Childhood’s End: Wrongful Death of a Fetus

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The plaintiffs (husband and wife) sued to recover damages for injuries sustained in an automobile accident caused by the defendants. The appellate court affirmed the trial court's award, which included $10,000 in damages to each parent for the loss of their six-month old fetus, born dead ten days after the accident. On rehearing, the Louisiana Supreme Court affirmed the lower courts' rulings and held that parents may recover damages for the wrongful death of a six-month old fetus. Danos v. St. Pierre, 402 So. 2d 633 (La. 1981).

Absent specific statutory provisions,1 civil liability at common law for prenatal injuries has been predicated upon the existence of legal personality.2 Prior to 1946 the common law did not recognize a cause of action for prenatal injuries, primarily because of the precedent established by the Massachusetts Supreme Court in Dietrich v. Inhabitants of Northhampton.3 The Dietrich court held that an unborn child unable to survive a premature birth has no separate existence from its mother; a fetus therefore cannot be considered a "person recognized by the law or capable of having a locus standi in court, or of being represented there by an administrator."4 Another early case, Allair v. St. Luke's Hospital,5 relied on Dietrich to hold that because an unborn child cannot be considered a "person" to whom a duty is owed separate from the duty owed its mother, the child, though born alive, cannot recover for its prenatal injuries. Later courts also relied on Dietrich and Allair as authority6 but added to the reasons for denying recovery the possibility of a flood of fictitious claims and the difficulties in proving a causal connection between the injury and the malformation or death.7

Although criticism of the Dietrich-Allair rationale that an unborn child is part of its mother began immediately,8 express judicial repudia-
tion was not forthcoming for nearly half a century. All American jurisdictions now recognize a cause of action for prenatal injuries to a child subsequently born alive, but many courts limit recovery to injuries sustained after viability, that point in fetal development at which the fetus can exist independently from its mother. The viability requirement has been criticized as arbitrary and, in light of modern medical science, unjustified. In fact, several jurisdictions have rejected the requirement altogether.

The major area of controversy in the field of tortious prenatal injuries at present is recovery for the wrongful death of a stillborn, and, specifically, whether a fetus can be considered a "person" within the basis of the unborn's viability:

If at that period [viability] a child so advanced is injured in its limbs or members and is born into the living world suffering from the effects of this injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child but wholly to its mother? 184 Ill. at 370, 56 N.E. at 641 (Boggs, J. dissenting). Consequently, Justice Boggs would have held a viable child to be a "person" distinct from its mother to the extent that if born alive it could maintain an action in tort for its prenatal injuries.


13. See generally Note, supra note 2.


17. One writer has argued that the characterization of the unborn as a "person" in prenatal injury cases where the child survives is unnecessary for imposing liability. Rather, the courts should recognize a "legally protected interest in beginning life with a healthy body." Note, Torts—Prenatal Injuries—Characterization of Unborn Child as a "Person" Immaterial to Recovery, 20 LA. L. REV. 810, 810 (1960). Effectively this is true. The American common law rule, however, is that a child en ventra sa mere (in the womb) is considered as born alive for all purposes to his benefit, but not so considered if to his detriment. For a thorough discussion of the common law rule see
the meaning of the wrongful death statutes.¹⁸ Twenty-eight jurisdictions now allow recovery for the wrongful death of a fetus;¹⁹ and all of them, either by recognizing the biological independence of the fetus²⁰

Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349 (1971). Birth and viability, then, act as a kind of suspensive condition, or condition precedent, to legal personality. See Endresz v. Friedberg, 24 N.Y.2d 478, 301 N.Y.S.2d 65 (1969). The effect is that once the child is born, all rights relative to or dependent on the child's personality relate back to the time spent in the womb. A similar rule exists in civil law jurisdictions, including Louisiana. See note 37, infra. The presumption behind the rule is that legal personality begins only at birth. Nonetheless, most wrongful death statutes employ the term "person," and courts have been compelled, understandably, to determine whether the statutes include the death of a fetus. Thus, in most instances, characterization of the unborn as a "person" is necessary for imposing liability for an unborn's wrongful death.

18. All American wrongful death statutes, in whatever form they appear, can be traced to England's Fatal Accidents Act, 9 and 10 Vict., c. 93 (1846). But there is considerable confusion among the various jurisdictions over the precise nature of the remedy and what damages are recoverable—the victim's or the survivors', pecuniary or non-pecuniary. A detailed discussion of the differences in the various wrongful death statutes is beyond the scope of this casenote. For a general discussion see S. Speiser, Recovery for Wrongful Death §§ 14:1-3 (1966).


20. This approach is of course a rejection of the Dietrich-Allair rationale criticized by many jurisdictions in prenatal cases in which the child lives. Other jurisdictions use a causative analysis, which focuses on the causal relation between the tortious conduct and the injury and not on the issue of biological independence. See Note supra note 2, at 280-82. However, those jurisdictions which deny wrongful death recovery for unborn children employ the theory, at least implicitly, that tort recovery depends on personality which in turn depends upon birth. See note 17, supra. See Gordon, supra note 2. Those jurisdictions which allow wrongful death recovery, however, link personality not to birth but to biological independence. Consequently, liability is imposed whether the fetus is born alive or dead.
or by simply following the "great weight of authority,"21 have recognized the essential personality of the unborn child. Arguments which have been used to justify recovery are that such an action is a logical corollary to the action allowed when the child lives,22 that the action is consistent with the philosophy of the wrongful death statutes,23 and that a denial would reward the tortfeasor rather than deter the wrongful act.24

Eleven jurisdictions have refused to extend wrongful death coverage to unborn children.25 Courts generally have justified this denial by strictly construing the applicable statutes.26 However, some courts have justified denial with such arguments that the action will result in double recovery to the mother27 and that proof of causation and damage is inherently difficult.28 Twelve jurisdictions have not considered the question squarely.29


23. 293 Ala. at 98, 300 So. 2d at 356.

24. 293 Ala. at 98, 300 So. 2d at 356.


26. "[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." Justin v. Atchison, 19 Cal. 3d 564, 575, 139 Cal. Rptr. 97, 107 (1977). Other statutory arguments denying recovery specifically address the nature of the remedy. *See S. SPEISER*, *supra* note 18, at § 14:1-3, at 743-50. *See also Kader, supra* note 2, at 647 n.40.

27. Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901 (1969). The argument is that the mother is already compensated for the pain and suffering accompanying her own injuries. Separate recovery in a wrongful death action would "double" her recovery for those damages.

28. *E.g.*, Graf v. Taggart, 43 N.J. 303, 204 A.2d 140 (1964). Such reasoning has been criticized: As to causation, *see Note*, *supra* note 14, at 563; as to damages, *see Note*, *Prenatal Injuries and Wrongful Death*, 18 Vand. L. Rev. 847 (1965): "It is submitted that the measure of damages now applied universally in wrongful death cases is inherently a determination involving considerable conjecture, and . . . will produce results no more speculative than those involving minor children." *Id.* at 855.

29. Those states that have not addressed the issue are Alaska, Arkansas, Colorado, Hawaii, Idaho, Maine, Montana, North Dakota, South Dakota, Texas, Utah and Wyoming. *But see Mace v. Jung*, 210 F. Supp. 706 (D. Alaska 1962) (federal court applying state law denied recovery for a nonviable fetus); *see also Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975) where the court said, "[w]hether or not it [loss of a stillborn]
Louisiana's foray into the field of prenatal injuries began with Cooper v. Blanck. In holding that a prenatally-injured, viable child born alive may maintain an action for its injuries, the Orleans Court of Appeals in Cooper broadly construed article 29 of the Louisiana Civil Code, which provides in part "[c]hildren in the mother's womb are considered, in whatever relates to themselves, as if they were already born." Referring to the word "whatever," the court said this "language used is of the most sweeping character." Continuing, the court declared in dicta that an action also would lie for the wrongful death of a stillborn. However, in Youman v. McConnell & McConnell, Inc. the Second Circuit Court of Appeals had occasion to interpret the scope of article 28 of the Louisiana Civil Code, which declares that "[c]hildren born dead are considered as if they had never been born or conceived." The court in Youman denied recovery for the wrongful death of a stillborn and held that an unborn child is not a legal person prior to birth.

The construction of articles 28 and 29 in these two cases clearly made birth the \textit{sine qua non} of legal personality, and personality the \textit{sine qua non} of tort recovery for prenatal injuries. This construction was in line not only with early common law rules but also with an apparently general civil law principle. Nonetheless, confusion arose among the Louisiana courts over the holdings in Cooper and Youman.

\textsuperscript{30} See notes 17 & 20, supra. Although France has no codal provision defining personality, capacity to inherit property depends on birth and viability. See \textsc{1 M. Planhol, Civil Law Treatise}, pt. 1, nos. 366-70 (11th ed. La. St. L. Inst. trans. 1959). Under Spanish law, the child must be born in human form and live at least twenty-four hours after separation from its mother before legal personality will relate back to the moment of conception. \textsc{Span. Civ. Code} arts. 29 & 30 (5th ed. Fisher trans. 1947). See also
In *Johnson v. South New Orleans Light & Traction Co.*, a companion case to *Cooper*, the Orleans circuit, without discussing articles 28 or 29, allowed recovery for the wrongful death of a stillborn child. *Valence v. Louisiana Power & Light Co.* also recognized a wrongful death cause of action but only in *dicta*. However, *Wascom v. American Indemnity Corp.*, a first circuit case, specifically relied on *Youman* and article 28 to deny recovery for the loss of stillborn twins. Subsequently, in two cases decided the same day, the first circuit reversed its decision in *Wascom* and allowed recovery for the wrongful death of a stillborn. The third and fourth circuits quickly followed suit. These decisions led the Louisiana Supreme Court to examine the rule in *Danos v. St. Pierre*.

In the instant case, the parents sued for the wrongful death of their six-month old stillborn fetus. The Louisiana Supreme Court expressly rejected the application of article 28, which considers unborn children as never having existed. Declaring that the "Legislature had no . . . intention in enacting [Civil Code article] 28" to preclude recovery for the wrongful death of a stillborn, the court based its decision on a "logical resolution of a problem in which the Legislature has not specifically expressed its intent to authorize or prohibit such...

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39. Neither *Johnson* nor *Cooper* were available to the second circuit when it decided *Youman*, both being unreported at the time. However, the *Cooper* decision was handed down on the same day as the *Johnson* decision on rehearing. The original hearing in *Johnson* had been given some ten weeks before. Perhaps *Cooper's* reliance on article 29 was intended to ameliorate the deficiency in *Johnson* of a proper codal analysis. But this is only speculation. See Comment, *Survival of Actions in Article 2315 of the Louisiana Civil Code: The Victim's Action and the Wrongful Death Action*, 43 TUL. L. REV. 330, 338-39 (1969), for an in-depth discussion of *Johnson*.

40. 50 So. 2d 847 (La. App. Orl. Cir. 1951). "We cannot be persuaded that, under no circumstances, should there be awarded damages to the parents of the unborn child if the fetus, while in its mother's womb, has been so injured that it cannot be born alive." *Id.* at 849. The parents were unable to recover for lack of sufficient proof of causation.

41. 348 So. 2d 128 (La. App. 1st Cir.), *writes refused*, 380 So. 2d 1224 (La. 1977).


44. 402 So. 2d at 638.
NOTES

recovery."

The court then weighed certain "persuasive considerations" favoring recovery against those factors militating against recovery.

First, the court stated that "it would be totally illogical and arbitrary" to condition liability upon birth, and buttressed the argument with the "supportive hypothetical foil" of prenatally injured twins, one of whom survives for a few moments outside the womb. To allow recovery for the survivor, but not for the stillborn, the court said, would be an unjustified distinction. Second, a denial of recovery ironically would benefit the tortfeasor who would have to pay for his maiming of the fetus, but who "would not have to pay any damages if his fault cause[d] prenatal death." Finally, the court referred to a recent amendment to the Louisiana Criminal Code, which defines a person as a human being from the moment of fertilization and implantation, as an indication of a "legislative favoring of applying laws such as wrongful death articles to unborn children."

While acknowledging the difficulty of proving damages and causation and the possibility of fraudulent claims, the court nevertheless described the arguments against recovery not only as "totally illogical, but also [as disregarding] the very essence of the judicial process. The court concluded that "the arguments favoring recovery more fully satisfy the logical reasoning and application of the natural law" and

45. Id.
46. Id.
47. Id.
48. Kader, supra note 2, at 646.
49. 402 So. 2d at 638 n.6.
50. Id. at 638.
52. 402 So. 2d at 638. This argument is deceptive. In 1976 Senate Bill 261, a companion bill to Senate Bill 260 (which was later enacted as 1976 La. Acts, No. 256, § 1), proposed amending article 2315 to define "person" as including a human being from the moment of conception. See OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 2d Reg. Sess. at 74 (May 18, 1976). Similarly, in 1981 House Bill 686 was introduced to provide for the same amendment. See OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 7th Reg. Sess. at 192 (April 24, 1981). Neither bill was passed. It is, therefore, questionable whether the "legislative favoring" the court refers to is properly supportive of the argument. See Danos v. St. Pierre, 402 So. 2d 633, 639 (La. 1981) (Dixon, C.J., dissenting).
53. 402 So. 2d at 638.
54. Id. at 639. For those positivists who recoil in horror at the mention of 'natural law,' see generally Stone, The So-Called Unprovided For Case, 53 Tul. L. Rev. 93 (1978): The phrase "natural law" was not defined in the code but derives from le droit natural in Portails' projet and can perhaps best be understood in the context of
held that because the Civil Code does not “expressly or impliedly”\textsuperscript{58} deny recovery, the plaintiffs have a cause of action for the loss of their unborn child.

The result reached in the instant case is desirable in view of the growing concern for the rights of the unborn\textsuperscript{56} and in view of the general policy of compensating victims for losses attributable to tortious wrongs.\textsuperscript{57} Moreover, the result accords with the trend of the majority of American common law jurisdictions that have faced the issue.\textsuperscript{58} Indeed, the court adopted from the common law all of the major arguments favoring recovery. Nonetheless, the basis of the court’s decision is somewhat ambiguous and confusing. The precise nature of the cause of action granted is unclear, as is the classification of the loss of an unborn as the loss of a person, non-person, or thing.

The initial question is whether the recovery granted falls under the first paragraph of article 2315,\textsuperscript{59} which contains Louisiana’s general statement of tort liability, or under the third paragraph of article 2315, which contains Louisiana’s wrongful death statute and which requires the death of a “person.”\textsuperscript{60} Justice Lemmon, writing for the majority on rehearing, framed the issue in terms of compensation for damages sustained by a tortfeasor’s “fault which causes [not only] the fatal injury to the child [but] also causes the loss to the parents.”\textsuperscript{61} He described the cause of action for the loss of the unborn child as one for “damages which are clearly recoverable by the literal terms of the fountainhead article of Louisiana tort law.”\textsuperscript{62} He then described

the seventeenth and eighteenth centuries. Natural law is essentially unwritten law, though portions of it may have been declared legislation. It has always existed. It is always the same everywhere. Before lex, ius was. . . . It is [is] the “good old law, not indeed expressly handed down, but tacitly existent,” not created but discovered.

\textit{Id.} at 98 (footnotes omitted).

\textsuperscript{55.} 402 So. 2d at 639.

\textsuperscript{56.} \textit{See generally} Note, supra note 2, at 299.

\textsuperscript{57.} \textit{See} W. PROSSER, LAW OF TORTS \textsection{} 1, at 6 (4th ed. 1971), although this proposition needs little support.

\textsuperscript{58.} See text at note 19, supra.

\textsuperscript{59.} \textsc{La. Civ. Code} art. 2315, which provides in part, “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”

\textsuperscript{60.} \textsc{La. Civ. Code} art. 2315, which provides in part.

The right to recover all other damages caused by an offense or quasi offense, if the injured \textit{person} dies, shall survive for a period of one year from the death of the deceased in favor of: . . . [three classes of wrongful death beneficiaries]. . . . The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased.

(Emphasis added).

\textsuperscript{61.} 402 So. 2d at 639.

\textsuperscript{62.} \textit{Id.} at 638.
the defendants' position as an attempt to preclude recovery by arguing "that the third paragraph of [article] 2315, authorizing recovery for damages (other than property damages) . . . contemplates damages for the wrongful death of a person." Because article 28 considers an unborn as never having been conceived, the defendants claimed that article 28 "precludes recovery for the wrongful death of a child born dead, even if damages were otherwise recoverable under [article] 2315."

Justice Lemmon characterized the defendants' argument as implying that the loss of an unborn child is a damage, other than a property damage, only recoverable under the wrongful death action. But because the wrongful death action requires the death of a "person," the application of article 28 would preclude recovery because a child born dead, considered as never having been conceived, is not a legal person. The defendants then further argued that this item of damages cannot be recovered even under the first paragraph because this damage cannot be recovered in wrongful death. Viewed in this light, the defendants' argument seems to imply that the wrongful death action prohibits the recovery of damages "otherwise recoverable" under the first paragraph. Under this analysis, the court, in rejecting the defendants' argument, has taken the case out of wrongful death by declaring that the legislature did not intend article 28 to preclude the recovery of such damages.

The problem with this interpretation of the case stems from the use of the "otherwise recoverable" language. By Act 71 of 1884, the legislature amended article 2315 to provide for a wrongful death action. The amendment legislatively overturned, at least for the benefit of certain enumerated beneficiaries, the rule first articulated in Louisiana in the case of Hubgh v. New Orleans and Carrollton Railroad Co. that no one may recover damages for injuries arising out of the injury to or death of another person. It was because of the narrow
judicial construction of article 2315 that the legislature provided the wrongful death action, the intention of the legislature being to expand, not contract, tort liability. The fact is that the early Louisiana jurisprudence determined that the damages now recoverable in a wrongful death suit were not "otherwise recoverable" under the fountainhead article. The argument that the wrongful death action precludes an "otherwise recoverable" item of damage is contrary, therefore, not only to the fundamental nature of the wrongful death remedy but also to a clearly established jurisprudential rule.

It is perhaps unfortunate that the court framed the issue so ambiguously. The real issue is whether the damages associated with or arising out of the loss of an unborn child is an item of damages recoverable in a wrongful death action or in a first paragraph action. The difference between the two causes of action, which may have contributed to the confusion, lies in the kind of damages awardable for the specified injury. Non-pecuniary damages recoverable in wrongful death usually take the form of compensation for the bereaved's mental anguish over the loss of the loved one. If recovery were to be allowed under the first paragraph, the nature of the damages would be the same because neither parent would be suing for damages arising out of his own bodily injury, but from his mental suffering due to the loss of the child. The subtle but crucial distinction is that the wrongful death action allows recovery for the mental damage arising out of the death of another person, whereas a first paragraph action does not.

The determination, therefore, of whether a wrongful death action exists for the death of a fetus is an entirely separate question from the determination of whether a cause of action exists under the "fountainhead article" for the breach of an obligation not to cause parents to suffer the loss of their unborn child. In fact, a judicial recognition of a new cause of action compensable under the first paragraph of article 2315—such as the loss of prospective parenthood—actually


70. The mother already has a cause of action for these damages. Rogillio v. Cazedessus, 241 La. 186, 127 So. 2d 734 (1961).

71. This argument has been advanced elsewhere. See Danos v. St. Pierre, 383 So.
would obviate the problem of wrongful death: The characterization of the fetus as a "person" would be unnecessary because the cause of action would not be for wrongful death. Likewise, the recovery by the parents would be for damages they sustain, not from the death of a "person," but from the loss of parenthood caused by a "tortfeasor's fault." 72

In light of the foregoing discussion, the more likely interpretation of the case is that the court grounded recovery in wrongful death, even though recovery under the first paragraph was an available alternative remedy. Language to the effect that birth alone "is without relevance to a decision . . . to recognize a cause of action for wrongful death" 73 makes little sense except in the context of a wrongful death action. The majority opinion declares that

[t]he loss to the parents . . . is substantially the same, whether the tortfeasor's fault causes the child to be born dead or to die shortly after being born alive, and a cause of action for the loss should be recognized in either event, at least in the absence of specific legislation expressing a contrary intent. 74

Moreover, in his opinion on original hearing and in his dissent on rehearing, Chief Justice Dixon expressly framed the issue as one for the wrongful death of a fetus. 75 In addition, judges at the appellate level 76 and Justice Dennis in his concurring opinion on rehearing 77 viewed the case as one for the wrongful death of a fetus.

Unfortunately, in granting the wrongful death action, the court did not address the issue of the unborn child's personality—not only as a general proposition in the Civil Code 78 but also in relation to the express wording of article 2315. 79 Under a broad reading of the decision, the court may have restricted the effects of legal person-

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72. LA. CIV. CODE art. 2315, para. 1.
73. 402 So. 2d at 638 n. 5.
74. Id. at 638.
75. Id. at 634, 639 (Dixon, C.J., on original hearing and in dissent on rehearing).
77. 402 So. 2d at 639. Justice Dennis joined the court's opinion fully but also concurred for the reasons given by Judge Lottinger in his concurring opinion for the court of appeals.
78. See text at notes 30-36, supra. Both articles 28 and 29 are placed in Book I, Title I of the Civil Code, which provides a general treatment of the distinctions of persons.
79. See note 60, supra.
ality, insofar as it defines the capability of acquiring rights,\textsuperscript{80} to inheritance matters only.\textsuperscript{81} If more narrowly read, the opinion may indicate that personality is unnecessary only for purposes of wrongful death recovery. The court did not articulate clearly which reading is correct.

If the former reading is the correct one—that is, that lack of legal personality affects only inheritance rights—then the court’s rationale warrants closer examination in relation to the survival action in article 2315.\textsuperscript{82} When one who has been tortiously injured dies, for whatever reason, before his cause of action against the tortfeasor has prescribed, a right of action to sue for the victim’s damages passes on to certain enumerated beneficiaries.\textsuperscript{83} Thus, if a stillborn acquires a cause of action for his prenatal injuries, due to the effects of legal personality, then his parents acquire the right to sue for those same injuries as survivors of the stillborn child.

If the latter reading is correct—that wrongful death recovery alone is unaffected by the unborn’s lack of legal personality—then the court’s rationale is not completely consonant with earlier Louisiana prenatal cases. \textit{Cooper v. Blanch}\textsuperscript{84} broadly construed article 29 to grant a cause of action for prenatal injuries either to the child or to his survivors if the child should subsequently die.\textsuperscript{85} The court in the instant case, however, refused to apply article 28—a statute \textit{in pari materia} with article 29\textsuperscript{86}—to articulate 2315 because of a perceived lack of legislative intent. In fact, no mention was made of article 29.

\begin{itemize}
  \item \textsuperscript{80} S. LITVINOFF & W. TÊTE, \textsc{Louisiana Transactions: The Civil Law of Juridical Acts}, § 7 at 2 (1969). \textit{See also} Gordon, \textit{supra} note 2, in which the author states, “Law requires some definite clear-cut lines, particularly one which heralds the beginning of legal personality. It is inaccurate to characterize the law of status as arbitrary, if that word is ever to have any meaningful content.” \textit{Id.} at 593.
  \item \textsuperscript{81} “The fact [of birth] may well have importance in inheritance matters, but is without relevance to a decision of whether or not to recognize a cause of action for wrongful death.” 402 So. 2d at 638 n.5.
  \item \textsuperscript{82} See notes 60 & 66, \textit{supra}.
  \item \textsuperscript{83} \textit{In Guidry v. Theriot}, 377 So. 2d 319 (La. 1979), the Louisiana Supreme Court held that article 2315 grants to the enumerated beneficiaries two separate and distinct causes of action. The \textit{survival} action allows the beneficiaries the right to recover the damages the victim suffered and would have been entitled to recover had he lived. The \textit{wrongful death} action allows the same beneficiaries the right to recover for the damages they have sustained as a result of the victim’s wrongful death. For further discussion, see Johnson, \textit{Death on the Callais Coach}, \textit{supra} note 67; Comment, \textit{Survival of Actions in Article 2315 of the Louisiana Civil Code: The Victim’s Action and the Wrongful Death Action}, 43 \textsc{TUL. L. REV.} 330 (1966); Comment, \textit{Rights of Children to an Action for Wrongful Death Under Article 2315}, 14 \textsc{TUL. L. REV.} 612 (1940).
  \item \textsuperscript{84} 39 So. 2d 352 (Orl. App. 1923) (unreported until 1949).
  \item \textsuperscript{85} \textit{See text at notes 31-33, supra}.
  \item \textsuperscript{86} \textit{See text at note 76, supra}.
\end{itemize}
How the one article can be applicable when the other is not in unclear.\textsuperscript{87} If article 29 does not apply to article 2315 tort liability, then the court must re-evaluate the basis of recovery for prenatal injuries when the child lives. If article 29 does apply, then the court’s rationale in the instant case is inconsistent with that of Cooper \textit{v.} Blanck.\textsuperscript{88}

A third, less obvious interpretation of the case is that the court, through the use of the principles of article 21 of the Louisiana Civil Code, has created a narrow exception to the requirement that a child be born alive before the effects of personality may accrue. Article 21 provides that “in all cases where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, and received usages, where positive law is silent.”\textsuperscript{89} The court specifically based its decision on a “logical resolution of a problem in which the Legislature has not specifically expressed its intent to authorize or prohibit such recovery.”\textsuperscript{90} According to article 21, this lack of legislative intent would be equivalent to an absence of express law, thereby authorizing a resort to equity. In its conclusion, the court declared that the arguments “favoring recovery more fully satisfy the

\textsuperscript{87.} Article 29 was adopted in its present form from the \textit{Projet} of the Code of 1825 and has remained unchanged for 157 years. Whatever intention the legislature had in enacting article 28, also adopted from the \textit{Projet}, must have been the same for article 29. \textit{See} 1972 \textit{Compiled Editions of the Civil Code of Louisiana} arts. 28 & 29 (J. Dainow ed.). Professor Stone has argued the amendment to article 2315 by Act 71 of 1884 also amended article 28 in order to provide for wrongful death recovery for fetuses. F. \textit{Stone}, \textit{Tort Doctrine}, in 12 \textit{Louisiana Civil Law Treatise} § 63 (1977). The court, however, rejected this argument, again on the basis of an absence of legislative intent. 402 So. 2d at 638 n.3. \textit{But see} Deason \textit{v.} State Farm Mut. Auto. Ins. Co., 386 So. 2d 146 (La. App. 3d Cir. 1980) (following Professor Stone’s argument).

\textsuperscript{88.} 39 So. 2d 352. In a footnote, the court stated that “the fact [that a child is stillborn] may well have importance in inheritance matters, but it is without relevance to a decision of whether or not to recognize a cause of action for wrongful death.” 402 So. 2d at 638 n.5. Arguably, then, birth is irrelevant also to the survival action, a tort action not dependent on inheritance.

On original hearing, and in dissent on rehearing, Chief Justice Dixon argued that a cause of action is a property right that arises through the operation of law. 402 So. 2d at 623, 639, (citing \textit{La. Civ. Code} art. 870.) Ownership of property and rights in property are limited to natural or judicial persons. \textit{La. Civ. Code} art. 479. Thus, in order for a fetus to own a cause of action for its own injuries, it must be a “person.” A fetus cannot acquire property through inheritance unless he is born alive, though he may die later. \textit{La. Civ. Code} arts. 954-957. But the Code articles defining capacity for inheritance do not apply to property rights acquired through operation of law. The only other articles discussing the fetus’ personality are articles 28 and 29, which according to the court’s rationale in the instant case, cannot apply to tort. An unborn child, then, cannot sue for its prenatal injuries; hence, the inconsistency.

\textsuperscript{89.} \textit{La. Civ. Code} art. 21.

\textsuperscript{90.} 402 So. 2d at 638.
logical reasoning and application of the natural law."\textsuperscript{91} This language is a close parallel to article 21's definition of equity. Although the court made no specific reference to article 21 in the decision, such language perhaps indicates at least an implicit reliance on equity.\textsuperscript{92} Under this analysis, although article 28 determines when legal personality commences in general, it has no specific application to an action for the wrongful death of a fetus. Being therefore faced with a situation in which the legislature has offered little guidance and in order to effectuate public policy, the court has declared that an action for the wrongful death of a "person" includes an action for the wrongful death of a fetus.

Whether the specific theory of recovery derives from the first paragraph of article 2315, from wrongful death, or from equity, as a matter of legislative interpretation, the court in the instant case may have inappropriately and even unnecessarily restricted the application of article 28 (and arguably article 29 as well). A court may legitimately construe a statute, "when its expressions are dubious," with reference to legislative intent.\textsuperscript{93} However, "when a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit."\textsuperscript{94} Further, "laws in pari materia . . . must be construed with a reference to each other."\textsuperscript{95} Finally, a court may not distinguish between odious or favorable laws "with a view of narrowing or extending their construction."\textsuperscript{96} The application of article 28 may or may not be deleterious to wrongful death recovery, depending on its construction with other articles in pari materia. However, the wording is both express and clear. Thus, the court's reliance upon the absence of the legislative intent to apply article 28 to wrongful death actions to support the conclusion that the Civil Code neither expressly nor impliedly denies recovery is at

\textsuperscript{91} Id. at 639.
\textsuperscript{92} For a general discussion of equity in Louisiana see Barham, Methodology of Civil Law in Louisiana, 50 Tul. L. Rev. 474 (1976); Sanders, The Judge: The Extent and Limit of his Role in a Civil Law Jurisdiction, 50 Tul. L. Rev. 511 (1976); Stone, The So-Called Unprovided For Case, 53 Tul. L. Rev. 93 (1978). See also Stone, Tort Doctrine in Louisiana: The Concept of Fault, 27 Tul. L. Rev. 1 (1952), wherein the author states, "It is fair to say that the development of the Louisiana law of delictual responsibility in its formative period came principally through the use of article 21. . . . This is not to say that all early judges, in their decisions on matters where the positive law was silent, made specific reference to Article 21. Only a few of them did." Id. at 5 (footnotes omitted).
\textsuperscript{93} LA. CIV. CODE art. 18.
\textsuperscript{94} LA. CIV. CODE art. 13.
\textsuperscript{95} LA. CIV. CODE art. 17.
\textsuperscript{96} LA. CIV. CODE art. 20.
least questionable." On the other hand, as a matter of social policy, a "judge's sense of justice sometimes requires him . . . to improvise a new solution beyond any implied or authorized legislation."98

Perhaps a better disposition of the case is found in a broad construction of article 29, as made by the Orleans Court of Appeals in Cooper v. Blanck.99 In referring to the amendment of article 29 in 1825,100 the court noted that "the words of limitation found in the original text of the article have been omitted and that since the adoption of the code of 1825, children en ventra sa mere are considered born 'in whatever relates to themselves.' This language used is of the most sweeping character."101 Dismissing the argument that article 29 applied only to succession matters, the court further noted that "the use of an illustration concerning property rights . . . would naturally be the most frequent application of the principle and consequently would most readily occur to the minds of the author."102 A

97. See text at note 52, supra.
98. Tate, The "New Judicial Solution": Occasions for and Limits to Judicial Creativity, 54 Tul. L. Rev. 877, 913 (1980). He explains further:

In abstract theory, I cannot easily justify this sort of judicial activism. . . . However, I can perhaps explain its occurrence, even among judges with strong feelings of fidelity to legislative supremacy in policy-choice; the judge with an oath to serve justice under the law, is confronted with an unfair result or a socially unworkable rule that he does not believe the legislature would have intended, had it foreseen the particular factual or social circumstances before the court.

Id. at 913.
99. 39 So. 2d 352.
100. La. Civ. Code art. 7 (1808), amended without comment by the redactors of the Civil Code of 1825, provided:

Children in their mother's womb, cannot be reckoned among the number of children, not even for the purposes of imparting to the father, the rights and advantages which the law may grant to parents on account of the number of their children.

Yet the hope that such children may be born alive, causes them to be considered in whatever relates to themselves, as if they were already born; thus the inheritances which fall to them, before their birth, and which belong to them, are kept for them, and curators are assigned to take care of their estates for their benefit.

(Emphasis added). See 1972 Compiled Editions of the Civil Code of Louisiana art. 29 (J. Dainow ed.).
101. 39 So. 2d at 360.
102. Id. Articles 28 and 29 originate from Las Siete Partidas, a codification of Spanish law from the late middle ages. The history of article 28 in Judge Lottinger's concurring opinion in the appellate decision of the instant case is used to illustrate that Spanish law meant to apply that article only to inheritance matters. 383 So. 2d at 1024. The source of article 29 is cited in a footnote with no discussion of the corresponding language used in the Spanish Code. 383 So. 2d at 1025 n.4. The source of article 29 provides in part, "While a child is unborn it will profit by everything which is done or said for its advantage, just as if it were born, but whatever is said or done to the injury of its person or property will be of no effect." Las Sieta Partidas bk. 4, tit. 23, 1. 3 (Scott trans. 1931) (emphasis added). The amendment of article
broad construction of article 29 would modify article 28 to the extent that an unborn child is a "person" for all matters that relate to it, while leaving intact the requirement of live birth for inheritance rights. 103

Moreover, this construction logically extends tort coverage to include a survival action for the unborn child's injuries. If an unborn child can be deemed already born for purposes of the wrongful death action, which compensates the survivors for their own injuries, caused by the death of the fetus, then, a fortiori, the unborn child should be deemed already born for purposes of a survival suit based upon a tortfeasor's interference with the fetus' right to life. 104

A separate question, though stemming from the analysis of the court's theory of recovery, concerns the extent of the precise holding of the case. First, viability should not be a requirement for recovery. The court relied upon the recent criminal code amendment defining a person as a human being from the moment of conception as legislative support for granting recovery. Moreover, although at common law all but one of the states allowing recovery for the wrongful death of a fetus still adhere to the viability limitation, the viability requirement is no longer consistent with established medical authority. 105 Further, prior Louisiana decisions of prenatal cases, in-

29 in 1825 appears to have brought that article more in line with its Spanish origin and further supports the argument that article 29 is to be applied generally throughout the Code.

103. The requirement of live birth is handled specifically by articles 954-957 of the Civil Code; no violence would be done to those provisions. Such a construction also would supply a better theoretical justification for a denial of a father's suit for his unborn child's wrongful death action for the death of its mother, which right the fetus would acquire under article 29 but would be unable to transmit to his heirs due to articles 954-957. See Diefenderfer v. La. Farm Bureau Mut. Ins. Co., 383 So. 2d 1032 (La. App. 1st Cir. 1980) (the fetus outlived its mother by a few minutes in the womb, but the fetus' wrongful death suit was denied).

104. A survival suit for a stillborn would be no more of a windfall to the survivors than would a survival suit for a child who lives only a few minutes outside the womb. See Cooper v. Blanck, 39 So. 2d 353. Moreover, by the court's own argument in the instant case, difficulty of the proof of damages or possibility of fraudulent claims should not bar a valid claim. See text at note 53, supra.

105. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (injury was to a two and one-half month old fetus). Rejection of the Dietrich-Allair rationale that an unborn is a part of its mother until birth was predicated on the recognition that medical authority regarded a viable fetus as a separate entity. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). Now that medical authority recognizes the biological independence of the fetus from the moment of conception, there seems to be little justification for maintaining the viability requirement. See generally Note, Prenatal Injuries, 18 Vand. L. Rev. supra note 28; Note, supra note 2; Note, supra note 14. But see Gordon, supra note 2; Comment, Developments in the Law of Prenatal Wrongful Death, 69 Dick. L. Rev. 258 (1965).
plicitly affirmed by the instant case, involved pre-viable, unborn children. Second, if the action granted is one for wrongful death, then recovery should not be restricted to the parents. The same considerations favoring recovery for the parents' loss apply equally to the compensation of any surviving siblings.

Finally, some mention should be made of the ramifications of *Roe v. Wade* and a women's constitutional right to an abortion upon the result of decisions like the instant case. An anomaly exists in the treatment of the fetus as a person by the state for purposes of tort recovery and in the holding in *Roe* that a fetus is not a "person" within the meaning of the fourteenth amendment to the United States Constitution. The apparent conflict between the two interests is sharply illustrated in a situation where a husband seeks to sue for the wrongful death of his aborted child. Unfortunately, the courts have no clear guidance for a proper resolution of the issue.

106. See *Stewart v. Arkansas Southern R.R. Co.*, 112 La. 764, 36 So. 676 (1904) (mother was two and one-half months pregnant at time of injury); *Ezell v. Morrison*, 380 So. 2d 664 (La. App. 4th Cir. 1980) (mother four and one-half months pregnant); *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. Ori. Cir. 1951). The appellate decision of the instant case specifically rejected "viability as a controlling factor." 383 So. 2d at 1029 (Lottinger, J., concurring). Presumably, the parents of Louise Brown could sue in products liability in Louisiana for the wrongful death of their child caused by a defective test tube.

107. See text at note 66, supra. Since a fetus can neither marry nor bear offspring, the only applicable class of beneficiaries would be parents and siblings.

108. The point is illustrated in the case of a young teenager, an only child, whose expectations of a brother or sister are dashed when his father and pregnant mother are tragically killed in an automobile accident.

109. 410 U.S. 113 (1973). The woman's right to an abortion is subsumed in the woman's fundamental right to privacy. *Id.* at 152-156.

110. *Id.* at 161-62.

111. See Legislative Symposium: Torts, 37 LA. L. REV. 1, 118 n.34 (1976), where the question is raised in connection with a spouse's right to sue his spouse's liability insurer, and in connection with a father's right to sue for the wrongful death of his illegitimate. See also Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971), wherein the author queries: Will the pregnant woman who is hit by a negligent driver while she is on her way to the hospital to have an abortion still have a cause of action for the wrongful death of her unborn child? If so, how is it possible for the law to say that a child can be wrongfully killed only hours before he can be rightfully killed? *Id.* at 369.

112. One author suggests that the apparent conflict of the two interests is "superficial": Assuming that the woman's right to terminate her pregnancy is but an aspect of her overall right to determine the outcome of her pregnancy, she would also have a constitutionally protected right to continue the pregnancy to delivery free from state interference not necessary to further its compelling interests in protecting the health and life of the woman and in protecting the potentiality of
However, a similar anomaly does not exist with regard to the viability issue. According to Roe v. Wade, though a fetus may represent only the "potentiality of life,"113 viability only marks the point at which the state's interest in protecting maternal and fetal life becomes compelling enough to justify interference with a woman's fundamental right to an abortion.114 Viability does not under Roe mark the beginning of legal personality. On that basis, Roe v. Wade is distinguishable from a decision to allow recovery for the wrongful death of a non-viable fetus where the personality of the fetus depends upon biological independence.115

From the standpoint of social policy, the decision in Danos v. St. Pierre achieves a just solution, although the theory of recovery has raised certain questions that undoubtedly will necessitate future judicial explanation. Nevertheless, compensation for the loss of one's unborn, in many cases, "marks the difference between a happy, peaceful and contented existence and a leaden footed march through life's pathway,"116 and for that the court is to be applauded.

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life represented by the unborn. While the Constitution would not prohibit purely private interference with the woman's right to continue her pregnancy to term, it also would not, under Roe v. Wade's reasoning, prohibit a state from protecting that right by recognizing and enforcing money judgments for harm caused by interference with the woman's right. Thus, at least in the context of the wrongful death action, which generally benefits the parents of the deceased child, recognition of a right to sue for the death of the fetus—both before and after birth—would have the effect of protecting the woman's constitutionally protected right to continue her pregnancy to term.

Kader, supra note 2, at 664-65.
113. 410 U.S. at 162.
114. Id. at 163.
115. See text at notes 20 & 104, supra. See Kader, supra note 2, at 659-60:
The viability or nonviability of the fetus may be determinative if the question is the woman's right to terminate its existence in the exercise of her individual right to privacy. But it is certainly not determinative, or even relevant, if the question is the ability of the tortfeasor to escape liability for his acts.
If the mother can intentionally terminate the pregnancy at three months without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at that same stage. There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.
65 Mich. App. at 303-04, 237 N.W.2d at 301 (footnotes omitted).