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Tort Law: Protection of Prenatal Life through Wrongful Death Statutes

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NOTES

TORT LAW: PROTECTION OF PRENATAL LIFE THROUGH WRONGFUL DEATH STATUTES—CRITIQUE OF *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988).

I. INTRODUCTION

> If the mother can die and the fetus live, or the fetus die and the mother live, how can it be said that there is only one life? If tortious conduct can injure one and not the other, how can it be said that there is not a duty owing to each?[1]

Administrators attempting to bring wrongful death actions on behalf of parents whose fetuses are stillborn as a result of prenatal injury have encountered various and everchanging judicial responses over the past several decades. Since the California Appellate Court, in *Scott v. McPheeters*, recognized fetuses as separate beings apart from their mothers,[2] courts have been increasingly willing to protect the rights of the unborn.[3] However, a minority of courts still refuse to recognize the widely accepted view that a wrongful death action may be maintained on behalf of a stillborn infant.[4]

This casenote reviews *Giardina v. Bennett*,[5] the New Jersey Supreme Court's recent denial of a right to bring a wrongful death action

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1. O'Neill v. Morse, 385 Mich. 130, 135–37, 188 N.W.2d 785, 787–88 (1971).

2. 33 Cal. App. 2d 629, 630, 92 P.2d 678, 679, *appeal denied*, 33 Cal. App. 2d 640, 93 P.2d 562 (1939) ("[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.").

3. *See* Eich v. Gulf Shores, 293 Ala. 95, 97, 300 So. 2d 354, 355 (1974) (holding that it would be illogical to allow recovery for a child who is injured prenatally and survives but not to allow recovery when that child's twin is stillborn); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964) (allowing an action for injuries suffered by a fetus after it reaches viability). *See generally* F. HARPER & F. JAMES, THE LAW OF TORTS § 18.3 (Supp. 1968); W. PROSSER, THE LAW OF TORTS § 55 (4th ed. 1971).

4. Approximately 14 states refuse to recognize a right to maintain a wrongful death action on behalf of a fetus who is injured prenatally and is subsequently stillborn. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968).

5. 111 N.J. 412, 545 A.2d 139 (1988).

on behalf of a fetus.[6] The conflicts between the *Giardina* ruling and the current majority rule will be discussed, followed by an analysis of whether *Giardina* evidences a reversal in the current trend toward recognition of wrongful death actions on behalf of fetuses.

II. FACTS AND HOLDING

In October, 1982, Regina Giardina was informed by the defendant, Gardiner Bennett, her obstetrician and gynecologist, that she was pregnant and that her due date was May 19, 1983.[7] Giardina received regular examinations by defendant and his staff during the course of her pregnancy.[8] On June 3, 1983, when Giardina was more than two weeks overdue, defendant performed a "non-stress test"[9] and reported to Giardina that it had not revealed any problems.[10]

Over the next nine days, plaintiff experienced intermittent pain and contractions and was examined by defendant twice.[11] Bennett considered her symptoms common and allegedly refused to perform a caesarean section.[12] Late on June 12, 1983, plaintiff was ordered to proceed to the hospital when her contractions were three minutes apart.[13] Shortly after she was admitted, the hospital staff discovered that there was no fetal heartbeat, and defendant confirmed that the baby was dead. It was stillborn the next afternoon.[14]

On June 11, 1985, the Giardinas filed a wrongful death action against the defendant and other hospital staff members alleging that defendant's treatment deviated from accepted standards of medical care.[15] They sought compensatory damages for the infant and damages for its " 'conscious pain and suffering' prior to death."[16] The complaint was brought under New Jersey's Wrongful Death Statute,[17] and was a

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6. *Id.* Facts are as alleged by plaintiff, absent full adjudication.

7. *Id.* at 414, 545 A.2d at 140.

8. *Id.*

9. A "non-stress test" is a procedure performed just prior to delivery of a child to determine if the fetus is undergoing any type of problem such as increased heart rate. If the fetus was dead at the time the test was performed, the doctor would have been aware of that fact. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* A "caesarean section" is a medical procedure whereby an incision is made in a woman's abdomen and the child is removed through that incision rather than being born vaginally.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. N.J. STAT. ANN. § 2A: 31-1 (West 1987) states that:

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury

direct challenge to the New Jersey Supreme Court's decision in *Graf v. Taggart*.[18] In *Graf*, the court denied a wrongful death claim brought in response to the pre-birth death of an infant.[19] On June 6, 1986, the *Giardina v. Bennett*[20] court granted defendant's motion for summary judgment and plaintiff appealed.[21] The appellate division summarily affirmed and the New Jersey Supreme Court granted plaintiff's petition for certification.[22]

The New Jersey Supreme Court ruled that the Giardinas did not have a claim under the wrongful death statute because a fetus which dies before birth is not a person.[23] In addition, the parents can protect their own interests by bringing a medical malpractice action against the defendant for direct infliction of injury upon themselves, and for emotional distress and mental suffering.[24] Chief Justice Handler, in a unanimous decision, cited legislative intent as a means to rule that the act was not meant to include a fetus which is stillborn.[25] The act refers specifically to the wrongful death of a "person."[26] When the act was passed in 1877, New Jersey and most other jurisdictions generally did not consider a fetus to be a person, for legislative purposes.[27] In addition, the common law treated an unborn child as being "merely part of his mother without separate existence or personality."[28] In reviewing the history of the common law regarding pre-birth injuries, the New Jersey Supreme Court in *Smith v. Brennan*[29] recited a string of cases[30] in which the courts had decided that "a child before birth is, in fact, a part of the mother and is only severed from her at birth . . . ."[31] The

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if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

Id.

18. 43 N.J. 303, 204 A.2d 140 (1964).

19. *Id.*

20. 111 N.J. 412, 545 A.2d 139 (1988).

21. *Id.* at 415, 545 A.2d at 140.

22. *Id.*

23. *Id.* at 420, 545 A.2d at 143.

24. *Id.*

25. *Id.* "The language, legislative history, and subsequent treatment of the Act and analogous statutory schemes counsel against interpreting the Act to cover the death of a fetus." *Id.*

26. N.J. STAT. ANN. § 2A:31-1 ("When the death of a person is caused by a wrongful act").

27. *Giardina*, 111 N.J. at 422, 545 N.E.2d at 144.

28. *See* Smith v. Brennan, 31 N.J. 353, 356, 157 A.2d 497, 498 (1960) (discussing common law treatment of the unborn); *see also* Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884) (wrongful death statute inapplicable to fetus, as it was considered to have no existence separate from its mother). *But see* Torigian v. Watertown News Co., 352 Mass. 446, 448, 225 N.E.2d 926, 927 (1982) (nonviability of a fetus does not bar recovery in a wrongful death action).

29. 31 N.J. at 353, 157 A.2d at 497.

30. *Id.* at 357, 157 A.2d at 499.

31. Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638, 640 (1900), *overruled,*

Giardina court reasoned that when the legislature wanted to include a fetus in a statute, it utilized specific wording.[32] Therefore, since the legislature did not use specific wording in the wrongful death statute, it must have meant to exclude a fetus.[33]

III. BACKGROUND

A. Wrongful Death Action Nonexistent at Common Law

At common law it was the rule that an action could not be maintained for the wrongful death of a decedent.[34] Recovery came only after statutory survival and wrongful death enactments,[35] which now exist in all fifty states.[36] These were enacted to counter the common law rule by providing recovery for a person's death when recovery under the common law was specifically denied. There were two primary reasons for the enactment of survival and wrongful death statutes: when the law provides for an action for negligence when the victim survives a tort, it should also provide for recovery when the tort is so severe as to cause death; and when a tortfeasor's negligence causes the death of someone's spouse, parent, etc., that loss should be one that is compensated.[37] These reasons, together with simple logical considerations of recovery for infants in many other situations, support the development of wrongful death actions on behalf of fetuses as well.

In general, wrongful death statutes were designed to allow recovery for the death of a decedent where, had the decedent survived, he would have been able to bring an action for the wrong committed against him.[38] However, the wrongful death statutes vary as to specific

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Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

32. *Giardina*, 111 N.J. at 421, 545 N.E.2d at 143. New Jersey Workers' Compensation Statute, N.J. STAT. ANN. § 34:15-13(f) (West 1988), enacted in 1911, specifically provides that "a child in esse" can be a dependent. *Id.* A "child in esse" is a child actually in existence after birth. *See* BLACK'S LAW DICTIONARY 698 (5th ed. 1979). In the New Jersey Uniform Anatomical Gift Act, N.J. STAT. ANN. § 26:6-57(b) (West 1987), a "decedent" is defined as "a deceased individual and includes a stillborn infant or fetus." *Id.*

33. *Giardina*, 111 N.J. at 421, 545 A.2d at 154.

34. Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475 (1848) (Massachusetts court was the first United States jurisdiction to adopt that common law rule), *overruled*, Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972); *see also* Commonwealth v. Boston & L.R. Corp., 134 Mass. 211 (1883).

35. "Survival statutes" provide a survivor with the same right to bring an action that the decedent would have had if he/she had survived. "Wrongful death statutes" provide a separate cause of action brought by an administrator of the deceased's estate on behalf of the survivors. *See* Note, *The Estate of an Unborn Child Has a Cause of Action for Wrongful Death - O'Neill v. Morse*, 70 MICH. L. REV. 729, 733–34 (1972).

36. *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:3 (1966) (collecting and comparing statutes).

37. *See* Note, *supra* note 35, at 733.

38. *See, e.g.*, N.J. STAT. ANN. § 2A:31-6 (West 1987).

provisions, such as, eligible beneficiaries and types and amounts of damages.[39] These differences play a part in determining whether the wrongful death statutes should be applicable to fetuses.[40]

B. Lower Courts' Varying Interpretations of Wrongful Death Acts in Relation to Fetuses

In the past thirty years, many lower courts[41] have reversed themselves in their interpretation of wrongful death statutes. The position of a minority of states, allowing wrongful death actions brought on behalf of a fetus in 1959,[42] has become a majority position in 1989.[43]

1. Majority Rule

At least twenty three states[44] and the District of Columbia allow administrators of the estates of stillborn children to bring actions for the benefit of the parents of fetuses who are injured prenatally and are

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39. *See* S. SPEISER, *supra* note 36, § 11:16, at 636–37. For example, some statutes limit recovery to pecuniary loss. MO. ANN. STAT. § 537.090 (Vernon 1988) states in part:

> In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium . . . and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which, would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss.

Id.

Other statutes allow recovery of extensive damages. For example, KY. REV. STAT. ANN. § 411.130 (Baldwin 1987) states in part:

> (1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered.

Id.

40. *See infra* notes 101–07 and accompanying text.

41. *See, e.g.*, O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971), *overruling* Estate of Powers v. City of Troy, 380 Mich. 160, 156 N.W.2d 530 (1968); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983), *overruling* State *ex rel.* Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976); Evans v. Olson, 550 P.2d 924 (Okla. 1976), *overruling* Howell v. Rushing, 261 P.2d 217 (Okla. 1953).

42. *See* Stidam v. Ashmore, 109 Ohio App. 431, 432-33, 167 N.E.2d 106, 107 (1959) (discussing rulings in other jurisdictions which did not allow wrongful death actions on behalf of stillborn fetuses).

43. *See, e.g.*, Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Maniates v. Grant Hosp., 15 Ill. App. 3d 903, 305 N.E.2d 422 (1973). *See generally* Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411, 422 (1978) (reviewing states' rulings regarding wrongful death actions on behalf of stillborn fetuses).

44. Ala., Conn., Del., Ga., Ill., Ind., Kan., Ky., La., Md., Mass., Mich., Minn., Miss., Nev., N.H., Ohio, Okla., Or., R.I., S.C., Wash., W. Va.. Annotation, *supra* note 43, at 422.

subsequently stillborn. Of these, only Georgia[45] and Rhode Island[46] allow recovery for an injury to a fetus which occurs before the fetus reaches viability. The remaining states recognize the right to bring an action for wrongful death for fetal injuries which occur after the fetus reaches viability.[47]

The growing recognition of the legal rights of fetuses has resulted from developments in many areas of the law, such as, tort and guardianship. Wrongful death statutes were initially enacted in the late 1800's, when it was not even considered that a fetus might be a separate being from its mother.[48] In *Dietrich v. Northampton,*[49] the Massachusetts Supreme Judicial Court denied recovery to the personal representative of a child who died at birth from prenatal injuries.[50] The 1884 decision rested on the concept that before birth a child is merely part of his mother without separate existence or personality.[51] In the late 1800's, tort actions for prenatal injuries could not be maintained even if the child did survive.[52] However, by 1940, this trend in the courts began to change.[53]

Beginning with California[54] and the District of Columbia,[55] courts throughout the country initiated the trend toward recognizing prenatal life. Prosser, a recognized torts scholar, noted that the retreat from the *Dietrich* position was "up till that time the most spectacular abrupt

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45. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (recognizing "quick" child).

46. Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976).

47. "The term 'viable' refers to the point in prenatal development at which time a fetus is capable of independent existence if removed from the mother's womb. It has often been stated that a fetus ordinarily becomes viable between the twenty-fourth and twenty-eighth weeks of the pregnancy." Werling v. Sandy, 17 Ohio St. 3d 45 n.1, 476 N.E.2d 1053 n.1 (1985). However, since the United States Supreme Court's decision in Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (interim ed. 1989), that figure may be pushed up to as far as 20 weeks gestational age. Since recognizing the wrongful death action from injuries occurring before viability is the exception, and because of the difficulty in supporting that rule, this note will focus on the rule which requires a fetus to reach viability.

48. *See* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

49. *Id.*

50. *Id.* at 17.

51. *Id.*; *see also* Smith v. Brennan, 31 N.J. 353, 356, 157 A.2d 497, 498 (1960) (discussing common law treatment of the unborn).

52. *Dietrich,* 138 Mass. at 15; *see also* Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937), *overruled,* Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971). The court in *Newman* denied recovery for the death of a child that survived three months after birth and died from injuries suffered 22 days prior to birth when his mother was a passenger on a Detroit streetcar. *See Newman,* 281 Mich. at 62, 64, 274 N.W. at 711.

53. *See* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678, *appeal denied,* 33 Cal. App. 2d 640, 93 P.2d 562 (1939).

54. *Scott,* 33 Cal. App. 2d at 629, 92 P.2d at 678.

55. *Bonbrest,* 65 F. Supp. at 138.

reversal of a well settled rule in the whole history of the law of torts."[56] The trend continued with courts recognizing prenatal rights in the areas of tort[57] and guardianship law.[58] By 1960, many courts declared that prior to birth, an unborn child has an existence separate and apart from its mother.[59] For example, in *Williams v. Marion Rapid Transit Inc.*,[60] the Ohio Supreme Court recognized a cause of action for a child who became crippled for life due to a prenatal injury, caused by the negligence of another.[61] The rationale of *Williams* was that an unborn viable child is capable of an existence independent of its mother, and that as the law recognizes an unborn child by protecting its property rights, the law should also recognize its civil rights for the infliction of injury due to negligence.[62]

Many of these courts simultaneously determined that a wrongful death action could be brought on behalf of a fetus. Ohio was in the minority when an appellate court first recognized a wrongful death action on behalf of a stillborn fetus in *Stidam v. Ashmore*[63] in 1959. In *Stidam*, the Ohio Court of Appeals for Madison County determined that the administratrix of a stillborn fetus' estate may maintain a wrongful death action on behalf of an infant when the defendant's negligence caused a prenatal injury and the fetus was subsequently stillborn.[64] The Ohio Supreme Court, in *Werling v. Sandy*,[65] reinforced that ruling in 1985 by deciding that a wrongful death action could be brought on behalf of a viable fetus injured prenatally and subsequently stillborn.[66]

In 1973, the United States Supreme Court, in the landmark case *Roe v. Wade*,[67] confirmed the trend by recognizing that once a fetus

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56. W. PROSSER, THE LAW OF TORTS § 55 (4th ed. 1971).

57. Womack v. Buckhorn, 384 Mich. 718, 187 N.W.2d 218 (1971) (allowing recovery by an eight year old child suffering from brain injuries sustained during the fourth month of his mother's pregnancy).

58. *See* MICH. COMP. LAWS ANN. § 600.2045 (West 1981) (providing that if a person not in being may be entitled to a property interest involved in a proceeding and that unborn person's interests are not able to be represented, a guardian *ad litem* may be appointed for the unborn person).

59. *See, e.g.*, Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

60. *Id.*

61. *Id.*

62. *Id.*

63. 109 Ohio App. 431, 167 N.E.2d 106 (1959).

64. *Id.* at 435, 167 N.E.2d at 108.

65. 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

66. *Id.*

67. 410 U.S. 113 (1973). In a challenge to a state statute criminalizing abortion, the United States Supreme Court held that the states could outlaw only those abortions performed after the fetus reaches viability because that is when the state begins to have an interest in the welfare of

becomes viable the state has an interest in the life of the fetus.[68] The Court explained that "[s]tate regulation protective of fetal life after viability . . . has both logical and biological justifications."[69] In *Webster v. Reproductive Health Services*,[70] the Supreme Court furthered this recognition by upholding a Missouri statute's preamble which states that life begins at conception.[71] The Court held that it is permissible to offer protections to unborn children in tort and probate law.[72] Many states[73] have adopted the majority rule of recognizing wrongful death actions brought on behalf of fetuses who are stillborn.

2. Minority Rule

The New Jersey Supreme Court has refused to recognize the many factors which make the protections of the prenatal life compelling, and has rejected the majority approach. It clings, with the minority, to the legislative intent without looking to society's need for court interference when the legislature has not acted. A shrinking minority of states[74] continue to adhere to the interpretation that a wrongful death action is not maintainable for the unborn child's death, even if the death of an unborn child is the result of injuries sustained after viability.[75] Most of these rulings are based on the legislative intent not to include a fetus as a "person" capable of recovery at the time the statutes were enacted.[76] In comparing workers' compensation and organ donation statutes, the word fetus or unborn child is used when the statute is specifically intended to apply to fetuses. Consequently, the minority jurisdictions feel that the legislatures' failure to use one of these specific terms in wrongful death statutes evidences their intent to exclude fetuses from protection.[77] The inconsistencies of this logic will be

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the child. *Id.* at 163.

68. *Id.* at 163.

69. *Id.*

70. 109 S. Ct. 3040 (interim ed. 1989).

71. *Id.* at 3042.

72. *Id.*

73. *See* S. SPEISER, *supra* note 36, at 778–1004.

74. *See* Annotation, *supra* note 43, at 424–30 (discussing states which still do not recognize a wrongful death action on behalf of a still-born infant).

75. *Id.*

76. Endresz v. Friedberg, 24 N.Y.2d 478, 483, 248 N.E.2d 901, 903, 301 N.Y.S.2d 65, 69 (1969) (although the statute, as enacted in 1847, was silent on the subject, it was fairly certain that the legislature did not intend to include an unborn fetus within the term "decedent"); *see also* McKillip v. Zimmerman, 191 N.W.2d 706, 709 (Iowa 1971) (holding that the legislature did not intend to include an unborn fetus when it adopted a survival statute referring to the death of a "person").

77. *See* Bayer v. Suttle, 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1972). In that case the court used another statute to interpret the Wrongful Death Statute. *Id.* at 364, 100 Cal. Rptr. at 214. The other statute provided that a child conceived, but not yet born, was to be deemed an

discussed later in this note.[78]

IV. ANALYSIS

In *Giardina v. Bennett*,[79] the New Jersey Supreme Court is very specific about the grounds on which their decision is based. "The language, legislative history, and subsequent treatment of the Act and analogous statutory schemes counsel against interpreting the Act to cover the death of a fetus. Further, the availability of a common-law action that satisfactorily accomodates the interests that are implicated supports this conclusion."[80] In taking this rigid approach to the problem, however, the court fails to recognize the inconsistent and illogical results which follow. Fetuses are now recognized as being separate persons from their mothers when they become viable, and the intent of the wrongful death act would be furthered by allowing actions on behalf of stillborn infants.

A. Fetus Now Recognized as Separate from Mother

One of the two major premises for the *Giardina* ruling is that when the legislature adopted the Wrongful Death Act in 1877, a fetus was not recognized as having a separate existence from its mother.[81] "[T]he common law . . . treated an unborn child as being 'merely a part of his mother without separate existence or personality.' "[82] The *Giardina* court thus reasoned "that the Legislature adopted this common-law understanding of the concept of a 'person' in the adoption of the Wrongful Death Act."[83] The court explained that in other statutes, such as those for workers' compensation, where fetuses were to be protected, the legislature used the specific term.[84] However, at least one of the civil statutes referred to[85] was enacted long before there was widespread recognition that a fetus had a separate existence.

In addition, the fact that a subsequent legislature uses the proper wording in a completely different statute does not create an assumption that it has gone through all former statutes to correct the term in others. *Giardina* ignores the fact that by 1973, the United States Su-

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existing person, so far as its interests were concerned in the event of its subsequent birth. *Id.* The court reasoned that there would have been no need for that specification if a fetus were already considered a "person" under the law. *Id.*

78. *See infra* text accompanying notes 82–99.
79. 111 N.J. 412, 545 A.2d 139 (1988).
80. *Id.* at 420, 545 A.2d at 143.
81. *Id.* at 421, 545 A.2d at 143.
82. *Id.* (quoting Smith v. Brennan, 31 N.J. 353, 356, 157 A.2d 497, 498 (1960)).
83. *Id.* at 421, 545 A.2d at 143.
84. *Id.*
85. New Jersey Workers' Compensation Act, N.J. REV. STAT. § 34:15-13(f) (1911).

preme Court recognized that the state had an interest in viable fetuses. The Court, in *Roe v. Wade*,[86] made this determination only after careful examination of the medical, scientific and social considerations surrounding the issue. The decision that a viable fetus does have importance therefore has a strong basis in fact and logic. This recognition must override the intent of some long past legislature which, 112 years ago, understood that a fetus was not viable until birth.

Other states have reconsidered the scope of their wrongful death statutes in light of technological developments. Indiana enacted a Wrongful Death Statute in 1881,[87] just four years after New Jersey passed its wrongful death statute. The Indiana appellate court, in *Britt v. Sears*,[88] concluded that since actions for prenatal injuries and deaths were unknown when the statute was enacted, the legislators very likely gave no thought to whether they were prohibiting an action for prenatal injury or death by not including the term "fetus."[89] Because the New Jersey legislature did not specifically exclude fetuses from the wrongful death act,[90] and because New Jersey's act was passed before Indiana's, one may infer that the New Jersey legislature just did not consider fetuses at all, and therefore never intended to exclude them from the wrongful death act. Thus courts must fill in the gaps where the legislature could not address certain conditions because those conditions did not exist at the time the legislature considered the law.

The nature of the judicial system is to interpret the statutory law and to apply it in a way which recognizes the current state of society.[91] In *Womack v. Buchhorn*,[92] the Michigan Supreme Court recognized that since a previous Michigan case[93] ruled against recovery for prenatal torts in 1937, "medical science has probably advanced more in one generation than in the previous 100 years or more."[94] In contending that case law must develop with that scientific knowledge, the *Womack* court quoted a New York court[95] which had overruled precedent

86. 410 U.S. 113 (1973).

87. *See* Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971) (recognizing the right for a father to maintain an action for the wrongful death of a stillborn child where the child was alleged to have been a full-term, healthy child capable of independent life).

88. *Id.*

89. *Id.* at 494, 277 N.E.2d at 24–25.

90. N.J. STAT. ANN. § 2A:31-1 (West 1987).

91. *See* Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971) (overruling precedent in Michigan by allowing a right to recovery under negligence for injuries inflicted on a child prenatally).

92. *Id.*

93. Newman v. Detroit, 281 Mich. 60, 279 N.W. 710 (1937), *overruled, Womack*, 384 Mich. at 718, 187 N.W.2d at 218.

94. *Womack*, 384 Mich. at 720, 187 N.W.2d at 219.

95. *See* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) (although the rule in that

twenty years earlier by allowing an action for negligent infliction of prenatal injuries:

> "What, then, stands in the way of reversal here? . . . Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? . . . Our court said, long ago, that it had not only the right, but the duty to reexamine a question where justice demands it . . . ."[96]

The *Womack* court followed this reasoning and overruled precedent.[97] Similarly, the *Giardina* court also had a duty to look to the advances in science, medicine and society and adapt its legal interpretations to those advancements. When *Giardina* was decided, a fetus was recognized as a separate being from its mother,[98] and it had been given other legal rights as well.[99] Therefore, the court should have accepted these developments and recognized a right to recovery for the wrongful death of a stillborn fetus. It might be argued that it is excessive judicial activism to interpret the statute in a way which recognizes a wrongful death action for a stillborn fetus, and that the matter is better left with the legislature. However, the courts have always been a means by which those people who do not have influence with the legislature can force the law to better respond to the needs of society.[100] In addition, many laws which have been enacted so long ago tend to be ignored by the legislature, and "it is often necessary to breath life into existing laws lest they become stale and shelfworn."[101] *Giardina* was an opportunity for the New Jersey Supreme Court to encourage the legislature to act by recognizing the rights of administrators to bring actions on behalf of stillborn fetuses, thereby showing the defect in the wrongful death statute as it is drafted.

B. Intent of Wrongful Death Statutes is Furthered by Allowing Action for Prenatal Injury Resulting in Stillbirth

Because most legislatures did not even consider or discuss the pos-

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case was one of common law and not statute, the principle and duty of the courts remains the same).

96. *Womack*, 384 Mich. at 724, 187 N.W.2d at 222 (quoting *Woods*, 303 N.Y. at 354, 102 N.E.2d at 694).

97. *Id.* at 725, 187 N.W.2d at 222.

98. *See supra* notes 3 and accompanying text.

99. *See supra* notes 54–62 and accompanying text.

100. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1939).

101. Eich v. Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974) (this liberal attitude comes from a state which had previously not even recognized a right to bring a negligence action after birth for injuries sustained prenatally).

sibility of recovery for stillborn infants in enacting wrongful death statutes,[102] courts have considerable latitude in determining the question on the basis of public policy and logic.

1. Public Policy of Wrongful Death Statutes

Wrongful death statutes were enacted based on the theory that if a tortfeasor's wrongful act is severe enough to cause death, he should not be rewarded by escaping liability, as he was under the common law.[103] The statutes were also enacted to compensate the survivors for the loss of the victim.[104] Contrary to the New Jersey Supreme Court's argument that legislative intent would be violated by allowing a wrongful death action for a fetus, this type of action is essential to the furtherance of legislative intent. Wrongful death actions were enacted partially to instill on tortfeasors the seriousness of their actions. To deny an administrator recovery when the tort is severe enough to cause death before birth, rather than death after birth, would serve to reward the more severe torts, thereby frustrating the primary intent of the statute. This view is recognized in nearly every state[105] which recognizes the cause of action.

2. Not Recognizing the Action Would Create an Absurd Result

Now that the United States Supreme Court has determined that the state does have an interest in the welfare of a viable fetus,[106] it is a better time than ever to recognize the absurdity of the minority rule. The *Roe* Court found that the state has an interest in protecting the life of a viable fetus because that fetus cannot protect itself.[107] The test to demonstrate the existence of the right to bring an action is that the injury "would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury."[108] If death had not ensued for the Giardinas' child, an action would have been maintainable, regardless of the amount of time that the child had lived after birth. The absurdity of the result has frequently been illustrated by the following example: " '[s]uppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before birth and the other after birth. Shall there be a cause

102. *See, e.g., Britt*, 150 Ind. App. at 487, 277 N.E.2d at 20.

103. *See* Note, *supra* note 35, at 731.

104. *Id.*

105. *See, e.g., Eich*, 293 Ala. at 95, 300 So. 2d at 354; Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962).

106. *See* Webster v. Reproductive Health Servs. 109 S. Ct. 3040 (interim ed. 1989); *Roe*, 410 U.S. at 113.

107. *Roe*, 410 U.S. at 163.

108. N.J. STAT. ANN. § 2A:31-1.

of action for death of the one and not for that of the other?' "[109] Surely the life of each is equally valuable to the parents, the survivors for which the wrongful death action was intended. Therefore, the result is absurd because the law would deem the grief to the parents for the death of one not worthy of recovery, while the grief for the loss of the other would be worthy of recovery. The parents might be able to bring a malpractice action, but it would limit the recovery only to damages for the actual injury to the mother and would allow nothing for the actual loss of the child.

C. Difficulty of Proving Damages Should Not Preclude Ability to Bring Action

The *Giardina* court argued that since the parents of a stillborn child could recover under common law tort remedies for direct infliction of injury, emotional distress and mental suffering,[110] the wrongful death action was not necessary. However, there are further damages awarded by the wrongful death statute which are not compensable through the common law.

One purpose of the wrongful death statute is to award damages to the survivor for the loss of the companionship of the decedent.[111] Although the child has not yet been born, many states hold that there has been companionship developed while the child was in the mother's womb.[112] This is especially true where the child is viable and the family can feel its movements. This loss is not recoverable by the mother under most tort actions. If the courts have recognized that the companionship does exist, it should be compensated for under the wrongful death action even if the loss is of a fetus.

Likewise, many wrongful death statutes are intended to compensate survivors for the loss of earning capacity of the decedent.[113] When a child is a victim of wrongful death, the courts do not preclude recovery because of the difficulty in determining future earning capacity.[114] Therefore, the difficulty in determining the earning capacity of a stillborn child should also not preclude recovery. The same factors that are used to determine the loss for a child are available for determining the loss for a stillborn.[115] This can be available even for statutes which

109. Werling v. Sandy, 17 Ohio St. 3d 45, 48, 476 N.E.2d 1053, 1055 (1985) (quoting Stidman v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959)).

110. *Giardina*, 111 N.J. at 413, 545 A.2d at 140.

111. *See* Note, *supra* note 35, at 733.

112. *See generally* A. COLMAN & L. COLMAN, PREGNANCY: THE PSYCHOLOGICAL EXPERIENCE (1971).

113. *See* Note, *supra* note 35, at 733.

114. Smith v. Brennan, 31 N.J. 353, 365, 157 A.2d 497, 503 (1960).

115. *See* Note, *supra* note 35, at 745.

limit recoveries to pecuniary loss.[116]

The New Jersey Supreme Court also addresses concerns that other courts have had with the difficulty of proving viability and causation.[117] The New Jersey Supreme Court emphatically states, however, that its decision in this case is based not on those concerns, but strictly on legislative intent.[118] Even if the court had cited these difficulties as its reasoning, it would not have been saved from an illogical result. The difficulty of proving viability and causation has not precluded children from recovering for injuries sustained while they were fetuses.[119] The same difficulty exists, and is overcome, in malpractice actions for miscarriage. It would be absurd and illogical to say that this difficulty precludes an administrator from bringing an action on behalf of a fetus for the same torts, which are so severe that they cause death. Procedurally, the case will still be dismissed if the plaintiff cannot prove the elements of the cause of action.

D. Giardina Ruling Should Not Change the Trend in the Courts

Although the New Jersey Supreme Court has definitely attacked, head-on, the trend which allows wrongful death actions for stillborn infants, this should not evidence a reversal in that trend. Other courts have continued to recognize the trend, with the addition of seven states[120] in the last ten years. It is apparent that these states have recognized the logical and practical reasons for allowing public policy to expand the definition of a "person" in wrongful death legislation. Courts which have not yet addressed the issue would be wise to consider the *Giardina* ruling as a fly in the judicial ointment, and not to follow its inconsistent logic.

V. CONCLUSION

The New Jersey Supreme Court had decided in *Giardina v. Bennett*[121] that nothing has changed which should make the court interpret the wrongful death statute any differently than when it was enacted

116. O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) (noting that under Michigan legislation authorizing recovery for pecuniary injury, parents are entitled to recover for the net value of their children's services, even if difficult to determine).

117. *Giardina*, 111 N.J. at 426–27, 545 A.2d at 153.

118. *Id.*

119. *See* Amann v. Faidy, 415 Ill. 422, 431, 114 N.E.2d 412, 417 (1953); *Smith*, 31 N.J. at 365–66, 157 A.2d at 503.

120. *See, e.g.*, Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985), *overruling* Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974); Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984) (recognizing wrongful death action against one whose tortious conduct caused the death of a viable unborn fetus).

121. 111 N.J. 412, 545 A.2d 139 (1988).

over one hundred years ago.[122] At that time a fetus was considered to be simply a part of its mother with no independent existence.[123] Other rights of the unborn were not recognized at that time either. The court has stuck its head in the sand by refusing to recognize the developments made in society and the need for the courts to interpret the laws to serve the needs of that advanced society. The most severe and devastating of torts, those which cause the death of an unborn child, should not go uncompensated simply because a legislature of a bygone era did not recognize the status of a fetus.

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122. *Id.* at 428–29, 545 A.2d at 147.
123. *Id.* at 421, 545 A.2d at 143.