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A Practical View of Farley v. Sartin

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A PRACTICAL VIEW OF *FARLEY v. SARTIN*

*Thomas J. Hurney, Jr.**

| | | |
|------|--|-----|
| I. | INTRODUCTION | 263 |
| II. | FACTS AND HOLDING | 264 |
| III. | THE WEST VIRGINIA WRONGFUL DEATH ACT | 265 |
| IV. | THE <i>FARLEY</i> COURT’S REASONING | 266 |
| V. | DEALING WITH THE <i>FARLEY v. SARTIN</i> CAUSE OF ACTION | 269 |
| | <i>A. Viability</i> | 269 |
| | <i>B. Comparative Negligence and the Unborn Child</i> | 276 |
| | <i>C. Damages</i> | 283 |
| | <i>D. Loss of Society</i> | 283 |
| | <i>E. Loss of Income</i> | 285 |
| VI. | CONCLUSION | 289 |

I. INTRODUCTION

The holding in *Farley v. Sartin*¹ that there is a claim for the wrongful death of an unborn child² regardless of viability provokes broad discussion, on both legal and public policy grounds. Understanding the basis for the court’s decision is important to practicing attorneys faced with prosecuting or defending such claims, however, more important are the issues created but left unresolved in the *Farley* opinion. This Article will examine some of these issues, including the application of West Virginia’s comparative fault scheme, the admissibility of evidence of whether the unborn child would have survived to a healthy birth and the appropriate

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¹ 466 S.E.2d 522 (W. Va. 1995).

² Like the court in *Farley*, this Article will use the term “unborn child” instead of fetus. *Id.* at 523 n.3.

measure of damages.

II. FACTS AND HOLDING

The plaintiff's pregnant wife and unborn child were killed in a vehicular accident with the defendant's tractor trailer.³ Although the unborn child was between eighteen and twenty two weeks and "was neither large enough nor developed enough to survive outside the womb,"⁴ Mrs. Farley's obstetrician testified that if she had not been killed, he had no reason to believe she would not have had a normal pregnancy.⁵

The plaintiff brought suit for the wrongful death of his wife and unborn child. Since the unborn child was not viable at the time of death, the circuit court granted summary judgment.⁶ Reversing on appeal, the Supreme Court of Appeals of West Virginia held:

In light of our previous interpretation of W.Va. Code, 55-7-5, and the goals and purposes of wrongful death statutes generally, the term "person," as used in W.Va. Code, 55-7-5 (1931) and the equivalent language in its counterpart, W.Va. Code, 55-7-6 (1992), encompasses a nonviable unborn child and, thus, permits a cause of action for the tortious death of such child.⁷

In West Virginia, therefore, a wrongful death action may be brought for the death of an unborn child, regardless of viability at the time of the death. This decision, without legislative direction, is unique to West Virginia. "[O]f those jurisdictions that have considered whether their wrongful death statutes . . . permit recovery for the death of a nonviable fetus, all but a few have refused to recognize such a cause of action."⁸ Only six states have allowed recovery for the wrongful

³ *Id.* at 523.

⁴ *Id.* at 523. In *Roe v. Wade*, the court stated that viability is usually placed at 28 weeks but may occur as early as 24 weeks. 410 U.S. 113, 160 (1973).

⁵ *Farley*, 466 S.E.2d at 524.

⁶ *Id.*

⁷ *Id.* at 522.

⁸ *Santana v. Zilog, Inc.*, 95 F.3d 780, 783 (9th Cir. 1996) (emphasis omitted) (citing cases from New Mexico, Massachusetts, Maryland, Alabama, Pennsylvania, Washington, District of Columbia, Rhode Island, Kansas, Hawaii, Michigan, New Hampshire, Alaska, South Carolina, Ohio and Oklahoma);

death of a nonviable fetus; West Virginia is the only state to do so without express legislative direction.⁹

III. THE WEST VIRGINIA WRONGFUL DEATH ACT

An understanding of *Farley* and how to deal with it must start with the actual language of the West Virginia Wrongful Death Act. Chapter 55, article 7, section 5 of the West Virginia Code states:

Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.¹⁰

The personal representative of the estate is the proper party plaintiff in a wrongful death action.¹¹ Chapter 55, article 7, section 6(b) of the West Virginia Code discusses damages, and particularly directs to whom they are to be distributed:

In every such action for wrongful death the jury, or in a case tried without a jury, the court, *may award such damages as to it may seem fair and just*, and, *may direct in what proportions the damages shall be distributed* to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision

see also Gary A. Meadows, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99, 105 (1992) (stating that the majority of jurisdictions require that the fetus be viable to constitute a "person" under wrongful death statutes)[hereinafter Meadows].

⁹ *Santana*, 95 F.3d at 784.

¹⁰ W. VA. CODE § 55-7-5 (1994).

¹¹ W. VA. CODE § 55-7-6(a) (1994); *see* *Richardson v. Kennedy*, 475 S.E.2d 418 (W. Va. 1996) (stating that the real party in interest is personal representative but the damages are awarded directly to the beneficiaries).

(2), subsection (c) of this section.¹²

The elements of damages that may be awarded are set forth in Chapter 55, article 7, section 6(c)(1) of the West Virginia Code as follows:

The verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses.¹³

IV. THE *FARLEY* COURT'S REASONING

To support its ultimate holding that a fetus is a "person" under the Wrongful Death Act, the *Farley* court analyzed the purpose of such acts, the availability of an action for injuries to a fetus later born alive, and prior decisions allowing wrongful death actions for viable unborn children.

The opinion discusses at length the origins of wrongful death acts which were enacted in response to the common law's refusal to allow compensation for death. The statutes accomplish two major policies. They compensate the surviving widows and children who were otherwise denied recovery,¹⁴ and "rectify] the

¹² W. VA. CODE § 55-7-6(b) (1994) (emphasis added). If there are no survivors, the damages are distributed under Chapter 42, article 1, section 1 of the West Virginia Code. *Id.*

¹³ W. VA. CODE § 55-7-6(c)(1) (1994). Chapter 55, article 7, section 6(c)(2) of the West Virginia Code further provides:

In its verdict the jury shall set forth separately the amount of damages, if any, awarded by it for reasonable funeral, hospital, medical and said other expenses incurred as a result of the wrongful act, neglect or default of the defendant or defendants which resulted in death, and any such amount recovered for such expenses shall be so expended by the personal representative.

W. VA. CODE § 55-7-6(c)(2) (1994).

¹⁴ "[T]he English Parliament passed the Fatal Accidents Act of 1846, commonly referred to as Lord Campbell's Act . . . [which] permitted recovery of damages by the close relatives of a victim who was tortiously killed Thus, by creating a cause of action for wrongful death, the English Parliament rectified the disparity between a tortfeasor's liability for injuries and for the more egregious harm, death." *Farley v. Sartin*, 466 S.E.2d 522, 525 (W. Va. 1995) (citations omitted).

disparity between a tortfeasor's liability for injuries and for the more egregious harm, death."¹⁵ These policies provided the basis for the *Farley* court's interpretation of "person."

Despite the recognition that at common law there was no claim for wrongful death,¹⁶ or for prenatal torts,¹⁷ the *Farley* court concluded that an unborn child is a "person" under the West Virginia Wrongful Death Act, regardless of its viability. To reach this conclusion, the court tracked, at some length, the development of the law of prenatal torts. Since *Bonbrest v. Kotz*,¹⁸ the leading case allowing a child born alive to recover for prenatal torts, the court found "every jurisdiction permits recovery for prenatal injuries if a child is born alive. In addition, it generally does not matter whether the injury occurred prior to or after the point of viability."¹⁹ Allowing *injury* claims regardless of viability was important to the *Farley* court because it was concerned with allowing meritorious claims and *not* allowing a tortfeasor to escape liability because of timing.

Where tortious injury caused the *wrongful death* of an unborn child, the *Farley* court observed that the majority of jurisdictions permit a wrongful death action if the unborn child had reached the point of viability.²⁰ Since a *viable* unborn child would have a cause of action for *injury* if born alive, the *Farley* court concluded "it only is logical that the phrase 'person' within the context of a wrongful death statute should include a viable unborn child who would have been born alive but for the tortious injury inflicted causing death prior to birth."²¹ Otherwise, the court concluded, to allow recovery for a child born with injuries, but deny it to a child who died, gives a tortfeasor "immunity from liability for causing a greater harm."²²

¹⁵ *Id.*

¹⁶ *Id.* (citing *Voelker v. Frederick Business Properties Co.*, 465 S.E.2d 246, 250 (1995); *Swope v. Keystone Coal & Coke Co.*, 89 S.E. 284, 286 (1916)).

¹⁷ *Id.* at 526 (citing *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), *overruled by* *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (1967)).

¹⁸ 65 F.Supp. 138 (D.D.C. 1946). Prior cases refused recovery because the infant was part of the mother and the injury too remote. *See* *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), *overruled by* *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (1967).

¹⁹ *Farley*, 466 S.E.2d at 528 (citations omitted).

²⁰ *Id.* at 528-29 (citations omitted).

²¹ *Id.* at 530-31 (citations omitted).

²² *Id.* at 530.

Discussing West Virginia precedent, the court explained that in *Baldwin v. Butcher*,²³ it allowed an action for the death of a viable unborn child. Using twins as an example, the court in *Baldwin* found it would be unjust and illogical to allow recovery for one twin who died shortly after birth but deny it for the stillborn twin.²⁴ The *Baldwin* court focused on the injustice of holding an injury-causing tortfeasor liable while creating immunity for one causing the greater harm.²⁵

From this analysis the court stated that it agreed with other courts, holding that where a child is born alive, recovery is allowed for prenatal torts regardless of when they occurred (before or after viability). Since the requirement of viability at the time of injury is a “mere theoretical abstraction,”²⁶ despite a lack of precedent, the *Farley* court concluded “we can find no legitimate reason or persuasive reason to infuse the [viability] distinction into West Virginia’s [wrongful death] statute.”²⁷ The court explained:

In our judgment, justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death. The societal and parental loss is egregious regardless of the state of fetal development. Our concern reflects the fundamental value determination of our society that life — old, young, and prospective — should not be wrongfully taken away. In the absence of legislative direction, the overriding importance of the interest that we have identified merits judicial recognition and protection by imposing the most liberal means of recovery that our law permits.

. . . .

Wrongful death statutes, after all, are designed to provide economic compensation to the surviving family. When a family loses a potential member because of tortious conduct, it suffers an injury of the same order . . . as that which occurs when it loses an existing member. The statute allows recovery for the loss of a life that would have provided love and sustenance but for the intervening

²³ 184 S.E.2d 428 (W. Va. 1971).

²⁴ *Farley*, 466 S.E.2d at 532.

²⁵ *Id.*

²⁶ *Id.* at 531.

²⁷ *Id.* at 533.

tort.²⁸

This ultimate holding followed the twin policies of compensating the survivors and not allowing tortfeasors off the hook because the unborn child was not viable.

V. DEALING WITH THE *FARLEY V. SARTIN* CAUSE OF ACTION

The *Farley* action for the loss of an unborn child raises several questions which must be developed in future litigation.

On the liability issue, the court did not address the effect of negligence by the parents and how it fits into the application of West Virginia's law of comparative fault. On the issue of causation, the court's opinion does not address whether the defense can put on evidence that the unborn child would not have survived regardless of the accident, or whether the child would have been healthy. Finally, while the court's opinion presumes a recovery for the damages enumerated in the wrongful death statute, there are significant evidentiary questions with respect to the recovery of lost wages for the unborn child, and the danger of double recovery with respect to damages awarded to the parents.

A. *Viability*

Baby Farley was not viable. Based upon the only medical evidence in the record, "Baby Farley was neither large enough nor developed enough to survive outside the womb."²⁹ Because viability is not a prerequisite to a wrongful death action, the court commented "our holding in this case eliminates the need for trial courts to decide what often could be an extremely difficult factual question, i.e.,

²⁸ *Id.* at 533-34 (citation omitted).

²⁹ *Farley*, 466 S.E.2d at 524. The court stated:

The deposition of Mrs. Farley's treating obstetrician, Dr. Gary Gilbert, which was the only medical testimony in the record, adduced the following. Mrs. Farley was probably eighteen weeks and a few days pregnant when calculated from the date of the first day of her last menses, although she could have been as far along as twenty-two weeks pregnant. Baby Farley was neither large enough nor developed enough to survive outside the womb. "The earliest surviving infant that [the doctor knew] of was right at 500 grams, which would have been about 22 weeks." Dr. Gilbert concluded that if Mrs. Farley had not been killed in the accident, he had "no reason to believe that she would not have a normal pregnancy."

Id. (citations omitted) (alteration in original). In the circuit court, plaintiff's counsel argued that viability was a disputed issue of fact precluding summary judgment. In light of the decision on viability, the court did not have to address this issue.

whether the fetus was ‘viable.’³⁰ However, the holding by the court and its underlying policy — “the societal and parental loss is egregious regardless of the state of fetal development”³¹ — should not be read to direct that viability is not an issue in wrongful death cases. This reading of *Farley* is too broad, given the legal issue addressed by the court and the remand to the circuit court for further proceedings.

Chapter 55, article 7, section 5 of the West Virginia Code imposes three prerequisites for recovery: (1) the death of a “person” (2) entitled to a cause of action for damages if death had not resulted (3) caused by wrongful act, neglect or default.³² While under *Farley*, an unborn child is a “person” under the Wrongful Death Act, the issue of viability is still relevant to the issues of causation and damages in these cases. The court recognized this, stating:

We recognize that the closer one gets to the moment of conception, the more substantial becomes the potential for fraudulent claims and for increased difficulties in resolving some issues of causation and damages. However, those risks are no more of a justification to erect a bar to legitimate claims in this context than they were when we dismissed them as a reason for rejecting claims relating to viable unborn children in *Baldwin*.³³

Whether the fetus would have proceeded to a normal healthy birth is certainly relevant to the issue of causation and damages. “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

³⁰ *Id.* at 534.

³¹ *Id.* at 533.

³² *Id.* at 530.

³³ *Farley*, 466 S.E.2d at 534. The court stated, “The denial of valid claims in order to discourage fraudulent ones and to avoid difficult problems in determining causation and fixing damages is not only totally illogical, but also disregards the very essence of the judicial process.” *Id.* at 529-30 (citing *Danos v. St. Pierre*, 402 S.E.2d 633, 638 (La. 1981)). Indeed, the court echoed a similar sentiment in overruling the long-held prohibition against recover of damages for emotional distress caused by negligence in *Heldreth v. Marrs*, stating, “[r]eliable medical evidence is available to weed out the fraudulent and trivial claims about which the *Monteleone* court was obviously concerned.” 425 S.E.2d 157, 161 (W. Va. 1992); see also *Riccottilli v. Summersville Memorial Hosp.*, 425 S.E.2d 629 (W. Va. 1993) (stating that plaintiff may recover for negligent infliction of emotional distress upon showing of facts sufficient to guarantee that the emotional damage claim is “not spurious”); *Courtney v. Courtney*, 437 S.E.2d 436 (W. Va. 1993).

it would be without the evidence.”³⁴ Under Rule 401 of the West Virginia Rules of Evidence, evidence having *any* probative value whatsoever can satisfy the relevancy definition, a liberal standard favoring a broad policy of admissibility.³⁵ The offered evidence does not have to make the existence of a fact to be proved more probable than not to provide a sufficient basis for sending the matter to the jury.³⁶ Although materiality is not specifically defined in the West Virginia Rules of Evidence, “the concept of materiality is embodied in Rule 401 insofar as relevancy is defined as a relationship between certain evidence and a ‘fact of consequence to the determination of the action.’”³⁷ All relevant evidence is admissible under Rules 401 and 402.³⁸

Farley’s holding should not be read to preclude the introduction of evidence that the unborn child would not have survived, or would have been disabled, to counter claims for future damages under the statute, most directly the loss of reasonably expected income.³⁹ The materiality and relevance of this evidence becomes clear when compared to the estate’s claim for loss of society and future income. These damage claims necessarily require a finding that the child not only would have been born, but would have proceeded to graduate from college (like his or her parents) and would have had a normal life span but for the negligently caused death.

That this task may involve complex medical or scientific issues is of no consequence. In a series of decisions before and after *Farley, Wilt v. Buracker*,⁴⁰

³⁴ W.VA. R. EVID. 401.

³⁵ *Id.*

³⁶ *McDougal v. McCammon*, 455 S.E.2d 788 (W.Va. 1995).

³⁷ W. VA. R. EVID. 402; FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 4-1(C) (3d ed. 1994).

³⁸ *Id.* (citing *Jarvis v. Modern Woodmen of America*, 406 S.E.2d 736, 741 n.4 (W. Va. 1991)).

³⁹ Claims for lost future income of unborn children are based solely upon assumptions based upon statistical information. See STANLEY S. SCHWARTZ & NORMAN D. TUCKER, HANDLING BIRTH TRAUMA CASES 96 (1985). “In birth trauma cases, the task [of proving wage loss] is more difficult since the injury occurs before the child has had any opportunity to demonstrate his earning potential.” *Id.*; see also MICHAEL L. BROOKSHIRE & STAN V. SMITH, ECONOMIC AND HEDONIC DAMAGES 129 (1990) [hereinafter BROOKSHIRE & SMITH]. As explored later in this article, the significant evidentiary barrier to this damages claim is the speculative nature of projecting earnings.

⁴⁰ 443 S.E.2d 196 (W. Va. 1993).

*Gentry v. Magnum*⁴¹ and *Craddock v. Watson*,⁴² the Supreme Court of Appeals of West Virginia directed trial judges that they must actively consider scientific testimony pursuant to Rule 702 of the West Virginia Rules of Evidence. Indeed, *Gentry* was decided only five days before *Farley*! Trial judges must analyze the admissibility of challenged medical or scientific testimony to determine whether it is (1) based on an assertion or inference derived from the scientific methodology, (2) whether it is relevant and (3) whether it is reliable. The issues of reliability must be resolved by consideration of the underlying methodology of the testimony, including an assessment of whether the theory and its conclusion can be and have been tested, whether the theory has been subjected to peer review, whether the actual or potential rate of error is known and whether the theory is generally accepted.⁴³ In adopting the approach fostered by *Daubert v. Merrell Dow Pharmaceuticals*,⁴⁴ the court directed trial judges to roll up their sleeves in situations where the scientific theory at issue cannot be judicially noticed and hold a hearing to determine its admissibility.⁴⁵

Complex medical issues are litigated in courtrooms all over the country, including West Virginia. The fact that they involve an unborn child makes no difference to the legal framework in which they are presented and considered. Several cases related to care of unborn children have reached the Supreme Court of Appeals of West Virginia. In *James G. v. Caserta*, the Supreme Court of West Virginia answered certified questions about claims for wrongful pregnancy, wrongful life and wrongful birth.⁴⁶ Wrongful pregnancy applies to cases where a failed sterilization procedure results in the birth of a healthy child. Wrongful birth, as used by the court, applies to cases where the child is born with a birth defect. In wrongful pregnancy cases, the court held that the parents may recover any medical and hospital expenses resulting from the negligence, including costs of the unsuccessful sterilization, pre-natal and post-natal care, childbirth and a second sterilization, physical and mental pain suffered by the wife as a result of the pregnancy and two sterilization surgeries and loss of consortium and loss of wages. "The ordinary cost of raising a healthy child cannot be recovered in a wrongful

⁴¹ 466 S.E.2d 171 (W. Va. 1995).

⁴² 475 S.E.2d 62 (W. Va. 1996).

⁴³ *Wilt*, 443 S.E.2d at 203.

⁴⁴ 509 U.S. 579 (1993).

⁴⁵ See also *Mayhorn v. Logan Medical Found.*, 454 S.E.2d 87 (W. Va. 1994).

⁴⁶ 332 S.E.2d 872 (W. Va. 1985).

pregnancy action.”⁴⁷

The court rejected the claim for “wrongful life” brought by the child born with birth defects. However, the court recognized a cause of action for wrongful birth, holding that parents may recover “the extraordinary costs for rearing a child with birth defects not only during his minority, but also after the child reaches the age of majority if the child is unable to support himself because of physical or emotional disabilities.”⁴⁸ *James G. v. Caserta* is significant in analyzing the *Farley* decision because the court recognized the need for the parents to demonstrate the existence of a genetic condition, discoverable by the physician, which should have been disclosed in genetic counseling. Moreover, the plaintiff’s damage claim includes proof of the cost of extraordinary child care arising from the defects. Obviously, the jury’s consideration of these factors requires examination of complex medical and genetic evidence.

*Rine v. Irisari*⁴⁹ involved the claim that the plaintiff’s infant son suffered profound mental retardation and cerebral palsy, among other things, as a result of the defendant’s failure to monitor the fetus with an electronic fetal monitor during labor and failed to transfer her to a high risk facility for labor and delivery.⁵⁰ In *Robinson v. Charleston Area Medical Center*,⁵¹ the plaintiff’s theory was that the infants’ brain damage “was caused by a lack of oxygen to his brain during the lengthy labor and the forceps delivery performed negligently by [the defendant physician].”⁵² The defense to this allegation was that the infant had certain congenital defects which caused the brain damage. These are but two examples of complex cases involving infants that make the point that we expect judges and juries to deal with complex medical issues and they do, all the time.⁵³

The medical issue related to causation and damages in “Farley” cases is whether the unborn child would advance to a healthy birth. While this Article is not

⁴⁷ *Id.* at 873.

⁴⁸ *Id.*

⁴⁹ 420 S.E.2d 541 (W. Va. 1992).

⁵⁰ *Id.* at 543.

⁵¹ 414 S.E.2d 877 (W. Va. 1992); *see also* *Garner v. Howe*, No. 95-2492 1997 WL 9764 (4th Cir. Jan. 13, 1997) (discussing evidence in a birth trauma case).

⁵² *Robinson*, 414 S.E.2d at 881.

⁵³ “The court must decide the dispute that is before it. It cannot refuse because the job is hard, or dubious, or dangerous.” KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960).

intended to be a treatise on fetal medicine, the medical literature abounds with scientific and statistical information about causes of and preventative measures for birth defects. Not all pregnancies advance to birth, and complications can result in termination of the pregnancy or the birth of a premature, and perhaps brain damaged infant. Studies have shown significantly high losses of pregnancy in couples who conceive, but where the pregnancy ends before it becomes clinically apparent.⁵⁴ A significant study in West Virginia hypothesized that “systematically identifying infants at high risk of postneonatal mortality and ensuring that these infants received adequate health care would reduce mortality.”⁵⁵ The authors concluded that “[e]nsuring affordable, available, accessible, and acceptable care for a small group of at-risk infants was associated with a dramatic drop in overall postneonatal mortality in West Virginia.”⁵⁶ By analyzing selected variables such as race, age, marital status and social class, researchers have come to conclusions about the health status of various populations and the consequent ability to produce healthy babies.⁵⁷ For example, “[f]or women who bear children at an early or late age, both the mother and her infant may be at risk for pregnancies with poor outcomes.”⁵⁸ Adolescents have a greater risk for problem pregnancies, a proportion of which is most likely secondary to other conditions such as poor prenatal care or lack of

⁵⁴ Allen J. Wilcox et al., *Incidence of Early Loss of Pregnancy*, 319 NEW ENG. J. MED. 189 (1988). The authors studied the risk of early loss of pregnancy and concluded “[t]he total rate of pregnancy loss after implantation, including clinically recognized spontaneous abortions, was 31 percent.” *Id.* (quoting from abstract). See also A. Brian Little, *There’s Many a Slip ‘Twiixt Implantation and the Crib*, 319 NEW ENG. J. MED. 241 (1988) (“Thus, when the loss of fertilized eggs before implantation is included, about 52 percent of all pregnancies end before the 28th week, and all but 6 percent of this 52 percent occurs before and abortion is recognized clinically.”).

⁵⁵ David Z. Myerberg et al., *Reducing Postneonatal Mortality in West Virginia: A Statewide Intervention Program Targeting Risk Identified at and After Birth*, 85 AM. J. PUB. HEALTH 631 (1995).

⁵⁶ *Id.*

⁵⁷ Calvin J. Hobel, *Factors Before Pregnancy That Influence Brain Development*, in PRENATAL AND PERINATAL FACTORS ASSOCIATED WITH BRAIN DISORDERS 178 (Freeman ed. 1985) [hereinafter Hobel]; see also *National Center for Biotechnology Information Website* (last modified Mar. 13, 1997) <<http://www3.ncbi.nlm.nih.gov:80/0mim>> (cataloging human genes and genetic disorders); Prenatal Screening Program, British Columbia Children’s Hospital, *Maternal Serum Markers of Fetal Abnormalities: Progress in Prenatal Screening* (visited Mar. 22, 1997) <<http://www.medscape.com/Medscape/womens.health/1996/v01.n07/w100.lockitch/w100.lockitch.html>> (“Second-trimester screening of a pregnant woman’s serum for markers of such congenital abnormalities as fetal trisomy 21 (Down syndrome) and neural tube defects has become an important part of antenatal care.”).

⁵⁸ Hobel, *supra* note 57, at 179.

education.⁵⁹ The risk of poor fetal outcome begins to increase in mothers older than age 30 years.⁶⁰ “Chronic hypertension and preeclampsia are common complications in pregnancy of women older than 35 years. Because low birth weight and dysmaturity are common findings, abnormal utero placental blood flow is thought to be common in older mothers.”⁶¹ Still other studies examine “very limited data on the effect of pre-pregnancy or early pregnancy exposure to hazardous substances on fetal outcome.”⁶² A woman’s reproductive history, including previous low birth weight infants, prior spontaneous abortions, still birth or live born infants with multiple or congenital abnormalities, prior therapeutic abortions and family diseases are all factors.⁶³ Some studies focus on paternal characteristics.⁶⁴ The risk of having a baby with Down’s syndrome increases from 1 in 2000 in the population under age 30 to 1 in 356 in the population over age 35, decreasing to 1 in 12 at age 49.⁶⁵ The risk of having a neural tube defect is 5% where the first child has the problem, and 10% if two are born with the problem.⁶⁶ Genetic counseling has grown as science develops ways to predict genetic disease. People with a higher risk of having a genetically defective child “require genetic counseling to guide them through the necessary learning and decision-making process involved in choosing whether to have a child.”⁶⁷

Certainly, the science and medicine are complex, but the court has already recognized the admissibility of complex genetic and statistical evidence in the

⁵⁹ *Id.* at 180.

⁶⁰ *Id.*

⁶¹ *Id.* at 181; see also *Medical Complications in Pregnancy* (visited Mar. 22, 1997) <<http://www.obgyn.net/english/ob/complica.htm>> (providing various links to complications of pregnancy); *Definition of Preeclampsia* (visited Mar. 22, 1997) <http://www.obgyn.net/english/ob/preeclampsia_definitions.htm>.

⁶² *Hobel, supra* note 57, at 183.

⁶³ *Id.* at 186-88.

⁶⁴ *Id.* at 189-90.

⁶⁵ STANLEY S. SCHWARTZ & NORMAN D. TUCKER, *HANDLING BIRTH TRAUMA CASES* (1985) (citing RIVLIN ET AL., *MANUAL OF CLINICAL PROBLEMS IN OBSTETRICS AND GYNECOLOGY* (1982)).

⁶⁶ *Hobel, supra* note 57 at 189-90; see <http://www.cdc.gov/nceh/programs/infants/brthdft/prevent/bd_links.htm> (providing links to March of Dimes Birth Defects Foundation, Spina Bifida Association, Alliance of Genetic Support Groups, New York Online Access to Health).

⁶⁷ *Hobel, supra* note 57, at 189-90.

criminal context. In *State v. Woodall*,⁶⁸ decided before the adoption of the *Daubert* approach to the evaluation of scientific evidence, the court stated:

Although we recognize the dangers inherent in evidence of probabilities, we do not find them in this case. Blood type and enzyme tests have general scientific acceptance, and the distribution of particular blood traits in the population is ascertainable. The party seeking to impeach blood test evidence is free to cross-examine the proponent's experts and offer experts of his own to discredit the conduct of the tests and the underlying statistical probabilities.⁶⁹

If complex evidence passes muster under the *Wilt/Gentry* approach, it should be admissible in *Farley* cases, particularly in response to claims for damages of loss of society and lost income.⁷⁰

B. *Comparative Negligence and the Unborn Child*

In 1978, West Virginia judicially adopted a modified comparative negligence scheme under which a party is barred from recovery if its negligence equals or exceeds fifty percent of the combined negligence or fault of all parties to an accident.⁷¹ While assumption of the risk is a separate defense in the West Virginia scheme of comparative negligence, the jury must consider it in its overall evaluation of the plaintiff's fault.⁷² Recovery is not barred by assumption of risk

⁶⁸ 385 S.E.2d 253 (W. Va. 1989).

⁶⁹ *Id.* at 261 (citations omitted). Anyone who watched the marathon O.J. Simpson trial is familiar with the mind numbing and complicated nature of DNA analysis. For an excellent collection of O.J. Simpson trial information, see Court TV Website, (visited Mar. 22, 1997) <<http://www.courtTV.com/casefiles/simpson/criminal/summary>>.

⁷⁰ Of course, whether this line of defense is tactically the way to go is another issue. Just because you can raise these defenses doesn't mean you always should.

⁷¹ *Haba v. Big Arm Bar & Grill, Inc.*, 468 S.E.2d 915 (W. Va. 1996); *Anderson v. Moulder*, 394 S.E.2d 61 (W. Va. 1990); *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511 (W. Va. 1989); *Valloric v. Dravo Corp.*, 357 S.E.2d 207 (W. Va. 1987); *Bowman v. Barnes*, 282 S.E.2d 613 (W. Va. 1981); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

⁷² *King*, 387 S.E.2d at 511. The court explained that contributory negligence is carelessness or the failure to use due care, but that assumption of the risk imposes a higher standard, applying only where the plaintiff has actual knowledge of the defect or dangerous condition, fully appreciates the risk involved and continues to use the product or participate in the activity.

unless the plaintiff's degree of fault — negligence and assumption of the risk — equals or exceeds the combined fault or negligence of the other parties to the accident.⁷³ To obtain a proper assessment of the total amount of the party's comparative fault, it must be ascertained in relation to all the parties who contributed to the accident, and not merely those defendants involved in the litigation.⁷⁴ West Virginia's adoption of modified comparative negligence did not change its adherence to joint and several liability.⁷⁵ Thus, a plaintiff may elect to sue any or all of those responsible for his injuries and collect damages from whomever is able to pay, regardless of their percentage of fault.⁷⁶

The law of comparative fault poses difficult issues in a claim for the loss of an unborn child. There is a conclusive presumption that a child under the age of seven is incapable of negligence,⁷⁷ thus the unborn child cannot be directly assigned fault. The difficult issue is how to factor in fault by the parents directly relating to the injury, such as negligence by the mother or father in the operation of an automobile.

In *Miller v. Warren*,⁷⁸ the Supreme Court of Appeals of West Virginia held

Assumption of the risk, similar to comparative negligence, must be raised by a defendant in the answer as affirmative defenses. *Id.*; see also *Desco Corp. v. Harry W. Trushel Constr.*, 413 S.E.2d 85 (W. Va. 1991); *Bills v. Life Style Homes, Inc.*, 429 S.E.2d 80 (W. Va. 1993).

⁷³ *Blake v. Wendy's International, Inc.*, 413 S.E.2d 414 (W. Va. 1991).

⁷⁴ See *Cline v. White*, 393 S.E.2d 923 (W. Va. 1990). A party may be absent from the litigation because it is beyond the court's jurisdiction, or has the benefit of some immunity, such as governmental or Workers' Compensation immunity. *Bowman*, 282 S.E.2d at 613; see *Miller v. Monongahela Power Co.*, 403 S.E.2d 406 (W. Va. 1991); *Haba*, 468 S.E.2d at 915; see also W. VA. CODE §§ 29-12A-1 to -18 (1992) (governmental immunity); W. VA. CODE §§ 23-2-6 to -6a (1994) (workers' compensation immunity). Parties entering into good faith settlements are also protected from suit. *Smith v. Monongahela Power Co.*, 429 S.E.2d 643 (W. Va. 1993); *Cline*, 393 S.E.2d at 923; W. VA. CODE § 55-7B-9(c) (1986) (MPLA).

⁷⁵ *Kodym v. Frazier*, 412 S.E.2d 219 (W. Va. 1991); *Sitzes v. Anchor Motor Freight, Inc.*, 289 S.E.2d 689 (W. Va. 1991).

⁷⁶ *Teter v. Old Colony Co.*, 441 S.E.2d 728 (W. Va. 1994); *Kodym v. Frazier*, 412 S.E.2d 219 (W. Va. 1991). Exceptions to this principle are carved out in medical professional liability cases and actions against municipalities. W. VA. CODE § 55-7B-9 (1994); W. VA. CODE § 29-12A-7(c-f) (1992).

⁷⁷ *Miller v. Warren*, 390 S.E.2d 207 (W. Va. 1990). For children between the ages of seven and fourteen, the presumption is rebuttable and a child age fourteen or older is presumed to be capable of being negligent. *Pino v. Szuch*, 408 S.E.2d 55 (W. Va. 1991); *Godfrey v. Godfrey*, 456 S.E.2d 488 (W. Va. 1995); *Belcher v. CAMC*, 422 S.E.2d 827 (W. Va. 1992).

⁷⁸ 390 S.E.2d 207 (1990).

“[t]he negligence of a parent cannot be imputed to the infant child, too young to know how to take care of itself; nor can such child be guilty of contributory negligence.”⁷⁹ *Miller* involved injuries sustained by two parents and their child in a motel fire. Liability was contested, with experts for both sides disagreeing who started the fire.⁸⁰ On appeal, the plaintiff challenged several jury instructions which allowed the jury to consider the plaintiff’s combined negligence, effectively imputing the negligence of the parents to the minor child. The Supreme Court of Appeals of West Virginia held this was error:

The negligence of a parent cannot be imputed to the infant child, too young to know how to take care of itself; nor can such child be guilty of contributory negligence. Any duty the defendants had to the plaintiffs ran to the infant personally, as well as to each of the adults individually. *An adult’s negligence may be “imputed” to a child only where the child’s cause of action is derivative only, for example, in a survivor’s wrongful death action where the child was not personally involved in the events giving rise to the cause of action.*⁸¹

As this passage suggests, *Miller* applies to injury cases. In cases for the wrongful death of a child, the jury considers the negligence of the parents. *Cole v. Fairchild*⁸² arose from the death of a minor. Stephen Cole, II, was killed in a motorcycle accident on property owned by defendant Flat Top Lake Association. The plaintiffs argued that Flat Top was liable for Stephen’s death because he was a business invitee when motorcycle riding on the property. When Flat Top attempted to implead the parents under a theory of negligent supervision, the trial court denied the motion, finding that under the doctrine of parental immunity, the claim was not actionable.

The court noted that the parental immunity doctrine generally prohibits children from suing their parents but is subject to many exceptions. Suits for personal injuries in automobile accidents where there is normally liability insurance

⁷⁹ *Id.* at 210 (citing *Dicken v. Liverpool Salt & Coal Co.*, 23 S.E. 582, Syl. Pt. 5 (W. Va. 1895)).

⁸⁰ The plaintiffs argued “the fire was caused by the defendant’s placing the bed in the room too close to the baseboard heater” which started the fire and “the absence of a smoke alarm at least aggravated their injuries.” The defendant’s expert testified that the fire was caused by a burning cigarette dropped by one of the parents. *Id.* at 208.

⁸¹ *Id.* (citations omitted) (emphasis added).

⁸² 1996 WL 731875 (W. Va. Dec. 20, 1996).

are not barred.⁸³ Where the injury is from intentional or wilful conduct, the doctrine is abrogated, but it remains with respect to claims arising from reasonable corporal punishment.⁸⁴ Given the many exceptions, the *Cole* court concluded “[b]ased upon equitable principles of fairness, as well as concepts underlying the doctrine of comparative negligence, we believe that any parental negligence which proximately causes the death of the parent’s child should be considered when determining the liability of the third party.”⁸⁵ Thus, where the parents seek compensation without consideration of their culpability proximately causing the death due to negligent supervision, “it would be inequitable for such parent to collect the total amount of an award when the parent is found to be at least partially at fault.”⁸⁶

Instead of imputing the negligence of the parent to the child’s estate, however, the court found that the parent should simply be treated as a joint tortfeasor. The court instructed:

Pursuant to W. Va. Code § 55-7-6, the jury and judge “may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to” the listed beneficiaries. By treating any beneficiary separately and apportioning the damages, the trial court simply may apply our comparative negligence doctrine to the negligent parent. If a parent’s action proximately caused the death of his or her child along with other third-party tortfeasors, the parent and other third-party tortfeasors may be held jointly and severally liable for the award. *Therefore, we hold, in a wrongful death action, where one or both of the parents of a deceased child are found negligent in contributing to the death of such child, either the judge or the jury should apportion the damages between the parents and other beneficiaries, if any, and assess the relative liability of each tortfeasor in order to comply our comparative negligence rule.*⁸⁷

⁸³ *Id.* at *12 (citing *Lee v. Comer*, 224 S.E.2d 722 (1976)). In West Virginia, family members can generally sue each other for personal injuries. *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978) (abolishing interspousal immunity). For a son versus father suit over an exploding lawnmower, see *Tippie v. Tippie*, 466 S.E.2d 548 (W. Va. 1996).

⁸⁴ *Cole*, 1996 WL 731875, at *12 (citing *Courtney v. Courtney*, 413 S.E.2d 418 (W. Va. 1991)).

⁸⁵ *Id.* at *12

⁸⁶ *Id.*

⁸⁷ *Id.* at *14 (citations omitted) (emphasis added).

Under *Cole*, each parent's negligence must be considered independently. The court rejected any concern that either a husband or wife could "collect an entire wrongful death award for a child when the other spouse partially is at fault for a child's death."⁸⁸ In a footnote, the court rejected the argument that "the negligent parent will undoubtedly share or jointly benefit in the full recovery by the other spouse, in spite of what may be substantial negligence on his or her part and thus benefit or profit from his or her own wrong."⁸⁹ The court stated:

However, we find this rationale ignores the fact that parents are often divorced, as is the situation in the present case. Furthermore, under our statute and our comparative negligence rule, we find this concern is diminished because each spouse is getting a separate award based upon their individual loss. Moreover, we believe it would be just as inequitable to deny a wrongful death beneficiary an award based upon the tortious conduct of another beneficiary as it would be to hold a negligent tortfeasor totally liable without any right to seek contribution from another negligent tortfeasor. We, therefore, will permit application of the comparative negligence rule to a parent whose own negligent act contributed to the death of his or her child.⁹⁰

Under *Miller* and *Cole*, therefore, the negligence of the parent or parents of an unborn child must be considered by the jury. The following scenarios illustrate the *Cole* rule.

A pregnant mother is injured in a vehicular accident with a coal truck, and loses her unborn child. The child's estate sues the coal company which files a third party complaint against the mother. The jury apportions 40% of the negligence to the mother and 60% to the coal company and awards \$1,000,000 to the estate, divided equally between the parents. Under *Cole*, the mother is effectively treated as a joint tortfeasor; accordingly, the coal company's liability to the estate would be \$600,000 and the mother's liability would be \$400,000.⁹¹

⁸⁸ *Id.* at *14 n.20.

⁸⁹ *Cole*, 1996 WL 731875, at *14 n.20 (citing *Stull v. Ragsdale*, 620 S.W.2d 264 (Ark. 1981)).

⁹⁰ *Id.*

⁹¹ The mother is used here for illustrative purposes. The joint tortfeasor could be the father. As to the negligence of one parent affecting the other, *Cole* states: "The jury should have been instructed that the negligence of one of the adults could not be imputed to the other adult." 1996 WL 731875 (citing *Walton v. Given*, 215 S.E.2d 647, 651 (W. Va. 1975)).

This is where *Cole* gets confusing. Chapter 55, article 7, section 6(c)(2) of the West Virginia Code requires the jury to set forth separately the amount of damages awarded for reasonable funeral, hospital, medical and other expenses and requires the personal representative to expend any amount recovered for those expenses. As to the other damages, the statute requires the jury to award damages not to the estate, but to the statutory beneficiaries. This section states the jury, or the court in a bench trial:

may award such damages as to it may seem fair and just, and, may direct in what proportion the damages shall be distributed to the . . . brothers, sisters, parents . . . if there are no such survivors, then the damages shall be distributed in accordance with the decedent's will, or, if there is no will, in accordance with the laws of descent and distribution."⁹²

In prior decisions, the court recognized that while wrongful death actions are brought on behalf of the estate, "the personal representative is merely a nominal party, and any recovery passes directly to the beneficiaries designated in the wrongful death statute and not to the decedent's estate."⁹³

Typically, in a scenario involving joint and several liability, the plaintiff recovers the full award of damages less the percentage of fault attributed to her.⁹⁴ Applying *Cole*, the wife's recovery should be reduced by her comparative negligence of 40%. It is unclear from *Cole* as to exactly how to achieve this. If each parent was awarded \$500,000, the total award would be \$1,000,000. If the mother's award is reduced by \$200,000 ($\$500,000 - (40\% \times \$500,000)$), there would be a total payment of \$800,000, with \$500,000 to the father and \$300,000 to the mother.⁹⁵

⁹² W. VA. CODE § 55-7-6(c)(2) (1994).

⁹³ *Richardson v. Kennedy*, 475 S.E.2d 418, 424 (W. Va. 1996) (citing *McClure v. McClure*, 403 S.E.2d 197 (W. Va. 1991)). See also, *Dunsmore v. Hartman*, 84 S.E.2d 137, 139-40 (W. Va. 1954); *Peters v. Kanawha Banking & Trust Co.*, 191 S.E. 581, 583 (W. Va. 1937).

⁹⁴ *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

⁹⁵ An obvious problem here is who pays who. The illustration of a third party complaint is used because of the fact pattern in *Cole*. Unless specifically excluded by policy language, the mother's insurance carrier could end up paying part of the verdict to the mother. See *Sitzes v. Anchor Motor Freight*, 289 S.E.2d 689 (W. Va. 1991). Assuming plenty of coverage for the mother and the coal company, the damages would be paid as follows. First, the damages to the parents are shared pro rata, i.e., Coal Company 60%, mother/carrier 40%. The coal company would pay the father \$300,000 and the mother \$180,000. The mother's carrier would pay the father the remaining \$200,000 and \$120,000

Cole could be circumvented by the court or jury awarding damages in amounts that avoid the percentage of negligence assessed against the mother. For example, using the same scenario, instead of splitting the \$1,000,000 award equally, the court or jury could award \$800,000 to the father and \$200,000 to the mother. The mother's \$200,000 award would be reduced by 40%, or \$80,000, leaving her a net award of \$120,000. The non-negligent father would get a full award of \$800,000, making the total payment to the beneficiaries of the estate \$920,000. By manipulating the amounts given to the beneficiaries, the court or jury could totally avoid the application of comparative fault.

The end result is a reduction in the total amount of money paid for the wrongful death of the fetus, although the negligence of the parent would not be imputed to the estate. An easier way to resolve this issue, in cases involving an unborn fetus, would be to recognize the unique nature of the situation and hold that the negligence of the parent reduces by the total award to the estate. A net figure, taking into account the reduction, could be distributed by the court or jury to the beneficiaries. This is more in keeping with the theory of comparative negligence, which is to hold each party responsible for fault, and eliminates the confusing situation which results from *Cole*.

If the mother is killed, as in *Farley*, the problem with *Cole* is striking. Since the mother would not be a statutory beneficiary since she did not survive, application of her percentage of fault is meaningless, since the jury will only give awards to the survivors. Thus, in an accident where there is 90% of fault by the mother, and 10% by the coal company, the award to the father would not be reduced at all. Assuming a claim against the mother's estate, there would be payment although there is not much doubt that the coal company could pay more than its share.

The Supreme Court of Appeals of West Virginia dealt with a related issue in *Belcher v. Goins*, where it recognized a cause of action for the loss or impairment of parental consortium for a child.⁹⁶ Since the loss of consortium claim is a derivative claim based entirely upon the same injury to the parent, the court held that any percentage of negligence attributable to the parent reduced the amount of the child's recovery. While a wrongful death claim is a direct action by the estate of the unborn child, the damages payable to the parents are derivative of the estate's claim. It is not unfair, then, to impute the negligence of the parents to the child's estate to reduce the total award. This solves the problem recognized and rejected in *Cole*. Given the unique nature of a wrongful death claim for an unborn child, the court should not follow *Cole* to its illogical end.

to the mother, assuming the policy did not expressly exclude such payment. If there was a problem, the mother's insurance could pay the father, with the coal company paying the rest of the father's plus the mother's award. This complex insurance issue is left to another, smarter author. If the mother was without insurance and judgment proof, the coal company might pay the whole verdict under joint and several liability. Even if no third party complaint was filed, the mother's recovery would be reduced by her percentage of fault under *Cole*. See *Bowman v. Barnes*, 282 S.E.2d 613 (W. Va. 1981).

⁹⁶ 400 S.E.2d 830 (W. Va. 1990).

C. Damages

The West Virginia Wrongful Death Act sets forth the various elements of damages which can be awarded in a wrongful death action. In a case involving the death of an unborn child, damages for the care, treatment and hospitalization incident to the injury resulting in death, and reasonable funeral expenses will probably not be significant, nor in much dispute. Damages for “services, protection, care and assistance provided by the decedent” would not appear to apply in a case for the death of an unborn child.⁹⁷ The primary focus in *Farley* cases will be the damages for lost income and “sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent.”⁹⁸

D. Loss of Society

The emotional loss to parents is the subject of the damages allowed for “sorrow, mental anguish, and solace” The loss of a child presents a powerful emotional argument which can result in enormous damage awards. For example, in *Roberts v. Stevens Clinic*,⁹⁹ a McDowell County jury awarded \$10,000,000 to the parents and two siblings of a two and one-half year old child. The court reduced the verdict, stating “[i]n a nutshell, the reason that we are compelled to reduce the verdict from \$10,000,000 to \$3,000,000 is that plaintiff’s counsel implied, in his closing argument, that the duty of the jury was to place a value on Michael’s life.”¹⁰⁰

While “the majority of jurisdictions permit parental recovery for the loss of their child’s society in a wrongful death action . . . there is much less agreement . . .” in cases involving the loss of a fetus.¹⁰¹ In *Wrongful Death and the Loss of Society of the Unborn*, the author notes that courts addressing this issue take three general approaches.¹⁰² The first approach is to treat a viable unborn child the same as an independently existing child.¹⁰³ Where the loss of society for an independently existing child is recoverable, it too is recoverable for the unborn child; where no

⁹⁷ See *Martin v. Smith*, 438 S.E.2d 318 (W. Va. 1993) (involving case where decedent worked odd jobs to assist his mother with household expenses and purchased gifts and necessities for his daughter).

⁹⁸ W. VA. CODE § 55-7-6(c)(1)(A).

⁹⁹ 345 S.E.2d 791 (W. Va. 1986).

¹⁰⁰ *Id.* at 798.

¹⁰¹ *Meadows*, *supra* note 8, at 108.

¹⁰² *Id.*

¹⁰³ *Id.* at 108-09

recovery is allowed, the converse would be true.¹⁰⁴ Other courts, such as *Didonato v. Workman*,¹⁰⁵ find that any award for loss of society would be based purely on speculation rather than reason.¹⁰⁶ The final approach focuses on actual evidence of loss of society.¹⁰⁷

Given the heavy reliance by the *Farley* court on the remedial nature of West Virginia's Wrongful Death Act, it is unlikely that the court would adopt any approach denying as speculative damages for the loss of society for an unborn child. Similar to courts which treat the unborn child the same as an independently existing child, the Supreme Court of Appeals of West Virginia will most likely allow recovery. This is consistent with the court's recognition in *Flannery v. United States* that a plaintiff rendered semi-comatose and unable to sense his injuries can recover for the loss of enjoyment of life.¹⁰⁸ The loss of enjoyment of life "is a separate compensable element in a damage award and clearly not part of pain and suffering."¹⁰⁹ Indeed, the *Flannery* court used an infant blinded by excessive oxygen as an example, stating that the infant had a loss even though its ability to comprehend was minimal. *Roberts v. Stevens Clinic* offers some insight as to what may be argued by the plaintiff regarding the loss of society, specifically prohibiting asking the jury to place a value on the life of the unborn child.

As to this item of damages, however, evidence of the parents' attitude toward the pregnancy should be admissible. In *Voelker v. Frederick Business Properties Co.*, the court held:

[E]vidence of a beneficiary's relationship with the decedent may be admitted into evidence for purposes of determining damages in a wrongful death action pursuant to *W. Va. Code*, 55-7-6(c)(1)[1989] which provides for the recovery of damages for "[s]orrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent[.]" Whether evidence is relevant pursuant to *W. Va. R. Evid.* 401 and 402 when determining damages in a wrongful death action and whether the probative value of such evidence is substantially outweighed by the danger of unfair prejudice pursuant to *W. Va. R. Evid.* 403 must be determined on a case-by-case basis. Moreover, on appeal this Court will not disturb a trial court's ruling on the

¹⁰⁴ *Id.* at 109 & n.82 (citing various cases).

¹⁰⁵ 358 S.E.2d 489 (N.C. 1987).

¹⁰⁶ *Meadows*, *supra* note 8, at 109.

¹⁰⁷ *Id.* at 110-11.

¹⁰⁸ *Flannery v. United States*, 297 S.E.2d 433 (W. Va. 1982).

¹⁰⁹ Douglas L. Price, *Hedonic Damages*, 95 W. VA. L. REV. 1055, 1060 (1993).

admissibility of such evidence unless there has been an abuse of discretion.¹¹⁰

Similarly, in *Walker v. Walker*,¹¹¹ the court held that the trial court could consider many factors in distributing a wrongful death settlement, including “the relationship between the decedent and his children.”¹¹²

Relevant evidence, for example, could include the circumstances of the pregnancy and the parents’ attitudes toward the pregnancy (such as considering abortion at the time of the death; the mother using drugs, alcohol or tobacco despite the risk to the unborn child; or abusive behavior by the father toward the pregnant mother). Instructive in this regard are *Arnold v. Turek*,¹¹³ and *White v. Gosiene*.¹¹⁴ Interpreting the 1989 amendments to Chapter 55, article 7, section 6 of the West Virginia Code in *Arnold*, the court found that they “removed the right of the jury or [judge] to distribute damages in such amounts . . . as [found] fair, just and equitable. Instead, the net proceeds . . . must [be distributed] in accordance with . . . the laws of descent and distribution.”¹¹⁵ The 1989 amendments removed the discretionary division of damages by the court or jury, causing the result in *White*, where an itinerant father shared in an award.¹¹⁶ Under the 1989 amendments “the fact that the wrongful death victim has been abandoned by a parent does not foreclose that parent from sharing in a wrongful death award thereunder.” This was fixed in 1992, as recognized in *White*, to restore discretion in the distribution of damages.¹¹⁷ Now, it is once again the province of the jury to make an award and divide it among the beneficiaries. As demonstrated by *Roberts v. Stevens Clinic*, the loss of a child is a powerful emotional argument. It may very well be that in a given case, counsel for the defendant does not choose to attack the loss of consortium claim for fear of angering the jury. Nonetheless, whether to use the evidence at trial as a tactical decision is not determinative of whether it should be relevant and admissible.

E. *Loss of Income*

In wrongful death actions, Chapter 55, article 7, section 6(c)(2)(B)(i) of the

¹¹⁰ *Voelker v. Frederick Business Properties Co.*, 465 S.E.2d 246, 252 (W. Va. 1995)

¹¹¹ 350 S.E.2d 547 (W. Va. 1986).

¹¹² *Id.*, Syl.

¹¹³ 407 S.E.2d 706 (W. Va. 1991).

¹¹⁴ 420 S.E.2d 567 (W. Va. 1992).

¹¹⁵ *Arnold*, 407 S.E.2d at 711.

¹¹⁶ *White*, 420 S.E.2d at 571.

¹¹⁷ *Id.* at 577

West Virginia Code allows as an element of damages compensation for reasonably expected loss of income of the decedent.¹¹⁸ This language does not require a deduction for estimated personal living expenses.¹¹⁹ To determine the future lost earnings in a wrongful death case, “[t]he jury may determine the probable earnings of the deceased in a wrongful death action by considering his age, earning capacity, experience and habits, during his probable lifetime.”¹²⁰ As a predicate for an award for loss of economic benefit from a decedent, a plaintiff must first produce evidence from which the jury can rationalize and determine with reasonable accuracy the probable quantum of the loss.¹²¹ Any award for pecuniary loss in a wrongful death action must be reduced to present value.¹²²

The issue of whether there is recovery for future lost income of an unborn child under the wrongful death action seems to be speculative at best. A claim for future lost wages should be based upon some evidentiary prerequisite, such as age, education and training and prior history of earnings. None of these exists in a situation where the deceased is an unborn child.¹²³

In another context, the Supreme Court of Appeals of West Virginia recognized inherent uncertainty of how a child might turn out. In *James G. v. Caserta*, the court allowed a suit against a physician for a failed sterilization resulting in pregnancy.¹²⁴ The court, however, refused to allow the parents to recover as damages the ordinary costs of raising a child they would not otherwise have had, stating that “the main problem with awarding damages for ordinary child-rearing expenses is in attempting to project the future emotional and other benefits that might be derived from having a healthy child . . . [a]s a consequence, it declined to award the costs of child-rearing expenses because the damages were too speculative.”¹²⁵ Indeed, in a footnote, the court stated:

Perhaps the cost of rearing and educating the child could be determined through use of actuarial tables or similar economic

¹¹⁸ *Wehner v. Weinstein*, 444 S.E.2d 27, 38 (W. Va. 1994).

¹¹⁹ *Id.*

¹²⁰ *Bowman v. Barnes*, 282 S.E.2d 613 (W. Va. 1981); *see also Craighead v. N. & W. Ry.*, 475 S.E.2d 363, 372 (W. Va. 1996).

¹²¹ *Panagopoulos v. Martin*, 295 F. Supp. 220, 227 (S.D.W. Va. 1969).

¹²² *Adkins v. Foster*, 421 S.E.2d 271, 275 (W. Va. 1992); *see Aldridge v. Baltimore & Ohio Ry. Co.*, 789 F.2d 1061, 1068 (4th Cir. 1986) (Boyle, J., concurring); *Mooney v. Eastern Associated Coal Corp.*, 326 S.E.2d 427, 431 (W. Va. 1984).

¹²³ *See BROOKSHIRE & SMITH, supra* note 39.

¹²⁴ 332 S.E.2d 872 (W. Va. 1985).

¹²⁵ *Id.* at 878 (quoting *McKernin v. Aasheim*, 687 P.2d 850, 855 (Wash. 1984)).

information. But whether these costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated. The child may turn out to be loving, obedient and attentive, or hostile, unruly and callous. The child may grow up to be the president of the United States, or to be an infamous criminal. In short, it is impossible to tell, at an early stage in the child's life, whether its parents have sustained a net loss or net gain.¹²⁶

Other significant events in the life of any person could change the beneficiaries of the estate. Once a child marries, the primary beneficiary becomes the spouse and, if there are any, the children, as opposed to the parents. Thus, at birth, it is difficult to see how, as a matter of law, the parents could argue that they reasonably expected any income from an unborn child, particularly for its adult life.¹²⁷

In an injury case, *Stone v. Kaiser Aluminum*, the court found the plaintiff's claim for future lost damages was speculative.¹²⁸ In *Stone*, the plaintiff testified that he expected to complete a master's of science degree and, according to the West Virginia Department of Labor, could expect to obtain employment six months thereafter. Because "the general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture," the court found "plaintiff's testimony with respect to his future lost wages was highly speculative."¹²⁹ The "plaintiff's testimony that he could expect to find employment six months following completion of his degree in December of 1995 clearly did not meet this requirement. The jury's award of future lost wages was, therefore, based upon mere speculation and conjecture and cannot be sustained."¹³⁰ The court ordered a remittitur of the amount awarded for future lost wages.

In *Craighead v. N & W Railway*,¹³¹ the defendants argued that the award of future lost earnings, based upon testimony that the decedent would have joined the United States military or would have earned the wages of an average person, were not "proved to a reasonable degree of certainty" as required by *Adkins v. Foster*.¹³² Distinguishing *Adkins* as a personal injury case, the court stated "the process of determining the extent to which an individual's future earning capacity is impaired

¹²⁶ *Id.*

¹²⁷ In *James G. v. Caserta*, the Supreme Court of Appeals of West Virginia recognized that generally, parents do not have the obligation to provide for children after the age of majority. *Id.* at 882.

¹²⁸ 475 S.E.2d 439 (W. Va. 1996).

¹²⁹ *Craighead v. N. & W. Ry.*, 475 S.E.2d 363, 456 (W. Va. 1996).

¹³⁰ *Id.* (citing *Sisler v. Hawkins*, 217 S.E.2d 60, Syl. Pt. 5. (1975)).

¹³¹ *Id.*

¹³² 475 S.E.2d 439 (W. Va. 1996).

is quite different from calculating the amount of future earnings that were lost due to the individual's untimely death." The determination of impairment of earning capacity requires consideration of the extent and permanency of the injury, the type of future employment, and the difference between the amount plaintiff would have earned but for the injury and the amount the plaintiff would be able to earn with the injury. "With regard to the determination of future lost earnings in wrongful death cases, this court has simply held that 'the jury may determine the probable earnings of the deceased in a wrongful death action by considering his age, earning capacity, experience and habits, during his probable lifetime.'"¹³³ Based upon this standard, the court concluded "the evidence of decedent's future lost earnings was not unduly speculative and was properly allowed."¹³⁴

In *Martin v. Smith*, the court affirmed an award of damages for the deceased for reasonably expected loss of income.¹³⁵ The court stated:

We find that the lower court made no error in assessing damages for the loss of income suffered by Mrs. Martin and the decedent's young daughter. In spite of the difficult circumstances of his upbringing, the decedent worked odd jobs as a student to assist his mother with household expenses. He also purchased gifts and necessities for his daughter from the modest sums he earned at odd jobs. The decedent was the first in his family to attend college where he received financial assistance. There is no reason that the decedent, if properly treated, could not have provided services, protection, care and assistance to his mother and child.¹³⁶

Economists can be hired to present a range of earnings based on statistical profiles.¹³⁷ In *Reager v. Anderson*, the court affirmed an award of \$1,250,000 to a minor patient who lost a leg as a result of medical malpractice.¹³⁸ Part of the plaintiff's evidence included testimony of economic and vocational rehabilitation experts opining as to a range of lost future earnings from \$192,236 to \$1,154,942

¹³³ *Craighead*, 475 S.E.2d at 373 (citing *Bowman v. Barnes*, 282 S.E.2d 613, Syl. Pt. 4 (W. Va. 1981)).

¹³⁴ *Id.*

¹³⁵ 438 S.E.2d 318 (W. Va. 1993).

¹³⁶ *Id.* at 323-24.

¹³⁷ See *BROOKSHIRE & SMITH*, *supra* note 39.

¹³⁸ 371 S.E.2d 619 (W. Va. 1988).

based upon five vocational scenarios.¹³⁹ No special interrogatory was submitted to the jury as to the vocational scenario selected. The court affirmed that the jury's award, noting "that none of the testimony as to these elements of damages was disputed by any witness, even though the appellant conducted extensive pretrial discovery on these matters. The weight of the evidence on these special damages was for the jury to decide."¹⁴⁰ Without addressing the issue of whether the damages were speculative, the court proceeded to compare the verdict in *Reager* to verdicts in other jurisdictions, coming to the ultimate conclusion that since there had been million-dollar verdicts for amputations in other courts, the verdict was not "monstrous."

The issue in a *Farley* case is whether there can be any reasonable certainty in predicting the lost future income of an unborn child. This may be particularly true where the child is of an age *in utero* which is medically considered nonviable. A strong argument can be made that any damages for lost income are speculative, involving a pure guess as to whether the child would survive to working age; whether the child would, in fact, work; what type of job, if any, the child would obtain; and how long the child would live, while participating in the work force. The pure speculative nature of this type of evidence should make it inadmissible as a matter of law in *Farley* cases.

VI. CONCLUSION

Farley v. Sartin claims present significant practical problems that must be resolved in future litigation. Because *Farley* was decided on narrow grounds — the sole issue being whether an unborn child is a "person" under the Wrongful Death Act — the opinion offers little guidance to practicing lawyers.

Evidence of negligence by the parents is admissible on liability issues, and reduces the parent's recovery under West Virginia's comparative negligence scheme. Evidence as to whether the child would have been healthy should be admissible to counter the plaintiff's claims of causation and damages. Evidence of the parents' relationship with the unborn child — including the mother's actions affecting the fetus — is admissible as to causation and damages, particularly as to

¹³⁹ *Reager*, 371 S.E.2d 619 (W. Va. 1988). The five scenarios were:

- (1) The patient chooses not to attend college but can hold a job; or (2) the patient chooses to attend college, graduates and can hold a job; or (3) the patient begins college, cannot finish due to medical reasons but can hold a non-skilled job; or (4) the patient attends college and graduates but cannot hold a job thereafter due to medical problems; or (5) the patient chooses not to attend college and for medical reasons cannot hold a job.

For each scenario, jobs were listed for a person with both legs and without one leg, and an average income was commuted each way. The differences between average annual income with both legs and an average annual income without one leg were multiplied by the expected number of workforce years and were reduced to present value.

loss of solace, etc. Finally, recovery for lost income of an unborn child should not be permitted as speculative.

Application of these proposals, all of which are grounded in West Virginia law, will properly allow consideration of fault by all responsible, and will eliminate pure speculation as to damages. A *Farley* claim will focus on reasonable damages for the emotional loss related to the death of an unborn child.