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**Torts—Wrongful Death: A Viable Fetus is Not a "Person" under the Arkansas Wrongful Death Statute. *Chatelain v. Kelley*, 322 Ark. 517, 910 S.W.2d 215 (1995).**

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TORTS—WRONGFUL DEATH: A VIABLE FETUS IS NOT A “PERSON” UNDER THE ARKANSAS WRONGFUL DEATH STATUTE. *CHATELAIN V. KELLEY*, 322 Ark. 517, 910 S.W.2d 215 (1995).

## I. INTRODUCTION

In *Chatelain v. Kelley*,<sup>1</sup> the Supreme Court of Arkansas considered whether a cause of action could be brought for the death of a fetus under the Arkansas Wrongful Death Statute.<sup>2</sup> The court, in resolving this issue, questioned whether the death of a fetus is the “death of a person” in the law of wrongful death.<sup>3</sup> Until this decision, Arkansas remained one of only a few states that had not decided whether a cause of action existed for the wrongful death of a fetus.<sup>4</sup> Although the court had previous occasion to address the issue of whether a fetus is a person,<sup>5</sup> *Chatelain* offered the court its first opportunity to interpret the term person in the wrongful death statute.<sup>6</sup>

This case began when the parents of a stillborn baby brought a wrongful death action against the delivering physician.<sup>7</sup> The trial court granted the physician’s motion for summary judgment upon finding that an unborn fetus is not a person under the Arkansas Wrongful Death Statute.<sup>8</sup>

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1. 322 Ark. 517, 910 S.W.2d 215 (1995).

2. ARK. CODE ANN. § 16-62-102 (Michie 1987 & Supp. 1995). The relevant portion of the statute provides:

(a)(1) Whenever the death of a person shall be caused by a wrongful act, neglect, or default and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, then, and in every such case, the person who, or company, or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death may have been caused under circumstances as amount in law to a felony.

(2) The cause of action created in this subsection shall survive the death of the person wrongfully causing the death of another and may be brought, maintained, or revived against the personal representative of the person wrongfully causing the death of another.

*Id.*

3. *Chatelain*, 322 Ark. at 518, 910 S.W.2d at 216.

4. See Barbara E. Lingle, Comment, *Allowing Fetal Wrongful Death Actions In Arkansas: A Death Whose Time Has Come?*, 44 ARK. L. REV. 465 (1991).

5. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987) (holding that a fetus is not a person under the manslaughter statute); *Carpenter v. Bishop*, 290 Ark. 424, 720 S.W.2d 299 (1986) (holding that the doctrine of parental immunity barred suit against mother for negligent death of her fetus); *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984) (holding that a fetus is not a “deceased person” within meaning of probate code).

6. *Chatelain*, 322 Ark. at 518, 910 S.W.2d at 216.

7. *Id.* at 518, 910 S.W.2d at 215.

8. *Id.*

The Arkansas Supreme Court affirmed the trial court's decision.<sup>9</sup> By holding that a fetus is not a person for purposes of the wrongful death statute, the court implicitly rejected the position held by an overwhelming majority of jurisdictions that allows recovery.<sup>10</sup> Instead, the court joined a small minority of jurisdictions.<sup>11</sup>

This note briefly reviews the historical development of fetal wrongful death actions. It then examines the major differences between the majority view and the minority view on issues within the law of fetal wrongful death actions. Next, it analyzes the court's reasoning in *Chatelain*. Finally, the note considers the significance of the decision.

## II. FACTS

On June 26, 1989, Joanne Mote, now Joanne Chatelain,<sup>12</sup> entered the Bull Shoals Community hospital for the expected delivery of her baby.<sup>13</sup> During the delivery, her physician, Dr. Lawrence A. Kelley, performed an emergency Cesarean section;<sup>14</sup> eighteen hours after Joanne was admitted to the hospital, she delivered a stillborn baby.<sup>15</sup>

The Motes brought a wrongful death action against Dr. Kelley and the hospital, alleging that Baby Eugene<sup>16</sup> was stillborn because Dr. Kelley negligently delayed the Cesarean section.<sup>17</sup> The Motes voluntarily dismissed the claim against the hospital in 1992 and refiled the complaint against Dr. Kelley.<sup>18</sup> In addition to punitive damages, they sought recovery for their mental anguish.<sup>19</sup> Dr. Kelley denied that he was negligent and argued that the stillborn fetus was not a "person" within the meaning of the wrongful death statute.<sup>20</sup> In 1993, the trial court granted Dr. Kelley's motion for summary judgment and concluded that an unborn fetus was not a person under Arkansas's Wrongful Death Statute.<sup>21</sup> The Motes appealed the

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9. *Id.*

10. See majority jurisdiction cases cited *infra* note 44.

11. See minority jurisdiction cases cited *infra* note 45.

12. Brief for Appellee at 4, *Chatelain v. Kelley*, 322 Ark. 517, 910 S.W.2d 215 (1995) (No. 95-450).

13. *Id.*

14. *Chatelain*, 322 Ark. at 517, 910 S.W.2d at 215.

15. Reply Brief for Appellants at 2, *Chatelain v. Kelley*, 322 Ark. 517, 910 S.W.2d 215 (1995) (No. 95-450).

16. *Id.*

17. *Chatelain*, 322 Ark. at 518, 910 S.W.2d at 215.

18. *Id.*

19. Appellee's Brief at 4, *Chatelain* (No. 95-450).

20. *Id.*

21. *Id.* at 5.

decision to the Arkansas Supreme Court, which affirmed the trial court's order granting Dr. Kelley's motion for summary judgment. The court held that an unborn fetus was not a person under the statute.<sup>22</sup>

### III. BACKGROUND

The right to bring an action for the wrongful death of a fetus arising from injuries received *en ventre sa mere*<sup>23</sup> developed gradually over more than a century. The common law traditionally denied recovery for prenatal or fetal injuries or deaths caused by tortious conduct.<sup>24</sup> Eventually, the courts recognized a common law action for tortiously inflicted prenatal injuries, if the fetus survived birth.<sup>25</sup> Similarly, the wrongful death statutes afforded a remedy if the prenatal injuries resulted in death after a live birth.<sup>26</sup> The controversial aspect of this area of tort law involves the right to recover for the wrongful death of an unborn fetus. Courts allowing such recovery have either recognized a new common-law cause of action or, more often, interpreted the applicable wrongful death statutes to include an action for the death of an unborn fetus.<sup>27</sup>

#### A. Historical Development of Fetal Wrongful Death Actions

*Dietrich v. Inhabitants of Northhampton*,<sup>28</sup> decided in 1884, is the first recorded American case that addressed the issue of tort liability for prenatal injuries. In *Dietrich*, a woman in her fourth or fifth month of pregnancy slipped and fell on a highway maintained by the defendant.<sup>29</sup> She suffered a miscarriage as a result of the fall.<sup>30</sup> The administrator of the child's estate brought an action against the defendant for negligence.<sup>31</sup> In an opinion written by Justice Holmes, the Supreme Judicial Court of Massachusetts held that an action for prenatal injuries would not lie based on the theory that the

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22. *Chatelain*, 322 Ark. at 525, 901 S.W.2d at 219.

23. This term means "in its mother's womb." BLACK'S LAW DICTIONARY 534 (6th ed. 1990).

24. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 367-68 (5th ed. 1984).

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

26. KEETON ET AL., *supra* note 24, § 55, at 368.

27. Lingle, *supra* note 4, at 488 & n.122.

28. 138 Mass. 14 (1884), *overruled by*, *Torigan v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967).

29. *Id.*

30. *Id.* at 14-15.

31. *Id.*

unborn child was essentially a part of its mother and not a separate being.<sup>32</sup> Justice Holmes noted the lack of precedent for civil liability in tort "to one not yet in being."<sup>33</sup> Courts followed *Dietrich's* enunciation of the common law rule for more than sixty years and set forth several reasons to justify the rule against recovery: lack of precedent, stare decisis, lack of duty to the fetus, difficulty in proof, and fear of fraudulent claims.<sup>34</sup>

In 1946, the United States District Court for the District of Columbia, in *Bonbrest v. Kotz*,<sup>35</sup> rejected the common law rule and permitted a surviving child to bring a cause of action for prenatal injuries sustained while viable.<sup>36</sup> *Bonbrest* involved a claim brought by an infant through its father and next friend to recover for injuries it sustained when negligently removed from its mother's womb.<sup>37</sup> The court distinguished *Bonbrest* from *Dietrich* on the grounds that the infant in *Bonbrest* survived a direct injury, which was inflicted when the infant was viable.<sup>38</sup> Moreover, the court expressly rejected the view that a viable fetus was only a part of its mother and not a separate being.<sup>39</sup>

*Bonbrest* established the rule that a viable fetus, injured in the womb, may recover for prenatal injuries if it survived birth. Every jurisdiction now permits recovery for prenatal injuries if the child is born alive; and if the child dies after birth, a claim may be brought for wrongful death.<sup>40</sup>

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32. *Id.* at 17. Justice Holmes explained:

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

*Id.*

33. *Id.* at 16.

34. Thomas L. Wenger, Comment, *Developments In The Law of Prenatal Wrongful Death*, 69 DICKINSON L. REV. 258, 259 (1965).

35. 65 F. Supp. 138 (D.D.C. 1946).

36. *Id.* at 139. The term "viable" in reference to a child means "capable of independent existence outside his or her mother's womb." BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

37. *Bonbrest*, 65 F. Supp. at 139.

38. *Id.* at 140.

39. *Id.* The court observed:

As to a viable child being "part" of its mother—this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra-uterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element—as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

*Id.*

40. KEETON ET AL., *supra* note 24, § 55, at 368. Arkansas has not decided this issue,

The most significant development in the law of fetal wrongful death occurred three years after *Bonbrest*. In 1949, the Minnesota Supreme Court became the first jurisdiction to recognize a cause of action for the wrongful death of a stillborn fetus.<sup>41</sup> In *Verkennes v. Corniea*, both the mother and fetus died during labor, allegedly due to the negligence of the surgeon and hospital.<sup>42</sup> The court held that where prenatal injuries result in stillbirth of a viable fetus, an action may be brought under the state's wrongful death statute.<sup>43</sup>

The Minnesota Supreme Court decision in *Verkennes* marked the beginning of a trend in state courts to allow recovery for the wrongful death of a fetus. Today, the substantial weight of authority favors allowing recovery under the wrongful death statutes for the death of a viable fetus.<sup>44</sup>

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but Justice Glaze stated that Prosser's statement appeared to be consistent with Arkansas statutory law. *Chatelain*, 322 Ark. at 526, 901 S.W.2d at 220 (Glaze, J., dissenting).

41. *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949).

42. *Id.* at 839.

43. *Id.* at 840. The court reasoned: "It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes cited." *Id.* at 841.

44. Jurisdictions recognizing fetal wrongful death actions include: Colorado, *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986) (applying Colorado law) (viable fetus); District of Columbia, *Simmons v. Howard Univ.*, 323 F. Supp. 529 (D.D.C. 1971) (viable fetus); Alabama, *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974) (eight and one-half month old fetus); Arizona, *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985) (viable fetus); Connecticut, *Gorke v. Le Clerc*, 181 A.2d 448 (Conn. Super. Ct. 1962) (viable fetus); Delaware, *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956) (viable fetus); Georgia, *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. Ct. App. 1955) (quick child) (stating that a quick child is "one that has developed so that it moves within the mother's womb." BLACKS'S LAW DICTIONARY 1247 (6th ed. 1990)); Idaho, *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982) (viable fetus); Illinois, *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88 (Ill. 1973) (viable fetus); Indiana, *Britt v. Sears*, 277 N.E.2d 20 (Ind. Ct. App. 1971) (full-term child); Kansas, *Hale v. Manion*, 368 P.2d 1 (Kan. 1962) (viable fetus); Kentucky, *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955) (viable fetus); Louisiana, *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981) (six month old fetus); Maryland, *State ex rel Odham v. Sherman*, 198 A.2d 71 (Md. 1964) (viable fetus); Massachusetts, *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975) (viable fetus); Michigan, *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971) (viable fetus); Minnesota, *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949) (viable fetus); Mississippi, *Rainey v. Horn*, 72 So. 2d 434 (Miss. 1954) (viable fetus); Missouri, *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983) (viable fetus); Nevada, *White v. Yup*, 458 P.2d 617 (Nev. 1969) (viable fetus); New Hampshire, *Poliquin v. MacDonald*, 135 A.2d 249 (N.H. 1957) (viable fetus); New Mexico, *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. Ct. App. 1980) (viable fetus); North Carolina, *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987) (viable fetus); North Dakota, *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984) (viable fetus); Ohio, *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985) (viable fetus); Oklahoma, *Evans v. Olson*, 550 P.2d 924 (Okla. 1976) (viable fetus); Oregon, *Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974) (viable fetus); Pennsylvania, *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985) (viable fetus); Rhode Island, *Presley v. Newport Hosp.*, 365 A.2d 748 (R.I. 1976) (nonviable fetus); South Carolina, *Fowler v. Woodward*, 138 S.E.2d 42 (S.C.

However, a respectable minority of jurisdictions continue to adhere to the live birth requirement and deny recovery for the wrongful death of a stillborn fetus.<sup>45</sup>

## B. Key Issues in the Law of Fetal Wrongful Death

Courts traditionally address several legal and policy issues when deciding whether to allow a cause of action for the death of a fetus under the wrongful death statutes. This note will discuss four of these issues: (1) whether the fetus is a person under the applicable wrongful death statutes; (2) the effect of the United States Supreme Court's holding in *Roe v. Wade*;<sup>46</sup> (3) whether to draw the line of recovery at live birth or viability; and (4) whether concerns about proof of causation and damages justify denying recovery. The majority and minority jurisdictions offer compelling arguments on each side of these issues.

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1964) (viable fetus); South Dakota, *Farley v. Mount Marty Hosp. Ass'n*, 387 N.W.2d 42 (S.D. 1986) (viable fetus); Utah, *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975) (viable fetus); Vermont, *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92 (Vt. 1980) (viable fetus); Washington, *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975) (viable fetus); West Virginia, *Baldwin v. Butcher*, 184 S.E.2d 428 (W. Va. 1971) (viable fetus); Wisconsin, *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107 (Wis. 1967). Illinois and South Dakota have enacted legislation addressing a cause of action for the wrongful death of a fetus, in addition to judicial decisions. 740 ILL. COMP. STAT. ANN. 180/2.2 (West 1993); S.D. CODIFIED LAWS § 21-5-1 (Michie 1987). Tennessee has enacted legislation to provide a cause of action. TENN. CODE ANN. § 20-5-106 (1994).

45. Alaska, *Mace v. Jung*, 210 F. Supp. 706 (D. Alaska 1962) (applying Alaska law) (recovery denied for nonviable four to four and one-half month old fetus); California, *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977); Florida, *Duncan v. Flynn*, 342 So. 2d 123 (Fla. Dist. Ct. App. 1977); Iowa, *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); Maine, *Milton v. Cary Med. Ctr.*, 538 A.2d 252 (Me. 1988); Montana, *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); Nebraska, *Smith v. Columbus Community Hosp. Inc.*, 387 N.W. 2d 490 (Neb. 1986); New Jersey, *Graf v. Taggart*, 204 A.2d 140 (N.J. 1964); New York, *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969); Texas, *Witty v. American Gen. Capital Distributions*, 727 S.W.2d 503 (Tex. 1987); Virginia, *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440 (Va. 1969). Hawaii and Wyoming have yet to decide whether to allow the cause of action.

46. 410 U.S. 113 (1973).

1. *The Fetus as a "Person" Under Wrongful Death Statutes: Traditional Analysis*

The right to recover damages for wrongful death is purely statutory.<sup>47</sup> Therefore, a plaintiff's ability to recover for the wrongful death of a fetus depends upon the language of the statute and its construction by the court.<sup>48</sup> Under the provisions of most wrongful death statutes, the right to bring an action is conditioned on the death of a "person" who, if death had not ensued, could have maintained an action for damages.<sup>49</sup> Thus, courts face the initial task of determining whether a fetus is a "person" under the applicable wrongful death statute.

Many courts examine the intent or purpose of the legislature in creating the cause of action as a basis for interpreting the meaning of the term "person."<sup>50</sup> However, legislative intent provides courts with only minimal assistance because it is likely that most legislatures never considered whether a fetus was to be included within the term "person" when the wrongful death statutes were enacted.<sup>51</sup> Some courts conclude that a fetus

47. Under the common law, the death of an injured tort victim terminated any existing cause of action for the injury as well as any new and independent cause of action in the victim's dependents or heirs. KEETON ET AL., *supra* note 24, § 127, at 945. In 1846, England changed the common law rule by passing Lord Campbell's Act. KEETON ET AL., *supra* note 24, § 127, at 945. All states have modified the common law by enacting wrongful death statutes, most of which are modeled after Lord Campbell's Act. KEETON ET AL., *supra* note 24, § 127, at 945-46. The majority of these statutes are death acts, which establish a new cause of action for the decedent's personal representatives or beneficiaries. KEETON ET AL., *supra* note 24, § 127, at 946. A minority of statutes are survival acts, which preserve the cause of action vested in the decedent at the moment of death. KEETON ET AL., *supra* note 24, § 127, at 946. The principal difference between the two types of statutes is the elements of damages that are recoverable. KEETON ET AL., *supra* note 24, § 127, at 946. For a general discussion of wrongful death statutes and claims, see STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY (3d ed. 1992).

48. MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 26.02, at 26-3 (1987).

49. *Id.* For the text of the various states' wrongful death statutes, see SPEISER ET AL., *supra* note 47, at app. A.

50. *E.g.*, O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); Justus v. Atchison, 565 P.2d 122 (Cal. 1977); Witty v. American Gen. Capital Distributions, 727 S.W.2d 503 (Tex. 1987).

51. See Summerfield v. Superior Court, 698 P.2d 712 (Ariz. 1985):

In our view, it is most likely that the legislature never adverted to the fetus/person issue when it passed Arizona's first wrongful death statute. . . . The solution to this problem cannot be found in a methodology which requires us to assume or divine a legislative intent on an issue which most probably was never considered.

*Id.* at 720. See also, Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 111 (Wis. 1967). ("The argument that the legislature never intended that such wrongful death actions apply to stillborn infants is also not valid. This law was passed in 1857 and little was known at that time concerning the life of an infant in the womb."); David Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 647-49 (1980) (explaining the various court interpretations of legislative intent).



is not a "person" on the basis of the common law interpretation of the term. Because the common law did not consider a fetus as a person, the courts infer that legislatures did not intend to include fetuses within the meaning of the term.<sup>52</sup>

In the absence of clear legislative intent on the issue, courts in the majority validate the action by proposing that construing the wrongful death statute to include fetuses effectuates the purposes of the statutes.<sup>53</sup> Virtually all courts that allow recovery note that wrongful death statutes are remedial in nature and purpose and, therefore, should be liberally construed to accomplish their objective of providing a cause of action against one whose tortious conduct caused the death of another.<sup>54</sup> Courts in the minority recognize the remedial nature of the wrongful death statutes but are unwilling to construe the term "person" to include fetuses absent specific statutory intent.<sup>55</sup>

Another source of authority courts cite when deciding whether a fetus is a "person" is the knowledge and attitudes of the medical community toward a fetus.<sup>56</sup> Modern medical attitudes view the fetus as a "separate though dependent entity from the moment of conception."<sup>57</sup> In *Mitchell v. Couch*,<sup>58</sup> the Kentucky Court of Appeals stated that the most convincing reason for holding that a viable fetus is an entity within the general understanding of the term "person" is because it has a biological existence

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52. *E.g.*, *Weil v. Moes*, 311 N.W.2d 259, 271 (Iowa 1981) (noting that an unborn fetus was not generally considered a "person" at common law); *Smith v. Columbus Community Hosp., Inc.*, 387 N.W.2d 490, 492 (Neb. 1986) (stating that in light of the common law rule that an unborn fetus was not a person in the law of torts, the legislature would have clearly stated its intention to create an action for the wrongful death of a viable fetus if it so intended); *Giardina v. Bennett*, 545 A.2d 139, 143 (N.J. 1988) (commenting that when the wrongful death act was enacted a fetus was not considered a "person" in a "legal or juridical sense" and that it is inferable that the legislature adopted the common law understanding of the concept of a "person" when it enacted the act).

53. *E.g.*, *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984); *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Farley v. Mount Marty Hosp. Ass'n*, 387 N.W.2d 42 (S.D. 1986).

54. *E.g.*, *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92 (Vt. 1980).

55. *E.g.*, *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977). "[W]e do not join those courts which have equated fetus with person simply because the wrongful death statute is 'remedial' and must be 'liberally' construed. . . . When the intent of that body [legislature] is clear . . . there is no room for construction, liberal or otherwise." *Id.* at 132. The same view was expressed in *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503 (Tex. 1987). "[A]lthough our wrongful death statute is remedial in nature and must be liberally construed, we may not rewrite the statute in the guise of construing it." *Id.* at 504.

56. Tyler J. Scofield, Note, *Recovery for Tortious Death of the Unborn*, 33 S.C. L. REV. 797, 802-03 (1982).

57. *Id.* at 802.

58. 285 S.W.2d 901 (Ky. Ct. App. 1955).

as a human being.<sup>59</sup> However, courts holding that the term "person" does not include fetuses carefully limit the interpretation of the word to the context of wrongful death.<sup>60</sup>

Courts also look to the legal status of the unborn in other areas of the law for guidance in interpreting the term.<sup>61</sup> Courts in the majority note that a guardian ad litem may be appointed for the unborn,<sup>62</sup> the unborn may inherit property,<sup>63</sup> the unborn are protected under the criminal law,<sup>64</sup> and the unborn are specifically included as "decedents" in the Uniform Anatomical Gift Act.<sup>65</sup> Thus, some courts conclude that a viable fetus should be accorded legal status and protection under the wrongful death statute.<sup>66</sup>

Courts in the minority recognize the legal status accorded the unborn in other areas of the law, but contend that the rights of the unborn in the other areas only vest when the child is born alive.<sup>67</sup> These courts argue that the treatment of the unborn in other areas of the law further illustrates the

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59. The court stated that "biologically speaking, such a child is, in fact, a presently existing person, a living human being." *Id.* at 905. See also *White v. Yup*, 458 P.2d 617, 622 (Nev. 1969) (stating that a commonly advanced reason by courts for allowing recovery is that a viable child is, biologically, a presently existing person and a living human being capable of existence outside the female body, as well as within).

60. *E.g.*, *Weitl v. Moes*, 311 N.W.2d 259, 273 (Iowa 1981) (admonishing that it expresses no opinion regarding the existence of a fetus as a person biologically, religiously, or philosophically); *Smith v. Columbus Community Hosp., Inc.*, 387 N.W.2d 490, 492 (Neb. 1986) (expressing no opinion with respect to the existence of the fetus as a person in the philosophical or scientific sense).

61. *Scofield*, *supra* note 56, at 800-01.

62. *E.g.*, *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971); *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982).

63. *E.g.*, *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92 (Vt. 1980). See William J. Maledon, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 351-54 (1971) (noting that the law of property recognizes the rights of the unborn from the moment of conception).

64. *E.g.*, *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985); see also Maledon, *supra* note 63, at 362-69.

65. *E.g.*, *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92 (Vt. 1980).

66. The court in *Bonbrest v. Kotz* questioned, "Why a 'part' of the mother under the law of negligence and a separate entity and person in that of property and crime?" *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946).

67. *E.g.*, *Justus v. Atchison*, 565 P.2d 122, 131 (Cal. 1977) (noting that the property rights of the unborn prescribed in the civil code do not vest until the child is born alive); *Endresz v. Friedberg*, 248 N.E.2d 901, 904 (N.Y. 1969) (pointing out that although an unborn child has certain property rights, the enjoyment of those rights is dependent upon being born alive).

legislative ability to use appropriate language to included fetuses when the legislature so intends.<sup>68</sup>

## 2. *The Fetus as a Person Under the Wrongful Death Statutes: The Effect of Roe v. Wade*

In *Roe v. Wade*,<sup>69</sup> the United States Supreme Court held, among other things, that an unborn fetus is not a "person" under the Fourteenth Amendment to the United States Constitution.<sup>70</sup> The Court acknowledged that an unborn fetus has been afforded legal status in some areas of the law, but concluded that the "unborn have never been recognized in the law as persons in the whole sense."<sup>71</sup> However, the Court also recognized viability as the "compelling" point in a state's "important and legitimate interest" of protecting potential life.<sup>72</sup>

Most courts deciding fetal wrongful death cases after *Roe* either have ignored the decision or distinguished it.<sup>73</sup> When the majority position cites *Roe*, it is usually for the proposition that *Roe* supports recovery for a viable fetus because the Supreme Court recognized that a state has a compelling interest in protecting fetal life at viability.<sup>74</sup> In addition, the majority argues that the Supreme Court's holding in *Roe*, that a fetus is not a "person" under the Fourteenth Amendment, is not conclusive on the issue of whether a fetus is a "person" under the wrongful death statutes.<sup>75</sup>

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68. *Justus v. Atchison*, 565 P.2d 122, 132 (Cal. 1977) ("When the legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the legislature speaks generally of a 'person' . . . it impliedly but plainly excludes such fetuses.").

69. 410 U.S. 113 (1973).

70. *Id.* at 158.

71. *Id.* at 162.

72. *Id.* at 163.

73. MINZER ET AL., *supra* note 48, at 26-6 & n.16. See Kader, *supra* note 51, for an excellent discussion of the effect of *Roe* on fetal wrongful death actions. Professor Kader identified three ways that courts have used *Roe*. First, courts have employed *Roe* in support of the argument that a fetus is not a person. Kader, *supra* note 51, at 656-58. Second, *Roe* has been used in an effort to limit recovery to a viable fetus because that is when the state's interest in prenatal life becomes "compelling." Kader, *supra* note 51, at 658-60. Third, courts have used *Roe* in an effort to expand recovery on the premise that the state has an interest in protecting prenatal life. Kader, *supra* note 51, at 660-62.

74. MINZER ET AL., *supra* note 48, at 26-6. See *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974); *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974).

75. MINZER ET AL., *supra* note 48, at 26-6. E.g., *Summerfield v. Superior Court*, 698 P.2d 712, 723 (Ariz. 1985) (concluding that *Roe* "neither prohibits nor compels" the inclusion of a fetus as a person for the purposes of other enactments"); *O'Grady v. Brown*,

Only a few courts have cited *Roe* in support of the position that there should be no recovery for the wrongful death of a viable fetus.<sup>76</sup> These courts cited *Roe* for the proposition that a fetus is not a "person."<sup>77</sup> Overall, it seems that *Roe*'s influence on fetal wrongful death claims has been slight.<sup>78</sup>

### 3. *The Line of Demarcation: Viability versus Live Birth*

The most fundamental issue concerning recovery for the wrongful death of a fetus is whether the fetus must be born alive in order to maintain an action for prenatal injuries that subsequently result in death. *Bonbrest v. Kotz*<sup>79</sup> established the rule that there must be a live birth in order to recover.<sup>80</sup> *Verkennes v. Corniea*<sup>81</sup> went one step further to allow recovery for the wrongful death of a stillborn fetus.<sup>82</sup> The overwhelming weight of authority follows *Verkennes* and supports recovery for the negligently caused death of an unborn, viable fetus.<sup>83</sup> However, a minority of jurisdictions continue to require live birth as a prerequisite for recovery.<sup>84</sup>

Courts adopting the majority view advance several reasons in support of the viability standard. First, viability is the point at which a fetus becomes a "person" within the meaning of wrongful death statutes.<sup>85</sup> Second, viability is a more logical point at which to draw recovery than live birth.<sup>86</sup> An often cited example of the illogical and inconsistent result

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654 S.W.2d 904, 910 (Mo. 1983) (stating that *Roe* "does not mandate the conclusion that the fetus is a legal nonentity").

76. *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977); *Weilt v. Moes*, 311 N.W.2d 259 (Iowa 1981). See Kader, *supra* note 51, at 656 n.91 for additional cases. Note, however, that several of these jurisdictions now allow recovery. Arizona, Missouri, and Tennessee now allow recovery. See also *supra* note 44.

77. *Justus*, 565 P.2d at 131 (noting that the *Roe* Court held that the word "person" in the Fourteenth Amendment did not include the unborn); *Weilt*, 311 N.W.2d at 271 (citing *Roe* in support of the statement that a fetus was not considered a "person" at common law).

78. MINZER ET AL., *supra* note 48, at 26-6.

79. 65 F. Supp. 138 (D.D.C. 1946).

80. *Id.* See *supra* text accompanying notes 35-39.

81. 38 N.W.2d 838 (Minn. 1949).

82. *Id.* See *supra* text accompanying notes 41-43.

83. See *supra* note 44.

84. See *supra* note 45.

85. E.g., *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88, 92 (Ill. 1973) (recognizing viability as the stage at which a child becomes a "person" within the wrongful death statute); *Rainey v. Horn*, 72 So. 2d 434, 439 (Miss. 1954) (stating that a viable child is entitled to protection of its person).

86. E.g., *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 357 (Ala. 1974) (arguing that it is illogical to allow liability to depend on whether death from fatal injury occurs before or after live birth); *Summerfield v. Superior Court*, 698 P.2d 712, 722 (Ariz. 1985) (stating

created by the live birth rule is the hypothetical situation proposed by the Ohio Court of Appeals in *Stidam v. Ashmore*.<sup>87</sup> The court offered the example of viable twins simultaneously suffering the same prenatal injury from which one died before birth and the other after birth.<sup>88</sup> The court concluded that logic dictates the recognition of causes of action for both or for neither.<sup>89</sup> A final reason courts advance in support of the viability standard is that denying recovery in instances where death results before birth rewards the tortfeasor for more severe negligent acts.<sup>90</sup>

Courts in the minority, which follow the common law rule and require live birth, counter with several arguments against the viability standard. First, the minority maintains that a child must be born alive in order to be a "person" under the wrongful death statutes.<sup>91</sup> The *Restatement 2d of Torts* supports this position.<sup>92</sup> Second, the minority argues that the justifications for allowing recovery where the child survives do not exist for the stillborn.<sup>93</sup> Finally, the minority proposes that live birth is a more appropriate place to draw the line for recovery than viability.<sup>94</sup>

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that viability is a less arbitrary and more logical point at which to recognize loss to the survivors than the moment of birth); *Werling v. Sandy*, 476 N.E.2d 1053, 1055 (Ohio 1985) (proposing that it is illogical and unjust to deny an action where the child is stillborn and, yet, permit the action where the child survives birth for only a few moments).

87. 167 N.E.2d 106 (Ohio Ct. App. 1959).

88. *Id.* at 108.

89. *Id.*

90. *E.g.*, *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974); *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92 (Vt. 1980); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107 (Wis. 1967).

91. *E.g.*, *Duncan v. Flynn*, 342 So. 2d 123, 127 (Fla. Dist. Ct. App. 1977) (citing a prior decision where it held that "a child injured before birth, once born alive is a 'person' under the Constitution of the United States and the State of Florida").

92. The *Restatement (Second) of Torts* states:

- (1) One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive.
- (2) If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.

RESTATEMENT (SECOND) OF TORTS § 869 (1979).

93. *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969). The court stated:

The considerations of justice which mandate the recovery of damages by an infant, injured in his mother's womb and born deformed through the wrong of a third party, are absent where the foetus, deprived of life while yet unborn, is never faced with the prospect of impaired mental or physical health.

*Id.* at 903.

94. *E.g.*, *Justus v. Atchison*, 565 P.2d 122, 134 (Cal. 1977) (concluding that the distinction drawn between the born and unborn is not arbitrary, but bears a rational relationship to the legislative goal of placing reasonable limits on wrongful death actions); *Endresz v. Friedberg*, 248 N.E.2d 901, 905 (N.Y. 1969) (stating that difficulties are always present where a line must be drawn, but live birth is a more appropriate place to draw the line). See also, *Wenger*, *supra* note 34, at 268 (arguing that live birth is a less arbitrary

#### 4. *Proof of Causation and Proof of Damages*

A final issue courts consider in deciding whether to allow fetal wrongful death actions involves public policy relating to proof of causation and damages. Courts in the majority argue that potential problems in proving causation or in assessing damages should not operate to completely bar the action.<sup>95</sup> The majority maintains that proving causation and damages is no less difficult in the wrongful death action of a child who is born alive and lives only a few moments than in the case of an unborn fetus, yet all jurisdictions recognize a cause of action for the former.<sup>96</sup> Finally, the majority rejects the idea that allowing a wrongful death action for a viable stillborn fetus would permit double recovery for those bringing the action, because the child is an entity in its own right.<sup>97</sup>

Difficulty in proving causation and assessing damages is a traditional argument that minority courts utilize to deny recovery. These minority courts assert that causation is difficult to prove in actions involving the death of an unborn viable fetus and that damages are too speculative.<sup>98</sup> Furthermore, because some wrongful death statutes limit recovery to pecuniary losses,<sup>99</sup> the minority submits that an unborn fetus lacks the ability

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place to allow recovery than viability).

95. *E.g.*, *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 358 (Ala. 1974) (concluding that substantive rights must be protected regardless of the difficulties of proof); *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88 (Ill. 1973); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975).

96. *E.g.*, *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88, 90-91 (asserting that difficulties in determining damages for the child who lives only momentarily after birth are no greater or different in character from difficulties in the case of an injured child who did not survive birth); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985).

97. *E.g.*, *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 358 (rejecting the double recovery argument because there is an injury to two different persons); *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975).

98. *E.g.*, *Endresz v. Friedberg*, 248 N.E.2d 901, 903 (N.Y. 1969) (emphasizing that proof of pecuniary injury and causation is decidedly more vague in suits for the unborn than in a suit for a surviving child's prenatal injuries). *See also* David A. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965) (arguing against the viability standard on damage grounds).

99. Pecuniary loss includes losses that can be estimated in, and compensated by, money. It includes the reasonable expectation of pecuniary benefit from the decedent, had he or she lived. It also includes loss of care, love, and affection. BLACK'S LAW DICTIONARY 1131 (6th ed. 1990). Arkansas's wrongful death statute allows the beneficiaries of the action to recover for the pecuniary injuries, including a "spouse's loss of the services and companionship of a deceased spouse and mental anguish resulting from the death to the surviving spouse and beneficiaries of the deceased person." ARK. CODE ANN. § 16-62-102(2)(f)(1) (Supp. 1995). *See* SPEISER ET AL., *supra* note 47, at app. A, for the

to incur pecuniary loss.<sup>100</sup> Finally, the minority courts contend that allowing a cause of action for a viable fetus would result in double recovery in favor of the estate or survivors because they may recover personal losses in independent actions.<sup>101</sup>

#### IV. REASONING OF THE COURT

In denying recovery for the death of Baby Eugene under the Arkansas Wrongful Death Statute, the Supreme Court of Arkansas rejected the majority position which holds that a fetus's death qualifies as the death of a person for the purposes of wrongful death. Implicit in the opinion is the assertion that a viable fetus, injured prenatally, may recover for its injuries only if it is born alive.<sup>102</sup> Before making its ruling, the court examined the rationale expressed by the majority and minority courts.

The court began its analysis by discussing the majority view, citing *Summerfield v. Superior Court*<sup>103</sup> as typical of the majority.<sup>104</sup> The *Summerfield* court concluded that there is an illogical distinction between recognizing a wrongful death action for a prenatal injury that results in the death of a child born alive and denying the cause of action when the prenatal injury causes the death of a viable fetus.<sup>105</sup> In addition, the

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various states' wrongful death statutes, including recoverable damages.

100. *E.g.*, *Justus v. Atchison*, 565 P.2d 122, 133 (Cal. 1977) (reasoning that a fetus is not a wage-earner and that its death causes no appreciable economic loss to its survivors); *Graf v. Taggart*, 204 A.2d 140, 143-44 (N.J. 1964) (noting that New Jersey limited damages to pecuniary loss; in absence of pecuniary loss the action will not lie and an unborn's pecuniary loss would be virtually impossible to predict); *Endresz v. Friedberg*, 248 N.E.2d 901, 905 (stating that liability for damages caused by wrong ceases at a point dictated by public policy or common sense). *See also* FOWLER V. HARPER ET AL., *THE LAW OF TORTS*, § 18.3 at 679 (2d ed. 1986) (arguing that the estate or survivors of the unborn child have a more tenuous and doubtful claim to pecuniary compensation than a child who survives prenatal injuries).

101. *Endresz v. Friedberg*, 248 N.E.2d 901, 905 (holding that damages recoverable by the parents for their loss in their own action adequately redresses the wrong).

102. *Chatelain v. Kelley*, 322 Ark. 517, 526, 910 S.W.2d 215, 219-20 (1995) (Glaze, J., dissenting). Justice Glaze noted that Arkansas has yet to rule that a tort action can be brought to recover damages for prenatal injuries if the injured child is born alive. He stated, "while the majority opinion appears to recognize that a prenatal-injured, viable fetus may have a cause of action for negligence if the fetus is born alive, no such action exists if the fetus is stillborn." *Id.* at 526, 910 S.W.2d at 220 (Glaze, J., dissenting).

103. 698 P.2d 712 (Ariz. 1985).

104. *Chatelain*, 321 Ark. at 519, 910 S.W.2d at 216.

105. *Id.* The court stated:

The Arizona Court pointed out that the law clearly would allow a cause of action for a prenatal injury resulting in the death of a child born alive, and it is thus illogical to say that a prenatal injury resulting in the death of a viable fetus should not form the basis of a wrongful death claim.

*Id.* (citing *Summerfield*).

Arkansas court noted that the *Summerfield* court decided viability is a less arbitrary and more logical point to recognize a loss to survivors.<sup>106</sup> Finally, the court observed what it described as a "common thread" in the majority cases; namely, the recognition that a wrongful death suit is a remedial device and that courts afford wrongful death statutes liberal interpretations to accomplish the dual purposes of compensation and deterrence.<sup>107</sup>

The court conducted a more detailed review of the minority approach by focusing on four issues. First, it discussed the live birth requirement,<sup>108</sup> citing *Duncan v. Flynn*<sup>109</sup> to support the position that there must be a live birth to maintain an action for prenatal injuries under a wrongful death statute.<sup>110</sup> Second, the court examined how some minority courts consider the fetus's treatment in other legislation.<sup>111</sup> Specifically, the court cited *Giardina v. Bennett*,<sup>112</sup> which noted the legislature's ability to distinguish between persons and fetuses in the Uniform Anatomical Gift Act.<sup>113</sup>

Third, the court reviewed the minority's position on the issue of statutory construction of the term "person."<sup>114</sup> The court pointed to an Iowa decision, *Weitl v. Moes*,<sup>115</sup> that held a "person" is one who has achieved an individual identity through birth.<sup>116</sup> Furthermore, the court noted that the *Weitl* court emphasized that Iowa's wrongful death statute was the "survival type."<sup>117</sup> The court observed that Arkansas's Wrongful Death Statute is also a "survival" type of statute.<sup>118</sup>

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106. *Id.*

107. *Id.*

108. *Chatelain*, 322 Ark. at 519, 910 S.W.2d at 216.

109. 342 So. 2d 123 (Fla. Dist. Ct. App. 1977).

110. *Id.*

111. *Chatelain*, 322 Ark. at 519-20, 910 S.W.2d at 216.

112. 545 A.2d 139 (N.J. 1988).

113. *Id.*

114. *Chatelain*, 322 Ark. at 520, 910 S.W.2d at 216-17.

115. 311 N.W.2d 259 (Iowa 1981).

116. *Id.* "The Iowa Court observed that a 'person' is a human being who has 'attained a recognized individual identity' by being born alive." *Chatelain*, 322 Ark. at 520, 910 S.W.2d at 216-17.

117. *Id.* at 520, 910 S.W.2d at 217. The court quoted the following language from *Weitl*:  
Such a statute does not create a new cause of action in the decedent's survivors; rather, it preserves whatever rights and liabilities a decedent had with respect to a cause of action at the time of his death. The cause of action thus preserved is deemed to accrue to the decedent's estate representative 'at the time it would have accrued to the deceased if he had survived.'

*Id.* (quoting *Weitl v. Moes*, 311 N.W.2d at 270 (Iowa 1981) (citations omitted)).

118. *Chatelain*, 322 Ark. at 520, 910 S.W.2d at 217. See *supra* note 2 for the relevant text of Arkansas's Wrongful Death Statute.



Fourth, and finally, the court discussed minority courts' concerns for a fetus's measurement of recovery.<sup>119</sup> The court cited cases voicing concern over the speculative nature of proving causation and assessing damages in cases involving the wrongful death of a stillborn.<sup>120</sup> These cases decided that the live birth rule presented a more appropriate place to draw the line for recovery.<sup>121</sup>

After completing its review of the majority and minority approaches, the court commented on the difficult nature of the decision that lay before it.<sup>122</sup> Then, the court discussed the three prior cases that afforded an opportunity to consider the issue of whether a fetus is a "person."<sup>123</sup> First, the court reviewed its holding in *Carpenter v. Logan*.<sup>124</sup> *Carpenter* determined that an unborn fetus could not be considered a decedent under the probate code.<sup>125</sup> In *Carpenter v. Bishop*,<sup>126</sup> the court failed to reach the issue of whether a stillborn fetus is a "person" because the suit was dismissed on other grounds.<sup>127</sup>

Finally, the court discussed *Meadows v. State*<sup>128</sup> where it held that the term "person" did not include a fetus under the manslaughter law.<sup>129</sup> The *Meadows* opinion held that the term "person" is defined by common law, and at common law a fetus was not included in the definition of the terms "human being" and "person."<sup>130</sup> Moreover, in *Meadows*, the court was persuaded that the repeal of an early feticide statute displayed the legislative intent that killing a viable fetus was not manslaughter.<sup>131</sup> The court

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119. *Chatelain*, 322 Ark. at 521, 910 S.W.2d at 217.

120. *Id.* (citing *Graf v. Taggart*, 204 A.2d 140 (N.J. 1964); *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969)).

121. *Chatelain*, 322 Ark. at 521, 910 S.W.2d at 217.

122. *Id.* at 522, 910 S.W.2d at 217-18. "The combination of expressions of public policy, logic, precedent, and legislative intent found in the cases of other states presents a very difficult field to traverse. We find the crossing less difficult, however, when we add decisions we have made on the periphery of the question presented." *Id.* See Lingle, *supra* note 4, at 472-79 for a discussion of the court's reasoning in these cases.

123. *Chatelain*, 322 Ark. at 522, 910 S.W.2d at 217-18.

124. *Id.* at 522, 910 S.W.2d at 218 (citing *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984)).

125. *Id.* at 523, 910 S.W.2d at 218. "Nothing is said about unborn children in the constitutional provision concerning probate courts or in the statutory jurisdictional provision. Any attempt to extend the probate code to unborn children would be without specific authority and would be void." *Id.* (quoting *Carpenter v. Logan*, 281 Ark. 184, 186, 662 S.W.2d 808, 810 (1984)).

126. 290 Ark. 424, 720 S.W.2d 299 (1986).

127. *Id.* The suit in *Carpenter* was barred by the doctrine of parental immunity. *Id.*

128. 291 Ark. 105, 722 S.W.2d 584 (1987).

129. *Chatelain*, 322 Ark. at 524, 910 S.W.2d at 218.

130. *Id.* at 524, 910 S.W.2d at 218-19.

131. *Id.* "An early feticide statute, Ark. Stat. Ann. § 41-2223 (Repl. 1964) provided that

reasoned that the manslaughter statute's revision illustrated that the General Assembly knew how to include language designed to protect or not to protect fetuses.<sup>132</sup>

The court also considered Amendment 68 of the Arkansas Constitution and its effect on the issue.<sup>133</sup> The state's public policy, as expressed in Amendment 68, is to protect the life of every unborn child from conception until birth to the fullest degree allowed under the Constitution.<sup>134</sup> However, the court reasoned that, if it were required by that Amendment to interpret the wrongful death statute as protecting fetuses, a cause of action would begin at conception.<sup>135</sup>

Finally, the court stated that the decision to include a fetus in the definition of "person" is a policy issue best left to the legislature.<sup>136</sup> The court emphasized that the General Assembly failed to expand the definition of the term in the probate law and in the manslaughter statute.<sup>137</sup> Moreover, the court was reluctant to hold that a fetus is a "person" under the wrongful death statute when it held otherwise under criminal and probate law.<sup>138</sup>

Justice Glaze, joined by Justices Corbin and Roaf, dissented. At the outset of his dissent, Justice Glaze pointed out that the majority of states allow a cause of action for the wrongful death of a viable fetus and that the reasons provided in support of recovery were compelling.<sup>139</sup> Furthermore,

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'the willful killing of an unborn, quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter.' . . . However, that manslaughter statute, specifically relating to unborn children, was expressly repealed by Act 928 of 1975. Obviously, the legislative intent shown, if any, is that the killing of a viable fetus is not manslaughter.'" *Id.* (quoting *Meadows v. State*, 291 Ark. 105, 111, 722 S.W.2d 584, 587 (1987)).

132. *Chatelain*, 322 Ark. at 525, 910 S.W.2d at 219.

133. *Id.*

134. *Id.* Amendment 68 reads as follows: "The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." ARK. CONST. amend LXVIII.

135. *Chatelain*, 322 Ark. at 525, 910 S.W.2d at 219. The court stated:

If we were to hold that Amendment 68 was a self-executing amendment requiring us to interpret the wrongful death law as protecting fetuses in accordance with its terms, we would have to draw the line not at birth or at viability but at conception, and that is a position that has not been advanced by anyone to our knowledge.

*Id.* Note that Rhode Island may be close to advancing such a position. In *Presley v. Newport Hosp.*, 365 A.2d 748 (R.I. 1976), the court held that a fetus is a "person" within the meaning of the wrongful death statute whether viable or nonviable. *Presley*, 365 A.2d at 754.

136. *Chatelain*, 322 Ark. at 525, 910 S.W.2d at 219.

137. *Id.* The court stated, "[s]urely this decision will heighten the General Assembly's awareness of the issue at hand, and we commend it to the legislative prerogative." *Id.*

138. *Id.*

139. *Id.* (Glaze, J., dissenting). Justice Glaze noted that at least thirty-one states allow

he reasoned that the distinction between allowing a cause of action for prenatal injuries to a child born alive, but not to a stillborn fetus, is illogical.<sup>140</sup>

Moreover, Justice Glaze asserted that the *Chatelain* majority did not properly consider the remedial nature of Arkansas's Wrongful Death Statute.<sup>141</sup> He argued that Arkansas's statute is similar to North Dakota's statute, yet North Dakota recognized the action.<sup>142</sup> Justice Glaze also criticized the majority for delegating the issue to the General Assembly; he contended that the General Assembly intended for courts to construe the statute to effectuate its purposes and objectives.<sup>143</sup>

Finally, Justice Glaze proposed that allowing the action would be consistent with the United States Supreme Court's decision in *Roe v. Wade*.<sup>144</sup> He reasoned that, because *Roe* found viability to be the point at which the state's legitimate interest began, the wrongful death statute should be interpreted to protect viable fetuses.<sup>145</sup>

## V. SIGNIFICANCE

In *Chatelain*, the Supreme Court of Arkansas decided an issue of first impression in Arkansas tort law. By rejecting the proposition that a fetus is a "person" under the wrongful death statute, the court foreclosed a plaintiff's right to recover for the wrongful death of a stillborn fetus. This decision is particularly significant in light of the progressive and modern views favoring recovery. The majority of courts faced with similar facts and

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the cause of action, while only nine deny the action. *Id.* (Glaze, J., dissenting).

140. *Chatelain*, 322 Ark. at 526, 910 S.W.2d at 220 (Glaze, J., dissenting). "In my view, it is logically indefensible and unjust to deny an action where the child is stillborn, yet permit the action where the child survives birth but only for a short period of time." *Id.* (Glaze, J., dissenting) (citing *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985)).

141. *Chatelain*, 322 Ark. at 527, 910 S.W.2d at 220 (Glaze, J., dissenting).

142. *Id.* (Glaze, J., dissenting).

143. *Id.* (Glaze, J., dissenting). Justice Glaze stated:

The majority opinion permits this court to avoid its traditional judicial role, by suggesting the General Assembly should address the issues raised here concerning the state's wrongful death statute. Presumably, the General Assembly intended that the courts would construe the statutes in a manner which would give effect to the statute's purposes and objectives.

*Id.* (Glaze, J., dissenting).

144. *Id.* (Glaze, J., dissenting) (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

145. *Chatelain*, 322 Ark. at 527-28, 910 S.W.2d at 220-21 (Glaze J., dissenting). Justice Glaze noted that the United States Supreme Court, in *Roe*, "found the compelling point in the state's legitimate interest of protecting potential life to be at viability." Thus he argued that "[a]pplying the rationale in *Roe*, the wrongful death statute should be construed to include a viable fetus as a person entitled to protection." *Id.* (Glaze, J., dissenting).

interpreting similar statutes have held that a fetus is a "person" under wrongful death statutes.<sup>146</sup>

However, *Chatelain*'s significance extends beyond the denial of a cause of action. The decision solidifies the legal status of a viable fetus under Arkansas law. As the court noted, earlier decisions held that a fetus is not a "decedent" under the probate code or a "person" under the manslaughter statute. Thus, the court was unwilling to reach a contrary result in *Chatelain* out of concern for creating inconsistent views of a fetus's legal status.

In conclusion, it is important to note that three justices favored allowing recovery under the statute. Thus, with a change in the composition of the court, the court might reverse itself, if given the opportunity. However, the *Chatelain* court strongly suggested that the Arkansas General Assembly must expand the definition of "person" to specifically include a fetus before an action would lie under the Arkansas Wrongful Death Statute.

*Brenda Daugherty Snow*

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146. See *supra* note 44.

