

9-1-1988

DiDonato v. Wortman and Wrongful Death of a Viable Fetus in North Carolina: The Case against Unreasonably Restricting Damages

Christopher P. Edwards

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Christopher P. Edwards, *DiDonato v. Wortman and Wrongful Death of a Viable Fetus in North Carolina: The Case against Unreasonably Restricting Damages*, 66 N.C. L. REV. 1291 (1988).

Available at: <http://scholarship.law.unc.edu/nclr/vol66/iss6/17>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

***DiDonato v. Wortman* and Wrongful Death of a Viable Fetus in North Carolina: The Case Against Unreasonably Restricting Damages**

Medical technology in this century has advanced at a breathtakingly rapid rate, as yesterday's unattainable goals are quickly transformed into today's basic medical knowledge. The law, accustomed to a more cautious rate of progress, has frequently found itself struggling to integrate new medical discoveries into a common law developed through years of carefully-reasoned growth. Particularly noteworthy medical progress has been made in the area of prenatal development.¹ Judicial recognition of fetal rights has proceeded somewhat more deliberately, but in North Carolina fetuses have been accorded a right of inheritance,² and a child born alive can recover for prenatal injuries suffered as a result of another's negligent behavior.³

The North Carolina Supreme Court's recent decision in *DiDonato v. Wortman*⁴ marked another legal milestone in establishing the rights of the unborn and their parents. The *DiDonato* court held that a viable fetus is a "person" under the North Carolina Wrongful Death Act and therefore the estate of a stillborn child may bring a cause of action under this Act.⁵ Although this decision adds North Carolina to the list of over thirty states that allow the estate of a stillborn child to bring some type of wrongful death action,⁶ the court limits

1. See J. ROSENBLITH & J. SIMS-KNIGHT, IN THE BEGINNING: DEVELOPMENT IN THE FIRST TWO YEARS OF LIFE 31-42 (1985). Obstetricians can now pinpoint a specific weekly timetable for fetal development. Between the eighth and twelfth weeks, for example, the fetus first begins to move its arms and legs, begins to show different facial expressions, develops external sexual organs, and has identifiable finger, palm, and toe prints. *Id.* at 31. By the 28th week, the fetus' lungs have developed to the point where it is capable of surviving on its own outside the mother. *Id.* at 32; see also T. VERNY & J. KELLY, THE SECRET LIFE OF THE UNBORN CHILD 15-52 (1981) (the start of fetal awareness occurs between the twenty-eighth and thirty-second weeks at which time the neural circuits in a fetus' brain are just as advanced as in the brain of a newborn and the cerebral cortex, the most complex part of the brain, is also advanced enough to support consciousness).

2. See *Byerly v. Tolbert*, 250 N.C. 27, 30-31, 108 S.E.2d 29, 32 (1959) (afterborn child of decedent entitled to intestate share of estate); *Deal v. Sexton*, 144 N.C. 157, 159, 56 S.E. 691, 692 (1907) ("The statute law of this state [pertaining to intestate succession] treats the unborn child in its mother's womb with the same consideration as if born."); N.C. GEN. STAT. § 29-9 (1984).

3. See *Stetson v. Easterling*, 274 N.C. 152, 155-56, 161 S.E.2d 531, 533-34 (1968); PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 367-70 (W. Keeton 5th ed. 1984). North Carolina has yet to recognize a cause of action for wrongful life or wrongful birth. A wrongful life claim is brought by a defective child who alleges that the negligent treatment or advice given the child's parents caused the child to be born. A wrongful birth claim is brought by parents of a defective child and alleges that the negligent treatment or advice provided the parents deprived them of the opportunity to prevent the child's birth. See *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 107 S. Ct. 131 (1986). The North Carolina Supreme Court reasoned that life itself, even life with defects, does not constitute an injury. *Id.* at 111, 337 S.E.2d at 533-34. However, parents may bring an action for "wrongful conception" if a physician's negligence results in an unintended pregnancy. See *Jackson v. Bumgardner*, 318 N.C. 172, 178-82, 347 S.E.2d 743, 748-49 (1986) (physician negligently fails to replace plaintiff's intrauterine device following surgery).

4. 320 N.C. 423, 358 S.E.2d 489 (1987).

5. North Carolina's Wrongful Death Act is codified at N.C. GEN. STAT. § 28A-18-2 (1984).

6. See *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Summerfield v. Superior Court*, 144 Ariz. 467, 698 P.2d 712 (1985); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Greater*

recovery to those damages the court views as clearly provable without resort to speculation.

This Note examines the *DiDonato* decision in light of the history of wrongful death actions brought on behalf of the unborn in North Carolina and in other jurisdictions. It also traces the evolution of North Carolina's wrongful death statute and the gradual expansion of recoverable damages resulting from judicial interpretation of the statute in light of changing perceptions of human value. This Note concludes that while the viable fetus should be entitled to the protection of North Carolina's wrongful death statute, the remedial purpose of the statute can better be served by permitting the recovery of additional damages, without basing these damages on pure speculation.

Norma DiDonato consulted defendant Dr. William J. Wortman on March 24, 1982 and was told by him she was pregnant.⁷ On a subsequent visit Wortman evaluated Mrs. DiDonato's pregnancy as one entailing "no risk."⁸ Mrs. DiDonato visited the offices of Wortman and codefendant John T. Hart frequently, and starting in late June 1982, chemical tests began revealing the presence of sugar in Mrs. DiDonato's urine.⁹ Defendants never informed Mrs. DiDonato of this finding or prescribed any medication to reduce the sugar level.¹⁰ On October 26, a non-stress test disclosed that Mrs. DiDonato was carrying a viable healthy baby¹¹ who could have been born alive had labor been

Southeast Comm. Hosp. v. Williams, 482 A.2d 394 (D.C. App. 1984); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); Chrisafogorgis v. Brandenburg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Danos v. St. Pierre, 402 So. 2d 633 (La. 1981); State ex rel. Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainy v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826, modified on other grounds, 95 N.M. 147, 619 P.2d 823 (1980); Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984); Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974); Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985); Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Farley v. Mt. Marty Hosp. Ass'n, 387 N.W.2d 42 (S.D. 1986); Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 425 A.2d 92 (1980); Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); TENN. CODE ANN. § 20-5-106 (1980). In addition, Iowa provides for recovery under a rule of civil procedure allowing parents to recover for the death of a minor child. See *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (Iowa 1983).

States that do not allow a cause of action are California, Florida, Nebraska, New Jersey, New York, and Virginia. See *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

7. See Plaintiff-Appellant's Brief at 3, *DiDonato* (No. 280A86). An initial due date of October 10, 1982, was set.

8. *Id.* This evaluation was made despite a family history of diabetes mellitus, a history of infertility, and Mrs. DiDonato's age at the time of the pregnancy, 36 years.

9. *Id.*

10. See *id.* at 4. Defendants also failed to tell Mrs. DiDonato that her due date had been revised from October 10 to later in the month. *Id.* at 3-4.

11. Viability is that "stage of fetal development when the life of the unborn child may be con-

induced.¹² Nevertheless, doctors could detect no fetal heartbeat when Mrs. DiDonato was admitted four days later, and she gave birth to a stillborn baby by cesarean section.¹³

Plaintiff Anthony DiDonato, the father of the decedent child and administrator of its estate, brought suit in Mecklenburg County Superior Court under N.C. General Statutes section 28A-18-2, North Carolina's wrongful death statute.¹⁴ Plaintiff alleged at trial that Mrs. DiDonato had suffered from mild diabetes mellitus during her pregnancy, causing blood sugar to be "spilled" into her urine.¹⁵ Plaintiff further alleged that this "spill" resulted in the greater-than-normal weight of the fetus, which in turn placed a strain on Mrs. DiDonato's vascular system and caused the fetus to outgrow the placenta and its blood and oxygen supply.¹⁶ Plaintiff claims defendants Wortman and Hart were negligent in failing to inform Mrs. DiDonato of the potential danger her diabetes posed to her pregnancy and in failing to monitor properly the effects of the diabetes on her developing child or take corrective action before the life of the fetus was put at risk.¹⁷

The trial court granted a motion by defendants to dismiss plaintiff's action for failure to state an actionable claim.¹⁸ The North Carolina Court of Appeals affirmed the decision, holding that a viable child *en ventre sa mere*¹⁹ who dies as a result of a third party's negligence is not a "person" within the meaning of the North Carolina Wrongful Death Act.²⁰ According to the court of appeals, any action to bring an unborn fetus within the protection of the Wrongful Death Act should originate in the General Assembly rather than in the courts.²¹

tinued indefinitely outside the womb by natural or artificial life-supportive systems." BLACK'S LAW DICTIONARY 1404 (5th ed. 1979).

12. Plaintiff-Appellant's Brief at 4.

13. *DiDonato*, 320 N.C. at 424, 358 S.E.2d at 489. The weight of the male fetus removed from Mrs. DiDonato's womb was 12 pounds, 11 ounces. See Plaintiff-Appellant's Brief at 4.

14. For the statutory language, see *infra* note 24.

15. Plaintiff-Appellant's Brief at 4-5.

16. *Id.* at 4-6.

17. *Id.* at 5-6.

18. *DiDonato v. Wortman*, 80 N.C. App. 117, 118, 341 S.E.2d 58, 59 (1986), *rev'd*, 320 N.C. 423, 358 S.E.2d 489 (1987).

19. *En ventre sa mere* means "in its mother's womb." BLACK'S LAW DICTIONARY 479 (5th ed. 1979).

20. *DiDonato*, 80 N.C. App. at 118-19, 341 S.E.2d at 59-60.

21. *Id.* at 119, 341 S.E.2d at 60. In a dissenting opinion Judge Phillips asserted that the 1969 amendments to the wrongful death statute had brought the viable fetus within the statute's purview by providing that pecuniary losses are not the sole damages recoverable in the event of a wrongful death. *Id.* at 121, 341 S.E.2d at 61 (Phillips, J., dissenting). Judge Phillips viewed the majority's restrictive definition of "person" requiring a live birth as being contrary to both legislative intent and common perceptions of the meaning of the word.

A "person," according to the common understanding of mankind if the dictionaries they use are any guide, is simply a human being. Nothing in the Wrongful Death Act or its history suggests that the word meant anything else to the General Assembly, but much indicates that it did not. . . . A viable, healthy 12-pound boy at term immediately before birth is certainly a human being and plaintiff's action is authorized in my opinion under both the language and spirit of the act.

Id. at 120, 341 S.E.2d at 60 (Phillips, J., dissenting). See *contra* *Cardwell v. Welch*, 25 N.C. App. 390, 393, 213 S.E.2d 382, 384 ("[W]e construe the word 'person' in our wrongful death statute to

In its analysis of the case the North Carolina Supreme Court²² warned against "inferring legislative approval of appellate court decisions [holding that a viable fetus is not a person for purposes of the wrongful death statute] from what is really legislative silence."²³ The court focused its attention on the wrongful death statute itself, the public policies surrounding its adoption, and the common law principles governing its application.²⁴

Specifically, the court interpreted the 1969 amendments to the Wrongful Death Act²⁵ to expand the class of plaintiffs entitled to bring causes of action by widening the spectrum of recoverable damages to encompass damages other than pecuniary loss.²⁶ By analogizing to a child's right to recover for prenatal injuries established in *Stetson v. Easterling*,²⁷ and by studying other jurisdictions' treatment of comparable wrongful death statutes, the court reasoned that a via-

mean one who has become recognized as a person by having been born alive."), *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975).

22. Plaintiff had an appeal of right to the supreme court by virtue of Judge Phillips' dissent in the court of appeals' opinion. See N.C. GEN. STAT. § 7A-30(2) (1986).

23. *DiDonato*, 320 N.C. at 425, 358 S.E.2d at 490. The decisions denying an action for the wrongful death of a stillborn child under the current statute are *Yow v. Nance*, 29 N.C. App. 419, 224 S.E.2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E.2d 833 (1976), and *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975).

24. *DiDonato*, 320 N.C. at 425, 358 S.E.2d at 490. North Carolina's wrongful death statute reads in part:

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent . . .

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, willful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

N.C. GEN. STAT. § 28A-18-2 (1984).

25. See *infra* text accompanying notes 53-62.

26. *DiDonato*, 320 N.C. at 429-30, 358 S.E.2d at 492-93.

27. 274 N.C. 152, 156, 161 S.E.2d 531, 534 (1968) (a living child can maintain a cause of action to recover damages for injuries negligently inflicted upon it while it was still in its mother's womb); see also *Gay v. Thompson*, 266 N.C. 394, 399, 146 S.E.2d 425, 429 (1966) ("Since the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence.").

ble fetus is a living being capable of independent life and worthy of protection under the Wrongful Death Act.²⁸ In summarizing the rationale behind its decision, the court stated,

The language of our wrongful death statute, its legislative history, and recognition of the statute's broadly remedial objectives compel us to conclude that any uncertainty in the meaning of the word "person" should be resolved in favor of permitting an action to recover for the destruction of a viable fetus *en ventre sa mere*.²⁹

The court next considered what damages would be available to the estate of a stillborn child in a wrongful death action.³⁰ In determining the recoverable damages, the court was bound by the requirement that any damages must be based on solid proof of loss and not on unreasonable speculation alone.³¹ While recognizing "that the damages in any wrongful death action are to some extent uncertain and speculative,"³² the court stated that the difficulty in calculating damages is particularly acute in actions based on the death of an unborn child because no characteristics of the child's personality, intelligence, or work capabilities can be known.³³

Consequently, the court held that the beneficiaries of a stillborn child's estate cannot recover damages for lost income or for loss of services, assistance, society, companionship, and the like, because all would require excessive speculation in the absence of knowledge about the child's relevant personal qualities.³⁴ Unless fetal pain and suffering can be proved to a court's satisfaction, the possibility of which the court doubted but would not foreclose, the estate is entitled to recover only medical and funeral expenses and any punitive or nominal damages capable of proof.³⁵

28. *DiDonato*, 320 N.C. at 426-28, 358 S.E.2d at 491-92. Referring to a living child's ability to recover for negligently inflicted prenatal injuries, the court stated, "It would be logical and consistent [with *Stetson v. Easterling* and similar decisions in other jurisdictions], and would further the policy of deterring dangerous conduct that underlies them, to allow such claims when the fetus does not survive." *Id.* at 427, 358 S.E.2d at 491.

29. *Id.* at 430, 358 S.E.2d at 493.

30. *Id.* at 430-32, 358 S.E.2d at 493-94.

31. See *Norwood v. Carter*, 242 N.C. 152, 156, 87 S.E.2d 2, 5 (1955); *Newbold v. Meadows Fertilizer Co.*, 199 N.C. 552, 552, 155 S.E. 244, 244 (1930).

32. *DiDonato*, 320 N.C. at 431, 358 S.E.2d at 494 (quoting *Graf v. Taggart*, 43 N.J. 303, 310, 204 A.2d 140, 144 (1964)). The *Graf* court distinguished prenatal wrongful death cases from other wrongful death actions by virtue of the *uniformly* speculative nature of the proof of loss of pecuniary benefits in prenatal cases. *Graf*, 43 N.J. at 310-11, 204 A.2d at 144-45.

33. *DiDonato*, 320 N.C. at 431-32, 358 S.E.2d at 494.

34. *Id.* at 432, 358 S.E.2d at 494. According to this interpretation of the statute, the estate is precluded from recovering any damages for the decedent's present monetary value listed in N.C. GEN. STAT. § 28A-18-2(b)(4). For the text of the statute, see *supra* note 24.

35. *DiDonato*, 320 N.C. at 432, 358 S.E.2d at 494. Any medical expenses associated with the birth process could be recovered by either the estate in its wrongful death action or by the mother in a separate personal injury action. Punitive damages would also potentially be available in both actions, although defendants allegedly committed only one tortious act. *Id.* at 432-34, 358 S.E.2d at 494-95. Fearing such a double recovery of some elements of damages, the court held that any wrongful death action brought by the estate must be joined with any personal injury claims brought by the parents in connection with the same negligent behavior that gives rise to the wrongful death action. *Id.* The court compared *DiDonato* to *Nicholson v. Hugh Chatham Memorial Hosp.*, 300 N.C. 295, 266 S.E.2d 818 (1980), in which the court established a spouse's right to maintain an action for loss of consortium, but required joinder of any such claim with any personal injury action

In an opinion concurring in part and dissenting in part joined by Justice Mitchell, Justice Martin agreed that the 1969 amendments to the wrongful death statute signified the General Assembly's intent to broaden the range of compensable deaths to include those that may not give rise to easily calculable pecuniary damages.³⁶ Because a viable unborn child has been held to have "a life capable of being destroyed" for purposes of the criminal law,³⁷ Justice Martin reasoned that a similar result should be reached when the court applies a lesser civil standard, such as in a wrongful death action.³⁸ Unlike the majority, however, Justice Martin would initially afford the plaintiff in a prenatal wrongful death action the opportunity to recover all statutory damages, limited not by the supreme court's direction but rather by the trial court's discretion.³⁹ In a separate dissenting opinion, Justice Webb argued that any expansion of the wrongful death statute should come through legislative rather than judicial action.⁴⁰ Justice Webb also questioned the majority's artificial limitation on damages for the cause of action created.⁴¹

The history of wrongful death recovery in North Carolina and the statutory predecessors to the current Wrongful Death Act give insight to the limitation on damages imposed in *DiDonato*. The earliest formulation of North Carolina's Wrongful Death Act, enacted in 1855, emphasized the purely financial basis of the tort, providing for recovery of damages only in terms of pecuniary injury.⁴²

brought by the other spouse in order to avoid double recovery. According to the *Nicholson* court, the real injury precipitating both actions was to the family relationship as an entity, and, therefore, only a single recovery should be allowed for any elements of damages duplicated in the two causes of action, including punitive damages. *Nicholson*, 300 N.C. at 303-04, 266 S.E.2d at 822-23.

36. *DiDonato*, 320 N.C. at 435-37, 358 S.E.2d at 495-97 (Martin & Mitchell, J.J., concurring in part and dissenting in part).

37. *State v. Forte*, 222 N.C. 537, 538, 23 S.E.2d 842, 843 (1943). In *Forte* the supreme court held that, for purposes of determining when a doctor may legally perform an abortion, a child does not acquire a legal existence separate from that of its mother until the mother is "quick with child," or feels the child move within her. *Id.* at 538-39, 23 S.E.2d at 843-44.

38. *DiDonato*, 320 N.C. at 435-36, 358 S.E.2d at 496 (Martin & Mitchell, J.J., concurring in part and dissenting in part).

39. *Id.* at 436, 358 S.E.2d at 497 (Martin & Mitchell, J.J., concurring in part and dissenting in part).

The legislature has defined the possible elements of damage recoverable in a wrongful death action and must have intended that the same rule of damages apply to all such actions. It is not the prerogative of this Court to usurp a legislative function by rewriting the statute to change the rule of damages.

Id. at 436-37, 358 S.E.2d at 496-97. Justice Martin would also leave the matter of joinder of separate wrongful death and personal injuries actions to the discretion of the trial judge. *Id.* at 437, 358 S.E.2d at 497. Martin stated,

There are many factors to be considered in deciding this question [of joinder], such as the identity of parties and the negligent act or acts involved. Defenses available to defendant or defendants as to each plaintiff, time constraints within which to institute the different actions, the measurement of damages, and other factors, may vary. Protecting a defendant from paying double punitive damages on the same evidence can be accomplished on a case-by-case basis.

Id.

40. *Id.* at 437-38, 358 S.E.2d at 497 (Webb, J., dissenting).

41. *Id.* at 438, 358 S.E.2d at 497 (Webb, J., dissenting).

42. The 1855 statute read:

sec. 2 Whenever the death of a person shall be caused by the wrongful act of another person, and the wrongful act is such as would have entitled the party injured to maintain

Statutory language pertaining to damages remained unchanged in North Carolina until 1969, and judges interpreted this language to preclude any plaintiff who could not demonstrate pecuniary loss from maintaining a cause of action.⁴³ Thus, representatives of persons who were not regular wage-earners, such as very young children,⁴⁴ homemakers,⁴⁵ the mentally-handicapped⁴⁶ and elderly persons⁴⁷ were effectively barred from bringing wrongful death actions, because the death of their decedents gave rise to no demonstrable lost income.⁴⁸

This interpretation of the wrongful death statute, making definite pecuniary loss a prerequisite for recovery, provided the primary justification for denying a cause of action to the estate of a stillborn child.⁴⁹ Thus, in the 1966 case *Gay v. Thompson*⁵⁰ the North Carolina Supreme Court held that a wrongful death action brought by a stillborn's estate was barred "on the ground there can be no evidence from which to infer 'pecuniary injury resulting from' the wrongful pre-

an action, and recover damages in respect thereof, if death had not ensued, then and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

sec. 3 Every such action shall be brought by and in the name of the personal representative of the deceased, . . . and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death.

Act of Feb. 16, 1855, Ch. 39, §§ 2-3, 1854 N.C. Public Laws, 97, 97-98 (codified in REVISED CODE OF 1854, ch. 1, § 9-10).

The tort continued to be based on the English premise that children helped support the family through work outside the home and that the death of a child could mean financial calamity for the family. For a discussion of the history of the pecuniary loss rule, see Note, *The Pecuniary Loss Rule as an Inappropriate Measure of Damages in Child Death Cases*, 18 IND. L. REV. 731 (1985).

43. See *Scriven v. McDonald*, 264 N.C. 727, 732, 142 S.E.2d 585, 588 (1965); *Bryant v. Woodlief*, 252 N.C. 488, 494-95, 114 S.E.2d 241, 246 (1960); *Collier v. Arrington*, 61 N.C. 356, 358 (1867). In *Scriven* the court reversed a judgment for \$5750 awarded to the estate of an eleven-year-old mentally-handicapped boy stating, "The statute, G.S. 28-174, leaves no room for sentiment. It confers a right to compensation only for pecuniary loss." *Scriven*, 264 N.C. at 732, 142 S.E.2d at 588.

44. See *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968) (sustaining a demurrer to estate's cause of action on behalf of a child who died from prenatal brain injuries after living only a few months on ground that calculating pecuniary damages would amount to sheer speculation).

45. See *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E.2d 49 (1952).

The view that the value of decedent's labor in the home as a housewife should be considered by the jury in determining the amount of damages recoverable is supported by reputable authority in some other jurisdictions, but under the North Carolina Statute as interpreted by the decisions of this Court compensation for wrongful death is limited to 'the pecuniary injury resulting from such death.'

Id. at 731, 71 S.E.2d at 52 (citation omitted) (quoting N.C. GEN. STAT. § 28-174 (1950)).

46. See *Scriven*, 264 N.C. 727, 142 S.E.2d 585 (denying recovery to the estate of a mentally-handicapped child based upon evidence tending to show the deceased would have continued to be dependent on others for his care and would never have been able to earn a livelihood).

47. See *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E.2d 793 (1958) (affirming jury award of no damages to estate of an 80-year-old woman without apparent earning capacity).

48. See *DiDonato*, 80 N.C. App. at 120-21, 341 S.E.2d at 60-61 (1986) (Phillips, J., dissenting), *rev'd*, 320 N.C. 423, 358 S.E.2d 489 (1987); *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 418-19, 196 S.E.2d 789, 805 (1973).

49. See *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966).

50. 266 N.C. 394, 146 S.E.2d 425 (1966). *Gay* was a case of first impression. The issue before the court was whether the administrator of the estate of a stillborn child who died as a result of injuries negligently inflicted while he was a viable fetus can maintain a cause of action under North Carolina's Wrongful Death Act. *Id.* at 395, 146 S.E.2d at 426.

natal death of a viable child *en ventre sa mere*; it is all sheer speculation.”⁵¹ Despite plaintiff’s allegations that the doctor’s negligence had resulted in the stillbirth of the Gays’ child, the court held that “[n]egligence alone, without ‘pecuniary injury resulting from such death,’ does not create a cause of action.”⁵²

Sensing the unjust results produced by requiring pecuniary loss as the exclusive basis for a wrongful death action, in 1969 the North Carolina General Assembly amended the wrongful death statute with the so-called “Wife’s Bill.”⁵³ The General Assembly stated its purpose in expanding the damages recoverable in a wrongful death action in the preamble to the amendments, which reads:

WHEREAS, human life is inherently valuable; and WHEREAS, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectively limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life⁵⁴

The amendments, which changed the wording of the statute to the current statutory language of the Wrongful Death Act,⁵⁵ allow a plaintiff to recover the medical and funeral expenses of the decedent, compensation for the decedent’s pain and suffering, applicable punitive or nominal damages, and the present monetary value of the decedent, measured in terms of the loss of decedent’s services, care, assistance, society, companionship, guidance, and net income.⁵⁶ In addition, all evidence reasonably tending to establish any of these elements of damages or the decedent’s present monetary value is admissible for that purpose.⁵⁷

While these changes in the Wrongful Death Act removed the pecuniary loss

51. *Id.* at 402, 146 S.E.2d at 431. In *Gay* the defendant doctor administered labor-inducing drugs to Barbara Gay despite the apparent good health of both Mrs. Gay and her unborn child. The drugs were unsuccessful and Mrs. Gay returned to her home, only to come back to the hospital the next day suffering from an acute infection of the uterus that resulted in the deaths of both Mrs. Gay and the child. *Id.* at 394-95, 146 S.E.2d at 425-26.

52. *Id.* at 398, 146 S.E.2d at 428 (quoting N.C. GEN. STAT. § 28-174 (1966)). Section 28-174 restricted recovery to “a fair and just compensation for the pecuniary injury resulting from such death.” N.C. GEN. STAT. § 28-174 (1966).

53. Act of April 14, 1969, ch. 215, § 1, 1969 N.C. Sess. Laws 194, 194 (codified at N.C. GEN. STAT. § 28-174 (1971)). The nickname “Wife’s Bill” stems from the fact the amendments enabled the estates of homemakers to recover damages in wrongful death actions for the first time. Because these women earned no outside income for performing their household chores, the courts had previously viewed their deaths as causing no pecuniary loss. See generally *Lamm v. Lorbacher*, 235 N.C. 728, 731, 71 S.E.2d 49, 52 (1952) (holding that decedent’s labor as a housewife is not to be considered in calculating pecuniary loss resulting from her death); Note, *The New North Carolina Wrongful Death Statute*, 48 N.C.L. REV. 594, 598 (1970) (suggesting that the amendments will force juries to consider the loss sustained by beneficiaries in all respects, not just in pecuniary terms).

54. Act of April 14, 1969, ch. 215, § 1, 1969 N.C. Sess. Laws 194, 194.

55. See N.C. GEN. STAT. § 28A-18-2(b) (1984). For the relevant statutory language, see *supra* note 24.

56. N.C. GEN. STAT. § 28A-18-2 (1984). For examples of cases in which courts have upheld increased damage awards or instructed juries to consider awarding increased damages in accordance with the statutory directive, see *Carver v. Carver*, 310 N.C. 669, 683, 314 S.E.2d 739, 747-48 (1984); *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 419, 196 S.E.2d 789, 805 (1973).

57. N.C. GEN. STAT. § 28A-18-2(c) (1984).

requirement as a major barrier that prevented wrongful death claims from being brought on behalf of stillborn children, North Carolina courts were reluctant to designate a viable fetus a "person" and allow its estate to maintain a cause of action.⁵⁸ In *Cardwell v. Welch*,⁵⁹ and later in *Yow v. Nance*,⁶⁰ the North Carolina Court of Appeals found it probable that by using the word "person" in the wrongful death statute, the legislature "intended to create a cause of action only for the wrongful death of one who by live birth had attained a recognized individual identity so as to have become a 'person' as that word is commonly understood."⁶¹ The court also reasoned that a live birth furnished an easily recognizable starting point from which to measure life for wrongful death purposes, as opposed to establishing a viability standard which would only lend itself to further argument and confusion.⁶²

North Carolina's hesitation to extend wrongful death protection to a viable fetus, however, was the exception rather than the rule among its sister states. Beginning with the groundbreaking 1949 Minnesota case *Verkennes v. Corniea*,⁶³ by 1986 thirty-five jurisdictions had afforded estates of viable fetuses the opportunity to recover damages by way of wrongful death actions.⁶⁴ While many of these decisions simply established the cause of action and remanded the case to a lower court for the determination of damages,⁶⁵ thereby ignoring the admitted difficulty in ascertaining which damages are recoverable, a few courts

58. See *Yow v. Nance*, 29 N.C. App. 419, 224 S.E.2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E.2d 833 (1976); *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975).

59. 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975).

60. 29 N.C. App. 419, 224 S.E.2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E.2d 833 (1976), *overruled by* *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987).

61. *Cardwell*, 25 N.C. App. at 392, 213 S.E.2d at 383.

62. *Id.* at 392-93, 213 S.E.2d at 383-84.

63. 229 Minn. 365, 38 N.W.2d 838 (1949).

64. See cases cited *supra* note 6. For additional justifications advanced by courts in establishing wrongful death actions on behalf of viable fetuses, see *Werling v. Sandy*, 17 Ohio St. 3d 45, 48, 476 N.E.2d 1053, 1055 (1985) (failure to allow cause of action could lead to inconsistency if viable unborn twins are injured simultaneously in the womb, one twin dying from the injury before birth and one after birth); *Amadio v. Levin*, 509 Pa. 199, 205, 501 A.2d 1085, 1087-88 (1985) (recognizing a wrongful death action on behalf of a child who has been born while denying one for a viable unborn child encourages tortfeasors to behave more negligently so as to kill an unborn child and thereby preclude a cause of action). *Contra* Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 594 (1965) ("[T]he grant of compensation . . . to the parents of an infant in utero, is in reality compensation for sentimental loss framed as though it were pecuniary loss."); Comment, *Developments in the Law of Prenatal Wrongful Death*, 69 DICK. L. REV. 258, 266-67 (1965) (calculating damages in prenatal wrongful death cases amounts to sheer speculation, and death of a fetus rarely represents a pecuniary loss to the parents).

Two states, Georgia and Rhode Island, allow a cause of action for fetuses killed before they reach the point of viability. In *Porter v. Lassiter*, 91 Ga. App. 712, 715-16, 87 S.E.2d 100, 102-03 (1955), the Court of Appeals of Georgia held that a fetus must be "quick," defined as "able to move in its mother's womb," for the wrongful death statute to be applicable. The Supreme Court of Rhode Island stated in *Presley v. Newport Hosp.*, 117 R.I. 177, 188, 365 A.2d 748, 754 (1976), that, "[i]t seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable non sequitur." See Note, *Wrongful Death of the Fetus: Viability is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103 (1984).

65. See, e.g., *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983) (en banc); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973).

have attempted to formulate workable solutions to the damages problem. Using their respective state wrongful death statutes as a guide, some jurisdictions have adopted the pre-1969 North Carolina view limiting recovery in viable fetus cases to definite pecuniary losses.⁶⁶ Others have declined to place such a limitation on damages and have held that an estate is entitled to a wider range of compensation.⁶⁷ While the specificity with which the various elements of recoverable damages are enumerated makes North Carolina's wrongful death statute somewhat unique, an examination of the damage provisions in wrongful death statutes of other jurisdictions will prove helpful in determining whether the limitation on damages imposed by the supreme court in *DiDonato* is reasonable.

In Illinois, which still requires damages to be based on the pecuniary injury suffered by the estate,⁶⁸ the supreme court upheld an award of \$125,000 to a stillborn's estate based on a presumption of substantial pecuniary loss.⁶⁹ The only evidence introduced in that case showed that the fetus appeared to be normal and healthy prior to the defendant's negligence.⁷⁰ Similarly, the Michigan Supreme Court stated in dicta in the 1971 case *O'Neill v. Morse*⁷¹ that Michigan's wrongful death statute could be interpreted to permit the parents of a deceased, previously viable fetus to recover damages for loss of their child's services.⁷² At that time the statute provided for the recovery of damages based on pecuniary injury, medical and funeral expenses, and compensation for pain and suffering.⁷³ While acknowledging these damages would be difficult to prove in the case of an infant or stillborn child, the Michigan court stated that the parents were entitled to such compensation if, as in the instant case, pecuniary injuries were alleged.⁷⁴

Minnesota is another jurisdiction in which courts have interpreted a statute

66. See, e.g., *Jones v. Karraker*, 98 Ill. 2d 487, 457 N.E.2d 23 (1983); *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971) (dicta).

67. See, e.g., *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969); *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970).

68. See ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd Supp. 1987). The statute reads in part, "[T]he jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death . . ." *Id.*; see also *id.* ch. 70, § 2.2 (statute specifying that the state of human gestation at death shall not preclude the maintenance of a wrongful death action of behalf of decedent).

69. See *Jones v. Karraker*, 98 Ill. 2d 487, 457 N.E.2d 23 (1983).

70. *Id.* at 489-90, 457 N.E.2d at 24-25. "[I]n many opinions involving verdicts for the wrongful death of minor children, the evidence of the child's health, abilities, disposition and other accomplishments has been discussed, but in none of these opinions was it held that such evidence is required to sustain a verdict." *Id.* at 491, 457 N.E.2d at 25.

71. 385 Mich. 130, 188 N.W.2d 785 (1971).

72. *Id.* at 139, 188 N.W.2d at 788; see also *In re Olney's Estate*, 309 Mich. 65, 84, 14 N.W.2d 574, 582 (1944) (establishing loss of decedent's services as part of pecuniary injury in wrongful death action).

73. See Act of July 12, 1965, no. 146, 1965 Mich. Pub. Acts 232. The statute has since been amended to replace its pecuniary loss basis with a broader spectrum of recoverable damages, including the loss of society and companionship of the deceased. See Act of July 28, 1971, no. 65, 1971 Mich. Pub. Acts 111-12 (codified at MICH. STAT. ANN. § 27A.2922(2) (Callaghan 1980)), as amended by Act of July 10, 1985, no. 93, 1985 Mich. Pub. Acts 222-24 (codified at MICH. STAT. ANN. § 27A.2922(6) (Callaghan Supp. 1987)).

74. *O'Neill*, 385 Mich. at 139, 188 N.W.2d at 788.

having the estate's pecuniary loss as its touchstone to encompass a greater range of damages than merely lost income.⁷⁵ In *Pehrson v. Kistner*⁷⁶ the Minnesota Supreme Court reversed a district court verdict awarding the estate of a viable fetus only \$540 on the ground that this amount was less than the \$586 of special damages proved by the plaintiff.⁷⁷ In remanding the case for a new trial on the issue of damages, the court stated, "[I]t is difficult to visualize a case where a human being does not have some monetary value in addition to special damages incurred by next of kin."⁷⁸ Among the jury's errors was the failure to consider awarding damages for pecuniary loss, which in Minnesota includes, among other things, compensation for lost counsel, guidance, aid, comfort, and assistance.⁷⁹ The court implied that while it realized trying to equate such intangible qualities with a definite pecuniary sum could be a difficult task for juries, the trial judge's right to overturn the verdict and the defendant's ability to appeal would prevent juries from returning unreasonably inflated verdicts.⁸⁰

The Kentucky wrongful death statute⁸¹ provides wrongful death plaintiffs with both a general recovery of damages and an award of punitive damages if the defendant's negligence was gross or wilful.⁸² The Court of Appeals of Kentucky, the highest court in Kentucky at the time, stated, "In few states is the determination of damages left to the jury to the extent that it is in Kentucky."⁸³ Kentucky case law interpreted the proper measure of damages in a wrongful

75. See *Rath v. Hamilton Standard Div.*, 292 N.W.2d 282, 284-85 (Minn. 1980) ("The term 'pecuniary loss' is not limited strictly to loss of income."); *Fussner v. Andert*, 261 Minn. 347, 352-54, 113 N.W.2d 355, 358-59 (1962) (expanding "pecuniary loss" to include loss of advice, comfort, and assistance that the jury could determine to be of pecuniary value).

76. 301 Minn. 299, 222 N.W.2d 334 (1974).

77. *Id.* at 301, 222 N.W.2d at 335-36.

78. *Id.* at 303, 222 N.W.2d at 337.

79. See *id.* at 302-03, 222 N.W.2d at 336-37.

80. *Id.* at 303, 222 N.W.2d at 337. "[A]ll verdicts attempting to compensate for the death of a minor child may be arbitrary attempts at a difficult, if not impossible, task. This court has on numerous occasions extended deference to amounts awarded by trial courts in this type of case." *Id.*; see also *Ahrenholz v. Hennepin County*, 295 N.W.2d 645, 649-50 (Minn. 1980) (affirming verdict of \$100,000 in wrongful death of a one-month-old child and comparing relative sizes of verdicts returned in child wrongful death cases in other jurisdictions). Although the infant in *Ahrenholz* had been born alive, many if not all of the valuation problems inherent in a viable fetus case also arise when a newborn infant dies because of another's negligent behavior. For example, evaluating the decedent's character and personality in attempting to arrive at compensation for lost counsel and comfort would be equally difficult in either case. In *Ahrenholz* the jury originally returned a judgment for \$428,000, but the trial judge viewed this sum as excessive and used his discretion to reduce the verdict to \$100,000, an amount upheld as reasonable by the Minnesota Supreme Court. *Id.* at 646-47. A similar reduction in the verdict could serve to protect the defendants in a viable fetus case from an award of damages more akin to punishment than compensation for the tort committed, while affording the jury the chance to return a verdict it views as fair under the circumstances.

81. KY. REV. STAT. ANN. § 411.130(1) (Michie Supp. 1986).

82. *Id.*

83. *Wilkins v. Hopkins*, 278 Ky. 280, 283, 128 S.W.2d 772, 774 (1939). The District of Columbia also gives a jury a wide amount of discretion in calculating damages, specifying only that they must "be assessed with reference to the injury resulting from the act, neglect, or default causing the death." D.C. CODE ANN. § 16-2701 (1981). It is significant that the reference is simply to the resulting injury and not the resulting pecuniary injury. In *Crooks v. Williams*, 508 A.2d 912, 915 (D.C. App. 1986), the Court of Appeals for the District of Columbia, applying § 16-2701, upheld an award of \$370,000 in a case in which a viable fetus died as a result of an obstetrician's negligence. A cause of action may also be maintained under D.C. CODE ANN. § 12-101 (1981), a "survival statute" allowing the legal representative of a decedent to maintain a cause of action in place of the decedent.

death action to be the "permanent reduction of the decedent's power to earn money."⁸⁴ Applying this rule in the context of a viable fetus case, the Court of Appeals of Kentucky held in *Rice v. Rizk*⁸⁵ that, "[t]he measure for damages in a wrongful death action involving an infant [including a stillborn infant, such as the decedent] is the destruction of the infant's power to earn money."⁸⁶ Notwithstanding the decedent's status as a stillborn child, the court held that the jury erred by failing to follow the trial court's instructions to award damages based on the "inference that the child would have had some earning power," and ordered a new trial.⁸⁷

In a similar 1969 case interpreting West Virginia law, the United States District Court for the Southern District of West Virginia held that in the absence of proof by plaintiff of specific pecuniary loss, West Virginia's wrongful death statute provided for the recovery of a maximum of \$10,000 for sorrow and distress only.⁸⁸ The court stated, "In awarding the initial \$10,000.00, the jury may properly consider as elements of damage the grief and mental distress of a parent on account of loss of a child."⁸⁹ The court reasoned that in regard to determining an appropriate award of damages for the sorrow and bereavement resulting from a death, no real distinction could be drawn between the deaths of a stillborn child and an adult.⁹⁰ However, the court noted that a great disparity in the difficulty of proof existed in regard to pecuniary loss, so as to prevent a stillborn's estate from recovering more than the specified sum of \$10,000, absent "evidence from which the jury could rationalize and determine with reasonable accuracy the probable quantum of such potential loss."⁹¹ West Virginia's current wrongful death statute has abolished all statutory limits on recovery and is similar to North Carolina's statute in that it allows a jury to award damages for "[s]orrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; . . . compensa-

84. See *Wilkins*, 278 Ky. at 285, 128 S.W.2d at 775.

85. 453 S.W.2d 732 (Ky. 1970).

86. *Id.* at 735.

87. *Id.* at 735-36. The court added,

Lack of proof of the decedent [stillborn] infant Rice's power will not preclude recovery for the wrongful, negligent destruction of the infant's power to earn money. To require such proof would be to deny damages in the instant case, as well as in all similar wrongful, negligent death cases involving infants.

Id. at 735. Interestingly, the court failed to address the applicability of a Kentucky statute awarding the parents of deceased minors damages for "loss of affection and companionship that would have been derived from such child during its minority" KY. REV. STAT. ANN. § 411.135 (Michie 1970).

88. See *Panagopoulos v. Martin*, 295 F. Supp. 220, 227 (S.D. W. Va. 1969). The wrongful death statute in use at the time, read:

In every such action the jury may award such damages as they deem fair and just, not exceeding ten thousand dollars In addition, the jury may award such further damages, not exceeding the sum of one hundred thousand dollars, as shall equal the financial or pecuniary loss sustained by the dependent distributee or distributees of such deceased person

W. VA. CODE § 55-7-6 (1966).

89. *Panagopoulos*, 295 F. Supp. at 227.

90. *Id.*

91. *Id.*

tion for reasonably expected loss of . . . services, protection, care and assistance provided by the decedent" in addition to the traditional damages for lost income and medical and funeral expenses.⁹² No appellate case has interpreted the new statute, however, and it does not give jurors any guidance as to how to calculate definite dollar amounts as compensation for these elements of damages.

Given that all wrongful death damage awards rest on a somewhat speculative basis,⁹³ the fear that a jury's decision on damages will be influenced by an especially pitiable plaintiff is a legitimate concern in any wrongful death action. This fear caused the majority in *DiDonato* to imply that awarding the estate of a stillborn child any damages for the present monetary value of the decedent would be to indulge sentiment and sympathy at the expense of legal certainty.⁹⁴ However, holdings in comparable areas of North Carolina law and in wrongful death decisions of other jurisdictions suggest that a legally defensible award of damages representing the fetus' monetary value can be calculated. The North Carolina Supreme Court stated in *Brown v. Moore*⁹⁵ that

The present monetary value of the decedent . . . will usually defy any precise mathematical computation. Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury—subject, of course, to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require.⁹⁶

Although it is well settled that a court will not award damages based on "sheer speculation, devoid of factual substantiation,"⁹⁷ it is equally true that the jury should be allowed to hear any evidence tending to establish the decedent's present monetary value.⁹⁸ The trial judge is always available to overturn any verdict lacking a sound factual basis⁹⁹ and to ensure that any damages awarded a stillborn's estate are reasonable and not based solely on emotional considerations.¹⁰⁰

North Carolina cases dealing with a spouse's loss of consortium exhibit courts' increasing willingness and confidence to let juries assess damages having

92. W. VA. CODE § 55-7-6 (Supp. 1987). For the session law deleting the limit on recovery from the statute, see 1976 W.Va. Acts 1-3.

93. See, e.g., *Gay v. Thompson*, 266 N.C. 394, 398, 146 S.E.2d 425, 428 (1966).

94. See *DiDonato*, 320 N.C. at 431-32, 358 S.E.2d at 493-94. "[O]ur liberality in allowing substantial damages where the proofs are relatively speculative should not preclude us from drawing a line where the speculation becomes unreasonable." *Id.* at 431, 358 S.E.2d at 494 (quoting *Graf v. Taggart*, 43 N.J. 303, 310, 204 A.2d 140, 144 (1964)); see also *Scriven v. McDonald*, 264 N.C. 727, 732, 142 S.E.2d 585, 588 (1965) ("The statute . . . leaves no room for sentiment.").

95. 286 N.C. 664, 213 S.E.2d 342 (1975).

96. *Id.* at 673, 213 S.E.2d at 348-49 (citations omitted).

97. See *Gay v. Thompson*, 266 N.C. 394, 398, 146 S.E.2d 425, 428 (1966); see also *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964) (holding that a distinction should be drawn between reasonable speculation common to every wrongful death action and excessive speculation required in awarding any compensation to representatives of an unborn child).

98. See *supra* text accompanying note 57.

99. See, e.g., *Walston v. Greene*, 246 N.C. 617, 617, 99 S.E.2d 805, 805-06 (1957).

100. Justices Martin and Mitchell echoed this sentiment in their *DiDonato* dissent, stating that plaintiffs should be allowed to recover all damages proved to the satisfaction of the trial judge. *DiDonato*, 320 N.C. at 436-37, 358 S.E.2d at 496-97. They believed it preferable to permit the trial judge to bar damage recovery on a case-by-case basis rather than to automatically preclude the recovery of an entire class of damages at the appellate level. *Id.* at 436, 358 S.E.2d at 496.

a somewhat intangible basis.¹⁰¹ In *Nicholson v. Hugh Chatham Memorial Hospital*¹⁰² the North Carolina Supreme Court re-established a spouse's right to bring a loss of consortium action in this state, defining consortium as "service, society, companionship, sexual gratification, and affection."¹⁰³ With the exception of sexual gratification, these same elements are also components of a decedent's monetary value in a wrongful death action.¹⁰⁴ More importantly, the *Nicholson* court held that these damages are not too remote to serve as the basis for a loss of consortium action.¹⁰⁵ An obvious difference exists between the two causes of action, because the plaintiff in a loss of consortium suit can introduce evidence of their loved one's prior conduct. But the estate of a stillborn child can accomplish much the same purpose by introducing evidence of the unborn child's health before death and the general family background, leaving it to the jury to infer the extent of services and companionship the child would have provided for its parents.¹⁰⁶

Similarly, a certain pecuniary sum cannot be attached to the pain and suffering endured by a tort plaintiff without engaging in speculation. Yet in *Dunlap v. Lee*¹⁰⁷ the North Carolina Supreme Court held that damages for pain and suffering are recoverable despite their elusiveness and that in arriving at its award a jury should consider "'what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damages to which he is entitled, in reasonable consideration of the suffering necessarily endured.'" ¹⁰⁸ Such a consideration would seem equally appropriate in a prenatal wrongful death case. Damages for the decedent's monetary value can only be denied in a prenatal wrongful death action not because of doubt over whether a definite loss worthy of compensation has occurred, but because of the intangible, emotional nature of the injury suffered. It must be remembered, however, that "[t]he fact that the full extent of the damages must be a matter of some speculation is no ground for refusing all damages."¹⁰⁹

101. See *Nicholson v. Hugh Chatham Memorial Hosp.*, 300 N.C. 295, 302, 266 S.E.2d 818, 822 (1980); *Goble v. Helms*, 64 N.C. App. 439, 451-52, 307 S.E.2d 807, 815-16 (1983), *disc. rev. denied*, 310 N.C. 625, 315 S.E.2d 690 (1984).

102. 300 N.C. 295, 266 S.E.2d 818 (1980).

103. *Id.* at 302, 266 S.E.2d at 822.

104. For a list of the elements of a decedent's monetary value, see N.C. GEN. STAT. § 28A-18-2 (b)(4), *supra* note 24.

105. *Nicholson*, 300 N.C. at 302, 266 S.E.2d at 822.

106. See *Jones v. Karraker*, 98 Ill. 2d 487, 457 N.E.2d 23 (1983); *Decof, Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME L. REV. 197, 202 (1971) (list of elements to be considered in arriving at the pecuniary value of children contains many references to family background and characteristics of parents and siblings); *cf. Espadero v. Feld*, 649 F. Supp. 1480, 1485 (D. Colo. 1986) (citing *Jones* to support views that the difficulty of ascertaining damages should not preclude a cause of action and that courts can fashion workable remedies in prenatal wrongful death cases).

107. 257 N.C. 447, 126 S.E.2d 62 (1962).

108. *Id.* at 452, 126 S.E.2d at 66 (quoting 15 AM. JUR. *Damages* § 72 (1938)). The court continued, "'The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed. In making the estimate the jury may consider the nature and extent of the injuries and suffering occasioned by them and the duration thereof.'" *Id.* at 452, 126 S.E.2d at 66-67 (quoting 15 AM. JUR. *Damages* § 72 (1938)).

109. *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E.2d 342, 349 (1975); *In Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 419-20, 196 S.E.2d 789, 805-06 (1973), the court stated:

In overruling *Cardwell* and *Yow*¹¹⁰ and bringing a viable fetus within the protection of this state's Wrongful Death Act, the North Carolina Supreme Court recognized that the life of a fetus killed by the negligent acts of another is just as intrinsically valuable as any other human life. The court's holding that this value should be reflected in an award of monetary damages to the fetus' estate was an overdue progressive step necessary to assure North Carolina parents that they will be compensated for the loss of their child. But while the court stated in effect that a viable fetus has some inherent worth, the remedy the court afforded the fetus' estate limited this thesis by circumscribing the normal damages awarded in wrongful death cases and thereby denied the full extent of the fetus' worth in financial terms. The court accomplished this limitation by holding without exception that damages for the wrongful death of a viable fetus cannot include compensation for lost income, lost services and assistance, or lost society and companionship.¹¹¹

The limitation on damages is at the same time both consistent and inconsistent with prior North Carolina case law. It is consistent with the reasoning used in *Gay v. Thompson*¹¹² to deny a cause of action for prenatal wrongful death entirely—that awarding any damages for intangible elements of loss would amount to “sheer speculation.”¹¹³ This line of thought is based on the well-settled rule that damages in a tort action are meant to compensate the plaintiff for the injury that has occurred and not to punish the tortfeasor.¹¹⁴ While damages certainly should not be awarded in a wrongful death action merely to serve a retributive purpose, *Gay* was decided in 1966, before the 1969 amendments to the Wrongful Death Act abrogated the pecuniary loss rule and expanded the damages recoverable in a wrongful death action to include compensation for the loss of some elements that are speculative by their very nature.¹¹⁵

Now that a broader range of damages is recoverable in wrongful death actions, an estate's ability to recover is no longer dependent solely on whether it can produce mathematical calculations to support its claims of lost future income.¹¹⁶ Indeed, the majority of the current elements of a decedent's monetary value, such as lost services and lost companionship, cannot be proved to a mathematical certainty in any wrongful death case. Speculation will be necessary to

Since the persons entitled to the damages recovered may have suffered substantial losses on account of these items of damage [in N.C. GEN. STAT. § 28A-18-2(b)(4)], we cannot say there can be no recovery for these items of damages because no yardstick for ascertaining the amount thereof has been provided. Damages recoverable under paragraph (4) would be as capable of exact ascertainment as damages for pain and suffering and mental anguish in a personal injury action.

110. See *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E.2d 382, cert. denied, 287 N.C. 464, 215 S.E.2d 623 (1975); *Yow v. Nance*, 29 N.C. App. 419, 224 S.E.2d 292, disc. rev. denied, 290 N.C. 312, 225 S.E.2d 833 (1976). For a discussion of the holdings in *Cardwell* and *Yow*, see *supra* text accompanying notes 59-62.

111. *DiDonato*, 320 N.C. at 431-32, 358 S.E.2d at 494.

112. 266 N.C. 394, 146 S.E.2d 425 (1966).

113. *DiDonato*, 320 N.C. at 432, 358 S.E.2d at 494; *Gay*, 266 N.C. at 400, 146 S.E.2d at 429.

114. See *Gay*, 266 N.C. at 400, 146 S.E.2d at 430; *Graf v. Taggart*, 43 N.J. 303, 311, 204 A.2d 140, 145 (1964).

115. See *supra* text accompanying notes 25-26, 53-57.

116. See *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E.2d 342, 348 (1975).

arrive at any verdict, and the North Carolina Supreme Court has held that some speculation in the calculation of damages cannot preclude recovery altogether.¹¹⁷

But it is on the issue of whether damages can be awarded in a prenatal wrongful death case for *any* elements of damages having a speculative basis that *DiDonato* is inconsistent with past case law. While calculating the monetary value of a viable fetus is made somewhat more speculative than comparable calculations because the fetus has never been born alive and its personal characteristics can never be known, a jury is forced to engage in similar speculation to arrive at an award for lost services and companionship in a loss of consortium action, or for pain and suffering in any negligence action in which it is awarded.¹¹⁸ Arguably, in a loss of consortium action a jury can look at the quality of the affected parties' past life together in arriving at an award of damages, but concepts such as "services" and "companionship" are by their very nature vague and difficult to translate into precise pecuniary terms. They would seem to be equally speculative regardless of the age or status of the decedent. For example, it is really no more speculative to attempt to assign a value to a baby's companionship that expectant parents will never enjoy, than to the companionship of an injured husband or wife. The North Carolina General Assembly could have chosen to bar completely the recovery of damages for such nebulous concepts on account of the speculation involved. Because the text of the wrongful death statute reflects the rejection of such a prohibition,¹¹⁹ all parties bringing wrongful death actions should have the same opportunity to receive damages for loss of companionship, services, and the like. A jury certainly will speculate to the same extent if the decedent in a wrongful death action is a one-month-old baby, for whom the full complement of damages is currently available, or a viable fetus, for whom the the supreme court could envision no calculable monetary value.

The limitation on damages adopted by the supreme court in *DiDonato* results in a vastly inadequate award of damages to the estate of the child who had a right to life, and to pursue a full life, only to have another's negligence bring an abrupt and tragic end to his potential. Absent a showing of malice or willful and wanton negligence, in which case punitive damages would be available, the estate may recover only medical and funeral expenses, pain and suffering, and nominal damages.¹²⁰ The monetary value of a child certainly encompasses a wider range of damages than that recognized in *DiDonato*, and undoubtedly includes more intangible qualities such as those enumerated in North Carolina General Statutes section 28A-18-2(b)(4). The estate of a stillborn child should have the opportunity to recover the entire complement of damages available to other wrongful death plaintiffs.

117. See *supra* text accompanying note 95-98.

118. See *supra* text accompanying notes 101-109.

119. See *supra* note 24 and text accompanying notes 53-57.

120. *DiDonato*, 320 N.C. at 432, 358 S.E.2d at 494. The court hinted that pain and suffering will rarely be recoverable because of the difficulty in proving that a fetus can feel any trauma, but in light of the constant advancement of medical technology the court refused to foreclose the possibility. *Id.*

Because of this unreasonably restrictive recovery the North Carolina Supreme Court should have looked at the manner in which other jurisdictions tread the fine line between awarding adequate compensatory damages and engaging in sheer speculation.¹²¹ Like the Supreme Court of Illinois in *Jones v. Karraker*,¹²² North Carolina's courts could relieve plaintiffs of the necessity of proving a decedent's present monetary value by establishing a presumption of pecuniary loss in viable fetus cases and a corresponding dollar amount for damages.¹²³ If the courts made this presumption rebuttable, plaintiffs would be automatically entitled to an adequate recovery unless the defendant could show some circumstances under which plaintiff deserved a lesser judgment.¹²⁴ In the alternative, the North Carolina General Assembly could establish a statutory minimum recovery similar to the one formerly employed in West Virginia¹²⁵ or a specified statutory sum to be awarded all estates successfully bringing wrongful death actions because of the death of viable fetuses.

Another approach the North Carolina Supreme Court could have followed is the expansion of the use of expert witnesses in ascertaining the present monetary value of a decedent. North Carolina courts frequently allow use of economists, provided of course that counsel first qualifies the economists as expert witnesses and that the economists carefully explain the basis of their calculations.¹²⁶ In a stillborn fetus case, several bases for calculating the present monetary value of a viable fetus exist adapted to reflect the loss from the estate's perspective rather than that of the parents of the deceased child.

A case from Michigan suggests an alternative measure of the value of a child can be calculated using an investment theory.¹²⁷ In *Wycko v. Gnodtke*¹²⁸ the Michigan Supreme Court held that in measuring the pecuniary value of a deceased fourteen-year-old, a jury should consider expenditures incurred by his parents in his upbringing in arriving at an appropriate measure of his monetary value.¹²⁹ While at first glance this theory may seem reasonable, it is theoretically

121. See *supra* text accompanying notes 68-92.

122. 98 Ill. 2d 487, 489-91, 457 N.E.2d 23, 24-25 (1983).

123. See *supra* text accompanying notes 68-70. Guidance in establishing a presumption could also be gleaned from *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970), a Kentucky case holding that awarding damages to the estate of a viable fetus should operate under the inference that the child would have possessed some earning power. *Id.* at 735.

124. Such circumstances include a showing by defendant that the fetus had a congenital defect or major prenatal illness prior to any negligent act by defendant.

125. See *Panagopoulos v. Martin*, 295 F. Supp. 220, 226-27 (S.D. W. Va. 1969).

126. See, e.g., *Powell v. Parker*, 62 N.C. App. 465, 303 S.E.2d 225 (permitting an economist to testify as to decedent's present monetary value provided the economist disclosed considerations used in arriving at value), *disc. rev. denied*, 309 N.C. 322, 307 S.E.2d 166 (1983); *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E.2d 675 (1982) (allowing an economist to testify about decedent's future net income and present monetary value of her household services).

127. Under the investment theory, expenses of birth, food, clothing, instruction, nurture, and shelter are considered to constitute a child's value. See *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960). *Contra Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973) (holding as inappropriate the investment theory for measuring a child's value); *Estate of Powers v. City of Troy*, 380 Mich. 160, 156 N.W.2d 530 (1968) (Brennan, J., concurring) (criticizing the *Wycko* holding for attempting to equate the loss of a human life with a specific pecuniary value).

128. 361 Mich. 331, 105 N.W.2d 118 (1960).

129. *Id.* at 339-40, 105 N.W.2d at 122-23. The court stated, "Just as with respect to a manufac-

unsound as applied to North Carolina law because it fails to take into account the important legal distinction between the parents as an entity and the estate itself. In a wrongful death action brought by the administrator of a stillborn child's estate, it is the estate and not the parents as individuals that seeks to recover damages for the loss of the child. It cannot be denied that in the majority of prenatal wrongful death cases the child's parents and the beneficiaries of its estate will be one and the same. But the parents of a stillborn child have other legal remedies available to them in seeking damages for injuries arising from the same negligent behavior that resulted in their child's death.¹³⁰ Any damages awarded pursuant to North Carolina's Wrongful Death Act go to the estate to be distributed accordingly.¹³¹ It is a slippery, yet significant, distinction.

A commentator also has advocated basing the measure of economic loss in child wrongful death cases on a similar investment theory and has proposed several variations that attempt to place an appropriate value on a child's life.¹³² These proposals are theoretically sound under the law of Colorado, the commentator's jurisdiction, because parents of minors are authorized by statute to bring wrongful death actions in that state.¹³³ But as applied to North Carolina law, which requires the personal representative of the deceased to bring any wrongful death action,¹³⁴ these investment theories are inappropriate. On one

turing plant, or industrial machine, value involves the costs of acquisition emplacement, upkeep, maintenance service, repair, and, renovation, so, in our context, we must consider the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter." *Id.* at 339, 105 N.W.2d at 122. The Court also held that companionship and mutual society give value to a life and should be considered in arriving at an award of damages. *Id.* at 339-40, 105 N.W.2d at 122-23.

130. The parents' ability to bring personal injury actions distinct from the estate's wrongful death action could result in two awards of damages for the same injury. *DiDonato*, 320 N.C. at 432, 358 S.E.2d at 494. The majority in *DiDonato* would require joinder of the parent's suits with the wrongful death action to avoid this overlap. *Id.* at 434, 358 S.E.2d at 495.

While the parents may bring actions for their own personal injuries resulting from the same negligent behavior that killed their unborn child, their chances of recovering damages for the emotional distress that doubtless accompanied their child's death are far from certain. As the North Carolina Supreme Court stated previously, "[I]t appears to be well settled in North Carolina that recovery in civil cases may be had where coincident in time and place with the act producing the mental stress some actual physical impact or genuine physical injury also results from defendant's wrongful act." *State v. Boone*, 307 N.C. 198, 204, 297 S.E.2d 585, 589 (1982).

In a case arising in a context similar to *DiDonato*, the North Carolina Court of Appeals held that a woman who gave birth to a single child after being misdiagnosed by physicians as carrying twins could not state a claim for emotional distress. *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 232-33, 336 S.E.2d 716, 718 (1985), *affirmed*, 316 N.C. 550, 342 S.E.2d 523 (1986). The court held that "the hurt, emotional upset and embarrassment suffered by plaintiff upon her healthy delivery after the negligently-arrived-at misdiagnosis of twins, is not a sufficient basis for recovery when there is no evidence of physical injury." *Id.* While the North Carolina Court of Appeals recently held in *Ledford v. Martin*, 87 N.C. App. 88, 92, 359 S.E.2d 505, 507 (1987), that birth by cesarean section is "physical injury" so as to allow the mother to successfully bring a separate cause of action, every viable fetus wrongful death case need not involve a cesarean birth. Unless parents of a stillborn child can demonstrate actual physical injury in those cases without a cesarean birth so as to receive substantial damages for emotional distress, the damages they recover will not come close to compensating them for the loss of their child.

131. See N.C. GEN. STAT. § 28A-18-2(a) (1984).

132. See Pacey, *Measures of Economic Loss in the Wrongful Death of a Child*, 14 COLO. LAW. 392 (1985).

133. See COLO. REV. STAT. § 13-21-201 (1)(c) (1973).

134. See N.C. GEN. STAT. §§ 28A-18-2(a), 28A-18-3 (1984).

hand, an economist may ascertain a child's value by calculating the return on the *parents'* investment if money spent in raising a child had been invested in a non-human asset, such as real estate or the stock market.¹³⁵ In the alternative, one may assume that the benefits derived from raising a child are equal to or greater than the costs, thereby entitling *parents* to at least the current average cost of raising a child to the age of majority as their damages.¹³⁶

Each of these methods, however, focuses on the investment made by parents in attempting to calculate a wrongful death recovery for the parents. As applied to North Carolina law, the proposals overlook the fact that any wrongful death recovery will be distributed by the estate of the stillborn, with the parents receiving damages only indirectly through the estate. Given the estate's status as plaintiff in a wrongful death action, it is theoretically improper to base the award to the estate on the parents' investment in the child. The investment theory, however, is not entirely without merit. A testifying economist might present statistics on the average costs incurred by all sources of a child's financial support in raising the child, a total investment in the child so to speak, and argue that the figure approximates the inherent value of a child. Further variations on these investment-based theories of recovery will be left to the economists. While it is true that treating a child as an investment assumes that all investments will be profitable and thus relies on a connection to reality that may in fact be nonexistent, these solutions to the damages problem employ solid economic analysis to calculate a recovery that is far less speculative than the recovery resulting when a jury is given no guidance at all in making its decision.

Rough justice and justice according to simple gut feeling seem to be dirty words in most of our courtrooms, words shrewd lawyers look on with disdain. And while what "seems fair" certainly should not be the sole guiding principle behind the American system of justice, the influence of the concept of fairness is readily evident in the role equity courts and equitable considerations have played in our legal history up to the present day. Keeping justice and fairness in mind, it is certain that no amount of money can ever compensate a person for the loss of a life. But by establishing a cause of action for wrongful death of a viable fetus in *DiDonato v. Wortman*, the North Carolina Supreme Court has allowed juries for the first time to ascertain the value of an unborn child's life, at least in part. The court's desire to prevent "sheer speculation" and emotionalism from inflating recoveries by the child's estate, however, has resulted in an unnecessarily conservative and cautious approach to the damages issue.

135. Pacey, *supra* note 131, at 401-02. Using 1985 figures and assuming that \$4850 is the yearly average expenditure on a child and that 8.5% is a reasonable rate of return, the parents' "alternative investment" would have yielded \$206,900 in eighteen years. *Id.* at 402.

136. Pacey, *supra* note 131, at 401. Dr. Pacey compares this approach with "shadow pricing" done by the U.S. government in calculating the value of social programs. For example, benefits gained from disease control or crime control programs must be equal to the moneys spent for these programs if the programs are to be fiscally desirable. *Id.* Other methods of placing a pecuniary value on children suggested by Dr. Pacey include awarding parents a set number of dollars per hour based on the average number of hours per week a child would devote to parental assistance and support and awarding parents a set percentage of a grown child's future earnings that would have likely been spent on parental service and aid. *Id.* at 400, 402.

Of course, juries should not be given the freedom to compensate grieving parents as beneficiaries beyond what they deserve, unconstrained by any limitations on the size of the judgment. On the other hand, the estate should be awarded a sum bearing some relation to the magnitude of the loss. Commentators have proposed and other jurisdictions have devised equitable and workable solutions to the damages problem, ranging from a presumption of substantial pecuniary loss, to a statutory minimum recovery in stillborn child wrongful death cases, to an economic analysis of the monetary value of a child's life. Not all of these solutions work equally well or have equally sound theoretical bases, but simple fairness dictates that North Carolina's courts and General Assembly should look at the methods employed by other jurisdictions to solve the difficult damages issue. In combination with one of these methods, juries should be given wide latitude to award damages as they deem appropriate, subject to the trial judge's power to overturn any verdict that is excessive on its face. This state should not compound the tragedy of a *person's* wrongful death by preventing adequate legal redress.

CHRISTOPHER P. EDWARDS