Wartelle v. Women's and Children's Hospital: A Fate Worse than Wrongful Death: Legal Nonexistence for the Stillborn Child

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NOTES

Wartelle v. Women’s and Children’s Hospital: A Fate Worse than Wrongful Death: Legal Nonexistence for the Stillborn Child

If a viable fetus is a “person injured” at the time of the injury, then [a fortiori] the fetus is a “person” when he dies of those injuries, and it can make no difference in liability under the wrongful death and survival statutes whether the fetus dies of the injuries just prior to or just after birth. To hold otherwise would perpetuate the very evils the statutes were intended to prevent—that an injury would be inflicted for which no remedy existed and a tortfeasor would escape liability by inflicting injury so severe that death results.

I. INTRODUCTION

In Danos v. St. Pierre, the Louisiana Supreme Court established the right of parents to recover for the wrongful death of their stillborn fetus who died because of prenatal injuries caused by the negligence of another. A logical extension of that ruling would seem to allow parents to bring a survival action for the prenatal injuries suffered by the fetus itself. However, in Wartelle v. Women’s and Children’s Hospital, the Louisiana Supreme Court refused to establish that right, holding that a stillborn fetus is not a person for the purposes of either the survival action or bystander damages. It is this author’s contention that the supreme court was wrong in both instances.

The supreme court indicated that it is up to the legislature to recognize a stillborn fetus as a person for the purposes of the survival action and bystander damages. This article addresses the bases upon which the supreme court could have upheld the Third Circuit’s decision in recognizing those actions and upon which the legislature should now act to clarify the law. These bases will be found in the legislative intent, the Civil Code, and Louisiana jurisprudence. This

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article examines the status of the legal personality of the fetus, whether viability of the fetus should play a role in defining that status, and how the decision on viability could affect abortion issues. It analyzes the survival action statute from the view point of an inheritance right and of a non-abatement issue. While this article focuses on the survival action, it also addresses the court's ruling on the Wartelles' claim for bystander damages and reviews the development of that action in Louisiana. Finally, the article explores what other states have decided on the issue of the survival action in order to put the Louisiana decision in a national perspective.

II. THE CASE

Kristine Wartelle was admitted to the hospital in labor at the conclusion of a normal, full term pregnancy. A fetal heart monitor, initially used on Mrs. Wartelle to monitor the fetus' heart rate, was negligently removed for approximately ninety minutes. During that critical time, the fetus went into distress, a condition which remained undetected due to the removal of the monitor, until it was too late to save the baby. The parents brought suit under the wrongful death statute for the loss they suffered from the wrongful death of their baby and for mental anguish (i.e. Lejeune damages or bystander damages) for viewing the

4. La. Civ. Code art. 2315.2 provides:
A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:
   (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;
   (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving; and
   (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving.
B. The right of action granted by this Article prescribes one year from the death of the deceased.
C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.
D. As used in this Article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

5. La. Civ. Code art. 2315.6. The mental anguish damages for viewing the act that caused the injury is called Lejeune damages in Louisiana, so named after the case that granted it. See Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990). The result was codified in Article 2315.6 which states:
A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:
   (1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.
   (2) The father and mother of the injured person, or either of them.
   (3) The brothers and sisters of the injured person, or any of them.
chain of events beginning with the replacement of the fetal monitor which failed to detect a heart beat and culminating with the pronouncement of death and the posthumous baptism of the child they named Ashley. The parents also brought a survival action for the pain and suffering that the baby endured during its distress.

The trial court granted an exception of no cause of action as to the survival action, holding the fetus was not a person for the purposes of Louisiana Civil Code article 2315.1. After a trial on the merits, the parents were awarded $250,000 in damages, subject to a credit for the $100,000 already tendered by the Patient's Compensation Fund, as well as special damages. Both parties appealed. The Third Circuit affirmed the $250,000 general damages award, found the trial court erred in dismissing the survival action, and remanded the case to determine damages. The trial court granted the parents $5000 in bystander damages under Louisiana Civil Code article 2315.6. On rehearing, the appellate court increased the bystander damages to $25,000 per parent and also awarded $50,000 in survival action damages for the fetus' pain and suffering. The Louisiana Supreme Court reversed on both the bystander damages and the survival action and remanded the case to the trial court to fix the damages consistent with its ruling.

(4) The grandfather and grandmother of the injured person, or either of them.
B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable. Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article.

6. La. Civ. Code art. 2315.1. The full text of the article states:
A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense, shall survive for a period of one year from the death of the deceased in favor of:
   (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;
   (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving; and
   (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving.
B. In addition, the right to recover all damages for injury to the decedent, his property or otherwise, caused by the offense or quasi-offense, may be urged by the decedent's succession representative in the absence of any class of beneficiary set out in the preceding paragraph.
C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.
D. As used in this Article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.
III. ANALYSIS OF THE SURVIVAL ACTION

A. Legislative Intent and the Civil Code

1. Survival Action

The statute central to the issue in this case is the survival action, which states in relevant part:

A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense, shall survive for a period of one year from the death of the deceased in favor of:

* * * *

(2) The surviving father and mother of the deceased. . . .”

The survival action and the wrongful death actions both relate to the same tortious incident, but the damages cover different injuries arising at different times. The survival action arises at the time of the injury itself and compensates the victim for the pain and suffering he endures until the time of his death. The action then survives to the enumerated beneficiaries. It does not die with the victim. The wrongful death action arises at the time of the victim’s death. It compensates the enumerated beneficiaries for their own loss of consortium and financial support caused by the death of the victim. Louisiana courts have long recognized the wrongful death action for the stillborn fetus but, until the Third Circuit decision in Wartelle, had not recognized the survival action for the stillborn fetus. The controversy centers around whether a stillborn fetus has the requisite legal personality to acquire the survival action.

2. Natural Personality

The general rule defining natural personality is found in Louisiana Civil Code article 25, which states: “Natural personality commences from the moment of live birth and terminates at death.” An exception to the general rule is found in Louisiana Civil Code article 26: “An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person except for purposes of actions resulting from its wrongful death.” The fictional personality


8. The exception contained in the last sentence of the article codified the Louisiana Supreme Court ruling in Danos v. St. Pierre, 402 So. 2d 633 (La. 1981) (emphasis added).
of the fetus existing from the moment of conception is wiped out if the child is
born dead.9

3. How Natural Personality Affects the Survival Action

In his majority opinion in the Wartelle decision in, Justice Marcus noted that
the exception stated in the first sentence of Article 26 allows the fetus to acquire
a cause of action and to inherit while en ventre sa mere.10 The second sentence
places a limitation on the exception (the born alive rule), but also provides a
narrow exception to the limitation (except in cases involving wrongful death).
A fetus can acquire a cause of action or can inherit only if it is subsequently
born alive. "Because [the fetus] is born dead, it is as though it had never existed
and the cause of action it acquired conditioned on live birth is considered as
never having been acquired."11 Citing Taylor v. Giddens,12 the supreme court
explained that a survival action is based on the victim's right to recover being
transmitted to the beneficiary upon the victim's death. Since the stillborn fetus
acquires no rights, it can transmit none.13

4. Why the Louisiana Supreme Court was Wrong

In reaching this conclusion, the majority failed to give full significance to
the exception to the born alive rule stated in Article 26. The majority also failed
to interpret the article within the broad framework of existing law and current
legislative intent. In his dissenting opinion, Justice Lemmon reiterated the
reasoning used in Danos v. St. Pierre that it is illogical to relieve a tortfeasor
of liability because he so seriously injures a viable fetus that it dies just before
birth, rather than immediately after birth. He stated, "When the Legislature
heeded that reasoning by this court and amended Article 26 to add the pertinent
language, the lawmakers clearly reserved all actions resulting from a tort
committed on a viable fetus that caused the fetus wrongfully to be born dead."14

The use of the plural "actions" supports the view that the legislature intended
to include all actions arising from the wrongful death, extending coverage to the
survival action arising from the same incident.15 The majority concluded that

10. This phrase is French and means "in its mother's womb," a term describing an unborn
child, according to Black's Law Dictionary.
13. Wartelle, 704 So. 2d at 781.
14. Id. at 786.
15. See La. Civ. Code art. 11. It is presumed that every word, sentence or provision
in law was intended to serve some useful purpose, that some effect is to be given to each
such provision, and that no unnecessary words or provisions were used. Sanchez v. Sanchez,
582 So. 2d 978 (La. App. 1st Cir. 1991). The assumption is that all parts of a statute,
each word, each phrase, and each clause were intended by the Legislature to have some
the survival action arose before death and, therefore, did not result from the wrongful death of the fetus. The majority cites Thomas J. Andre’s article as providing an extensive discussion of both actions and the damages recoverable under them. Justice Lemmon points out that even that author recognized a logical extension of Danos would include a survival action in favor of a stillborn child whose death was caused by a tort.

This author disagrees with the majority’s conclusion that the survival action does not result from the wrongful death of the fetus. A logical reading and interpretation of the survival action statute shows that the action arises simultaneously with the tortious incident, but it does not “ripen” until the victim dies. The tortious incident marks the beginning time for the measurement of damages and the death marks the ending time. Without death, there could be no survival action, for the victim would bring his own action for his bodily injury and pain and suffering. Therefore, the survival action, by its very nature, results from the wrongful death of the victim. Since the victim cannot bring the claim for damages himself, the beneficiaries are allowed to do so. This is the essence of the non-abatement argument, discussed infra.

The majority interprets the language “wrongful death” in the last statement of Article 26 to modify “actions” and so limits the application of the article’s exception to wrongful death actions. However, by using ordinary rules of grammar and sentence construction, it is clear that the words “wrongful death” must modify the pronoun “its”, the word immediately preceding the language. The pronoun “its” refers back to the unborn child addressed in the article’s exception. Therefore, the legislature must have intended to create an exception for all actions associated with the death of the fetus caused by another’s tortious conduct—that is, its wrongful death—which certainly includes the survival action. Justice Lemmon stated in his dissenting opinion in Wartelle:

When the evidence presented by the survival action beneficiaries establishes that the viable fetus, more probably than not, sustained conscious pain and suffering inflicted by the death-causing tort, the survival action falls within the contemplation of Article 26 as an action resulting from the viable fetus’ “wrongful death.”

The official revision comments to Article 26 state that the stillborn child is considered a person for a wrongful death action, with no mention made of the survival action. The majority in Wartelle contended that had the legislature

meaning and that none were inserted by inadvertence. State v. Texas Co., 205 La. 417, 17 So. 2d 569 (1944).
16. Wartelle, 704 So. 2d at 782.
18. Wartelle, 704 So. 2d at 782 n.10.
19. Id. at 786.
20. Wartelle, 704 So. 2d at 786.
intended to include the survival action in the scope of the amendment to Article 26, it could have expressly provided for it. The majority reasoned that the legislature knew of the two separate actions stemming from Article 2315, since the legislature created the survival and wrongful death actions from that article just the year before. If that were true, and supposing that wrongful death modifies "actions" rather than "its," then the last sentence in Article 26 would presumably have read "... purposes of actions resulting from its wrongful death and survival." That language states mutually exclusive conditions of the child's status and strengthens the argument that wrongful death does not modify actions, as the court contends.

The supreme court in *Wartelle* rejected the plaintiff's contention that the word "actions" in Article 26 referred to different types of claims that can be brought in relation to the wrongful death of the fetus. The court interpreted the plural form of the word to mean that multiple parties can bring the action, noting that both the mother and the father could sue for the wrongful death of their unborn child. While it is true that multiple parties can recover, the recovery is sought in one suit in which all parties are joined. The same parties that can bring the wrongful death action can also bring the survival action simultaneously. Hence, those parties could bring different types of actions. It is reasonable to conclude that the plural use of the word indicates that different types of actions resulting from the wrongful death are included in the exception. When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. The purpose of the law was to protect the rights of the stillborn child in cases resulting from its wrongful death. The separation from Article 2315 of the survival action and the wrongful death action the year before Article 26 was amended supports the legislature's recognition that different types of actions are available.

Legislation is the solemn expression of legislative will. According to civilian doctrine, legislation and custom are primary sources of law. They are contrasted with secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity. In Louisiana, as in other civil law jurisdictions, legislation is superior to any other source of law. The official comments to Article 26 state that the amendment creating an exception for actions resulting from the fetus' wrongful death did not change the law. The supreme court in *Wartelle* concluded that to include the survival action under the scope of Article 26 would be contrary to legislative intent at the time the article was amended.

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22. *Wartelle*, 704 So. 2d at 782.
23. *Id.* at 782 n.11.
amended and would effect a change in the law. 28 This author contends that is an inaccurate conclusion based on revisions of abortion statutes (discussed infra) made before the amendment to Article 26. In any case, the amendment to Article 26 should be interpreted in light of today’s clear legislative intent to protect the rights of the unborn child.

A law is not frozen in time. It must be interpreted in light of prevailing meanings, usage, and legislative intent. As the Livingston Committee, charged with revising the Civil Code of 1808, noted:

The idea of forming a body of Laws, which shall provide for every case that may arise, is chimerical; the continual change which takes place in the state of Society; the new wants, new relations, new discoveries, which continually succeed each other, and which cannot be foreseen; would alone render it impossible to provide Laws for their Government. Therefore, even, if men could be found capable of framing regulations, sufficiently minute and comprehensive, to embrace all present relations, and to govern the intercourse of the present day, the System would in the course of years be as inconvenient, and as ill suited to our descendants, as the antiquated Laws, of which we complain, are now to us. 29

The Louisiana legislature made clear its intent to formulate a state policy to protect the unborn child to the extent possible through legislative action. Louisiana Revised Statutes 40:1299.35.0 30 expresses the legislative intent to regulate abortion to the extent permitted by United States Supreme Court decisions and reserves the right to return to the state’s former policy prohibiting abortions if the Supreme Court should modify or reverse those decisions or if the United States Constitution is amended to allow protection of the unborn. Louisiana declared and reaffirmed its position a) in recognizing the unborn child as a human being from the time of conception, b) in recognizing that the unborn

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28.  Wartelle, 704 So. 2d at 784.
30.  La. R.S. 40:1299.35.0 (1992) states:
It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for the purposes of the unborn child’s right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception, by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.
child is a legal person entitled to a right to life, and c) in recognizing that this right to life begins from the time of conception under the laws and Constitution of Louisiana. 31

The legislature defined an "unborn child" as "the unborn offspring of human beings from the moment of conception through pregnancy and until the termination of the pregnancy." 32 The words "termination of the pregnancy" were substituted for the words "live birth" in the 1981 amendment of Louisiana Revised Statutes 40:1299.35.1(2). 33 The legislature defined "viable" to mean "potentially able to live outside of the womb of the mother upon premature birth whether resulting from natural causes or an abortion, or otherwise, and whether that potentiality exists in part due to the provision or availability of natural or artificial life support systems." 34 The legislature intended to provide protection to the unborn child and to preserve the rights accruing to the unborn child. Furthermore, the intent was to eliminate the requirement of live birth of the child before the child was recognized as a person. Hence, the unborn child who was born dead was a person who had acquired rights and could transmit those rights to the enumerated beneficiaries under Article 2315.1.

Act 825 of the 1997 legislative session created a new cause of action for damages attributable to the termination of pregnancy, indicating that the legislative intent to protect the unborn child still exists. Louisiana Revised Statutes 9:2800.12 35 holds any person who performs an abortion is liable for a period of three years from the date of discovery of the damage with a peremptive

31. Id.
35. The full text of Louisiana Revised Statutes 9:2800.12 states:
Liability for the termination of a pregnancy

A. Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion, which action survives for a period of three years from the date of discovery of the damage with a peremptive period of ten years from the date of the abortion.

B. For purposes of this Section:

(1) "Abortion" means the deliberate termination of an intrauterine human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn child.

(2) "Damage" includes all special and general damages which are recoverable in an intentional tort, negligence, survival, or wrongful death action for injuries suffered or damages occasioned by the unborn child or mother.

(3) "Unborn child" means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy.

C. (1) The signing of a consent form by the mother prior to the abortion does not negate this cause of action, but rather reduces the recovery of damages to the extent that the content of the consent form informed the mother of the risk of the type of injuries or loss for which she is seeking to recover.

(2) The laws governing medical malpractice or limitations of liability thereof provided in Title 40 of the Louisiana Revised Statutes of 1950 are not applicable to this Section.
period of ten years from the date of the abortion. The person is liable to the mother for injuries suffered by the mother or the unborn child and for damages which are recoverable in an intentional tort, negligence, survival or wrongful death action. Explicit in the article is that the mother is entitled to bring a survival action claim for damages based on the prenatal injuries the fetus received. Implicit in the article is that the fetus acquired the survival action, did not lose it upon death, and was able to transmit it to the mother.

B. Jurisprudence

1. The Unborn Child is a Person

The supreme court in Wartelle decided that a stillborn fetus did not constitute a person for the purposes of the survival action statute.\(^3\) The reporter for the committee working on the revision of Article 26 stated that the amendment reflected jurisprudence that allowed for the recovery of damages for the wrongful death of the unborn child, referring to the codification of the Danos decision.\(^3\) The court concluded that since no survival action had been granted for a stillborn fetus at the time of the revision, then that action was excluded from coverage in the article.\(^3\) This reasoning is weak at best since the issue of whether to grant a survival action for a stillborn fetus had not yet been fully explored. The supreme court in Wartelle cited Diefenderfer\(^3\) as the only case directly on point and noted that the First Circuit denied the action in that case.\(^3\) The strength of this authority is questionable since the Louisiana Supreme Court granted a writ to review that decision as a companion case to Danos. However, the case settled before it was heard. Arguably, Judge Lottinger's dissenting opinion in Diefenderfer, which relies on the reasoning in Danos, and the dicta in the Danos appellate decision are at least as persuasive as the majority opinion in Diefenderfer, especially since the supreme court upheld Danos. Since there was no definitive jurisprudence on the issue of the survival action for the stillborn child at the time Article 26 was amended, the argument to limit the interpretation of the amendment to the wrongful death action is not compelling.

A historical review of Louisiana jurisprudence which involves injuries to the unborn child can begin with Cooper v. Blanck.\(^4\) In that case, the Louisiana Supreme Court recognized that:

\begin{quote}
a viable foetus capable of sustaining independent existence, including a foetus en ventre sa mere in ninth month of gestation, is a “child” for
\end{quote}

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36. Wartelle, 704 So. 2d at 781.
37. Wartelle, 704 So. 2d at 782-83 and n.14.
38. Wartelle, 704 So. 2d at 783-84.
whose negligent killing an action may be maintained and who obtains
a right of action against one whose negligence caused the injury, which
survives to [the] parents. 41

Cooper involved a near term fetus who was injured by falling plaster and was
born alive but survived only three days. 42

The Cooper court noted the long standing difference between civil law and
common law treatment of a fetus. Common law commentators criticized civilian
law treatment of the unborn child as a person. 43 The source of the criticism
was Louisiana Civil Code article 29 (1870), which stated:

Children in the mother's womb are considered, in whatever relates to
themselves, as if they were already born; thus the inheritances which
devolve to them before their birth, and which may belong to them, are
kept for them, and curators are assigned to take care of their estates for
their benefit. 44

However, Louisiana Civil Code article 28 (1870) specifically addressed the
stillborn child in providing that "[c]hildren born dead are considered as if they
had never been born or conceived." 45

The Cooper court concluded that Article 29 referred not only to successions
but also to wrongful death. 46 The case cited examples where a child was allowed
to bring timely suit for wrongful death of the father, which occurred before the
child was born. 47 Under the Cooper reasoning, an inheritance right, including a
survival action, would pass to the surviving parents or siblings if the child died

41. Id.
42. Id.
43. Id. at 357.
44. Our present day Article 26, cited supra, is based in part on Article 29 (1870).
45. See supra note 44.
46. Cooper, 39 So. 2d at 358.
47. Cooper, 39 So. 2d at 360. See Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768
(1918) (where the Louisiana Supreme Court held that a right of action survived to the child en ventre
sa mere and that it could recover after its birth for the wrongful death of its father). The Louisiana
Supreme Court misstated the holding in Badie. In that case, the plaintiff and the accident victim
were married shortly after he was injured. She was pregnant at the time. Two months after the
accident, the victim died from typhoid fever. The child was born after his death. The wife sued only
for the decedent's injuries—not for any loss she or the child suffered. Therefore, the court decided
it was irrelevant whether the mother had failed to overcome a presumption that the decedent was not
the child's father or that the mother had not been appointed the child's tutrix. The defendant could
not complain that some of the damages award would be allocated for the child's benefit. The court
alluded, however, that the mother, on behalf of the child en ventre sa mere, could have sued for
the father's wrongful death had these issues not been present. See also Cooper, 39 So. 2d at 359 for
reference to the English case of The George and Richard, 3 Adm. & Ecc. 466, decided in 1871
(where a child en ventre sa mere, if born in time, could maintain an action for wrongful death of its
father).
after a live birth. If the child was born dead, then all inheritance rights would be wiped out and nothing would pass from the child to his surviving heirs.

The Cooper court specifically ruled that Article 29 was not limited to inheritance rights. It applied to the acquisition of property rights, and a cause of action was a property right. The court said that for a prenatal injury to a child, if the child survives the birth, the child may bring an action under Article 2315. If the child dies before birth, the parents can bring an action for its death.48

The survival action is best treated as a property right. If the survival action is treated as an inheritance right, then to allow a stillborn fetus to bring a survival action would contradict the reasoning of this court since the child born dead never acquired any rights. Furthermore, viewing it as an inheritance right would break through the strict confines of the enumerated beneficiaries in the wrongful death action. Suppose a mother and child were killed in an accident where the child briefly survived the mother before its birth. The child could acquire a survival action for its own injuries, as well as a wrongful death action for the loss of its mother. Suppose further that the parents of the child were not married so that the father would be precluded from bringing his own wrongful death action as to the death of the mother. It would now be possible for him to inherit both the survival action and the child’s wrongful death action. This result was rejected by Diefenderfer v. Louisiana Farm Bureau Mutual Insurance Co.,49 a companion case to Danos v. St. Pierre,50 which settled before it was heard by the supreme court. The First Circuit in Diefenderfer held that the father could recover damages for the loss of his stillborn child but did not have a cause of action to recover for the personal injuries suffered by the unborn child itself.51 Furthermore, the unborn child, which briefly survived the death of its mother while still in the womb, had no cause of action for the wrongful death of its mother.52

2. Wrongful Death of the Fetus

Danos and its progeny stand for the proposition that a stillborn fetus is a person for the purposes of the wrongful death statute.53 In that case, a mother delivered a stillborn seven month old fetus who died of prenatal injuries sustained in a car accident.54 In holding that a stillborn fetus was a person for

51. Diefenderfer, 383 So. 2d at 1034.
52. Id.
53. Danos, 402 So. 2d at 639.
54. 383 So. 2d at 1020.
presents the wrongful death statute, the Louisiana Supreme Court in *Danos* cited the following reasons for allowing recovery:

1. It would be totally illogical and arbitrary to condition liability upon birth.
2. Denial of recovery would benefit the tortfeasor, making it better to kill rather than injure the fetus.
3. The Louisiana Criminal Code in Acts 1976 defined a person as a human being from the moment of fertilization and implantation, indicating a legislative intent to apply the laws to unborn children.  

The supreme court rejected the contentions that difficulty in proving causation and damages and the possibility of fraudulent claims were justifiable reasons for denying the cause of action.  

The *Diefenderfer* dissent cited the same reasons for recognizing a survival action for the stillborn fetus.  

Judge Ellis, in his concurring opinion in *Diefenderfer*, reasoned it was "unnecessary to classify a fetus as a person, thing, or non-person in order to reach the result herein," concluding that Louisiana Civil Code articles 28 and 29 precluded the acquisition or transmission of a cause of action by the stillborn fetus because it never acquired legal personality.  

Ironically, both courts used legislative intent as a basis for their decisions, one finding no intent and the other finding clear intent. The *Diefenderfer* court relied on a lack of legislative intent to amend or repeal the articles which would allow property rights to be transmitted from or through the stillborn child, while the *Danos* court specifically cited clear legislative intent to give full protection of the laws to the unborn child as a reason for its decision. In *Diefenderfer*, Judge Lottinger dissented from the denial of a cause of action for damages suffered by an unborn child, citing the reasoning of his concurring opinion in *Danos*.

The supreme court in *Danos* stated a belief that the arguments favoring recovery more fully satisfied logical reasoning and the application of natural law.  

Under existing jurisprudence, a fetus injured or deformed by the acts of a tortfeasor can sue for its prenatal injuries if it emerges from the womb alive. If it lives for 10 days or 10 minutes or even 10 seconds outside the womb, its survivors can sue not only for the fetus’ prenatal injuries

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55. 402 So. 2d at 638.
56. *Id.*
57. *Diefenderfer*, 383 So. 2d at 1037 (Ellis, J., concurring).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Danos*, 402 So. 2d at 639.
and post-birth suffering but also for their own damages suffered as a result of the child’s wrongful death. But under the law as it stands today, a nine-month-old fetus which emerges stillborn because of a tortfeasor’s negligence is considered a nonentity, a nothing, a mass of lifeless matter for which no wrongful death recovery whatsoever is allowed. This anomalous state of affairs, carried on in modern times by the legal fiction of antiquity, can no longer be justified.63

The court could have substituted the words “survival action” for “wrongful death” and applied exactly the same rationale in Wartelle.

3. Inheritance Right or Non-abatement Statute?

The Danos opinion was ambiguous about property rights. A narrow reading of the opinion may indicate that personality is unnecessary for purposes of wrongful death actions only.64 However, a narrow reading is inconsistent with earlier Louisiana cases involving prenatal injuries. Cooper v. Blanck construed Louisiana Civil Code article 29 broadly to grant a cause of action either to the child or to his survivors if the child should subsequently die, stating that the “language used was of the most sweeping character.”65 The facts of Cooper are distinguishable from both Danos and Wartelle in that the infant was born alive.

A broad reading would indicate that the lack of legal personality affects only inheritance rights; therefore, the stillborn acquires a cause of action for his prenatal injuries which his parents can acquire as survivors of the child.66 “A 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.”67

It is not clear whether Danos itself would support a survival action for a stillborn fetus. In his appellate court opinion, Judge Ellis stated that he did not think Articles 28 and 29 were intended to cover the wrongful death action but did believe they precluded the acquisition or transmission of a cause of action by the fetus, which, by law never acquires personality if born dead.68 Justice Lemmon (the same, sole dissenter in the Wartelle decision) concluded in the supreme court opinion that “[i]t would be totally illogical and arbitrary for the cause of action to depend on whether the child lives outside the womb for a few

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63. Danos, 383 So. 2d at 1031.
65. McReynolds, supra note 64, at 1422. See also Cooper, 39 So. 2d 352, 360 (Orl. App. 1923).
66. McReynolds, supra note 64, at 1422.
67. McReynolds, supra note 64, at 1426.
68. Danos, 383 So. 2d at 1024.
minutes," but stated in a footnote that "the fact may well have importance in inheritance matters."  

The better view is actually found in Judge Lottinger’s appellate court opinion, which traced the history of those articles from Las Siete Partidas and concluded that the redactors were obviously speaking of natural rather than unnatural causes of death of the stillborn child. "Natural causes fall more into the historical examination of Article 28 and its relationship to succession and inheritances." Implying that unnatural causes of death fall under tort law and Article 2315, Lottinger concluded that Article 28 was never intended to prohibit a wrongful death action for a stillborn child. The same reasoning should apply to the survival action, supporting a broad reading of Danos. Judge Lottinger limited his holding to the wrongful death action but indicated in dicta that the holding was broader than that.  

Lottinger’s statement is further supported if the survival action is considered as a non-abatement issue rather than an inheritance issue. Non-abatement simply means that the action does not die with the victim, but may be asserted by the victim’s survivors. This idea was discussed extensively in Guidry v. Theriot. The Louisiana Supreme Court held in that case that Article 2315 supports two separate and distinct actions. Although arising from the same tortious incident, the two actions come into existence at different times. “The survival action comes into existence simultaneously with the commission of the tort and is transmitted to the beneficiaries upon the victim’s death. The wrongful death action does not arise until the victim dies.” The recoveries permitted under each action are also quite different. “The survival action permits recovery only of the damages suffered by the victim from the time of injury to the moment of death. The wrongful death action is intended to compensate the

69. Danos, 402 So. 2d at 638.  
70. Id. at n.5.  
71. Danos, 383 So. 2d at 1026.  
72. Id.  
73. Lottinger said,  
   My concurring opinion is limited to the holding that the parents of a stillborn whose death results from the negligent or intentional act of another have a right to seek damages for the wrongful death of their inchoate child under Article 2315. However, from a legal standpoint, this opinion cannot be so limited. If a fetus is a person for wrongful death purposes, it must also be considered a person for other purposes under Article 2315. Danos, 383 So. 2d at 1029-30.  
74. Guidry v. Theriot, 377 So. 2d 319, 322 (La. 1979). The holding in Guidry concerning the interruption of prescription was repudiated in Louviere v. Shell Oil Co., 440 So. 2d 93 (La. 1983). The court in Louviere held that once a suit interrupts prescription, that interruption continues during the pendency of the suit for all prescriptions affecting that cause of action, and all prescriptions start to run anew only from the last day of interruption. This repudiation did not affect the interpretation of the survival action statute.  
75. Id.  
76. Id.  
77. Id.
beneficiaries for compensable injuries suffered from the moment of death and thereafter."\(^7\)^8

No language here indicates that the survival action requires live birth for the victim’s right to bring a survival action to come into existence. Where the death of a fetus occurs as a result of another’s tortious conduct, the parents should be allowed to bring a survival action for the injury to the child. To deny the right to recover would be to deny that the damage was incurred from tortious conduct. That conclusion is illogical and inconsistent with Article 2315, the fountain head of tort recovery in Louisiana, which states that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”\(^7\)\(^9\) This article is illustrative of the strong public policy in Louisiana requiring a tortfeasor to make reparation for the injury he has caused.

Citing Guidry in Taylor v. Giddens,\(^8\)\(^0\) the supreme court reiterated that the survival and wrongful death actions, although arising from a common tort, are separate and distinct actions, each arising at a different time and addressing itself to the recovery of damages for completely different injuries and losses. The Taylor court said that the survival action is in the nature of a succession right in that it is transmitted to the beneficiaries upon the victim’s death.\(^9\)\(^1\) “A right to recover damages under the provisions of this paragraph [Article 2315] is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted or irregular heirs, whether the suit has been instituted thereon by the survivor or not.”\(^8\)\(^2\) If the survival action is a succession right, there must be a live birth under Articles 28 and 29. Classifying the survival action as a non-abatement issue, on the other hand, simply means that the right does not die with the victim and may be asserted by the beneficiaries enumerated in the statute. Under this analysis, live birth would not be a condition precedent to bringing the action.

4. Codal Support for Non-Abatement

There is clear legislative intent to treat the survival action statute as a non-abatement right. Article 2315 was amended in 1960 at the same time that the Louisiana Code of Civil Procedure was enacted.\(^8\)\(^3\) Louisiana Code of Civil Procedure article 428 provided that an action did not abate on the death of a party unless it was a right or action which was strictly personal.\(^8\)\(^4\) “The

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78. *Id.*
81. *Id.* at 840.
82. *Guidry*, 377 So. 2d at 321 (citing La. Civ. Code art. 2315 (1960)).
83. *Id.* at 323.
84. *Id.* La. Code Civ. P. art. 428 states that: “An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal.”
legislative intent as noted in the official revision comments was to 'abrogate the harsh jurisprudential' rules and 'to attain the original objectives of the Livingston committee' which drafted the 1825 Codes,' thereby effectuating the Livingston committee's intent to prevent Louisiana courts from applying the common law rules on abatement and survival of actions. Prior to the amendment in 1855 of the predecessor of current Article 2315, Louisiana courts did in fact adhere to the Livingston committee's intentions and rejected the idea that a personal action for tort damages died with the victim. Despite legislative intent and earlier jurisprudence, however, later courts allowed the common law rule of abatement to be imported into Louisiana jurisprudence, an effect which was expressly abrogated by Article 428.

Article 428 provides an exception for a strictly personal right or action, which does abate upon the victim's death. Former Louisiana Civil Code article 1997 (1870) provided that "an obligation is strictly personal when none but the obligee can enforce its performance, or when it can be enforced only against the obligor." Louisiana Civil Code article 1999 (1870) stated that "every obligation shall be deemed heritable as to both parties, unless the contrary be specifically expressed, or necessarily implied from the nature of the contract.

Article 2315 expressly transmits the survival action to beneficiaries, a circumstance not indicative of a strictly personal action. Although it must be conceded that only a limited class of beneficiaries is established, this affects only the right of heritability, not the nature of the right inherited. . . . It taxes our imagination to conclude that a right which is heritable by a designated beneficiary and when acquired is transmissible to his heirs, is personal to the tort victim in whose favor the right originally arose.

Only if the stillborn fetus' right to recover for tortious damages is strictly personal can the court deny the stillborn fetus the right to transmit his survival action upon his death.

Neither Louisiana Code of Civil Procedure article 428 nor Louisiana Civil Code article 2315 expressly states or necessarily implies that the stillborn fetus

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85. Edward Livingston, Louis Moreau-Lislet, and Pierre Derbigny were given the task of revising the Louisiana Civil Code of 1808.
86. Guidry, 377 So. 2d at 323.
89. Id.
90. Id. at 323.
91. See La. Civ. Code art. 1766, paragraph 1 for the current location of this text.
92. Guidry, 377 So. 2d at 323.
93. See La. Civ. Code art. 1765, paragraph 2 for the current location of this text.
94. Guidry, 377 So. 2d at 323.
95. Id. at 324 (emphasis added).
is a special class of persons to whom such actions are deemed to be strictly personal. Where the law makes no distinction, we ought to make none. The words of a law must be given their generally prevailing meaning. Therefore, since damage did occur through the fault of another to a person recognized in Louisiana statutes and jurisprudence as legally existing, and since the right to recover is not strictly personal, then the parents of a stillborn fetus should be entitled, as included among the enumerated beneficiaries, to acquire the survival action for the damages sustained by the stillborn fetus.

5. An Absurd Result

In In re P.V.W., the Louisiana Supreme Court held that a permanently comatose newborn infant with severe brain damage dependent upon mechanical life support systems had a right to discontinue such life support and that the right could be asserted by the parents. In rejecting that the removal of life support systems violated the constitutional protection against euthanasia, the court stated that:

We note a vast difference between a person whose quality of life has been significantly decreased by a devastating illness or injury and a person whose comatose body has been significantly (and perhaps unwarrantedly) invaded by machines which cannot cure or improve, but can only artificially prolong an existence that will never be known by the patient.

Implicit in the court’s statement was that the infant, who for practical purposes was dead and had never known conscious life, was a person with recognized rights which its parents could assert on its behalf. In comparing the vital signs of a full term fetus just before delivery, the fetus is dependent upon a natural life support system (the mother) but is certainly capable of independent life once “disconnected” from the mother. A fetus can be observed to respond to stimuli; brain wave patterns and heart rate can be detected and measured as normal activity. The child can be observed to demonstrate sucking reflexes, and growth and development can be charted.

To say that Ashley Wartelle never knew life and cannot be recognized as a person who either acquired rights or the ability to transmit those rights cannot be reconciled with the court’s determination that the comatose infant was a person who was given all those rights and protections of the law. To so rule

96. La. Civ. Code art. 11.
97. In re P.V.W., 424 So. 2d 1015 (La. 1982).
99. In re P.V.W., 424 So. 2d at 1022.
100. See generally Fetal Development: A Psychobiological Perspective (Jean-Pierre Lecanuet, et al. eds. 1995).
would be to encourage parents to go through the additional expense in emotions and resources to have the child put on artificial life support in order to qualify for the protections afforded by the law, and then go through the ordeal of removing that life support so that the child could officially die after its "live" birth. The law ought not demand this of parents.

IV. DOES THE VIABILITY RULE HAVE A PLACE IN LOUISIANA?

Virtually all American jurisdictions now recognize a cause of action for prenatal injuries where the fetus is subsequently born alive. However, many refuse to grant recovery for injuries where the fetus is stillborn and was never viable. 101 This restriction has been criticized as arbitrary and unjustified in light of modern, medical science. 102

Where other jurisdictions have struggled with the question of where to draw the line for the right to recover for negligent injuring, Louisiana considers the matter well settled. Louisiana is "[t]he only state to truly abandon both the 'born-alive' rule and the 'viability' rule . . . where a fetus is a 'person' at conception." 103 Louisiana refused to incorporate the viability requirement in Danos, treating it as an element of proof pertaining to the amount of damages allowed.

Viability has not been the controlling factor in some previous Louisiana cases allowing recovery, and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cutoff point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable. Instead, viability is one of the factors to which courts should look in determining the nature and extent of damages in each particular case. 104

Although he did not address the requirement of viability, Justice Lemmon repeatedly used the adjectives "full-term" and "viable" to describe the fetus in his dissent, 105 perhaps indicating that he finds viability to be a prerequisite to the recognition of personality. The Danos opinion should control here also, making viability an element of proof in determining damages, rather than a requisite for bringing the action.

101. McReynolds, supra note 64, at 1412.
102. Id.
104. Danos, 383 So. 2d at 1029. See also Stewart v. Arkansas S. R.R. Co., 112 La. 764, 36 So. 676 (1904) (where 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 was four and one-half months pregnant); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. Orl. Cir. 1951) (appellate court specifically rejected viability as a controlling factor) (case overruled on other grounds).
105. Wartelle, 704 So. 2d at 786.
V. ANALYSIS OF THE CLAIM FOR BYSTANDER DAMAGES

The supreme court denied the Wartelles any recovery for the emotional distress and mental anguish they suffered from the chain of events beginning with the replacement of the fetal monitor and culminating with the posthumous baptism of their daughter Ashley. The court concluded that a stillborn fetus is not a person for purposes of bystander actions. The court reasoned that if the bystander action were to be available, it would have to fall within the exception created in Article 26. However, the bystander action belongs to the parents rather than to the interests of the fetus. The court stated that the bystander action was not an action which resulted from the wrongful death of the fetus and that the bystander action has no necessary relationship to death. Conversely, it has no necessary relationship to live birth either.

The court reasoned that the legislature could have expressly provided for an action for bystander damages in relation to a stillborn fetus but did not. However, legislative intent can be found to allow a mother to recover for mental anguish associated with the death of a fetus. Louisiana Revised Statutes 9:2800.11(B)(2) allows the mother to recover for all general and special damages available in “an intentional tort, negligence, survival, or wrongful death action.”

The Diefenderfer court stated that it was unnecessary to classify a fetus as a person, a thing, or a non-person. In light of the supreme court’s decision in Wartelle, it may now be necessary for the fetus to be classified. Louisiana Civil Code article 2315.6 codified the ruling in Lejeune v. Rayne Branch Hospital. The wording of the statute allowed one viewing the event causing injury to another person or coming upon the scene shortly thereafter to recover for the mental anguish or emotional distress suffered. Lejeune recites a long list of cases where parents had previously been denied recovery for emotional distress resulting from viewing an injury to their children. However, that court noted that the jurisprudence had long allowed for such recovery relating to the damage of one’s property. The Lejeune court cited a number of cases where parents were allowed to recover for mental anguish stemming from their fear about possible injury to a fetus or worry that a fetal injury might result in

106. Id. at 784.
107. Id.
108. Id. at 784-85.
109. Id. at 785.
111. See supra note 5 for the text of this article.
112. 556 So. 2d 559 (La. 1990).
113. Lejeune, 556 So. 2d at 563-64.
stillbirth.\textsuperscript{114} One case allowed recovery for mental anguish on viewing damage done to the body of the deceased. All of these cases permitted recovery on the basis of a property theory.\textsuperscript{115}

Under the supreme court’s ruling in \textit{Wartelle}, it would appear that a gap in the law exists. An unborn child is a person for all matters relating to its interests, but a stillborn child is not a person. Nor has a stillborn child been defined to be property. Louisiana Civil Code article 4 states: “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”

Earlier jurisprudence allowed parents to recover for fear that their unborn child would be injured or would be stillborn. However, \textit{Wartelle} would deny the parent’s right to recovery if their greatest fears were realized—that their child had died. Justice Lemmon, in his dissent, stated:

It is equally incorrect to deny bystander damages under La. Civ. Code art. 2315.6 even to the laboring mother who not only saw, but also sensed, the death-dealing tort to her child who, but for that tort, would momentarily have been born alive.\textsuperscript{116}

The facts of this case indicate that the parents suffered severe emotional distress and mental anguish. To deny recovery for those damages contradicts the underlying premise of tort law in Louisiana.

The earlier discussion established a sound basis for recognizing the stillborn fetus as a person who can acquire and transmit rights associated with its wrongful death. Therefore, the stillborn fetus should be considered a person for the purposes of Article 2315.6 so as to allow the parents to recover for their mental anguish. The result in \textit{Wartelle} allows the tortfeasor to benefit by causing the greater harm—the death of the fetus—a result specifically rejected in \textit{Dano} and in Article 26.

\textsuperscript{114} Skorlich v. East Jefferson Gen. Hosp., 478 So. 2d 916 (La. App. 5th Cir. 1985) (physician owed a duty to the father as well as to the mother not to negligently injure the child during the birth process); Jordan v. Fidelity & Cas. Co., 90 So. 2d 531 (La. App. 2d Cir. 1956) (damages awarded to the father for worry and mental anguish that his unborn child might have been injured because of physical injuries sustained by the mother, caused by the negligence of the defendant); Champagne v. Hearty, 76 So. 2d 453 (La. App. Orl. 1955) (damages awarded to the mother for worry and mental anguish and fear of harm to her fetus because of injury sustained by the mother caused by the defendant’s negligence); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. Orl. 1951) (damages awarded to parents for mental anguish and worry because of an injury to a viable fetus that could result in childbirth) (case overruled on other grounds). \textit{See Lejeune}, 556 So. 2d 559 n.8 (La. 1990), for a complete listing of cases.

\textsuperscript{115} \textit{Lejeune}, 556 So. 2d at 567. \textit{See} footnotes 8 and 9 of that case for a listing of cases relied upon by the \textit{Lejeune} court.

\textsuperscript{116} \textit{Wartelle}, 704 So. 2d at 786.
VI. CONTRASTING VIEWS: A NATIONAL PERSPECTIVE ON THE SURVIVAL ACTION

A. Legal Personality of the Unborn Child

Courts generally state that it is the legislature's place to recognize and protect the unborn child. Some courts fall back to Supreme Court decisions on constitutional issues to deny recovery for the stillborn fetus' injury. The mother of a stillborn child challenged the constitutionality of New Jersey's wrongful death and survival statutes denying recovery on behalf of stillborn fetuses. The court held that the statutes did not violate substantive due process and no claim alleging an equal protection violation could be brought on behalf of a stillborn fetus. "The unborn are not persons within the meaning of the Fourteenth Amendment, it follows that the unborn are not encompassed within the meaning of the terms 'person' or 'citizen' for purposes of 42 U.S.C. §1983." The court ruled the state requirement that the child be born alive in order to have actions brought on his behalf was rationally related to the state interest in setting limits on tort recovery for wrongful death. The court defined the issue to be whether the unborn are "constitutional beings" rather than whether they are "human beings." Some jurisdictions have already reached the same conclusion as the Third Circuit in Wartelle and the dissent in Dieffenderfer. The District of Columbia court recognized that liability to a victim should not be extinguished by the fortuitous event of death and that the action provided by the survival statute arose, not from the death, but from the injury itself. The court concluded that the survival statute did not create a new cause of action but rather preserved for the benefit of the decedent's estate the cause of action which the decedent could have brought had he not died. In that case, a thirty-three week old viable fetus negligently injured en ventre sa mere was a "person" within the meaning of the wrongful death and survival statutes, and the fatal prenatal injury to an otherwise viable fetus was actionable.

117. See Giardina v. Bennett, 545 A.2d 139, 425 (1988) (where the court refused to extend the definition of person in the Wrongful Death Act beyond its original boundaries, despite the fact that the legislature had acted to protect the fetus in other areas).
119. Id. at 1400 n.9.
120. Id. at 1406.
121. Id. at 1402.
123. Williams, 482 A.2d at 397.
124. Id. at 395.
125. Id. at 398.
The Montana Supreme Court recognized a cause of action for the wrongful death of a viable unborn fetus.126 The court noted that the new wrongful death statute used only "person" and that the former reference to "minor child" had been eliminated.127 It then based its decision on another statute defining an unborn child to be a person. "A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."128 The court found that the definition did not make live birth a condition precedent to classification of a fetus as a person.129

B. Viability v. Non-Viability

A Maryland court denied a wrongful death action where a nonviable fetus was stillborn,130 concluding that any extension of liability to permit such an action must be created by the legislature.131 The court disagreed with appellant's argument that the distinction between viability and non-viability had been erased in earlier cases,132 commenting that the concept of viability merely had no role where the child was born alive.133

A Kansas court noted that "viability—the ability to live independently of the mother—is an irrelevant demarcation when a child survives prenatal injuries and is born [alive] with damages suffered within the womb."134 That court stated that "viability is an improper condition precedent to recover when the injured fetus is born alive... [but] viability is not an illogical condition precedent when a negligently injured fetus is stillborn [because it] has never become an independent living person."135

In a case similar to Wartelle and employing some of the same reasoning advanced in this article, the Pennsylvania Supreme Court reversed earlier decisions by holding that a right of recovery existed under that state's wrongful death and survival statutes136 on behalf of a stillborn child who died as a result of injuries received en ventre sa mere.137 The fetus was a full term, "fully

127. Id. at 732.
131. Id. at 1270.
132. Id. at 1267.
133. Id.
134. Humes v. Clinton, 792 P.2d 1032, 1036 (1990); Kandel, 663 A.2d at 1267.
135. Humes, 792 at 1037. See also Kandel, 663 A.2d at 1267.
136. See 42 Pa. C.S.A. §§8301(a) and 8302 (1998). The Survival Act provides that "[a]ll causes of action or proceedings, real or personal, shall survive the death of the plaintiff or of the defendant. . . ."
matured and perfectly proportioned" baby.\textsuperscript{138} In dicta, the court seemed to restrict its holding to viable fetuses in concluding that it was time to join other states and the District of Columbia in recognizing the survival and wrongful death actions in favor of the estates of stillborn children who received fatal injuries "while viable children en ventre sa mere [sic]."\textsuperscript{139}

General language used in the concurring opinion by the Pennsylvania court indicates that the line would not be drawn at viability either. "It cannot be gainsaid that the word 'person' is capable of being understood as synonymous with 'human being' regardless of the state of gestation or development; even less can it be denied that the word may be used to refer to a human being beyond the point of 'viability.'"\textsuperscript{140}

The Pennsylvania Supreme Court gave few clues as to whether its holding would be extended to nonviable fetuses in future cases.\textsuperscript{141} It was believed likely that the court would restrict future holdings to viable fetuses since the weight of authority from other jurisdictions upon which the court relied favored permitting recovery only for the wrongful death of viable fetuses. Additionally, it was believed that any extension of the holding should be left to the legislature.\textsuperscript{142} One commentator argued, however, that the viability standard should be rejected to allow wrongful death and survival actions on behalf of any stillborn infant since viability was as arbitrary a line to draw as was live birth. As medical science progresses, the courts would find viability an increasingly difficult demarcation to determine.\textsuperscript{143}

The Kansas Supreme Court stated that, under the wrongful death statute, parents would only be able to maintain the action if the child himself could have brought the action for injuries had he lived.\textsuperscript{144} The court adopted the view that would allow recovery by the child for his prenatal injuries and by the parents for the wrongful death of a stillborn viable fetus.\textsuperscript{145} However, the court refused in a later case to extend the holding to include the wrongful death of a nonviable fetus, stating that such extension must be made by the legislature.\textsuperscript{146}

In Louisiana, in order to preserve parallelism and consistency of state laws, viability should not be the controlling factor in whether a stillborn fetus can recover for its own injuries. The courts have refused to draw the line anywhere other than the moment of conception for wrongful death recovery; the same line

\textsuperscript{138}. Id. at 1085.
\textsuperscript{139}. Id. at 1086-87 (emphasis added).
\textsuperscript{140}. Id. at 1098-99.
\textsuperscript{142}. Id. at 841.
\textsuperscript{143}. Id. at 841-42.
\textsuperscript{144}. Loquist, supra note 129, at 267; Hale v. Manion, 368 P.2d 1 (Kan. 1962).
\textsuperscript{145}. Hale, 368 P.2d at 2. See also Loquist, supra note 129, at 267.
\textsuperscript{146}. Humes v. Clinton, 792 P.2d 1032 (Kan. 1990).
should be used for the survival action. Viability should remain an element of proof affecting the amount of damages awarded.

C. Effect on Abortion Issues

The Maryland Supreme Court found that recognizing a cause of action for wrongful death of a non-viable stillborn fetus did not create an inherent conflict with abortion laws recognizing the constitutionally protected choice of a woman to terminate pregnancy during the first trimester. The court explained that other states had avoided this conflict by requiring viability when the fetus was stillborn. The court then noted that the majority of jurisdictions adhered to its rationale in denying a cause of action for the wrongful death of a nonviable stillborn fetus, citing only Missouri [without mentioning Louisiana] as permitting such recovery. In a 1995 Missouri Supreme Court decision, it was held that a cause of action could be maintained for a nonviable fetus based on a newly enacted statute recognizing that "[t]he life of each human being begins at conception." Lottinger’s opinion in Danos brushed aside this very issue, stating that a deeper examination of a woman’s constitutional right to have an abortion under certain circumstances was required and since that issue was not before the court, it would not be discussed. Recent legislation allowing a woman to sue the person who performed the abortion for mental anguish damages for injuries sustained by the woman or the unborn child seems to have resolved the conflict in favor of granting the stillborn fetus the right to recover for its own prenatal injuries.

D. Inheritance Right or a Non-abatement Issue?

One of the reasons cited by the Pennsylvania Supreme Court for earlier denials of the action was that since “only children born alive may take property by descent under our Intestate laws, the court assumed that the Legislature had already limited the creation of causes of actions to those instances where the existence or estate of a child was recognized by the laws of intestacy.” This holding makes it clear that the recovery afforded the estate of a stillborn is no different than the estate of a child that dies within seconds of its birth. Intestate statutes were interpreted as providing that since a stillborn fetus could

148. Id. at 1268.
149. Id. at 1269.
150. Connor v. Monkem Co., 898 S.W.2d 89, 91 n.6 (Mo. 1995) (en banc).
154. Id.
not take by distribution, then no distribution scheme for damages awarded under a survival or wrongful death action existed.

This reasoning confused the substantive right to maintain an action with the procedure to distribute estate assets. The court concluded that since a child en ventre sa mere was an individual, a stillborn's estate which recovers for injuries under the wrongful death or survival statutes would distribute these assets by the rules of intestate succession. "The Survival Act does not create a new cause of action. Rather, it abrogates the common law rule that an action abates on the death of a party."

I am aware of no other instance in the law where the very existence of a cause of action is made subject to a condition subsequent. I conclude that the cause of action for prenatal injuries accrues to the child upon the occurrence of the injuries without regard to the later live birth of the child and, pursuant to the Survival Act, survives the death of the child whether the death occurs before or after birth.

The reasoning employed in this case would have worked equally as well in Wartelle to recognize the stillborn fetus' right to bring a survival action, which would be transmitted to the surviving enumerated beneficiaries.

E. Status of the Survival Action for the Unborn Fetus in Other States

The Iowa Supreme Court interpreted that state's wrongful death statute to be of the "survival" type which did not create a new cause of action in the decedent survivors but rather preserved whatever cause of action a decedent had at the time of death. Therefore, the cause of action could only accrue to the decedent's estate representative if it would have accrued to the deceased had he survived. "The ordinary meaning of the word 'person' is a human being who has 'attained a recognized individual identity' by being born alive."

The court held that a fetus, whether viable or not, is not a "person" within the meaning of the wrongful death statute.

155. Id.
156. Id.
157. Id. at 1093.
158. Id. at 1096.
159. Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981). This case was overruled by Audubon-Extra Ready Mix, Inc. v. Illinois Cent. Gulf R.R. Co., 335 N.W.2d 148 (Iowa 1983), where it was held that a minor does not have a cause of action for parental consortium independent of the statute providing for recovery of the value of services and support when the parent is wrongfully or negligently killed. But damages in the action of the loss of parental consortium are not limited to the period of the child's minority. The holding in Weitl concerning the definition of a person for purposes of the wrongful action was not discussed.
160. Weitl, 311 N.W.2d at 270. See also Iowa Code § 611.22 (1950).
161. Weitl, 311 N.W.2d at 271.
162. Id. at 273.
The dissenting opinion inferred a suggestion from the majority that it might allow an action for prenatal injury if the fetus was born alive, although the court had never been faced with that question. The dissent went on to say:

If we recognize, as virtually every jurisdiction has, that an injury to a fetus is compensable as to a live-born child, it is perfectly compatible with our survival statute to merely substitute the personal representative to pursue the claim when the decedent is prevented by death from doing so.

Several other jurisdictions have denied recovery. A Texas court held that no wrongful death or survival action existed for the death of a fetus. Likewise, the Arkansas Supreme Court held that an unborn fetus was not a person for the purposes of the Arkansas wrongful death statute and recommended the issue to the legislature to change the law. The Florida Supreme Court refused to recognize that a stillborn fetus was a "minor child" within the meaning of the wrongful death statute, stating that a cause of action could only arise after a live birth and subsequent death.

The New Mexico Supreme Court recently denied recovery for injury to, and wrongful death of, an eighteen to twenty-two week old fetus injured in a car accident. An emergency caesarian section was performed in an effort to save the child. It had a detectable heart beat at the time of birth but died a few minutes later. The court found that a nonviable fetus was not a person within the meaning of the wrongful death statute because it was of the survival type. The ruling in this case is contradictory to most other jurisdictions which recognize the action where there is evidence of a live birth, regardless of how briefly the child lives or its viability at birth.

VII. CONCLUSION

The arguments for affirming the Third Circuit's decision in Wartelle were much stronger than those for reversing. The choice of the phrase in Article 26, "resulting from its wrongful death," was intended to exclude from the scope of the exception to the born alive rule only those instances where the fetus died of natural causes. The use of the plural "actions" indicates the legislature intended to include various types of actions resulting from the fetus' wrongful death. By applying common rules of grammar, one can discern that the legislature intended

163. Id. at 276.
164. Id. at 277.
169. Miller, 905 P.2d at 195.
170. Id. at 197.
to include within the exception in Article 26 all actions, including the survival action, resulting from the death of the fetus because of the tortious conduct of another.

The legislature has declared its intent to recognize the child as a person with legal personality from the moment of conception, with only grudging concessions made to United States Supreme Court decisions which allow an abortion in the first trimester and refuse to recognize the nonviable fetus as a "constitutional" person under the Fourteenth Amendment. Recent legislation involving abortion issues explicitly states that the mother can bring a survival action for the fetus against the person who performed the abortion, as well as maintaining a variety of actions for her own injuries. The legislature must consider that such an action could be brought against a tortfeasor whose negligent or intentional act caused the fetus' death.

The survival action, as a property right, provides for non-abatement of the right to bring suit for the decedent's pre-death injuries rather than a mechanism for the distribution of inheritance rights. Therefore, the live birth of the child is irrelevant to the ability to bring the action. The enumerated beneficiaries in the statute control who may bring the action in lieu of the decedent.

In none of the relevant Louisiana Civil Code articles is there any language stating that the right to bring the survival action is conditioned upon the subsequent live birth of the child. Nor is there any language making that right strictly personal to a special class of persons consisting of unborn children. Inheritance rights would still be predicated upon live birth of the child, as required by the statutes controlling such matters.

Tolerating an injury to the fetus for which there can be no recovery conflicts with the underlying premise of tort law and the public policy favoring recovery in this state. Allowing a tortfeasor to benefit by failing to make him compensate for the greater injury (death) to the fetus is illogical. It is also illogical to recognize that the parents can recover for the loss of their child in a wrongful death action and yet refuse to recognize the fetus' own action for the injuries it sustained, or the parents' action for the mental anguish associated with the stillbirth of their child.

The Louisiana Supreme Court had ample bases upon which to affirm the Third Circuit's decision in *Wartelle*. It has been left for the legislature to correct this error. Unfortunately, any action by the legislature will come too late for the stillborn child, Ashley Wartelle, and her parents.

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