirit of the law stated in both *Azzolino* and *Jackson*, and should be regarded as nothing more than peripheral by North Carolina courts.

One issue which has not been addressed by any courts of jurisdiction in North Carolina is mitigation of damages. Given a wrongful conception action complains the medical condition of pregnancy is the injury, the question arises whether the mother must mitigate her damages by obtaining an abortion or by placing

\(^{368}\) The court also employs subtle word changes in this part of its analysis, referring to child rearing expenses, the term used in *Jackson*, as "costs of care," which tends to reinforce its distinction between the healthy and impaired children. *Id.*

\(^{369}\) *Gallagher*, 852 F.2d at 778.

\(^{370}\) *See* *Miller v. Johnson*, 343 S.E.2d 301, 307 (Va. 1986).

\(^{371}\) *Azzolino*, 315 N. C. at 109, 337 S.E.2d at 532.

\(^{372}\) *Jackson*, 318 N.C. at 180, 347 S.E.2d at 748.
the child up for adoption. This issue would also apply in the context of an action claiming violation of the plaintiff's right to control her own reproduction. The violation would end with the abortion. The *Jackson* court noted the wrongful conception claim arose out of traditional tort analysis and was no different than any other medical malpractice claim.\footnote{373. Id. at 179, 347 S.E.2d at 747.} Would it not follow that a plaintiff must do all she could to mitigate her damages, as this is a basic tenet of tort law?\footnote{374. See 25 C.J.S. Damages § 3.3 (1966); Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).} This question becomes particularly significant when discussing whether parents should be able to recover child rearing expenses.

Few courts have broached the issue, but the general rule that has emerged from those which have is there is no such mitigation requirement.\footnote{375. See 62A Am. Jur. 2d Prenatal Injuries; Wrongful Life, Birth, or Conception § 119 n.92 (1990).} While most of these cases deal with the issue in the context of a wrongful birth claim, it follows that the same rationales would apply in the wrongful conception context as well.\footnote{376. See Smith v. Cote, 513 A.2d 341 (N.H. 1986) (noting that unwillingness to apply “avoidable consequenes” rule, which would require placing child for adoption, was reason why only extraordinary medical and educational expenses and not normal child-raising expenses were allowed in wrongful birth cases); Kingsbury v. Smith, 442 A.2d 1003 (N.H. 1982) (indicating that one reason for denying child-raising expenses in wrongful conception cases was to avoid putting upon parents “the awesome choices of having an abortion or putting the child up for adoption as a course of mitigating damages”); Comras v. Lewin, 443 A.2d 229 (N.J. Super. Ct. App. 1982) (fact that abortion was diagnosed in second trimester did not preclude plaintiff from recovering for birth of defective child, even though her theory of recovery was based on fact that with earlier diagnosis she would have had an abortion, since effect of delayed diagnosis was to increase risks of abortion); Miller v. Johnson, 343 S.E.2d 301 (Va. 1986) (noting, in rejecting child-rearing expenses for birth of healthy baby, that contrary ruling might raise issue whether plaintiff should have submitted to abortion or placed child for adoption).} Also, there is the question of whether the overall public policy goal to protect human life would be violated by a tort policy requiring abortion.\footnote{377. For a general discussion of the view a duty to mitigate may exist, see 62A Am. Jur. 2d Prenatal Injuries; Wrongful Life, Birth, or Conception § 121 (1990).}
IX. OTHER PERTINENT AREAS OF THE LAW

A. Fetus’ right to assert federal civil rights claims under 42 U.S.C. § 1983

The question of whether a fetus is a “person” capable of stating a claim under the federal civil rights statute has arisen mainly in the context of an action to collect welfare benefits. Pregnant mothers with no other children have claimed a violation of their unborn child’s civil rights under 42 U.S.C. § 1983. The general trend has been to deny such claims on the premise an unborn child is not a “person” under the Fourteenth Amendment of the Constitution, and thus cannot state a claim for violation of rights arising under that Amendment. Some federal courts, however, have held to the contrary and allowed section 1983 claims asserted by unborn children. The Fourth Circuit Court of Appeals affirmed an unborn child could state a section 1983 claim for denial of equal protection in a class action case in Virginia seeking Aid for Families with Dependant Children benefits for unborn children. Therefore, plaintiffs in North Carolina may be able to pursue other types of section 1983 claims on behalf of unborn children, such as an action against a law enforcement officer who injures an unborn child during an attack on its mother.

B. Unborn Children and Insurance Law

North Carolina courts have not dealt with this subject as of the date of this Article, but it is likely they will in the near future. In the mean time, insurers and insureds would be wise to consider the issue of whether an unborn child is an “insured” or “injured” person under various insurance policies. Given North Carolina’s recognition of an unborn child as a “person” in the wrongful death and prenatal injury contexts, the question is certainly one that is open for debate. Both sides will need to consider the issue of viability as well.

380. Id.
Suprisingly, the issue of whether an unborn child is covered by the language of a particular insurance policy has reached the appellate courts only a few times.\textsuperscript{383} Of the three courts that have considered the issue, two have considered viability a crucial issue, while the third explicitly rejected viability as a determinative test.\textsuperscript{384} The Fourth Circuit Court of Appeals has not addressed this issue.

C. Workers' Compensation and the Unborn Child

North Carolina also has not addressed the issue of how its workers' compensation statute would apply to the unborn child. The primary question would be whether a work-related injury suffered by the child's mother which also injured the child would require the unborn child to proceed under the exclusive remedy provisions of the Workers' Compensation Act.\textsuperscript{385} Only Texas and Louisiana have decided this issue, with each holding the exclusivity provisions of their state's workers' compensation acts did not preclude an action for the wrongful death of an unborn child.\textsuperscript{386}

Another issue arising under workers' compensation law is whether a mother may maintain a cause of action for emotional distress against her employer for the death of her child resulting from an on-the-job injury. Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.,\textsuperscript{387} and Ledford v. Martin\textsuperscript{388} allow a mother to assert a civil cause of action for emotional distress connected with the wrongful death or injury of her unborn child. The Workers' Compensation Act, however, is silent on this issue and its definition of "injury"\textsuperscript{389} is so broad as to be ambiguous on whether a

\begin{itemize}
\item \textsuperscript{383} See generally Wanda Wakefield, Annotation, Unborn Child as Insured or Injured Person Within Meaning of Insurance Policy, 15 A.L.R. 4th 548 (1982).
\item \textsuperscript{384} Id.
\item \textsuperscript{385} Chapter 97 of the General Statutes of North Carolina denotes the Act. Section 97-10.1 provides the Act is the exclusive remedy for an employee injured on the job. An employee cannot file a civil claim in a court of general jurisdiction for pain and suffering, medical expenses, permanent injuries, etc., if the injury occurred while working for an employer covered by the Act, unless the injury falls under an exception thereto (intentional act).
\item \textsuperscript{387} 327 N.C. 283, 395 S.E.2d 85 (1990).
\end{itemize}
court would include this scenario within its rubric. Nationally, only one case has decided this issue. That case held an employee’s claim for mental anguish suffered after loss of her fetus due to a work-related injury was barred under the state’s workers’ compensation act because her mental anguish arose out of the work-related injury, and there was no basis for making a distinction between such an injury and any other injury covered by the act.\footnote{Witty v. American Gen. Capital Distribs., Inc., 727 S.W.2d 503 (Tex. 1987).}

\section{Property Law and the Unborn Child}

The law of property has long recognized the unborn child as a legal entity for the purposes of inheritance. Given the well-established character of the law in this area, it warrants only brief mention here. In North Carolina an unborn child is deemed a person capable of taking by deed, or other writing, any estate in the same way as if he were born.\footnote{See N.C. GEN. STAT. § 41-5 (1984).} This right attaches at conception.\footnote{Mackie v. Mackie, 230 N.C. 152, 52 S.E.2d 352 (1949).} The granting of “legal personality” is imputed to the unborn child for beneficial, but not detrimental purposes.\footnote{Id.}

\section{The Status of the Fetus in North Carolina: Answering “The Question”}

It is difficult to say what the status of the fetus is in North Carolina. While there is some case law and several statutes on the subject, there is an overall paucity of law — case or statutory — that defines the legal status of the fetus. The law that does exist is inconsistent. For example, consider the question of “Is a fetus a ‘person?’” North Carolina’s constitution has been interpreted to say a fetus is not a “person.”\footnote{State v. Stare, 302 N.C. 357, 275 S.E.2d 439 (1981).} Conversely, the Wrongful Death Act’s use of the word does include a viable fetus.\footnote{DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987).} North Carolina common law views the fetus, regardless of viability, as a person capable of bringing a tort claim for injuries suffered before birth.\footnote{Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).} The State’s property law views the fetus as a living child capable of inheriting, and its procedural law recognizes the fetus as a being for which a guardian ad litem can be

A defendant can be fined and sentenced up to ten years for the crime of killing a “quickened” fetus, but a fetus is not a “person” under the state’s murder statute.

Thus, a fetus has a different status in different areas of the law of North Carolina. How can this be? Is not an unborn child always an unborn child? How can a child have legally enforceable rights in one context and be seen as nothing more than a lump of meaningless tissue in the next? The question of how the present law has evolved is nothing more than an exercise in legal scholarship tracing the origins of common and statutory law. The more important question is the one that must be resolved in the minds of society and in the law: In the course of human development, from conception forward, when does one become a “person” entitled to the same rights and status under the law as every other “person” in that society (hereinafter “The Question”)? Some would say this is really a question about when “life” begins. No matter how one frames the question, the answer sought is the same. Is an unborn child a “person” from the time he is conceived, or sometime later in his gestational development? Is he a “person” at all before he is born? These questions are quickly followed by others equally important. If a child is a “person” at viability but not before, why? What characteristics does a viable child possess to make it “worthy” of being deemed a “person” that a nonviable child does not? The answers to these and other questions have broad reaching implications for other areas of law in a society. If a child is a “person” at viability, but not before, based on some measure of cognitive ability or a checklist of bodily parts, the fifty year old woman who has lost all real cognitive ability through disease or who was born without some of the body parts on such a list will need to know if she is still considered a “person.”

Inconsistency in state law is difficult enough to resolve, but the questions become incredibly more complicated when federal abortion law is thrown into the mix. If society recognizes the unborn child as a “person” at conception, then a woman’s right to an abortion would necessarily be outweighed by that “person’s” right to life. As the law stands, a woman is legally allowed to take the life of her unborn child anytime before viability. Anyone else

397. See N.C. GEN. STAT. § 1A-1, Rule 17(b)(4) (1990 & Supp. 1994). For a complete review of applicable North Carolina law on these subjects, see Appendix A.
who does the same thing at any point after quickening will be imprisoned for ten years.

Many are content with such inconsistency. It is not uncommon for different areas of the law to develop in divergent directions with regard to a common issue. The problem here, however, is the magnitude of "The Question" is far beyond any that has been asked in the law to date. Some contend such a question cannot be answered by the law — it is one for philosophers and religion to answer. The harsh reality is that advances in reproductive technology will force the law to answer "The Question" in the near future.

In what seems like science-fiction based scenarios, scientists in laboratories around the world are working on ways to duplicate and create human beings. In vitro fertilization, the process of conceiving a human child in a test tube, is a common practice. Creating several human embryos at one time for implantation into a hopeful mother has brought about the freezing of embryos for long periods of time. In the next year, doctors will be able to remove the microscopic eggs of a baby girl and preserve them to be fertilized and then implanted into her womb whenever she is ready to have children, be it age 35 or 65. Goat eggs are being fertilized in test tubes and placed in a stasis tank for the normal gestational period, yielding mammals that have never lived inside another. Scientists have successfully "cloned" human embryos. Work is being done to allow the transfer of a fetus from one womb to another.

The development of such incredible technology brings one back to "The Question" at a startling rate. The scientific community has already begun the struggle to determine whether a human embryo can be used in experiments. Our courts have just begun to understand the incredible difficulty in deciding whether a frozen human embryo is property, a child, or something else.398 What is the difficulty and why the struggle? No one wants to answer, at least in the legal sense, "The Question." If the answer to "The Question" was that one became a "person" at conception, there would be no debate over these issues. It would be unthinkable to allow destructive experimentation on "people," and a "person" who is a child would have custody disputes decided according to existing law.

Even if no one is ready to answer “The Question,” the law should begin to consider the effect of inconsistent results with regard to the status of the fetus. A hypothetical serves to demonstrate the problem. In California, the court of appeals has held the state’s homicide statute, which states it is murder to intentionally kill a “fetus,”\textsuperscript{399} applies to a nonviable fetus.\textsuperscript{400} In the same year, the California Supreme Court held a surrogate mother who had not contributed any genetic material to the creation of a child she carried to term, was a “genetic stranger” to the child and, thus, had never had any parental rights to him.\textsuperscript{401} An interesting hypothetical situation thus arises. Assume a couple entered into a surrogacy contract with a woman who met existing legal criteria, and in the agreement the surrogate agreed to give up all constitutional rights with regard to abortion. The surrogate is impregnated with an embryo to which she contributed no gamete and is thus a “genetic stranger” to the unborn child. She carries the child for the first trimester and decides she wants out of the agreement and no longer wishes to carry the child to term. She obtains an abortion. Has the surrogate committed homicide in killing a fetus to which she has no parental rights and for which she has no constitutional right to abort? Is her action to be considered nothing more than breach of contract? If the jurisdiction recognized actions for prenatal injury and wrongful death of children \textit{in utero}, would the couple whose gametes created the child have standing to bring either action? Currently, in California, there are no answers to any of these questions, and it is doubtful any court is anxious to attempt to formulate any.

A call for an answer to “The Question” is not a call for chaos or anarchy in the law. It is not even a call for a dramatic departure from existing trends in the law. It is no more than a realization that the law must begin to take a realistic approach to dealing with the medical fact that a fetus is no longer a mysterious movement in a mother’s womb. The current law addressing fetal issues is based on archaic assumptions and on inaccurate information. The court in \textit{Roe v. Wade}\textsuperscript{402} cited the common law and the intent of the authors of the Fourteenth Amendment in ruling that a fetus

\footnotesize{399. Apart from legal abortion.}  
\footnotesize{402. 410 U.S. 113 (1973).}
was not a "person" within that document's meaning. The North Carolina Supreme Court cites the same type of rationale to find an unborn child is not a "person" within the meaning of the state's constitution. The fact is, however, both the developers of the ancient common law rules still in use in much of American law and the writers of both the United States and North Carolina Constitutions had no idea an unborn child could be completely distinguished from any other human being on the planet from the moment of conception. Nor did they know a child of ten weeks gestation has a beating heart and a measurable brain wave. Surely these people would have been amazed to see the pictures that are now common fare in books and magazines, showing a tiny child in the womb, sucking his thumb. No matter how one views the "correct" answer to "The Question," such an answer must be arrived at after an honest examination of the facts. The facts available to this earlier generation of law makers painted a significantly different picture of what a fetus "is" before birth than the picture painted today by those responsible for much of the current law.

North Carolina has made no attempt to answer "The Question." No case or piece of legislation has yet addressed the issues of surrogate parenthood, in vitro fertilization, criminal culpability of mothers who abuse drugs while pregnant, fetuses as insureds under insurance contracts, frozen embryos, cloning, or any of a host of other issues concerning the legal status of a fetus. The legislature should forgo shortsightedness and begin to debate such issues now. Conflicts and inconsistencies in fetal law should be resolved definitively by legislation. Answering "The Question" would be a good place to start.

403. Id.
### APPENDIX A

<table>
<thead>
<tr>
<th>Case</th>
<th>Recognized in N.C.?</th>
<th>Fetus a &quot;person&quot;?</th>
<th>Viability required?</th>
<th>Types of Damages Allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Wrongful Death</strong></td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>Pain and suffering</td>
</tr>
<tr>
<td>(DiDonato v. Wortman; N.C.G.S. § 28A-18-2)</td>
<td></td>
<td></td>
<td>(Supreme Court has not specifically imposed this requirement)</td>
<td>Medical and funeral expenses</td>
</tr>
<tr>
<td><strong>Prenatal Injuries</strong></td>
<td>YES</td>
<td>YES</td>
<td>NO</td>
<td>All damages available in a normal tort action</td>
</tr>
<tr>
<td>(Stetson v. Easterling)</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Wrongful Life</strong></td>
<td>NO</td>
<td></td>
<td>Not decided</td>
<td>None</td>
</tr>
<tr>
<td>(Azzolino v. Dingfelder)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Wrongful Birth</strong></td>
<td>NO</td>
<td></td>
<td>Not decided</td>
<td>None</td>
</tr>
<tr>
<td>(Azzolino v. Dingfelder)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Wrongful Conception</strong></td>
<td>YES</td>
<td>Not decided</td>
<td>Not decided</td>
<td>Related to the pregnancy: pain and suffering, medical expenses, loss of consortium, lost wages. (Possibly child rearing expenses in case where resulting child is born impaired)</td>
</tr>
<tr>
<td>(Jackson v. Bumgardner; Gallagher v. Duke (federal))</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
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### Criminal Law

| N.C.G.S. § 14-44 | NO | NO. Quickening required for N.C.G.S. § 14-44. |
| N.C.G.S. § 14-17 |

### Property Law

| N.C.G.S. § 41-5 | YES — able to inherit or take by deed | Undecided | NO | N/A |
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2. PRENATAL INJURY

I. Prenatal Injury: Practice Notes:

A complaint for prenatal injury should include a statement regarding the viability of the plaintiff only if the child was, in fact, viable at the time of injury. If the plaintiff was not viable, however, this point should be omitted altogether so as to avoid suggesting argument on the issue to the defendant. The defendant, on the other hand, should look for this fact in the complaint, and if it is not present, defense counsel should obtain such information in discovery. Causation is likely to be the largest issue of proof in a case for prenatal injury. The difficulty in establishing a causal link between the injuries suffered and the defendant’s actions steadily increases as the gestational age at which the injuries were inflicted decreases. Therefore, it is very important for the plaintiff to obtain expert evidence that will eliminate intervening causes that may have also been responsible for the same type of injuries. The ultimate goal is to eliminate all causes but the defendant’s actions as a possible cause of the injuries, so that the jury can infer that such actions must have been the cause of the injuries. For instance, where the plaintiff’s mother was over forty years of age, it would be important to have an expert testify to the fact that the type of injuries incurred by the plaintiff are not the type of complications associated with childbirth in older women. One of the best ways to establish causation is to prove that the defendant’s actions caused premature birth, which in turn caused the plaintiff’s injuries.

Proving damages also raises complex issues. Economists will probably be needed to establish any claims for lost earning capacity, and accordingly, different economic models will need to be researched. Graphic representation of the plaintiff’s damages in the most basic of forms is a necessity to simplify the process and to communicate effectively with the jury. A ‘day in the life’ video can prove very effective, as can testimony from the family regarding their observations of what the plaintiff’s abilities are at present.

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3. **WRONGFUL DEATH OF UNBORN CHILD**

I. Wrongful Death: Practice Notes:

A. **DEFENSE OF A FETAL WRONGFUL DEATH CASE:**

1. **VIABILITY:**

   Given the current status of the law in North Carolina, defense counsel should make every effort to discover what evidence is available on this issue. In a close case, a medical expert will be needed to examine the medical records pertaining to the mother, the child's prenatal care, including all testing done, i.e., sonograms, ultrasounds, amnioscentesis, etc., and the alleged death-causing injury. Counsel should also consider taking the depositions of the doctors responsible for the care of the mother and child during the pregnancy, and also those allegedly responsible for the alleged injury. As the crucial issue, doctors should be required to state their opinions as to the child's viability at the time the alleged injury was inflicted. If enough evidence
exists to clearly establish that the child was not viable at the time of injury, a motion for summary judgment may be appropriate. Depending on the facts, counsel should consider taking the position that viability is a relatively concrete concept that can be established at a certain point during gestation. To argue that viability is relatively uncertain and difficult to prove with any certainty opens the possibility for the court to err on the side of the plaintiff due to the broad remedial purposes of the wrongful death statute.

The standard list of defenses available in a wrongful death claim are also applicable to the fetal plaintiff.

2. Damages:

If the case proceeds to trial, the next line of defense will be the issue of damages. Counsel should remember that the only damages available to the fetal plaintiff are those for medical and funeral expenses, pain and suffering, nominal damages, and punitive damages. Punitive damages, however, are usually of greatest concern to defense counsel given the potential for a large verdict. This is especially so in a situation where the jury will be told it cannot make any award to the estate, i.e., the parents, for the loss of their child’s companionship, society, and the like. The only real opportunity to vent jury frustration and/or anger towards the defendant will, therefore, naturally be in the area of punitive damages. Accordingly, every action must be taken at every stage of the litigation process to remove the potential for a recovery of punitive damages. The standard for such damages is the same as in other cases, and accordingly, appropriate research should be done.

There exists some question as to the level of proof required of the plaintiff on the issue of damages for the pain and suffering of the fetal decedent. The defendant should make a pretrial motion to exclude such evidence as a matter of law if it appears that the plaintiff’s evidence on this issue is weak or speculative. Given the language in DiDonato regarding damages for pain and suffering, a good faith argument can be made that without competent medical evidence proving that the fetus was, in fact, capable of feeling pain, the plaintiff’s claim for such damages should be dismissed and all evidence on this point excluded from the trial. If the pretrial motion is unsuccessful, another motion can be made at trial to strike the evidence.
B. PROSECUTION OF A WRONGFUL DEATH CASE:

1. VIABILITY:

The plaintiff bears the burden of production on this issue. To prevail, medical evidence in the form of records and expert testimony is needed. Doctors should state with a reasonable degree of medical certainty that the decedent was viable at the time the death-causing injury was sustained. Plaintiff can argue that viability should never be set at more than twenty weeks, as this is the gestational age at which abortions are prohibited. Plaintiff can also argue that because viability can never be established with absolute certainty without putting the fetus to the actual test of survival, any doubt or ambiguity as to viability of the decedent should be resolved in favor of the plaintiff. This is especially true given the broad remedial purposes of the wrongful death statute and the Court's language in *DiDonato* regarding who should be regarded as a 'person'.

Finally, the plaintiff must plead in her complaint that the fetal decedent was viable at the time the alleged injury was inflicted. Being a threshold issue, such a pleading is essential to the survival of the cause of action.

2. DAMAGES:

The fetal plaintiff also bears the burden of proving each element of damages. Nominal damages and medical and funeral expenses are relatively simple to prove. Plaintiff should present all medical expenses precipitated by the wrongful act and should not attempt to separate the mother's expenses from those of the child. The statute allows recovery of all medical expenses proximately caused by the tortfeasor's negligence.

The main issue here is the damages for the pain and suffering of the child before death. Again, medical evidence is crucial, and the plaintiff should talk with the health providers who treated the mother and child for the injuries as soon as possible to preserve any crucial data. Fetal stress monitor printouts are especially important in this context and should be obtained immediately for interpretation by experts. Any other indicia of the child's conscious state prior to death should be carefully noted. This is the single area of damages, besides punitives, available to the jury to bring back any sizeable verdict. As such, it should be given thoughtful attention.

Punitive damages are statutorily available and should be plead in any case where there is intentional or reckless conduct.
by the defendant which allegedly caused the child’s death. Courts are unlikely to look favorably on such conduct, and thus are more likely to allow the punitive damages issue to go to the jury. Punitive damages should thus be plead whenever good faith allows, and the claim should be vigorously defended.

A case praying for pecuniary damages and loss of society damages should be brought so that the issue can possibly be revisited by the North Carolina Supreme Court on appeal. A case which presents good data on the progress and health of the fetus prior to death should be selected to give the court a good scenario for recognizing a plaintiff’s right to attempt to prove these types of damages.

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4. WRONGFUL LIFE

I. Wrongful Birth/Life/Pregnancy: Practice Notes:

The practitioner should thoroughly understand the distinctions between these different causes of action. Wrongful conception is basically a malpractice claim and should be handled accordingly. Counsel should remember that the cause of action is for the parent(s) and not for the resulting child. Counsel should plead the fact of pregnancy as the injury. Plaintiffs may want to include a claim that the defendant's actions violated their constitutional right to control their reproduction.

The defendant should emphasize discovery on the issue of why the plaintiffs did not want to become pregnant. A desire to avoid disruption of careers or lifestyle or to avoid bearing a genetically impaired child more aptly state a claim for money damages than a claim which expressly a wish to avoid a pregnancy dangerous to the mother. This is especially true if the mother delivered without complications, and she had always wanted the child. Defendant should also discover if the mother had a normal pregnancy, if she suffered from morning sickness and for how long, the method of delivery, whether anesthesia was administered, what type was given and how long it was observed to be in effect, the length of the labor, and finally whether there
were any complications in delivery. All of these factors go to the issue of the mother’s pain and suffering arising from the pregnancy.

Both parties should be mindful of the statute of limitations in such cases. The North Carolina Supreme Court has not ruled on when the limitations period will begin to run, though it is likely to depend on the facts of each case. In failed sterilization cases, for instance, the limitations period will probably run from the time the plaintiff discovered that the operation was unsuccessful. Negligent counseling actions, however, may begin to run at the time the pregnancy occurred or at the time the negligence is discovered. Counsel should also consider the role of the doctrine of res ipsa loquitur in wrongful conception cases, especially those revolving around a claim of unsuccessful sterilization.

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10. CRIMINAL LAW

I. CRIMINAL LAW: PRACTICE NOTES:

The defendant charged with a violation of section 14-44 of the North Carolina General Statutes 406 should focus on the issue of quickening if the death of the fetus was early in the pregnancy. The State bears the burden of proof beyond a reasonable doubt on this issue, and given the rather ambiguous nature of the legal concept of quickening, this is one of the more promising defenses in such a case. Such proof becomes even more difficult when the mother has also died, as she is the best evidence of when she could feel the child moving in the womb.

Another possible defense would be to assert that section 14-44 of the North Carolina General Statutes is unconstitutionally vague, under both the North Carolina and United States Constitutions. The statute applies only to the killing of a quickened fetus. This term is inherently ambiguous as its use does not positively fix a moment in time that can be readily ascertained. It is also a highly subjective standard as the mother is going to be the only reliable evidence as to when she first felt the baby move within her. Thus, it is conceivable that the statute could support a conviction for killing the fetus at ten weeks gestation in one case, but not for the same act at fifteen weeks gestation. Alternatively, of two men who kill separate fetuses of

406. Given Beale, it is assumed that no prosecutor could, in good faith, bring an indictment for murder for the killing of an unborn child.
exactly the same gestational age, one may go free and the other may not based solely on a standard of proof that relies almost entirely on the mother of the victim. Moreover, the term quickened is largely a term of legal art and cannot be said to have meaning to the average person. Counsel can argue that the statute does not provide true notice of what actions will constitute a crime under its language.

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