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# Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England

ANTHONY JACKSON\*

## I. WRONGFUL LIFE

### A. *What is a "Wrongful Life"?*

Baby Shauna might reasonably have assumed that she would be born in good health. Her parents, Phillis and Hyam, did everything within their power to ensure a healthy birth. In fact, out of concern for Shauna's well-being, Phillis and Hyam went so far as to undergo tests to ensure that their baby daughter was not at risk of being born with a debilitating disease.

Naturally, Phillis and Hyam relied on the results of these tests in deciding to parent a healthy child. Had they known that they were the carriers of genes that could lead to a crippling disease, Phillis and Hyam would not have continued with the pregnancy. The laboratory assured them that all was well, however, and as far as Phillis and Hyam knew, Shauna could eagerly anticipate her entrance into life without unnecessary complications.

Phillis and Hyam understandably assumed that the lab would perform the tests with the requisite skill and care. In fact, however, the lab was grossly negligent in conducting the tests. Moreover, at the time these tests were performed, the nation's leading authors on Tay Sachs expressly warned the lab that its test procedures were substantially inaccurate and could produce a false negative result, in conscious disregard of the health, safety, and

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well-being of the baby.<sup>1</sup> Phillis and Hyam could not have known that the information they had sought for Shauna's sake was incorrect.

As a result of the laboratory's negligence, Shauna was born mentally-retarded. Her many symptoms included: high susceptibility to disease; convulsions; partial blindness; inability to feed orally; loss of motor reactions, including the inability to sit up or to hold up her head; and gross physical deformity. Shauna's life expectancy was no more than four years, during which she would suffer great physical pain, emotional distress, and a loss of enjoyment of life.

Shauna was born with precisely the crippling disease that her parents had sought to avoid. The question this incident poses is whether the resulting child should be able to bring legal action against the doctor or applicable authority, without whose negligence that child never would have suffered from such horrific disorders. The doctor's negligence resulted in the birth of a child with insuperable disabilities.

Such an action reflects the rapid progress in genetic medical knowledge during the latter part of this century. Increasingly, doctors can predict the probability that children will be handicapped by genetic disorders. Timely advice thus enables parents to decide whether or not to conceive; in more advanced circumstances, it also can allow parents to decide whether to continue with a pregnancy. Such actions can arise from the failure to test satisfactorily for genetic conditions or to screen for genetic problems, or the failure to offer sufficient or appropriate advice on hereditary disorders. In addition, during the pregnancy itself, the doctor can fail to offer amniocentesis to a pregnant rubella contact or a mother whose child is susceptible to Down's syndrome. Moreover, if offered, such procedures also carry the risk that they will be negligently performed or that their results will not be communicated.

This action raises unusual legal issues. The claim is brought by or on behalf of the child who alleges that she was born because of the doctor's negligent failure to properly advise her parents and, as a result, has to suffer the condition. The doctor's negligent

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1. *Curlender v. Bio-Science Lab.*, 106 Cal. App. 3d 811 (1980).

advice causes the pain, suffering, and financial hardship experienced each day by the child.

The doctor has not caused the disability itself. But for the doctor's negligent acts, however, the child would not have been born and, thus, would not have suffered the ensuing condition. The parents either would have decided not to conceive or, if they became aware of the condition at a later stage, would have terminated the pregnancy in accordance with the applicable law. This action has been labeled as one brought by the child for her own "wrongful life." The emotive bias of this phrase will be discussed below.

Actions for "wrongful life" raise interesting questions of both law and ethics, examining the interrelationship of medicine, social policy, and tortious conduct. The issue demands attention in societies that recognize both medical advances and their impact on the law.

A relatively recent phenomena, wrongful life cases have arisen in both the United States and England. Despite cultural and legal differences between the two countries, the outcomes in these cases, with a few noteworthy exceptions, have been the same. This similarity makes a comparative study highly informative. The wrongful life action has transcended different cultural starting points and has produced similar answers in both societies.

This Article examines judicial responses to the complex legal and ethical problems raised by such actions. It closely analyzes the rationales on which courts rely in making their decisions. These rationales reveal that the legal systems in both countries desperately need to return to the fundamental components of each claim in order to reformulate solutions that better address the needs for consistency and justice.

### *B. Judicial Response*

In the only wrongful life case decided in England,<sup>2</sup> the doctor negligently failed to detect German measles. As a result, the child was born partially blind and deaf, with serious damage to her neural tissues, as well as other disabilities not considered by the court.<sup>3</sup> During the pregnancy, the child's mother suspected that

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2. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166.

3. *Id.*

she had contracted German measles.<sup>4</sup> She therefore went to see her doctor, explaining that she was pregnant and concerned about her child's future well-being.<sup>5</sup> The doctor assured her that she did not have rubella.<sup>6</sup> Furthermore, as the child had not been infected, the doctor assured the mother that she did not have to consider an abortion or worry about the child's health.<sup>7</sup> Relying on this information, the child's mother continued her pregnancy.<sup>8</sup> In fact, the doctor had negligently misplaced one of the two blood samples that he had taken from the mother.<sup>9</sup> In addition, he confused one of her samples with a sample taken from another source.<sup>10</sup> As a result, the doctor negligently failed to interpret her test. The complaint alleged that but for the doctor's negligence, the mother would have terminated her pregnancy to avoid giving birth to a child with debilitating injuries.<sup>11</sup>

The court of appeals rejected the claim, stating that this was "a wholly novel claim, supported by no English authority."<sup>12</sup> Furthermore, the court could not make sense of the reasoning employed by the only U.S. case supporting such an action.<sup>13</sup>

The English court held that the doctor owed no legal duty to the fetus "to prevent its birth" nor to "cause its death."<sup>14</sup> Moreover, the court found the mother's rubella, and not any conduct on the part of the doctor, to be the sole cause of injury to the child.<sup>15</sup>

Even if the child had suffered a legally cognizable injury, the court declared that compensatory damages would be impossible to calculate. According to the court, the purpose of monetary damages is to "as far as possible put the injured party in the condition in which he or she was before being injured."<sup>16</sup> The court cited to the "impossibility of making such an assessment" in

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4. *Id.* at 1172.

5. *Id.*

6. *Id.*

7. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1173.

8. *Id.*

9. *Id.* at 1172.

10. *Id.*

11. *Id.* at 1173.

12. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1186.

13. *Id.*

14. *Id.* at 1188.

15. *Id.* at 1178.

16. *Id.* at 1181.

a case for wrongful life, as it apparently would involve comparing a life with defects against non-existence, which the court could not evaluate.<sup>17</sup> In addition, the court found that such an action was against public policy, running "wholly contrary to the concept of the sanctity of human life."<sup>18</sup>

The procedural bases for this decision are questionable.<sup>19</sup> Substantial arguments in favor of a novel cause of action should not be regarded as unarguable. In fact, substantial arguments in favor of this novel cause of action were made in the U.S. case that the English court rejected without analysis.<sup>20</sup> Furthermore, these same arguments were made in subsequent cases in that jurisdiction. This differential treatment makes crucial the need to examine the ways in which U.S. courts have dealt with the same issue.

A majority of states in the United States have rejected the "wrongful life" cause of action. Notwithstanding two earlier cases in which the U.S. courts considered actions by children against their parents for having been born illegitimate,<sup>21</sup> *Gleitman v. Cosgrove*<sup>22</sup> represents the first major U.S. decision on the current topic. In that case, the doctor knew that the patient had rubella but negligently advised her that the disease would not affect her child in any way.<sup>23</sup> The complaint alleged that, had she been properly informed, the patient would have terminated her pregnancy to avoid giving birth to a child suffering crippling disabilities.<sup>24</sup>

The Supreme Court of New Jersey denied the child's claim for wrongful life. The court found particularly troubling the child's assertion that he would have been better off not being born. According to Chief Judge Weintraub, "[m]an, who knows nothing of death or nothingness, cannot possibly know whether that is so."<sup>25</sup> Furthermore, using reasoning parallel to the reasoning used in a later case, the court found that "there is no precedent in appellate judicial pronouncements that holds a child has a

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17. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1189.

18. *Id.* at 1188.

19. *Id.* at 413.

20. *Curlender v. Bio-Science Lab.*, 106 Cal. App. 3d 811 (1980).

21. *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. 1963), *Williams v. State*, 223 N.E.2d 343 (N.Y. 1966).

22. 227 A.2d 689 (N.J. 1967).

23. *Id.* at 690.

24. *Id.* at 691.

25. *Id.* at 711 (Weintraub, C.J., dissenting in part).

fundamental right to be born as a whole, functional human being."<sup>26</sup> The court also found that damages were nearly "impossible" to calculate in a wrongful life cause of action.<sup>27</sup> Such a calculation would involve measuring "the difference between his life with defects against the utter void of nonexistence."<sup>28</sup>

Throughout the decision, the court evinced a general reluctance to sanction abortion by allowing a cause of action to be predicated upon the deprivation of "the opportunity to terminate the existence of a defective child in embryo."<sup>29</sup> Subsequent cases cite similar reasoning in denying actions for a variety of afflictions, including Down's syndrome<sup>30</sup> and polycystic kidney disease.<sup>31</sup>

Nevertheless, three states, including New Jersey, currently recognize the right of a child to bring a wrongful life claim.<sup>32</sup> The first of these decisions is *Curlender v. Bio-Science Lab.*,<sup>33</sup> a 1980 California case involving the facts cited in the introduction of this Article.

In that case, the court agreed with one of the dissenting comments in *Gleitman*, specifically that the denial of the child's action "permits a wrong with serious consequential injury to go wholly unaddressed."<sup>34</sup> Judge Patterson systematically dismantled the reasons previously offered to reject wrongful life claims. First, citing the U.S. Supreme Court decision in *Roe v. Wade*,<sup>35</sup> Judge Patterson stated that the parents' constitutional right to have an abortion, proved "to be of considerable importance in defining the parameters of 'wrongful life' litigation."<sup>36</sup> He thus rejected the now inapplicable argument that the illegality of an abortion was a reason to deny wrongful life claims. Second, Judge Patterson reiterated the principle, clearly stated by the U.S. Supreme Court

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26. *Speck v. Finegold*, 408 A.2d 496, 508 (Pa. 1979).

27. *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967).

28. *Id.*

29. *Id.* at 693.

30. *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978).

31. *Park v. Chessin*, 60 A.2d 80 (N.Y. 1977), *rev'd and overruled by Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978).

32. *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984). The other two jurisdictions are California and Washington. *Harbeson v. Parke-Davis*, 656 P.2d 483 (Wash. 1983).

33. 106 Cal. App. 3d 811 (1980).

34. *Gleitman v. Cosgrove*, 227 A.2d 689, 703 (N.J. 1967).

35. 410 U.S. 113 (1973).

36. *Curlender*, 106 Cal. App. 3d at 820. This decision was handed down six years after the New Jersey Supreme Court *Gleitman* decision.

fifty years prior, that difficulties in computing damages could not be permitted to justify a denial of liability for negligence.<sup>37</sup> After reviewing the more recent decisions of courts in other jurisdictions, Judge Patterson found that, "there has been a gradual retreat from accepting 'impossibility of measuring damages' as the sole ground for barring the infant's right of recovery."<sup>38</sup> Third, following a federal district court decision in a Tay-Sachs case two years earlier,<sup>39</sup> Judge Patterson recognized that "society has an interest in insuring that genetic testing is properly performed and interpreted."<sup>40</sup> He thus found a legally cognizable injury in that case because the child suffered from the Tay-Sachs disease as a result of the defendants' negligence.<sup>41</sup>

The *Curlender* court found that the serious nature of the wrong, combined with the fact that such diseases go undetected because of a lack of due medical attention, suffices to allow such actions in law.<sup>42</sup> The *Curlender* court further held that damages should be calculated to compensate "for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition."<sup>43</sup>

In the subsequent case of *Turpin v. Sortini*,<sup>44</sup> the California Supreme Court agreed to allow actions for wrongful life but disputed the *Curlender* court's method of calculating damages. The *Turpin* case involved James and Donna Turpin's two children—for these purposes, rather inappropriately named 'Hope' and 'Joy.'<sup>45</sup> In 1976, on the advice of their pediatrician, the Turpins took their only daughter, Hope, to be evaluated for a possible hearing disorder. Hope was examined by a licensed professional specializing in the diagnosis and treatment of speech and hearing defects.<sup>46</sup> He advised the Turpins that her hearing

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37. *Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555 (1931).

38. *Curlender*, 106 Cal. App. 3d at 826.

39. *Gildiner v. Thomas Jefferson University Hospital*, 451 F. Supp. 692 (E.D.Pa. 1978).

40. *Id.* at 696.

41. *Id.*

42. *Curlender*, 106 Cal. App. 3d at 830.

43. *Id.*

44. 643 P.2d 954 (Cal. 1982).

45. *Id.* at 955-56.

46. *Id.* at 956.



was within normal limits.<sup>47</sup> Three months later, relying upon this diagnosis, James and Donna decided to conceive their second child, Joy.<sup>48</sup> Had they known that Hope suffered from hereditary deafness, which could also afflict any future children the Turpins might have, they would never have conceived Joy.<sup>49</sup>

In fact, the specialist had negligently examined, tested, and evaluated Hope.<sup>50</sup> Far from having hearing within normal limits, Hope was actually 'stone deaf' due to a hereditary ailment.<sup>51</sup> James and Donna did not learn of this until late 1977, two months after the birth of Joy, when other specialists diagnosed Hope's true condition.<sup>52</sup> The nature of this condition was such that there was a reasonable degree of medical probability that the hearing defect would be inherited by any future children conceived by the Turpins.<sup>53</sup> Joy was born in August 1977, suffering from the same total deafness as her sister Hope.<sup>54</sup>

The court rejected the proposition that an impaired life was preferable to nonlife in all circumstances. While affirming the "worth and sanctity of less-than-perfect life," the court nevertheless questioned whether these considerations alone provide a sound basis for rejecting the child's tort action.<sup>55</sup> The court doubted whether, in the case of deafness, a jury would find that life with the condition was worse than no life at all.<sup>56</sup> Nevertheless, the court ruled that if a disease were very serious, "we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all."<sup>57</sup>

The *Turpin* court denied recovery for general damages, citing the impossibility of determining whether the plaintiff had, in fact, suffered any injury by being born.<sup>58</sup> Furthermore, the court held that, even if damages could be determined, a fair, non-speculative

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47. *Id.*

48. *Id.* at 956.

49. *Turpin v. Sortini*, 643 P.2d 954, 956 (Cal. 1982).

50. *Id.* at 956.

51. *Id.*

52. *Id.* at 956.

53. *Id.*

54. *Turpin v. Sortini*, 643 P.2d 954, 956 (Cal. 1982).

55. *Id.* at 961.

56. *Id.* at 962-63.

57. *Id.* at 963.

58. *Id.*

assessment of any resulting damages also would be impossible to determine.<sup>59</sup> Unlike the *Curlender* court, however, the *Turpin* court indicated that it would allow the child to recover damages for her medical expenses.<sup>60</sup> First, such damages, according to the court, are “both certain and readily measurable.”<sup>61</sup> Second, recognizing that the parents did not have their own action in law based on exactly the same facts, the court allowed recovery of medical expenses on the ground that it would be “illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child’s own medical care.”<sup>62</sup> Lastly, the court allowed the child to recover medical expenses because, otherwise, such recovery would depend entirely upon “the wholly fortuitous circumstance” of whether the parents were available to sue or whether the expenses were incurred at a time when the parents no longer remained legally responsible for providing care to the child.<sup>63</sup>

The *Turpin* dissent criticized the decision as being “internally inconsistent” in permitting “a child to recover special damages for a so-called wrongful life action, but den[ying] all general damages for the very same tort.”<sup>64</sup> While commending the “modest compassion” of the majority, the dissent further noted that “they suggest no principle of law that justifies so neatly circumscribing the nature of damages suffered as a result of a defendant’s negligence.”<sup>65</sup>

All U.S. jurisdictions, as well as England, recognize the right of a child to sue a member of the medical profession for any disability that the doctor negligently inflicted on the child before birth. Nevertheless, in denying a child’s right to sue for wrongful life, courts have argued that to allow such a course of action would require the extension of traditional tort concepts beyond manageable bounds.

This Article argues that wrongful life claims do fit squarely within the tort law system and that, consequently, the above assertion cannot withstand close analysis. In a traditional tort

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59. *Turpin v. Sortini*, 643 P.2d 954, 963 (Cal. 1982).

60. *Id.* at 965.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Turpin v. Sortini*, 643 P.2d 954, 966 (Mosk, J., dissenting).

65. *Id.*

action, the defendant owed a duty of care to the plaintiff and, thus, must compensate the plaintiff with monetary damages. Therefore, a child's action for wrongful life against a negligent physician must be examined in the context of this paradigm. In addition to satisfying each of the requirements for a traditional tort action, the child's claim for wrongful life results in substantial injustice where it is denied.

### C. *The Conception of Wrongful Life Within the Law of Torts*

#### 1. The Duty

When deciding the tort action of negligence, courts must ask whether defendant owed plaintiff a "duty of care." The duty of care is a useful tool for mapping out those areas of human behavior upon which the courts should impose liability. Nevertheless, the concept of duty has certain analytical limitations. As Prosser and Keeton note, duty cannot be unearthed through close examination precisely because "it is a shorthand statement of a conclusion, rather than an aid to analysis in itself."<sup>66</sup> Perhaps attempting to explain these limitations, Winfield and Jolowicz acknowledge that "duty is the primary control device which allows the courts to keep liability for negligence within acceptable limits, and the controversies which have centered around the criteria for the existence of a duty reflect differences of opinion as to the proper ambit of the law of negligence."<sup>67</sup>

The law in both the United States and in England similarly approach the question of when, and under what circumstances, a duty should be imposed. In the traditional analysis, a court first attempts to delineate general circumstances under which a duty will be imposed. Then, the court conducts a fact-specific examination to determine whether the plaintiff in a particular case was a foreseeable victim of the breach of the duty. Lord Goff, in *Smith v. Littlewoods Org. Ltd.*,<sup>68</sup> accurately summarized the modern legal trend in both countries: "[T]he broad general principle of liability for foreseeable damage is so widely applicable that the function of the duty of care is not so much to identify cases where

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66. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 358 (1984).

67. W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 73 (1989).

68. [1987] 1 App. Cas. 241, 280.

liability is imposed as to identify those where it is not.”<sup>69</sup> Nevertheless, an examination of the various approaches courts use for guidance in this field is informative.

The history of contemporary English case law began with the two-stage test formulated by Lord Wilberforce in *Anns v. Merton London Borough*.<sup>70</sup> In that case, the court first required a relationship of sufficient “proximity or neighbourhood” between plaintiff and defendant such that, in the latter’s reasonable contemplation, carelessness on her part might cause damage to the former.<sup>71</sup> Where such a relationship existed, the court imposed a *prima facie* duty of care.<sup>72</sup> Then, the court considered whether any factors existed that ought to negate, reduce, or limit that duty.<sup>73</sup>

This case caused such a backlash that, within a decade, it no longer represented a correct general statement of the approach to establish a duty of care. Most of the blame for this must be placed on the enthusiastic judges who took up the elegant rationalization of the law, as spelled out in *Anns v. Merton*, and used it to attack previously well-entrenched principles of non-liability.

Ten years later, the Privy Council in *Yuen Kun Yeu v. Attorney-General of Hong Kong* reversed *Anns* by finding two available interpretations of the first stage of the test articulated in that case.<sup>74</sup> First, the Council considered whether proximity entailed merely the reasonable foreseeability of the injury itself, thus relegating all matters of “policy” to the second stage of the test.<sup>75</sup> The Council rejected this interpretation. Rather, the Council interpreted “proximity” to include a number of factors, including foreseeability, which should be considered in the imposition of a duty of care.<sup>76</sup> Under the Council’s interpretation, the whole concept of the necessary relationship between the plaintiff and the defendant, especially its closeness and directness,

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69. *Id.*

70. 1978 App. Cas. 728.

71. *Id.* at 751.

72. *Id.* at 751-52.

73. *Id.* at 752.

74. [1988] 1 App. Cas. 175 (P.C. 1987) (appeal taken from H.K.).

75. *Id.*

76. *Id.* at 191-92.

must be examined.<sup>77</sup> Courts have followed this approach in subsequent cases.<sup>78</sup>

Commentators note, however, that "the differences between the approach in these cases on the one hand and the *Anns* formula on the other is verbal, a matter of emphasis."<sup>79</sup> In more recent cases, the concept of "proximity" seems to differ according to the type of case. Where the loss arises from an act that inflicts physical harm upon the plaintiff or her property, the defendant's duty may be established by foreseeability alone.<sup>80</sup> Where the loss arises from a failure to act, or a statement, or where the loss is purely economical, the court may insist upon a substantially closer relationship between the parties.<sup>81</sup>

Under the current approach, "policy", whether concealed in the language of proximity, or free-standing in the comparatively rare cases to which the *Anns* second stage is now said to be applicable, means simply that the court must decide . . . whether there should be a duty."<sup>82</sup> In either case, duty is ultimately a policy issue, and courts must decide whether they best represent the interests of society by imposing liability in a particular case.

U.S. cases also treat the concept of duty as subject to policy considerations. *Weirum v. RKO General, Inc.* involved an action against a rock radio station with a large teenage audience.<sup>83</sup> To increase its popularity, the station ran a contest in which listeners raced to locate an ever-moving disc-jockey at his next stopping point and answer a fairly simple question.<sup>84</sup> The first listeners to do so received money and a brief appearance on air.<sup>85</sup> In the facts that gave rise to this action, two minors, driving separate cars, attempted to pursue the disc-jockey to his next destination.<sup>86</sup> In the course of their pursuit, one of the minors negligently forced another car off the road and into the center divider, killing its sole

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77. *Id.* at 192.

78. *See, e.g., Hill v. Chief Constable of West Yorkshire*, 1989 App. Cas. 191; *Ryeford Homes Ltd. v. Sevenoaks D.C.*, NEW L.J., 255 (1989); *Mills v. Winchester Diocesan Bd.*, 2 All E.R. 317 (1989).

79. ROGERS, *supra* note 67, at 79.

80. *Id.* at 79.

81. *Id.*

82. *Id.* at 80.

83. 539 P.2d 36 (Cal. 1985).

84. *Id.* at 43-44.

85. *Id.* at 44.

86. *Id.*

occupant.<sup>87</sup> The surviving wife and children of the decedent sued the radio station. The court recognized a duty of care based on the foreseeable risk of harm to other road users caused by the activities of the defendants.<sup>88</sup> As a result, the plaintiffs could recover.

The *Weirum* court utilized an expansive definition of duty. Rather than adopting a rigid legal formula, the court stated that "any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall."<sup>89</sup> Thus, courts are willing to use the concept of duty as a door by which to introduce policy considerations into the law of torts.

*Kelly v. Gwinnell*<sup>90</sup> further illustrates this point. There, the court held that a social host could be liable for any injury to the victim of an automobile accident caused by the negligent driving of one of the host's guests.<sup>91</sup> Where a host serves alcohol to a guest who is visibly drunk, that host may be liable for the negligent acts of that guest toward a third party arising out of the guest's intoxicated state.<sup>92</sup>

In reaching its conclusion, the court recognized that establishing a duty "involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."<sup>93</sup> Ultimately, "when the court determines that a duty exists and liability will be extended, it draws judicial lines based on fairness and policy."<sup>94</sup> Thus, once again, the question of the existence of a duty is one of policy, not strict legal principle.

Establishing the duty does not signify the end of the matter, however. Once a court finds that a duty exists, it then must ask whether the duty is owed to the individual plaintiff before the court. Both U.S. and English courts have devised "tests" for determining the proper placement of ultimate liability.

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87. *Id.* at 45.

88. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 46 (Cal. 1985).

89. *Id.* at 46.

90. 476 A.2d 1219 (N.J. 1984).

91. *Id.* at 1222.

92. *Id.* at 1224.

93. *Id.* at 1222.

94. *Id.*

*Donoghue v. Stevenson*<sup>95</sup>—arguably the most famous English decision—enunciated both the circumstances in which a duty would arise and to whom it would be owed. The case arose after two young women decided to have a relaxing afternoon at a cafe in Paisley.<sup>96</sup> One of the women offered to treat the other to a bottle of ginger-beer.<sup>97</sup> The shopkeeper, who received his supplies from the manufacturer, opened the bottle for the young woman and poured some of its contents into a tumbler that already contained a portion of ice-cream.<sup>98</sup> After the woman drank a portion of the contents of the tumbler, her friend began to pour the remainder of the bottle's contents into the tumbler. At this time, the two women discovered the decomposing remains of a snail floating out of the bottle.<sup>99</sup>

As a result of both the nauseating sight of the snail and the impurities in the ginger-beer, which she had already consumed, the young woman suffered from both shock and severe gastroenteritis.<sup>100</sup> She could not have examined the contents of the ginger-beer beforehand, as it was sold in opaque bottles sealed with metal caps. The young woman's complaint alleged that, because the drink was manufactured for public consumption, "it was the duty of the [manufacturer] to provide a system of working his business which would not allow snails to get into his ginger-beer bottles."<sup>101</sup>

In holding that the manufacturer owed the general public a duty to ensure that his bottles were free of noxious matter, and that he would be liable in tort should such a duty be broken, Lord Atkin laid out the principles upon which a duty would be both established and breached. The now famous passage states in full:

In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must

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95. 1932 App. Cas. 562.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 601.

100. *Donoghue v. Stevenson*, 1932 App. Cas. 562, 601.

101. *Id.* at 563.

pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor; and the lawyer's question, Who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>102</sup>

At the second level of inquiry as to whether a breach of duty occurred in a particular case, the court must determine whether the injury to the plaintiff would have been in the contemplation of the "reasonable man." Lord Atkin's reference to "neighbours" contemplates foresight, and not merely physical closeness. Under this definition, "neighbours" includes "persons who are so closely and directly affected by [one's] act that [the actor] ought reasonably to have them in contemplation." This analysis raises the related issue of exactly who these "persons" are.

In the United States, the equally famous case of *Palsgraf v. Long Island R.R.*<sup>103</sup> addressed this question. Although they may be suspect, the facts as presented to the New York Court of Appeals involved a man attempting to board a moving train. Servants of the defendant railroad company allegedly acted negligently in causing the man to drop a small package that he was carrying, which was wrapped in newspaper.<sup>104</sup> While a guard on one of the cars held the door open and tried to help the gentleman aboard, another guard on the platform gave him a push from behind.<sup>105</sup> The package, which evidently contained fireworks, dropped onto the rails and caused an explosion, which knocked

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102. *Id.* at 580.

103. 162 N.E. 99 (N.Y. 1928).

104. *Id.* at 99.

105. *Id.*



over some scales many feet away.<sup>106</sup> These scales struck and injured the plaintiff, Helen Palsgraf.<sup>107</sup>

In finding for the defendants, the court stated that, regardless of whether the defendants' servants were negligent with respect to the person or property of the man carrying the package, they were not negligent with respect to Helen Palsgraf.<sup>108</sup> The court found determinative the fact that nothing in the appearance of the package suggested to even the most cautious mind that it would cause a violent explosion.<sup>109</sup> Citing this fact, Chief Justice Cardozo reasoned that:

[i]f no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . [T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.<sup>110</sup>

The English case of *Bourhill v. Young* states the same principle.<sup>111</sup> In *Bourhill*, Lord Russell stated that the duty of care "only arises towards those individuals of whom it may reasonably be anticipated that they will be affected by the act which constitutes the alleged breach."<sup>112</sup> Because the duty of care depends upon the time-worn considerations of "reasonableness" and "foreseeability," policy concerns thus govern who may recover in individual cases. The court in *Kelly v. Gwinnell* explicitly recognized this fact when it stated that "[w]e impose this duty on the host to the third party because we believe that the policy considerations served by its imposition far outweigh those asserted in opposition."<sup>113</sup>

Clearly, then, "duty" is not sacrosanct. Rather, it represents "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."<sup>114</sup> As long as the concept of duty establishes a general

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106. *Id.*

107. *Id.*

108. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928).

109. *Id.*

110. *Id.* at 99-100.

111. 1943 App. Cas. 92.

112. *Id.* at 102.

113. 478 A.2d 1219, 1224 (N.J. 1984).

114. *Brennen v. Eugene*, 591 P.2d 719, 722 (Or. 1979).

context of liability as well as a specific context that applies to a particular plaintiff in an individual case, duty remains a device through which judges introduce policy considerations into the law. Indeed, "the only necessary function performed by the duty of care concept in the present law is to deal with those cases where liability is denied not because of lack of foreseeability but for reasons of policy."<sup>115</sup>

Actions for wrongful life must be considered in light of this tendency to justify the imposition of a duty with policy considerations. Whatever the courts' reasons for accepting or rejecting actions for wrongful life in the cases discussed above, those decisions to refuse recognition of the doctor's duty toward the child were based on policy alone. Such policy decisions should be reversed, and a duty owed to the child should be found. Clearly, the act giving rise to the claim is a negligent one, typically involving a medical practitioner who lost a blood sample, misread a laboratory report, or offered ill advice about a condition that should have been detected. The relationship between the doctor and the child in these cases is a close one. Furthermore, the injury to the plaintiff is foreseeable, since the mother most likely employed the doctor to help her make an informed choice about whether or not to give birth to a child. The result of the doctor's negligence, the birth of a child suffering from a disability that should have been detected, is precisely that which the defendants were supposed to have guarded against.

Applying Lord Atkin's "neighbor principle," the unborn child clearly should fall within the contemplation of the doctor. A reasonable doctor necessarily would know that the unborn child naturally will be affected by any advice given to the mother.

Therefore, the court's assumption that wrongful life actions cannot exist because the doctor owes no duty to the child must be analyzed critically. Sound reasons in both law and policy support allowing the action. These reasons, grounded in both law and morality, as well as the nature such a duty should take, deserve closer examination.

As a glance at the U.S. cases quickly confirms, the fact that the child is as yet unborn will not present a barrier to all legal claims. The physician may indeed owe a duty to the child in the

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115. ROGERS, *supra* note 67, at 83.

child's own right. As with the English case of *Burton, Bonbrest v. Kotz*<sup>116</sup> was the first U.S. decision to recognize a right of action for the breach of a duty owed to a fetus. Thereafter, for the purposes of recovery under the law of torts, courts considered the unborn child a "person" from the moment of conception.

In two later cases that demonstrate the extent of this duty, the courts found a duty owed to the unborn child under circumstances far more tenuous than they would be in the context of a wrongful life action. In *Jorgensen v. Meade Johnson Lab., Inc.*,<sup>117</sup> the court held that mongoloid children have a cognizable complaint against the manufacturer of their mothers' birth control pills, once plaintiffs establish that the pills were responsible for the mongoloid condition. Furthermore, in *Renslow v. Mennonite Hospital*,<sup>118</sup> a physician negligently transfused a female patient with an incompatible blood type.<sup>119</sup> Nine years later, the woman gave birth to a child suffering from permanent damage to various organs, including the brain and the nervous system.<sup>120</sup> The court held that the physician reasonably could have foreseen both that his teenage patient would later marry and have children and that a subsequent child could be injured as a result of his negligent blood transfusion. Thus, in effect, a physician engaging in an activity unrelated to a present or future pregnancy may nevertheless owe a duty of care to future children of the patient, despite the fact that those children were not in anyone's immediate contemplation at the time of the treatment. Clearly, then, a specialist in childbirth or prenatal conditions should owe a duty of care to the existing child on whose behalf he provided the treatment.

Furthermore, denial of a child's wrongful life action is seemingly inconsistent with established precedent finding that the medical profession owes the mother a duty of care in cases arising out of exactly the same facts.<sup>121</sup> Recognizing this inconsistency, the court in *McKay*<sup>122</sup> acknowledged that a duty did indeed exist, although they failed to follow this legal principle on policy

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116. 65 F. Supp. 138, 142 (D.D.C. 1946).

117. 483 F.2d 237 (10th Cir. 1973).

118. 367 N.E.2d 1250 (Ill. 1967).

119. She was given Rhesus positive blood that was incompatible with Rhesus negative, her actual blood group. *Id.* at 1251.

120. *Id.*

121. These so-called "wrongful birth" cases are discussed below.

122. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166 (Eng. C.A.).

grounds. There, Lord Justice Ackner found as a matter "of course" that the doctor owed a duty to the mother under such circumstances, accepting that policy did not bar her claims.<sup>123</sup> Thus, the negligent doctor's failure to perform an abortion or a sterilization, or the negligent failure to inform the parents of a fetal abnormality, may be considered grounds for finding the breach of a duty. The courts' reluctance to apply the same duty to wrongful life cases, which are based on identical facts, seems peculiar. These cases fail to offer a logical answer to the pertinent observation that "if a duty is owed to one of the affected parties, why not to the other?"<sup>124</sup>

Even if one accepts that a duty is owed to the child, however, the nature of that duty also must be considered, especially with respect to judicial pronouncements characterizing it in a rather nebulous light. The court of appeal in *McKay* held that duty required the medical profession actively to "take away life."<sup>125</sup> In Lord Justice Stephenson's characterization, "[t]he only duty which either defendant can owe to the unborn child . . . is a duty to abort or kill her."<sup>126</sup> Of course, no justifications exist for a duty to take away life. For good reasons, however, the wrongful life claim does not seek to punish the physician for failing to kill the child. If the law imposed a duty upon doctors to prevent the birth of a child, one of two unpalatable alternatives would result should the mother decide to continue the pregnancy. The idea that a doctor would be under a legal duty to abort the child, even if against the express wishes of the child's mother, seems horrific by any civilized standards. Of course, no ethical grounds exist to legally bind a doctor to kill a baby who is both expected and desired.

Equally distasteful is the second alternative result. In a case where a mother desires to give birth to the child, her failure to prevent its birth constitutes an intervening act, which both absolves the doctor from liability and may subject her to liability with respect to the child's future wrongful birth action.<sup>127</sup> If the duty

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123. *Id.* at 1188.

124. Tony Weir, *Wrongful Life - Nipped in the Bud*, 1982 CAMBRIDGE L.J. 225, 227.

125. *McKay*, [1982] 1 Q.B. at 1179.

126. *Id.* at 1178.

127. Lord Justice Ackner recognized that ". . . if the duty of care to the fetus involved a duty on the doctor. . . to prevent its birth, the child would have a cause of action against its mother who had unreasonably refused to have an abortion." *Id.* at 1188.

owed requires the prevention of birth under such wrongful life circumstances, then such a mother clearly breaches that duty. Furthermore, this duty places the mother in the seemingly paradoxical position of being potentially liable to a plaintiff whose very existence is the result of the alleged wrongful decision. Such a result would be absurd. It naturally would disrupt that child's family life, also causing bitterness and raising acute social implications. Clearly, such a basis for the duty should be rejected automatically on policy grounds alone.

Thus, the duty owed by the doctor in wrongful life cases is not to prevent the birth of the child. Rather, the duty only requires the doctor to inform the mother of any risks associated with the birth of her child. Indeed, Lord Justice Griffiths' dissent in *McKay* recognized this distinction.<sup>128</sup> Emphasizing that the ultimate decision whether or not to abort must always belong to the mother, Lord Justice Griffiths stated that "if there is a risk that the child will be born deformed, that risk must be explained to the mother, but it surely cannot be asserted that the doctor owes a duty to the fetus to urge its destruction."<sup>129</sup>

The responsibility to inform is the essence of the duty in wrongful life cases. Recognizing this duty contradicts the assertion, made in several wrongful life cases, that allowing such actions would encourage doctors to practice "defensive medicine" by experiencing subconscious pressure to advise abortions in doubtful cases out of fear of actions for damages.<sup>130</sup> The doctor's duty to provide information to the mother about any risks to the fetus naturally ends once the information is provided. A wrongful life action could not succeed against the doctor because she was not under any obligation to prevent the birth of the child. This result is supported by the policy reasons discussed above.

Imposing a duty on doctors to inform parents of the probability that their offspring will not be born in the condition that they expect is a reversion to the traditional principle of "informed consent." In *Harbeson v. Parke-Davis, Inc.*, the Ninth Circuit Court of Appeals set forth the elements a plaintiff must establish to show that her consent was not properly "informed."<sup>131</sup> The

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128. *Id.* at 1189.

129. *Id.* at 1192.

130. For example, see *McKay v. Essex Area Health Auth.* [1982] 1 Q.B. 1166, 1187.

131. 746 F.2d 517 (9th Cir. 1984).

plaintiff must show that she was unaware of a material risk and that the doctor failed to disclose that risk.<sup>132</sup> She further must show that had she known of the risk, she would have pursued a different course of action, and that the failure to disclose the risk led to the injury.<sup>133</sup> Each of these factors is necessary to a successful action for wrongful life.

Clearly, a doctor's negligent failure to disclose leads to an unknown risk to the parents. Furthermore, the parents' decision to conceive is a direct result of their ignorance about the child's condition. Ultimately, the child is born, suffering from the undisclosed disabilities.

If a duty is placed on the doctor to offer competent medical information and advice,<sup>134</sup> a court must then determine to which person or persons the doctor owes such a duty. While it is generally accepted that such a duty is owed to the mother, traditionally it has been denied to the child. A leading English treatise, however, maintains that "there is no reason why the duty cannot be owed *to the child* through the agency of its mother and hence an action brought by the child for breach of a duty owed to it."<sup>135</sup> Recognizing that the mother is acting in the interests of her child, it seems sensible to designate her as its agent.

As previously established, a legal duty can extend to an unborn person. Accordingly, *Turpin v. Sortini*<sup>136</sup> recognized that during the gestation period, "the law generally accords the parents the right to act to protect the child's interests."<sup>137</sup> The child is not precluded from bringing an action in his own right simply because he can act only through his parents.

This viewpoint is particularly persuasive when applied by analogy to the following situation: a landlord fails to inform a pregnant woman of a dangerously loose step on his premises; if the

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132. *Id.* at 522.

133. *Id.*

134. This duty was imposed in wrongful life cases that have recognized the action. For example, the *Curlender* court held: "We have no difficulty in ascertaining and finding the existence of a duty owed by medical laboratories engaged in genetic testing to parents and their as yet unborn children to use ordinary care in administration of available tests for the purpose of providing information concerning potential genetic defects in the unborn." *Curlender v. Bio-Science Labs*, 106 Cal. App. 3d 811, 828 (1980).

135. IAN KENNEDY & ANDREW GRUBB, *MEDICAL LAW: TEXT AND MATERIALS* 26 (1989).

136. 643 P.2d 954 (Cal. 1982).

137. *Id.* at 962.

woman trips on that loose step, and the fetus is injured as a result, the fetus would have an action in law against the landlord.<sup>138</sup> The fact that the landlord owes an independent duty to the mother is irrelevant to the child's action, which he can bring in his own right. The fact that the mother could have prevented the injury to the fetus had the landlord informed her of the loose step will not preclude the fetus from bringing his own action where the information was not disclosed. The court does not deny the fetus recovery merely because he would not have been able to act on his own right.

In wrongful life cases, the law should also recognize the existence of a duty to a fetus where a doctor fails to disclose material information to its mother. In each case, the decision to act on the advice rests with the mother, but "in a 'wrongful life' context, the fetus' inability to decide between life and nonexistence should not be the basis for relieving the physician of his duty to inform the fetus, through the parents, of possible birth defects."<sup>139</sup> The doctor's duty to inform logically extends to an unborn child.

Recognizing that a doctor owes a child a duty to inform her mother of the child's condition, but owes no duty to physically prevent her birth, does not resolve the problem of a child who sues her mother for failing to act on the doctor's advice. Once the doctor informs the mother of the risks involved, his legal duty is fulfilled. If the mother decides to continue her pregnancy, the issue then becomes whether the child can sue her mother.

The *Curlender*<sup>140</sup> court addressed this issue but provided an unsatisfactory answer. The court held that when a parent, with full knowledge of the child's future disability, decides to continue the pregnancy, the decision constitutes "an intervening act of proximate cause."<sup>141</sup> The court further argued that "no sound public policy should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring."<sup>142</sup>

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138. Note, *A Cause of Action for 'Wrongful life': [A Suggested Analysis]*, 55 MINN. L. REV. 58, 70 (1970).

139. Thomas Keasler Foutz, "Wrongful life": *The Right Not To Be Born*, 54 TUL. L. REV. 480, 490 (1980).

140. *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811 (1980).

141. *Id.* at 829.

142. *Id.*

The *Curlender* court's reasoning has encountered several criticisms. First, it is clear that the parents did not cause the injuries themselves. Second, though the parents' decision to continue with a pregnancy is the proximate cause of the birth, tort liability does not attach if the decision was not negligent. Moreover, cases in which a parent knows that a child will be born disabled, but nevertheless decides to bring her into the world are the most inappropriate cases to impose liability. Society should not punish parents who have chosen to care for their disabled child. It is likely that parents who consciously bring a disabled child into the world will be particularly nurturing and sensitive to the child's needs and will demonstrate genuine love and care. Rather than imposing legal sanctions upon them, these are parents whom society should respect.

If a child were allowed to sue his parents under these circumstances, the policy implications would be offensive. While policy considerations alone should be enough to override this action, there are several key differences between a duty to prevent birth and a mere duty to inform. These distinctions will make it easier to recognize that an action between mother and child in such a case would be impossible.

First, a mother makes a choice on behalf of the child. The doctor's duty is limited to providing the mother with sufficient information to allow her to make an informed choice. Once she has made a choice, it is the choice of the child as well. She is acting as the spokesperson for the child who is incapable of expressing his desire. Therefore, a child should not be allowed to bring an action based upon a wrong decision because it is "impossible to envisage an action against the mother if the outcome of that informed choice is a live child. The mother's choice is the child's choice, for who else would we have exercise it?"<sup>143</sup>

A relatively straightforward principle of tort law supporting the denial of a child's action against the mother is often overlooked by courts and commentators. To fully understand why an action by a child against his mother would be impossible, the cause of action must be broken down into stages. The doctor is liable

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143. Robert Lee, *To Be or Not to Be: Is that the Question? The Claim of Wrongful Life*, in *BIRTHRIGHTS: LAW AND ETHICS AT THE BEGINNING OF LIFE* 172, 182 (Robert Lee & Derek Morgan eds., 1989).



because of her negligent advice, and this negligent advice gives rise to the claim. When a mother, after being informed of the risks, decides to conceive or continue with her pregnancy, her potential liability is entirely different. Notwithstanding the reasons why a mother decides to give birth to a disabled child, it is extremely improbable that her decision is negligent.<sup>144</sup> No child would be able to prove that the mother's decision was made negligently.

Establishing that negligent advice given by a doctor denied the mother the opportunity to make a conscious decision, on behalf of the child, whether or not to continue with the pregnancy is a factual issue. A cause of action cannot succeed unless the plaintiff can demonstrate that the defendant acted negligently. Proving negligence by a doctor can be accomplished, but proving the mother's negligence is almost impossible.

In England, a child is statutorily precluded from bringing an action against his mother by the Congenital Disabilities (Civil Liability) Act of 1976.<sup>145</sup> A mother cannot be liable to her offspring under the Act. In the United States, the doctrine of parental immunity is eroding, and the courts are beginning to address the circumstances under which a child can sue her parents. The legal reasoning in these cases, where a mother allegedly has caused prenatal damage to her child, is instructive. In wrongful life cases, however, the mother has done nothing to cause any injury to the child. This obvious distinction supports the present argument.

In *Grodin v. Grodin*,<sup>146</sup> Randy Grodin, Roberta's infant son, brought an action against his mother for his brown teeth. He alleged that his brown teeth were the result of his mother's use of medication during her pregnancy.<sup>147</sup> Roberta was prescribed the drug Tetracycline for a medical condition entirely unrelated to her pregnancy.<sup>148</sup> At the time, she did not know she was pregnant because she had been previously informed that she was

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144. *Id.*

145. Section 1(1) reads: "If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (*other than the child's own mother*) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child." Congenital Disabilities (Civil Liability) Act of 1976, ch. 28, § 1(1) (Eng.).

146. 301 N.W.2d 869 (Mich. 1980).

147. *Id.* at 870.

148. *Id.* at 869.

unable to bear children.<sup>149</sup> The Tetracycline prescription and the assurance of her inability to conceive occurred on two separate and completely independent visits to her doctor.

Randy brought his action, claiming that his mother was negligent in her failure to seek proper prenatal care after becoming pregnant, in her failure to request a pregnancy test, and in failing to inform her doctor that she had continued to take the drug Tetracycline.<sup>150</sup> The court held that circumstances existed to impose liability on the mother. According to the *Grodin* court, "[T]he focal question is whether the decision reached by a woman in a particular case was a 'reasonable exercise of parental discretion.'"<sup>151</sup> The Michigan Court of Appeals reversed and remanded the case for a determination of the "reasonableness" of the alleged negligent conduct.<sup>152</sup>

Strong law and policy considerations make it abhorrent for any court to hold that the failure to procure an abortion was an unreasonable exercise of parental authority. To legalize the killing of the fetus is one thing; to state that it is unreasonable not to choose such a course of action is quite another. A woman's choice to give birth to a child, which she clearly desires to nurture, should always be reasonable.

In *Stallman v. Youngquist*,<sup>153</sup> an action by a child against its mother who had negligently injured the fetus while driving, was dismissed based on the policy grounds discussed above. The court held that a child has no cause of action against its mother for a prenatal injury unintentionally inflicted upon it.<sup>154</sup> Such liability was said to involve excessive legal interference in the uniquely intimate relationship that exists between a mother and her fetus, at the expense of the mother's rights of privacy and autonomy.<sup>155</sup> The court was not prepared to create two potential legal adversaries under these circumstances from the moment of conception until birth. The court held that a mother's liability is different from that of a third person because the relationship between a mother and

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149. *Id.*

150. *Id.* at 870.

151. *Id.* at 871.

152. *Grodin v. Grodin*, 301 N.W. 2d 869, 871 (Mich. Ct. App. 1980).

153. 531 N.E.2d 355 (Ill. 1988).

154. *Id.* at 361.

155. *Id.* at 360.

her fetus is unlike that between any other plaintiff and defendant.<sup>156</sup> No other plaintiff depends exclusively upon any other defendant for everything necessary to begin and sustain life itself. Likewise, no other defendant must endure profound and possibly life-threatening biological changes to bring the adversary into the world.

It is hardly surprising, therefore, that these and other policy factors influenced the California Legislature to reverse part of the *Curlender* decision, which enabled a child suffering from a disability to sue her parents after giving birth to her despite their knowledge of her condition.<sup>157</sup> Currently, a child cannot, as a matter of state law, bring an action for wrongful life against her parents.<sup>158</sup>

In cases where a child is allowed to bring an action against a parent, two factors must exist: (1) negligence, and (2) an unreasonable exercise of parental authority. In wrongful life cases, however, neither requirement is present. Accordingly, a doctor owes a child a duty to inform the child's mother about any possible abnormalities in his condition. Once the doctor conveys this information, she has fulfilled her legal duty. If the doctor provides negligent information, she is liable to the child. Once the doctor informs a mother of any risks in a manner expected of someone in her profession, she can no longer be held legally liable. Under these circumstances, if the mother continues with the pregnancy, she should not be liable to her child in a wrongful life suit for legal and policy reasons.

## 2. The Cause

As stated in *Curlender*, "the real crux of the problem is whether the breach of duty was the proximate cause of an injury cognizable at law."<sup>159</sup> Cases denying wrongful life claims have frequently determined that a doctor cannot be held liable because he did not cause the injuries to the child. These decisions misunderstand the nature of the claim. The child is not saying that "but

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156. *Id.*

157. The *Curlender* decision was reversed in part by chapter 331 of the 1981 California Statutes.

158. CAL. CIV. CODE § 43.6(a)(West 1982 & 1995 Supp.) states, "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born."

159. *Curlender v. Bio-Science Labs*, 106 Cal. App. 3d 811, 828 (1980).

for” the negligence he would have been born without defects. Rather, the child is alleging that had he not been born as a result of the doctor’s negligent advice, he would have not suffered his present condition.

Interestingly, these cases are similar in principle to those where a doctor negligently fails to diagnose a terminal disease. As in wrongful life cases, the doctor did not cause the disease, but the negligent diagnosis resulted in increased pain and suffering. In these cases, “survival actions” can be brought on behalf of the decedent.

It is noteworthy that the causation question in wrongful life cases is much stronger. In survival actions, the doctor did not, in any way, cause the disease suffered. The negligence of the doctor merely precluded a temporary alleviation of the pain. In wrongful life cases, however, the negligence of the doctor gives rise to the birth of the child and ultimately causes the disability that is suffered. Without this negligence, the child would not have been born, and would not endure *any* pain and suffering. Analyzing survival action decisions is illuminating.

In *Williams v. Bay Hospital, Inc.*<sup>160</sup> a patient was negligently advised that her chest x-ray was clear and that she had not developed lung cancer. She subsequently died from cancer.<sup>161</sup> Her widower brought a survival action against the hospital for its negligent failure to diagnose the cancer.<sup>162</sup> He was forced to concede that the hospital’s negligence did not cause his wife’s death.<sup>163</sup> The hospital, however, was unable to refute the charge that it had exacerbated the pain and suffering by its failure to diagnose the disease.<sup>164</sup> Undisputed medical evidence established that the negligent diagnosis did not ultimately cause the death of the patient.<sup>165</sup> Nevertheless, the court held that a survival action could be brought for the patient’s pain and suffering, which “more likely than not” the hospital’s negligence caused.<sup>166</sup>

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160. 471 So. 2d 626 (Fla. 1985).

161. *Id.* at 628.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Williams v. Bay Hosp., Inc.*, 471 So. 2d 626, 628 (Fla. 1985).

166. *Id.* at 630.

*Tappan v. Florida Medical Center, Inc.*<sup>167</sup> involved the negligent failure of a chiropractor to diagnose lung cancer. A widow brought a claim on behalf of her deceased husband, alleging that he would have lived six to eight months longer had he received a proper diagnosis of, and treatment for, the lung cancer.<sup>168</sup> She conceded that the disease would have ultimately killed her husband regardless of the negligent manner of treatment.<sup>169</sup> In awarding damages, the court held that negligence was a proximate cause of his shortened life and increased suffering.

No logical distinction exists between the survival actions discussed above and cases for wrongful life. The physician's negligence did not cause the disease in either case, nor would competent medical treatment have been able to avert the illness. Rather, the negligent act caused the suffering in wrongful life cases, and increased the suffering in survival actions.

To prove causation, the child must simply demonstrate that: (1) the physician had a duty to inform the parents of a potential deformity; (2) the physician, in fact, failed to adequately inform the child's parents; and (3) had the parents been informed, they would have prevented the child's birth. Whether the standard to be applied is of a "reasonable" parent in like circumstances, or whether a subjective standard should be adopted, is unclear. The test, however, must necessarily be a subjective one. The child can only bring the action on the basis of what his mother would have chosen under the circumstances, not on the basis of what a "reasonable parent" would have done. Furthermore, the distinction between an objective and subjective test is largely academic. A remedy should only be awarded in cases involving very serious handicaps. Courts probably would agree with the mother's subjective decision, even when analyzing the circumstances under an objective test. The court likely would find that a "reasonable parent" might not have desired to give birth to a child in such severe circumstances.

"If one accepts the idea that the damage the child is suing for is not its deformity, but rather its birth, then proximate cause presents little obstacle to the child's recovery."<sup>170</sup> The child's

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167. 488 So. 2d 630 (Fla. 1986).

168. *Id.*

169. *Id.* at 631.

170. Foutz, *supra* note 139, at 491.

birth would have been prevented by the doctor's competent advice, on which the parents would have relied in choosing not to proceed with the pregnancy. Had it not been for the negligent advice, the child would not have been born. Accordingly, in *Phillips v. United States*,<sup>171</sup> the court held that where adequately informed parents would terminate the pregnancy, the failure to provide such information sufficiently establishes a proximate cause.

### 3. The Injury

In both England and the United States, courts have found that it is more convenient to deny wrongful life claims based on a lack of damage, rather than a lack of duty. In *McKay*, the court considered the injuries the doctor caused the child and concluded that there had been "none in the accepted sense."<sup>172</sup>

Similarly, in *Walker v. Mart*,<sup>173</sup> the Arizona court dismissed the action on the basis that bringing a child into the world was not a legally cognizable injury. This approach generally is supported on the ground that the doctors did not cause the deformities themselves. Furthermore, the assertion that it is preferable not to have been born rather than being born with severe disabilities is "logically impossible."<sup>174</sup> Such conclusions are "a mystery more properly left to the philosophers and theologians" than to the courts.<sup>175</sup>

In a wrongful life claim, it is undisputed that the doctor did not cause the actual injuries. To argue that the lack of actual injury precludes an action is to equate a *physical* injury with legal harm. The child is not contending that the doctor caused the deformities *per se*, rather, he is contending that the negligence caused the disabilities to be suffered. This suffering certainly constitutes harm to the child. Moreover, the child does not claim that the doctor caused the defects. The physician's negligent failure to inform her parents of certain risks led to the child's birth. The action arises from the birth itself, not from the resulting deformities. No logical reason exists to deny a tort action arising out of childbirth. It is more useful to recognize that the 'no

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171. 508 F. Supp. 537 (D. S.C. 1980).

172. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1189.

173. 790 P.2d 735 (Ariz. 1990).

174. *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1966).

175. *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978).

damage' argument is policy-based and asserts the desirability of life after death.

This view is frequently articulated in case decisions and the opinions of commentators. *McKay* established that "the child would not have been *better* if the defendants had done their duty; she would not have been at all. To damage is to make worse, not to make simpler."<sup>176</sup> This last comment, instead of providing an answer regarding whether any injury existed, merely reiterated the question. Simply stated, the child *is* claiming that she would have been "better" if she would not have been at all. To declare that it is never better for a child not to be born is a reasonable sentiment. It must be recognized, however, that these contentions are personal value judgments and not objective facts. This specific point is arguable in individual cases.

The extent to which subjective value judgments have been treated as objective fact is well illustrated by the *Gleitman* case. The court held that it was "basic to the human to seek life and hold onto it however heavily burdened."<sup>177</sup> Furthermore, the court found that if the infant plaintiff "could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us that he would almost surely choose life with defects as against no life at all."<sup>178</sup> The emotive language, particularly the description of life being "snuffed out," resembles a personal opinion and does not reflect the decision of a court of justice. In fact, the entire passage is a strong value judgment. It is unclear why a court should be able to attribute to a fetus those decisions the court thinks the fetus would have chosen had it been able. It is particularly peculiar that the source of this statement is a court that refuses to resolve questions concerning nonexistence.

The fact that a fetus cannot physically express its desire is a unique feature of this action. The *Gleitman* court did not provide an explanation for choosing its own speculative opinion about what the fetus would have wanted rather than accepting the contentions of the fetus' mother. Whatever one's opinion regarding whether non-existence is ever preferable to life, it is uncontroverted that the maternal bond to the child is likely to be stronger than any

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176. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166.

177. *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1966).

178. *Id.*

judicial bond. To describe life, "however heavily burdened," as a value completely overlooks the fact that, in each of these cases, non-existence was the *preferred* result. This state was not achieved because of the negligence of the defendant.

It is a fallacy to believe that the defendant's negligence didn't cause damage to one born with genetic defects that would not exist if one had not been born. Such faulty reasoning overlooks the fact that the child lives and suffers as a result of the defendant's negligence. Further, it ignores the reality that damage does not always mean to make things worse, it also means to fail to make things better when one is able to do so.

#### 4. The Damages

Those who argue against a tort for wrongful life usually wage a double-pronged assault. Even if made to concede that the plaintiff actually endured an injury when born, critics argue that it is impossible to calculate damages in a fair, nonspeculative manner. *Gleitman* provides a useful illustration of this point. Classifying the normal nature of tortious damages as "compensatory," the court calculated damages by "comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence."<sup>179</sup> The court reasoned that this involved measuring the difference between "life with defects against the utter void of non-existence," an impossible task when used to make "the comparison required by compensatory remedies."<sup>180</sup> In England, the law is identical. The court in *McKay* held that "the most compelling reason for rejecting this claim is the intolerable and insoluble problem it would create in the assessment of damages."<sup>181</sup>

These arguments, however, are incapable of withstanding closer scrutiny. An interesting paradox immediately emerges upon examination of the reasons that the courts offer for denying damage awards in wrongful life cases. In the seminal cases, *McKay*<sup>182</sup> and *Gleitman*,<sup>183</sup> courts in England and the United

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179. *Id.*

180. *Id.*

181. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1192.

182. *Id.*

183. *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1966).



States focused their reasoning on the superiority of life over non-existence in all circumstances. Furthermore, in *Berman v. Allan*,<sup>184</sup> the court held that "life—whether experienced with or without a major physical handicap—is more precious than non-life."<sup>185</sup> Notably, this is the precise reason upon which courts rely in refusing to recognize that the child had suffered any legally cognizable injury.

The courts further contend that they are incapable of measuring damages because it is absolutely impossible to compare the relative values of life and non-existence. In so doing, however, they seemingly overlook their own premise—life is superior to non-existence under any circumstances. They fail to recognize that, ironically, "the very premise logically entails the measurability *in principle* of non-existence, simply by virtue of the assertion that it is necessarily worth less than life in any form."<sup>186</sup>

If non-existence "cannot be measured, how is one to know whether life is always more valuable?"<sup>187</sup> In *Speck v. Finegold*,<sup>188</sup> the Supreme Court of Pennsylvania analyzed this question with honesty. The Court rejected the argument that it was impossible to calculate the respective values of existence and non-existence as a "hyper-scholastic rationale" serving only to mask judicial reluctance to hear wrongful life cases.<sup>189</sup> As with other areas of "reasoning" in denying these claims, it is apparent that policy is stronger than logic. In certain situations, the law implicitly allows a comparison between life and non-existence. For example, the law declares that doctors act lawfully in refusing to provide life-prolonging treatment to disabled children, citing the child's "best interests."<sup>190</sup> Therefore, comparing life with non-life is something that the law, in principle, is already prepared to do.

*Superintendent of Belchertown State School V. Saikewicz*<sup>191</sup> provides a U.S. example of this principle. In that case, a severely retarded adult was afflicted with leukemia, for which chemothera-

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184. 404 A.2d 8 (N.J. 1979).

185. *Id.* at 12.

186. Harvey Teff, *The Action for 'Wrongful Life' in England and the United States*, 34 INT'L & COMP. L.Q. 423, 433 (1985).

187. Alexander M. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 650 (1979).

188. 439 A.2d 110 (Pa. 1981).

189. *Id.* at 115.

190. *In re B (a minor)*, [1981] 1 W.L.R. 1421, 1422.

191. 370 N.E.2d 417 (Mass. 1977).

py could produce only temporary remission.<sup>192</sup> The treatment would produce adverse side-effects and result in suffering that Mr. Saikewicz could not understand.<sup>193</sup> Because of this, the Massachusetts Supreme Court held that, as a matter of law, it was not in Mr. Saikewicz's interest to prolong his life.<sup>194</sup> This decision appears impossible to reconcile with the many other decisions that prevail in the courts that the life, in law, is always preferable to non-life. Under these circumstances, the law recognizes the relative values of life and non-existence.

Examining the manner in which the law of torts treats the issue of damages can be helpful. Fundamental reasons exist for allowing a child to bring the action, and he should not be precluded by imprecise calculations of damages. In fact, when the Law Commission of England and Wales considered whether actions should be permissible in cases of wrongful life,<sup>195</sup> and in concluding that they should not, they recognized that "law is an artifact and, if social justice requires that there should be a remedy given for a wrong then logic should not stand in the way."<sup>196</sup> The same principle has long been recognized in the United States. In 1931, the U.S. Supreme Court, in *Story Parchment Co. v. Patterson Parchment Paper Co.*,<sup>197</sup> explicitly declared that difficulties encountered in the computation of damages cannot be permitted to justify a denial of liability.<sup>198</sup> Cases that have denied wrongful life actions have also accepted this principle.<sup>199</sup>

It is difficult to understand why the "immeasurability" of damages in these cases is used by courts to deny an action and completely ignored in many other cases. This point is exemplified by the contradictory statements of Lord Justice Stephenson in

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192. *Id.* at 420.

193. *Id.*

194. *Id.* at 435.

195. Law Com. No. 60, *Report on Injuries to Unborn Children* (Cmnd 5709) (1974).

196. *Id.* para. 89.

197. 282 U.S. 555 (1931).

198. See also *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166.

199. See *Berman v. Allan*, 404 A.2d 8 (N.J. 1979)(holding that "... were the measure of damages our sole concern, it is possible that some judicial remedy could be fashioned which would redress plaintiff, if only in part, for injuries suffered."); see also *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981)(referring to the "... recognized principle, not peculiar to traditional tort law alone, that it would be a denial of justice to deny all relief where a wrong is of such a nature as to preclude certain ascertained damages.").

*McKay*.<sup>200</sup> Asserting that if there were sound legal grounds to recognize this tort, he “would not let the strict application of logic . . . defeat it,”<sup>201</sup> his Lordship overlooked the fact that he had previously declared that “if difficulty in assessing damages is a bad reason for refusing the task, impossibility of assessing them is a good one.”<sup>202</sup> If one agrees with the former statement, the latter serves only to emphasize the judiciary’s manipulation of neutral components of the tort system to deny claims on policy grounds that it perceives to be unmeritorious.

One needs only to examine other areas of tort case law, where damages are awarded, to realize that the difficulty in assessing damages should not preclude a remedy. Courts readily calculate damages in cases involving a shortened life expectancy. These cases demonstrate that a slide-rule cannot be of significant assistance in attempting to transform misfortune into precise monetary compensation.<sup>203</sup>

Ironically, Lord Justice Stephenson stated in *McKay*<sup>204</sup> that the prospect of calculating damages in a case involving loss of expectation of life “has been held so difficult that the courts have been driven to fix for it the constant and arbitrary figure.”<sup>205</sup> He does not provide an explanation regarding why damages cannot be calculated in a wrongful life case. Instead, Stephenson meekly expresses the now implausible assertion that assessing such damages is impossible.

In more common tort claims, it is often impossible to place a monetary figure on an injury. The majority of cases award punitive damages for personal injuries. It is, however, just as arbitrary to place a precise figure on the loss of a limb or a serious permanent medical injury as it is to determine figures in cases for

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200. [1982] 1 Q.B. 1166.

201. *Id.* at 1184.

202. *Id.* at 1182.

203. See Weir, *supra* note 124, at 228. Referring to the decision of the court of appeal in *McKay*, he recognized that “. . . their Lordships tended to say that it [the damage] was unsusceptible of measurement. This is not quite accurate. For forty years the courts have been awarding damages for ‘loss of expectation of life,’ i.e., for being killed . . . since it is the fact that they have done it, they can hardly deny that it is possible. If one can give damages for the onset of permanent unconsciousness (death) one can equally give damages for the onset of temporary consciousness (life): the factors in the equation are identical.” *Id.*

204. *McKay*, 1 Q.B. at 1166.

205. *Id.* at 1181.

wrongful life. Furthermore, in wrongful birth cases, courts are prepared to calculate damages upon a showing of facts identical to those comprising actions for wrongful life. While the judiciary does not believe these cases involve the same excursion into metaphysics as a comparison between life and non-existence, it remains unclear why it is significantly more certain to assess the value of a child's aid, comfort, and society, so as to offset against the cost of upbringing the unwanted child. Any such calculations are necessarily speculative in nature. Damages should not, and have not, been denied on this ground alone.

A major reason why the damages issue creates confusion is the defendants' reliance on the tort principle that damages are compensatory in nature and are designed to "put the injured party in the condition in which he or she was before being injured."<sup>206</sup> Critics of the wrongful life action state that it is impossible to put the plaintiff back into his or her former condition. Arguably, "a *restitutio in integrum* by specific physical compensation" is inconceivable, and "[a] life which should not have been created may not be snuffed out."<sup>207</sup> This emotive declaration, again, misunderstands both the action and the nature of the damages.

A plaintiff is not claiming that he wishes to be literally transplanted back into the exact pre-injury state, nor will tort damages generally accomplish this task. The difficulty with this type of mischaracterization is that it ignores reality. All damages in tort law are estimates. It is no easier to return the plaintiff's negligently crushed left arm than it is to return him to oblivion. Tort damages are only "compensatory" to the extent that they award monetary remedies to someone who has suffered a wrong. The rationale supporting these awards is easier to understand and to accept if one recognizes the form that damages actually take. An award of damages is a vindication of the plaintiff's rights rather than a forced physical regression into his prior condition.<sup>208</sup>

An examination of less tangible, non-physical injuries exemplifies this point. In the law of defamation, "presumed damages" can be awarded in certain circumstances without any

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206. *Id.*

207. G. Tedeshi, *On Tort Liability for 'Wrongful Life'*, 1 *ISR. L. REV.* 513, 536 (1966).

208. See Teff, *supra* note 186, at 435. "In the last analysis [tortious damages] are more intelligible as a general vindication of rights, or as reasonable solace for the plaintiff's condition, than as purported restoration of the *status quo*." *Id.*

showing of *actual* harm to the plaintiff's reputation at all. If it were strictly necessary to place a plaintiff in his pre-tort condition, little basis exists for awarding damages in cases where there is neither an attempt to figure out what the original condition was, nor an attempt to ascertain the extent it has been altered by the alleged injury. If it is possible under present law to calculate the difference between an injury and no injury, there is no reason to deny a remedy to a child who was injured in the manner discussed above. Awarding damages for wrongful life is neither more speculative nor less certain than other tort actions that are permitted access to the courts on a daily basis.

To some extent, the method that is used to calculate the damages awarded in wrongful life cases should not form a part of the discussion about whether such actions should be recognized. Having seen that once courts find that a claim has merit, they will readily devise a way to award a remedy, it suffices to say that for all the reasons articulated in this Article such an action should lie. It is informative, at the very least, to examine how courts that recognize the action have awarded damages in attempting to outline the most plausible direction that should be followed by the judiciary on this issue.

*Curlender* was the landmark case to consider the form that damages should take.<sup>209</sup> There, the court allowed the child to recover damages for the pain she would suffer during her limited lifetime, and for any extra expenses she would incur as a result of her impaired condition.<sup>210</sup> Subsequent decisions, however, have restricted the *Curlender* scope, primarily by rejecting so-called "general damages" for pain and suffering in this type of case. In *Turpin v. Sortini*,<sup>211</sup> for example, the court restricted the damages recoverable to "special" damages "for the extraordinary expenses necessary to treat the hereditary ailment."<sup>212</sup> While this damage restriction has been followed in all subsequent cases allowing wrongful life actions,<sup>213</sup> the bases for these decisions remain

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209. *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811 (1980).

210. *Id.* at 489.

211. 643 P.2d 954 (Cal. 1982).

212. *Id.* at 966.

213. See, e.g., *Nandini Gami, a minor v. Mullikin Medical Ctr.*, 135 Cal. App. 3d 189 (1993); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984). In *Andalon v. Superior Court*, 162 Cal. App. 3d 600 (1984), the parties recognized that the *Turpin* calculation was too challenging thereby stipulating that the plaintiff could not recover general damages for the

unclear. The dissent in *Turpin* first argued this point, questioning why a court that was prepared to sanction a remedy in these case but did not put into monetary terms the very wrong that gave rise to the action.<sup>214</sup>

This line of criticism was embraced by later commentators who recognized that "it seems odd to admit simultaneously that an injury has been inflicted on the child while denying full compensation for it."<sup>215</sup> Furthermore, "the court should not choose which damage they want to allow and then deny those which logically flow from their reasoning."<sup>216</sup> It is inconsistent to reach a desired result but ignore the reasoning necessary to achieve that result.

"The general rule of damages in tort is that the injured party may recover for all detriment caused."<sup>217</sup> Nonetheless, courts waver between awarding damages for pain and suffering and awarding damages for extraordinary expenses only. It is equally important to consider injuries where damages should not be awarded and to offer solutions about how damages can be calculated.

The child should not be compensated for the injury itself. As previously noted, these actions are unusual because the doctor did not cause the actual defect. To award damages for the injury would be akin to holding the physician liable for a consequence that her negligence did not cause. Commentators misguidedly suggest that a doctor should be required to pay for a child's everyday expenses in these cases. The factor that is claimed to be "wrongful" in wrongful life cases is the fact that the child was born *with defects*, which he was negligently assured he would not

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pain and suffering that arose out of the genetic defect. *Id.* Furthermore, there could be no recovery for the loss of the plaintiff's earning capacity, as the child would have been born with the defects even without the negligence. *Id.* Therefore, the doctor could not be held responsible for removing earning capacity. *Id.*

214. The dissent stated, "An order is internally inconsistent which permits a child to recover special damages for a so-called wrongful life action, but denies all general damages for the very same tort. While the modest compassion of the majority may be commendable, they suggest no principle of law that justifies so neatly circumscribing the nature of damages suffered as a result of a defendant's negligence." *Turpin*, 643 P.2d at 966 (Mosk, J., dissenting).

215. Roger B. Dworkin, *The New Genetics*, 1 *BIO. L.* 89, 98 (1986).

216. Kathleen Gallagher, *Wrongful Life: Should the Action be Allowed?*, 47 *L.A. L. REV.* 1319, 1328 (1987).

217. *Crisci v. Security Ins. Co.*, 426 P.2d 173 (1967).

possess, not that he has to incur everyday expenses. If the child was born in a healthy condition, the condition that was negligently advised, he would have necessarily incurred everyday expenses in the same way as any other individual.

The claim in a wrongful life case is the balance between the benefits that the child enjoys by being able to experience the joys of life offset by the burdens that the child endures by experiencing life while suffering from severe handicaps. It should immediately be obvious that a child could only recover if the handicaps outweighed the benefits of being alive. To prove this to the trier of fact, the handicaps would need to be very severe indeed. This factor distinguishes the action for wrongful life from personal injury actions. In the latter, the plaintiff seeks to recover damages caused by the injury itself, however slight. It is the defendant's negligence that caused the injury itself. In wrongful life cases, however, the negligence has not caused the injury, but instead has caused the wrongful life. A life can only be said to be "wrongful" if the pain of living is so great that it outweighs the benefits of life that a child usually enjoys.

The practical effect of this proposed measure overcomes several of the traditional barriers behind which courts have hidden to deny the action. Interestingly, courts are able to place values on life, while declaring that it is impossible to evaluate non-existence. Using the suggested measure of damages for wrongful life actions makes it unnecessary to delve into weighing life against non-existence. Instead, it simply asks a court to measure damages on the basis of weighing the burdens of life with its benefits.

This solution ensures that a child will be able to seek recovery only in cases of exceptionally severe handicaps. Prior to considering the amount of damages, a court will have to be convinced that the particular child was severely disabled before it actually suffers a 'wrongful life.' If the burdens do not outweigh the benefits, the court could then, and only then, declare that this child sustained no damages directly flowing from the doctor's negligence. *Turpin* recognized that, where the affliction was deafness, it was highly unlikely for a jury to find that life with the disability was worse than no life at all.<sup>218</sup> If the disability was sufficiently serious to outweigh the joys of living, damages would be available.<sup>219</sup>

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218. *Turpin*, 643 P.2d at 954.

219. *Id.*

Several commentators express their fear that children with minor birth defects would be overcompensated while those with the most horrendous injuries would be under-compensated.<sup>220</sup> The argument articulated above renders these fears groundless. These criticisms fail to recognize that wrongful *life* actions do not compensate for the injuries. Rather, the compensation is for a life in which the burdens outweigh the benefits. Unless a child suffers from a severe handicap, he would not be able to show any "damage" that he endured as a result of the negligence. The burdens of his life would not be found to outweigh its benefits. To understand the nature of the action, this distinction must be remembered. Damages are awarded not because the doctor inflicted the injury, but because the doctor negligently caused the injury suffered.

The use of this kind of balancing test is not a novelty in tort law. The Restatement of Torts specifically recognizes a balancing test as the legitimate way to calculate damages in cases where a defendant has caused both a benefit and a burden.<sup>221</sup> Furthermore, the weighing of benefits against the burdens of life is used to calculate damages in cases brought by parents for the "wrongful birth" of their child. Even courts that have denied claims for wrongful life freely use the suggested measure to calculate damages in wrongful birth cases.<sup>222</sup> This shows not only that this measure is a plausible measure of damages, but also that it is illogical and inconsistent not to use it. Using this test further undermines any supposed legal irrebuttable presumption that the joys of life in any form always outweigh its burdens.

An award to parents for the "wrongful birth" of their child does not consider the child's own pain and suffering. "[O]nce the right of parents to collect for their own economic losses is accepted, it becomes difficult not to allow the child to recover for his own injuries directly."<sup>223</sup> Furthermore, the balancing ap-

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220. See, e.g., Melinda A. Roberts, *Distinguishing Wrongful from "Rightful" Life*, 59 J. CONTEMP. HEALTH L. & POL'Y 70 (1990).

221. RESTATEMENT (SECOND) OF TORTS § 869 (1979). "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." *Id.*

222. See, *inter alia*, Troppi v. Scarf, 187 N.W.2d 511 (Mich. 1971) (holding that the value of a child to its parents outweighed the cost of its rearing).

223. Capron, *supra* note 187, at 659.



proach suggested above not only enables the child to recover for her own wrongful life, but also ensures that the physician is held legally liable, but only to the extent of the harm that his negligent conduct actually caused. Moreover, allowing an action for wrongful birth overcomes the fears that the action implicitly declares that a disabled life is not worth living. Calculating damages by the proposed balancing manner allows a court to provide the necessary recovery to a disabled person, while still taking into account all of the benefits she can enjoy from life.

Once it is recognized that recovery should be based on a balancing test of benefits and burdens, no logical reason exists to limit damages to those damages that are "special," as was done in *Turpin* and subsequent cases. Relief in those cases could only be granted to those genuinely able to show that they were experiencing a "wrongful life." This showing is only possible in the rare cases involving children born with severe handicaps. Once this threshold requirement is met, it seems illogical to deny damages for both special and general damages resulting from the condition. If recovery is limited to these individuals, there is no principled basis on which to deny them all damages flowing from their wrongful lives. Pain and suffering is as much a reality as unanticipated financial expenditure.

#### D. Policy Factors

Though the judiciary obviously is guided by considerations of policy, their decisions should be based on neutral components of the tort law. The "policy" arguments of individual judges may not be in accord either with the sentiments of society as a whole, or with what generally is considered "best" for society.<sup>224</sup> It is therefore necessary to examine the underlying policy arguments in this area and to evaluate whether they are sufficient to deny a cause of action for wrongful life.

##### 1. A Wrong in Need of Redress

Critics of the cause of action for wrongful life are concerned about the intricate details of the legal theory surrounding the action and, as a result, fail to view its essential components. "The

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224. See Weir, *supra* note 124, at 227. "'Against public policy' is a judicial utterance which, being interpreted, means: 'We feel that this would be a bad thing, and we hope that others feel the same, though we have no means of knowing.'" *Id.*

reality of the 'wrongful life' concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others."<sup>225</sup> Legislators must decide whether the law is prepared to allow negligent parties to escape liability completely and whether the law should deny a critically disabled child the desperately needed support. The enlightened dissent in *Gleitman* argued that accepting this position permitted "a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of torts."<sup>226</sup>

Today, medicine is more advanced than it was at the time of the *Gleitman* decision in 1967. As knowledge about genetics increases, there are fewer reasons to excuse doctors from all liability in these instances. Moreover, the question is not only a legal one; it concerns ethics as well. If a child is born with debilitating defects as a result of the negligence of the doctor, that child has "a strong moral claim for supplemental child support . . . [t]he tortfeasor's misconduct has irreversibly changed the status quo. A child has been born, and that child needs support."<sup>227</sup> It becomes necessary, therefore, to consider whether other policy factors in this area are sufficiently strong to override that fundamental and essential need.

## 2. Emotive Factors

A subject rarely encapsulates so many sensitive ethical issues without producing emotional responses from the judiciary. Theoretically, the legal system is objective. This objectivity does not, however, prevent an occasional subjective outburst, thinly veiled in the casing of legal analysis. Such remarks are proffered on both sides of the controversy.

Lord Justice Griffiths declared that "such a claim seems utterly offensive; there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child."<sup>228</sup> This opinion is no less subjective than the classification by the majority in *Curlender* that the birth of a baby into such circumstances is a

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225. *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 828 (1980).

226. *Gleitman v. Cosgrove*, 227 A.2d 689, 703 (N.J. 1967).

227. Philip F. Peters, *Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law*, 67 TUL. L. REV. 397, 398 (1992).

228. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1193.

"catastrophic result."<sup>229</sup> Other exclamations demonstrate far less restraint, calling a wrongful life claim a "Hitlerian elimination of the unfit,"<sup>230</sup> and describing its proponents as reflecting a "Fascist-Orwellian societal attitude of genetic purity."<sup>231</sup>

Critics of a wrongful life action are disturbed by the perception that a claim for wrongful life establishes a child's right "to be born as a whole, functional human being."<sup>232</sup> Contrary to the views of the opponents of this right, it is not novel to tort law. The *Grodin* court held that a child is entitled to damages from anyone who wrongfully interferes with her "legal right to begin life with a sound mind and body."<sup>233</sup>

Recognizing the legal right, however, is not the most important point of the wrongful life claim. More significantly, the assertion that a wrongful life action must recognize the right to be born fully functional is misguided. Such an assertion overlooks the fact that any such action would have to be based upon a showing of negligence. Far from being a claim for the right to be born "normal," it is an action to ensure that a child is born "without the handicap of a *readily preventable*, serious genetic defect."<sup>234</sup>

It has been suggested that such mischaracterizations arise from the emotive language of the name of the claim itself.<sup>235</sup> One author opined that "wrongful life" is "a clear case of a meritorious cause of action being denied because of its ill-chosen label."<sup>236</sup> It is less partial to name the action what it really is, "genetic malpractice," and not label it with the potentially disturbing term "wrongful life."<sup>237</sup> Some of the emotional prejudices associated with the claim would be eliminated if one recognized that the claim has far more to do with medical malpractice than with disrespect for life itself. Calling life "wrongful" causes, in the minds of some, denigration of that quality.

The action neither implicitly nor explicitly calls for active euthanasia in these circumstances. Nor does it state that someone

229. *Curlender*, 106 Cal. App. 3d at 815.

230. *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 379 (Wis. 1975).

231. *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978).

232. *Becker v. Schwartz*, 386 N.E.2d 807, 812 (E.D. Pa. 1978).

233. *Grodin v. Grodin*, 301 N.W.2d 869, 870 (Mich. 1980).

234. Editorial, 285 NEW ENG. J. MED. 799, 800 (1971) (emphasis added).

235. Maxine A. Sonnenburg, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. CAL. L. REV. 477 (1982).

236. *Id.* at 509.

237. *Id.*

who suffers from an impaired existence should be denied protection under the law. In fact, it provides for the exact opposite. The action simply states that the child, through her parents, should be the one to decide whether she wishes to enter a life during which she will suffer disabilities. This action simply affirms that "choices about health care lie with the patient, not with the provider of care."<sup>238</sup>

In this respect, it is apparent that the court's reluctance to recognize the claim is simply another example of the legal system's sanctioning of medical paternalism. The affluent medical profession is afforded exclusive protection at the expense of the usually powerless patient. Certainly, it is better for society to recognize that "the law can best protect potential children by not in effect immunizing from liability those in the medical field providing inadequate guidance to the children's parents, and by offering a means of redress for the harm to the children."<sup>239</sup>

An examination of early U.S. decisions highlights the extent to which they were influenced by the illegal status of abortion.<sup>240</sup> Abortion no longer bars a claim for wrongful life in England,<sup>241</sup> and, after *Roe v. Wade*,<sup>242</sup> it is not a bar in the United States either. Many of the more recent wrongful life decisions, however, tend to focus on the emotive abortion issue, though in some cases unintentionally.

In *McKay*, Lord Justice Ackner was not prepared to impose a duty on the doctor to inform the mother of the "desirability" of an abortion.<sup>243</sup> Not only does this utterly fail to recognize the true nature of the duty owed, it also misstates the facts. The doctor did not espouse the value of an abortion, as the court of appeal leads one to believe. The doctor's negligence arose when he assured the mother that an abortion was unnecessary. One author suggests that an unstated reason for the courts' denial of these actions is their reluctance to condone abortion in any way.<sup>244</sup> Naturally, abortion is more easily accepted if the child brings the action. This reluctance, perhaps, explains why a

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238. Capron, *supra* note 187, at 653.

239. *Id.* at 654.

240. See *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967).

241. Abortion Act, 1967, ch. 87 (Eng.).

242. 410 U.S. 113 (1973).

243. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166.

244. Teff, *supra* note 186, at 434.

parent's claim for 'wrongful birth' is allowed while the child's own action is denied.

Courts and commentators continue to mischaracterize the action. The action for wrongful life is not considered to be in accordance with public policy because it is tantamount to proclaiming that it is preferable to keep disabled persons from society. Allowing a wrongful life claim "would mean regarding the life of a disabled child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving."<sup>245</sup> This misconception is so outrageous that it is almost inconceivable that it could genuinely be held. A court, however, may desire to symbolize the action. It must be remembered that the child's claim does not seek an end to her life, nor does it attempt to prevent conception in general.<sup>246</sup> This Article does not suggest that a disabled person should be killed, nor does this Article make the offensive proclamation that a person with birth defects has no right to exist. On the contrary, the action precisely determines the facts surrounding a child's existence. A child has negligently been born in a defective state; the child is alive and needs support. Contrary to showing disrespect for life itself, the entire action is based on providing assistance to the *living*. As was insightfully recognized in *Procanik*, a wrongful life action seeks no more than to "respond to the call of the living for help in bearing the burden of their affliction."<sup>247</sup>

Critics who concentrate on the need to value the sanctity of life fail to realize, ironically, that proponents of the action agree with them. No better current example exists than the *Turpin* case, where the court, in allowing the claim, confirmed it valued "the worth and sanctity of less-than-perfect life."<sup>248</sup> The court further held that it would be difficult to understand how awarding damages to alleviate the suffering of a severely disabled child could possibly disavow the sanctity of her life.<sup>249</sup> Paradoxically, allowing such a claim signifies nothing more than the fact that the child is entitled to receive the full measure of legal and non-legal rights and privileges that are accorded to all members of society.

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245. *McKay*, 1 Q.B. at 1180.

246. See Teff, *supra* note 186, at 434.

247. *Procanik v. Cillo*, 478 A.2d 755, 763 (N.J. 1984).

248. 643 P.2d 954, 961 (Cal. 1982).

249. *Id.*

Rather than showing a disrespect of life, allowing remedies in these situations recognizes life's value. The idea that society denigrates the disabled by providing them with social benefits once they have been born is an idea that has been obsolete for years. Likewise, it is no longer believed that providing people who suffer from disabilities with support encourages societal intolerance of them. On the contrary, attitudes like these generally reflect the true merits of a compassionate society. Furthermore, because the child is already alive and suffering from the condition, "any feelings of rejection he might experience are more likely to stem from being deprived in fact of security and affection in his early years, a prospect as, if not more, likely in the absence of compensation."<sup>250</sup>

Some critics inexplicably regard the action for wrongful life as signifying societal loathing of the disabled. One author repeats a familiar misconception of critics by declaring that "the growing awareness of disabled people as productive members of society and the legislation passed to aid disabled persons should not be undermined by a judicial determination that entire groups of people have 'wrongful' lives."<sup>251</sup> This attitude may appear to be somewhat extraordinary. An action for wrongful life is not a value judgment about the quality of the lives of disabled people in general. It is simply a legal action that compensates those who suffer from disabilities that arose out of the negligence of a medical practitioner. One critic's assertion dangerously confuses an individual case with a universal truth. Without a showing of negligence, one could not bring a claim alleging that her life was "wrongful," even if she experienced the same condition.

This rule is easily demonstrated by the following hypothetical: A man goes to the hospital because he needs his appendix removed. As a result of negligence by the hospital, he is released with his infected appendix still in place. He discovers that he has been circumcised. If a court were to award him damages based on the negligence in his case, it is unthinkable that this decision would be considered a negative declaration about the lives of people who have been circumcised voluntarily or without negligence on the part of the physician. The fact that this man should never have

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250. See Teff, *supra* note 186, at 438.

251. Gallagher, *supra* note 216, at 1328.

been circumcised does not suggest that anything is wrong with circumcised people in general.

While the gravity of the hypothetical does not parallel the nature of a "wrongful life" claim, the logic and legal principles of the two situations are identical. Injuries that would not have arisen without negligence warrant a remedy on account of that negligence. Damages are awarded not for the condition itself, but for the negligence that brought the condition into existence. Therefore, wrongful life claims are not judgments about the lives of disabled persons. Rather, they are simply statements about the negligence of doctors.

Emotional outbursts are fairly irrational when not logically supported. The reasons proposed by critics for denying a wrongful life claim does not withstand even a modicum of analysis. It remains to be seen whether other "policy" grounds contain any substance to dispute the availability of the action.

### 3. Floodgates

The wrongful life action has been denied on the grounds that it would be impossible "to determine the degree of deformity necessary to state a claim for relief."<sup>252</sup> Critics argue that the courts could be flooded by an endless wave of wrongful life claims.<sup>253</sup> Neither of these arguments, however, is valid. It has already been shown that, to receive damages in a wrongful life case, a child must demonstrate that the burdens of her life outweigh the benefits. This burden will be extremely difficult to prove in any case where the handicap suffered is not exceptionally severe. Thus, cases would only come to court in rare instances. The idea that cases will flood the court system miscomprehends both the nature of the claim and the remedy.

Another argument questions the ability of courts to determine "how gravely deformed"<sup>254</sup> a child must be before he can bring the action. Critics concede that formulating an exact test to be applied in every case, irrespective of individual circumstances, is impossible. This lack of precision, however, is an advantage, as with common law, and allows for flexibility in individual cases. The tort law system is contoured around concepts like "reason-

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252. *Elliot v. Brown*, 361 So.2d 546, 548 (Ala. 1978).

253. *Id.*

254. *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1193 n.66.

ableness" and "probability," both of which are incapable of precise definition. This lack of precision does not merit the denial of actions in other cases. Particularly in wrongful life claims, the standard to be applied is whether the burden of life outweighs its benefits. In general, the legal system acknowledges that it is dealing with persons with exceptionally severe handicaps, although there are grey areas in particular cases. It is important that the law retain a certain amount of flexibility to deal with these unforeseen situations. A minimal amount of imprecision is preferable to rigidity and subsequent injustice.

#### 4. "Dissatisfied life" cases

Some scholars who criticize wrongful death actions rely on a line of cases that misclassify the action. Cases have arisen where healthy children sue their parents for being born into circumstances that they perceive to be undesirable. The best known example of this type of claim arose when an illegitimate child sued his father for his illegitimate status in life.<sup>255</sup> The Illinois Court of Appeals understandably denied relief on the ground that if such an action were allowed, "one might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation."<sup>256</sup> The decision has been followed by a line of similar cases, none of which have permitted a "dissatisfied life" claim.<sup>257</sup>

This type of action is very different from the action for wrongful life, and the reasons for rejecting the claim should be obvious. It would be impossible for a child to demonstrate

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255. *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. 1963).

256. *Id.* at 858.

257. *Williams v. New York*, 223 N.E.2d 343 (N.Y. 1966) (holding that "[b]eing born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognisable in court."); *Slawek v. Stroh*, 215 N.W.2d 9 (1974) (finding that policy considerations with regard to illegitimate children were not the same as those concerning physically disabled children); *Coleman v. Garrison*, 349 A.2d 8 (1975) (finding that the value of human life outweighs any damage that might be said to follow from the mere fact of birth); *Stills v. Gratton*, 127 Cal. Rptr. 652 (1976) (holding that the only existing 'damage' arose from the birth of the child itself. The circumstances of the case did not, in any case, merit an action because the child was said to be "a joy to his mother" and was "happy and healthy in every respect"); *Foy v. Greenblott*, 190 Cal. Rptr. 84 (1983) (denying an action where there was no physical impairment).



satisfactorily to a court that his life was so affected by the unfortunate circumstances of his birth that life's burdens outweighed its benefits. From a policy point of view, it is clear that the floodgates inevitably would open. If every aspect of a dissatisfied life were the subject of litigation, the court doors could never be closed.<sup>258</sup>

## II. WRONGFUL BIRTH

### A. *What is "Wrongful Birth"?*

The generic term "wrongful birth" has been used to encompass a wide variety of situations. These situations typically involve actions brought by parents who allege that the negligence of a physician led to the birth of a child that they did not want or with which they are in some way dissatisfied. Commentators have attempted to classify the action for purposes of clarity. Those cases involving parents who gave birth to an unwanted, but healthy baby, are labeled "wrongful conception" or "wrongful pregnancy." "Wrongful birth" encompasses cases in which a child is born with a handicap.<sup>259</sup>

An action for wrongful birth arises out of the same facts as an action for wrongful life. The only difference is the plaintiff bringing the action. Here, it is the parents, not the child, who bring the claim. The basis of the parents' action is the defendant's negligence, which resulted in the birth of a child that is born physically or mentally disabled because of a genetic defect for which the defendant is not responsible. Liability can arise where a medical practitioner fails to recognize or explain the genetic basis of a condition,<sup>260</sup> or where a diagnostic technology is not offered in an appropriate and timely fashion to enable informed reproductive choices by the parents.<sup>261</sup> The legal issue is whether to recognize, as a legal right compensable by tortious damages, the ability of parents to prevent the birth of a child whom they subsequently discover to be "defective."<sup>262</sup>

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258. "Dissatisfied life" claims are an entirely different species of case, and the fact that they have been denied is beyond the scope of the present discussion.

259. See, e.g., EDWARD KIONKA, TORTS 231 (2d ed. 1993).

260. *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982).

261. *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981).

262. See, e.g., *Harbeson v. Parke-Davis*, 656 P.2d 483, 488 (Cal. 1983). "The parents' right to prevent a defective child and the correlative duty flowing from that right is the

An action for wrongful pregnancy arises where the defendant's negligent conduct failed to prevent the birth of a healthy, but unwanted child. This situation can arise in the following scenarios: (1) where a physician negligently performs a vasectomy,<sup>263</sup> or when a physician provides any other type of ineffective contraception,<sup>264</sup> and the parents conceive, as a result; (2) where a physician negligently fails to diagnose a pregnancy, thereby denying a mother the choice of an abortion at a timely stage,<sup>265</sup> or (3) where a doctor negligently performs an abortion, and the birth of a healthy child results.<sup>266</sup>

It is simplistic to say that the necessary tort elements—duty, breach, causation, and damages—must be fulfilled for these actions to succeed. On both sides of the Atlantic, however, the law conspicuously fails to properly analyze these essential tort components. In several instances, it appears that courts simply assume that a remedy should be awarded, without considering how these actions fit within the traditional framework. Little energy is expended to create any logical consistency in the reasoning and outcome of wrongful life, wrongful birth, and wrongful pregnancy cases, despite their overwhelming factual similarities. Furthermore, the law within each of these elements has been formulated on a piecemeal basis, with an emphasis on the individual case rather than on ensuring justice for the whole.

Once again, it is useful to compare English case law with cases in the United States because the same legal questions have arisen in both countries, resulting in both similar and different holdings. American cases are infinitely more numerous and span a much longer time period. It is particularly interesting to compare and contrast U.S. and British decisions to determine whether the quantity of U.S. decisions spanning decades improves the level of reasoning used in American jurisdictions.

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heart of the wrongful birth action.”

263. *Cockrum v. Baumgartner*, 425 N.E.2d 968 (Ill. 1981).

264. *Troppe v. Scarf*, 187 N.W.2d 511 (Mich. 1971).

265. *Rinard v. Biczak*, 441 N.W.2d 441 (Mich. 1989).

266. *Miller v. Johnson*, 343 S.E.2d 301 (Va. 1986).

## B. Judicial Responses

### 1. In England

The issue of "wrongful pregnancy" in England did not arise until a series of conflicting cases in the early 1980s eventually determined that a remedy was possible to parents who gave birth to a healthy child. Recovery was more easily attained, however, in those cases involving children who suffered from disabilities. The main disputed issue involved whether parents could claim damages, not only for the negligently performed procedures themselves, but also for raising a child that they did not want. It is surprising that this important and controversial issue has yet to be considered by the House of Lords.

*Sciuriaga v. Powell* was the first case of its kind, but the main issue, whether a parent could recover the costs of a child's upbringing, was not considered.<sup>267</sup> In *Sciuriaga*, the birth of a healthy child followed a negligently performed abortion.<sup>268</sup> Damages were awarded to the parents for the failed procedure itself, based on ordinary principles of medical negligence.<sup>269</sup> Public policy issues were neither raised nor discussed.

Three years later, however, the central issue, whether the law should recognize the right of a parent to receive compensation when a healthy baby is born, was thoroughly analyzed and rejected on public policy grounds. *Udale v. Bloomsbury Area Health Authority*<sup>270</sup> concerned a negligently performed sterilization. As a result of the negligently performed operation, both parents incorrectly assumed that they no longer needed other forms of contraception, and subsequently, a healthy child was born to them.<sup>271</sup> The action was analyzed as a "wrongful birth" case, although it may now be more clearly identified as a case for "wrongful pregnancy."<sup>272</sup>

In rejecting the action, Justice Jupp emphasized what he considered to be overriding arguments of public policy.<sup>273</sup> These

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267. [1980] CA Transcript 597.

268. *Id.*

269. *Id.*

270. [1983] 2 All E.R. 522.

271. *Id.*

272. *Id.* at 523.

273. *Id.* at 530-31.

actions would place an excessive financial burden upon the medical profession and could likely lead to a lowering of professional standards, pressuring doctors to recommend abortions for fear of potential litigation.<sup>274</sup> Furthermore, the action could have vast social implications by disrupting family life and causing bitterness that would result between parent and child.<sup>275</sup> The court wanted to avoid the potential that a child could learn that a court had publicly declared his life to be a mistake and that he was unwanted.<sup>276</sup> Moreover, ascertaining damages was problematic. Damages are calculated by offsetting the joys of having a child against the financial burdens and other hardships it causes.<sup>277</sup> Thus, a loving mother would not be able to recover anything, whereas "a plaintiff who nurtures bitterness in her heart . . . would be entitled to large damages."<sup>278</sup> The opinion that there should be rejoicing, and not dismay, at the birth of a healthy child was supported by arguments about the sanctity of human life.<sup>279</sup>

When the same issue was subsequently considered, however, the sanctity of life argument was held inapplicable to the birth of a child with disabilities. *Emeh v. Kensington Chelsea and Westminster Health Authority* involved a negligently performed vasectomy, which resulted in plaintiff's pregnancy.<sup>280</sup> After refusing to have an abortion, the plaintiff gave birth to a congenitally deformed child.<sup>281</sup> The court of appeals indicated that a stronger argument existed for awarding damages in cases of deformed children as opposed to cases involving healthy ones.<sup>282</sup> The plaintiff subsequently was awarded damages for full child-rearing costs, without limiting them by balancing the differences between the needs of a normal and an "abnormal" child.<sup>283</sup> The court of appeals, however, declined to create a policy that precluded the award of damages to healthy, but unwanted, children in similar cases.<sup>284</sup>

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274. *Id.*

275. *Id.*

276. *Udale v. Bloomburg Area Health Auth.*, [1983] 2 All E.R. 522, 530-31.

277. *Id.* at 531.

278. *Id.* at 531.

279. *Id.*

280. [1984] 3 All E.R. 1044.

281. *Id.*

282. *Id.* at 1050.

283. *Id.*

284. *Id.*

In *Thake*, a railway worker, and father of five children, underwent a sterilization operation to ensure that he would not be able to have more.<sup>285</sup> The vasectomy was negligently performed, and his wife became pregnant once again, giving birth to a healthy girl.<sup>286</sup> In allowing an action for wrongful pregnancy, and recognizing damages for child-rearing costs, Justice Pain refuted the arguments of Justice Jupp in *Udale*. Justice Pain did not agree that the birth of a child was always a blessing, as evidenced by the availability and frequent use of birth control methods, family planning, and abortion.<sup>287</sup> Furthermore, the learned judge believed that awarding damages would make the girl feel rejection later in life, as she would perceive the remedy only as a "means of having made life somewhat easier for her family."<sup>288</sup> The test to be applied in calculating damages was familiar, the extent to which the burden of having a child was offset by the joys that the child provided to the family.<sup>289</sup>

In each of the above cases, there was no dispute over awarding damages for the pain and suffering caused by the failed procedures themselves. The main controversy involved the issue whether parents could additionally recover the expense of raising the unwanted child. More recent cases have answered that question in the affirmative.

*Allen v. Bloomsbury Health Authority*<sup>290</sup> provides a useful recent summary of the applicable principles. In *Allen*, the health authority negligently failed to diagnose Mrs. Allen's four-week pregnancy at the time they performed a sterilization operation.<sup>291</sup> Mrs. Allen alleged, and the defendants conceded, that had the pregnancy been diagnosed at the time of the operation, she would have had an abortion.<sup>292</sup> The pregnancy was only detected, however, after seventeen weeks, at which time Mrs. Allen felt that

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285. *Thake*, [1984] 2 All E.R. 513.

286. *Id.* at 517.

287. *Id.* at 525.

288. *Id.* at 526.

289. *Id.*

290. *Allen v. Bloomsbury Health Auth.*, [1993] 1 All E.R. 651; *Fish v. Wilcox and Gwent Health Auth.*, [1993] 13 B.M.L.R. 134.

291. *Allen*, [1993] 1 All E.R. at 651.

292. *Id.*

it was too late to terminate her pregnancy.<sup>293</sup> The baby girl was born completely healthy.<sup>294</sup>

The claim had never been considered by the House of Lords, but Justice Brooke attempted to promulgate the legal principles that he could discern from the few first instance cases and appellate pronouncements that existed. He held that if the negligence of a doctor resulted in an unplanned birth, the mother was entitled to recover damages for the pain and suffering associated with the pregnancy, as well as damages for the financial loss caused by raising the child to adulthood.<sup>295</sup> Damages for the significant effort and exhaustion that a mother might suffer in bringing up a child was not recoverable.<sup>296</sup> This burden was offset by the joy of raising a healthy child.<sup>297</sup> This principle, however, did not apply where the child suffered from disabilities. In these cases, "the law is willing to recognize a claim for general damages in respect of the foreseeable additional anxiety, stress and burden involved in bringing up a disabled child, which is not treated as being extinguished by any countervailing benefit."<sup>298</sup>

Therefore, while the law in this area is unsettled, it is clear that when a procedure has been negligently performed and it leads to the birth of a child, parents have a cause of action. The court of appeals has stated that this cause of action is amplified when the child is born with a disability. Wrongful birth decisions, however, have recognized both the action and the award of child-rearing damages for healthy children as well.

English courts have adopted a different approach when considering the more typical case of "wrongful birth," cases involving the negligent failure of a doctor to diagnose a disability in the fetus, which led to continued gestation and the ultimate birth of a disabled child. While the facts of the two cases discussed below, were based upon a "wrongful birth," and though the claim was ultimately rejected, the rationale does not shed any light upon the present discussion. Both cases were decided on their own particular facts, and the holdings were somewhat unusual.

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293. *Id.*

294. *Id.*

295. *Id.* at 651.

296. *Allen v. Bloomsbury Health Auth.*, [1993] 1 All E.R. 651, 652.

297. *Id.* at 651.

298. *Id.* at 657.

In *Salih v. Enfield Health Authority*,<sup>299</sup> a child was born suffering from congenital rubella syndrome as a result of a health authority's failure to diagnose and warn the mother that her child could be affected by rubella.<sup>300</sup> This negligence resulted in the inability of the child's mother to terminate her pregnancy. In finding that the parents were not entitled to damages, the court used reasoning that one author has termed "bizarre."<sup>301</sup> In determining that these parents had not suffered any financial loss, the court relied on evidence that showed that the parents would have had a fourth child had this one, their third, not been disabled. The parents intended to have four children, and, because they only had three, they were not entitled to any damages.<sup>302</sup> Whether or not one agrees with the result of the case, its *ration decidendi* is not extraordinary. Whether the parents would have sought to have additional children once their disabled child was born absolutely was, and should have remained, a matter for them, and not a concern of either the defendants or the court.

In the other case, *Rance v. Mid-Downs Area Health Authority*, a boy was born with a very serious handicap, spina bifida, allegedly caused by the negligence of a hospital radiologist who did not arrange for further scans.<sup>303</sup> These scans would have confirmed, or allayed suspicions, that the child was in fact suffering from his condition.<sup>304</sup> Had the child's mother been completely informed, the mother would have had her pregnancy terminated.<sup>305</sup> The claim was rejected, but once again on grounds that do not assist the present discussion. Justice Brooke failed to find any negligence on behalf of the radiologist.<sup>306</sup> Furthermore, he stated that even if he had, he would not have allowed the action on the basis that the mother was at a stage of her pregnancy that was too advanced to lawfully have it terminated,<sup>307</sup> a statement now

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299. [1991] 3 All E.R. 400.

300. *Id.*

301. P.R. Glazebrook, *Unseemliness Compounded by Injustice*, 51 CAMBRIDGE L.J. 226 (1992).

302. *Salih*, 3 All E.R. at 400-01.

303. *Rance v. Mid-Downs Area Health Auth.*, [1991] 2 W.L.R. 159.

304. *Id.* at 168.

305. *Id.*

306. *Id.*

307. *Id.* at 192-93.

rendered obsolete because of recent amendments to the Abortion Act of 1967.<sup>308</sup>

While at first glance it appears that English law does not recognize "wrongful birth" actions in a typical case involving negligent genetic diagnosis that results in the birth of a disabled child, it is apparent that the courts have never considered this claim on any principled or logical basis. The English position makes it significantly more interesting to examine the position in the United States, and it makes it challenging to take a fresh look at the type of considerations that should rightfully influence this area of the law.

## 2. The United States

The courts in the United States have also approached "wrongful pregnancy" and "wrongful birth" cases differently. The prevailing view when a healthy child is born is to allow parents to recover limited damages for the pain associated with the failed procedures, but very few courts allow recovery of expenses for child-rearing costs.<sup>309</sup> In fact, of the thirty-six jurisdictions that allow wrongful pregnancy claims, twenty-eight deny damages for child-rearing as a matter of law.<sup>310</sup> In those minority jurisdictions where recovery for child-rearing has been allowed, some states insist that those costs should be offset by the emotional benefits attained by the parents,<sup>311</sup> whereas others allow full recovery without any such offset.<sup>312</sup>

Two of the leading cases in this area succinctly demonstrate the different approaches that are taken by the courts, influenced by whether the child is born healthy or disabled. In *Cockrum v. Baumgartner*, a doctor negligently performed a vasectomy on the plaintiff.<sup>313</sup> The doctor was further negligent when he assured the Cockrums that a sperm test conducted by the laboratory showed that there was no longer any live sperm present.<sup>314</sup> If the doctor exercised due care and skill, he would have known that

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308. *Id.*

309. See Kionka, *supra* note 259, at 231.

310. Lisa A. Podewils, *Traditional Tort Principles and Wrongful Conception Child-Rearing Damages*, 73 B.U. L. REV. 407, 408 (1993).

311. *Burke v. Rivo*, 551 N.E.2d 1, 4-6 (Mass. 1990).

312. *Lovelace Medical Ctr. v. Mendez*, 805 P.2d 603, 613-14 (N.M. 1991).

313. 447 N.E.2d 385, 389 (Ill. 1983).

314. *Id.* at 385.



the laboratory report revealed that the vasectomy, in fact, had been medically unsuccessful. The plaintiffs claimed that but for the physician's negligence, Mrs. Cockrum would never have become pregnant.<sup>315</sup> As a result, she gave birth to a healthy child.

The Supreme Court of Illinois recognized a cause of action against a physician where it was alleged that because of the doctor's negligence the plaintiff conceived or gave birth.<sup>316</sup> Damages in these cases, however, were measured by considering the expenses of the unsuccessful operation, the pain and suffering involved, any medical complications caused by the pregnancy, the costs of delivery, lost wages, and loss of consortium.<sup>317</sup> The court acknowledged the dispute over whether the plaintiffs could recover the costs of raising a healthy child as damages.<sup>318</sup> The court adopted the majority view, holding that no recovery for child-rearing expenses would be allowed when a healthy child was born.<sup>319</sup> The joy of giving birth to a healthy child offset any conceivable loss.<sup>320</sup> It was contrary to public policy for parents to devalue the lives of their children in order to recover damages.<sup>321</sup>

*Speck v. Finegold*<sup>322</sup> involved the birth of an unhealthy child. The case provides an interesting contrast. As in *Cockrum*, Mrs. Speck gave birth to a child conceived as the result of a negligently performed vasectomy on her husband.<sup>323</sup> A subsequent attempted abortion was also negligently carried out.<sup>324</sup> This negligence led to the birth of a baby daughter who suffered from neurofibromatosis, a disorder caused by a genetic defect in Mr. Speck. The Supreme Court of Pennsylvania reasoned that the action was based upon the birth of a "defective" child.<sup>325</sup> Accordingly, parents could recover, not only for the pain and suffering attributable to the failed procedures, as in *Cockrum*, but also for child-rearing

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315. *Id.*

316. *Id.* at 388.

317. *Id.*

318. *Id.*

319. *Cockrum v. Baumgartner*, 447 N.E.2d 385, 388 (Ill. 1983).

320. *Id.*

321. *Id.*

322. 439 A.2d 110 (Pa. 1981).

323. *Id.* at 113.

324. *Id.*

325. *Id.*

expenses, which had been explicitly denied in the Illinois case.<sup>326</sup> Furthermore, the court allowed recovery for emotional distress alleged to have been suffered in giving birth to, and having to look after, a "defective" child.<sup>327</sup> The greater inclination of the courts to award child-rearing and emotional distress damages in cases involving the birth of children suffering from disabilities is mirrored in each case discussed in this section.<sup>328</sup>

In cases where a doctor has negligently failed to diagnose a pregnancy, thereby removing a mother's option to abort, the courts generally have denied a claim for child-rearing costs where the infant is healthy. In both *Rinard v. Biczak*<sup>329</sup> and *Rieck v. Medical Protective Co.*,<sup>330</sup> the courts expressly declared that child-

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326. *Id.* at 113.

327. *Id.* at 114.

328. For examples of cases that follow the distinction alluded to in *Cockrum* and *Speck* as between healthy and unhealthy children arising out of negligently performed sterilizations and abortions, see, *inter alia*, *Weintraub v. Brown*, 470 N.E.2d 634 (N.Y. 1983) (denying damages for child-rearing costs arising from a failed vasectomy on policy grounds where child was healthy); *Ramey v. Fassoulas*, 414 So.2d 198 (Fla. 1982) (denying child-rearing costs arising from a failed vasectomy because child was healthy; had child been born with substantial physical or mental defects, the parents would have been able to recover special medical and educational expenses associated with raising such a child to majority); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984) (holding that parent could not maintain an action for child-rearing expenses resulting from a negligently performed abortion as the child was born normal and healthy); *Johnson v. University Hosp. of Cleveland*, 540 N.E.2d 1370 (Ohio 1989) (limiting extent of damages due to failed vasectomy in accordance with the policy consideration that the birth of a healthy child cannot be an injury to her parents); *Goforth v. Porter Medical Assoc., Inc.*, 755 P.2d 678 (Okla. 1988) (denying recovery for the rearing costs of a healthy child due to failed sterilization); *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. 1973) (denying recovery for rearing costs of a healthy child due to failed sterilization because the emotional benefits it gives the parents far outweighs their economic burdens). Contrast the position in cases that arise on the same facts, but the result in the birth of a child who suffers from disabilities: *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982) (holding that parents could recover for mother's medical expenses and pain and suffering occasioned by the failed sterilization; for medical care necessitated by the child's orthopedic disability; and for the costs of raising the child to her majority); *Stribling v. De Quevedo*, 422 A.2d 239 (Pa. 1980) (allowing recovery for mother's lost earnings, physical pain and suffering and emotional distress incident to negligent sterilization; allowing father's claim for damages incident to birth and rearing of his son born with dextrocardia granting recovery for his mother's medical expenses; denying recovery for emotional and mental distress); *Pitre v. Opelousas Gen. Hosp.*, 530 So.2d 1151 (La. 1988) (holding that parents could recover for expenses incurred during pregnancy and delivery, mother's pain and suffering, father's loss of consortium, service and society, as well as their emotional and mental distress due to failed bilateral tubal ligation resulting in child born with albinism).

329. 441 N.W. 44 (Mich. 1989).

330. 219 N.W.2d 242 (Wisc. 1974).

rearing costs were not recoverable as damages in cases where healthy children were born. It was contrary to public policy to allow such claims when the birth of a healthy child was assumed to be a welcome addition to the family.<sup>331</sup> This position is vastly different, however, where the physician, while detecting the pregnancy, negligently failed to diagnose or predict the effect of either a condition or a genetic defect that led to the birth of a child who suffers from disabilities. Numerous cases have allowed parents to recover damages for both child-rearing and emotional distress damages in situations where a doctor has negligently failed to detect the presence of rubella, or failed to warn of its potential harm to the unborn fetus.

*Blake v. Cruz*<sup>332</sup> provides an example of a child born with congenital defects following a failure to diagnose the mother's rubella. The court awarded damages for the costs of medical and hospital care for the child, as well as for its support and maintenance not only up to, but beyond, the age of majority.<sup>333</sup> Furthermore, the parents were awarded damages for the emotional distress of having given birth to a disabled child.<sup>334</sup>

The Michigan Court of Appeals reached a similar result in *Eisbrenner v. Stanley*.<sup>335</sup> In *Eisbrenner*, a deformed child was born as the result of a failed rubella diagnosis.<sup>336</sup> While child-rearing damages were not awarded for the period after the age of majority, the parents were recompensed for medical expenses incurred due to the child's disabilities.<sup>337</sup> Again, damages were awarded for the emotional distress allegedly caused by the disabled child.<sup>338</sup>

Not all similar cases have allowed recovery for emotional distress. It is unusual, however, to find a case where courts do not award damages beyond those caused by the immediate effects of the negligence itself, despite the fact that this has often been the

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331. *Id.* at 244; see also *Rinard*, 441 N.W. at 44.

332. 698 P.2d 315 (Idaho 1984).

333. *Id.* at 320.

334. *Id.*

335. 308 N.W.2d 209 (Mich. 1981).

336. *Id.* at 210.

337. *Id.* at 214.

338. *Id.*

result in cases involving healthy babies, as previously demonstrated.<sup>339</sup>

Similar differences exist in the treatment of healthy and unhealthy children born in cases where the pregnancy itself is detected, but a defective gene or chromosome within the fetus is negligently misdiagnosed. Recovery for child-rearing expenses has been denied where the failure to diagnose the pregnancy led to the birth of a healthy child.<sup>340</sup> In cases where the child is born disabled, denial of child rearing expenses is noticeably in the minority. Two cases involving Tay-Sachs illustrates this approach. The court in *Naccash v. Burger* allowed parents to recover damages for expenses incurred in the care and treatment of their afflicted child.<sup>341</sup> The court further held that the circumstances of the case permitted recovery for emotional distress as well.<sup>342</sup> Similarly, in *Goldberg v. Ruskin*,<sup>343</sup> the child also was born with the Tay-Sachs disease. The court explicitly stated that the reasons for denying costs of rearing a normal and healthy child should not prevent the parents of an abnormal child from recovering the expenses reasonably necessary for the care and treatment of their child's physical impairment.<sup>344</sup> Furthermore, the plaintiffs were allowed to plead facts that entitled them to recover damages for emotional distress.

In *Lloyd v. North Broward Hospital District*, the failure of health care providers to detect genetic defects enabled the parents to sue for mental anguish.<sup>345</sup> The parents sought damages for special care and maintenance expenses of their disabled child, incurred both before and after the age of majority.<sup>346</sup> This cause of action belonged expressly to the parents and would not extend to the child.<sup>347</sup> Likewise, in *Lininger v. Eisenbaum*,<sup>348</sup> it was the parents who could bring a claim for the extraordinary medical and educational expenses occasioned by a form of hereditary blindness in the child, which the doctor negligently failed to

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339. *Id.*

340. *Howard v. Lecher*, 366 N.E.2d 64 (N.Y. 1977).

341. 290 S.E.2d 825 (Va. 1982).

342. *Id.*

343. 471 N.E.2d 530 (Ill. 1984).

344. *Id.* at 538.

345. 570 So.2d 984 (Fla. 1990).

346. *Id.* at 986.

347. *Id.* at 988.

348. 764 P.2d 1202 (Colo. 1988).

diagnose. The court stressed that the child could not have a claim of its own under these circumstances.<sup>349</sup>

The law in this area in both England and the United States has offered contradictory answers to the controversial questions under consideration. Unlike the action for wrongful life discussed in the previous section, however, both countries are willing to recognize claims for wrongful pregnancy and wrongful birth. Significant differences remain over the extent of the damages awarded, but it generally appears easier to seek damages in cases where the child suffers disabilities, for the negligence itself, as well as the more controversial damages, such as child-rearing expenses and damages for emotional distress.

It is the task of this section of the Article to analyze why courts are willing to recognize these actions and to discuss whether such claims should, in fact, be permissible. It is also necessary to consider whether any logical consistency exists to explain the approach taken with regards to actions for wrongful life, wrongful birth, and wrongful pregnancy.

### *C. The Desirability of Wrongful Pregnancy and Wrongful Birth Actions*

#### 1. Cases Involving the Birth of Healthy Children

Similar to wrongful life, for an action to be successful in the law of torts, it must be analyzed with the traditional elements of negligence: a breach of a duty that led to an injury to the plaintiff, which is compensable by monetary damages. The costs of a healthy child should not be allowed under any of these elements.

##### *a. The Duty*

The concept of duty is a policy device used to determine whether to extend or limit liability in certain instances.<sup>350</sup> It therefore is impossible to separate the notion of duty from whether it is correct on policy grounds to allow such an action. The "duty" that has allegedly been breached in this type of case is the doctor's duty to diagnose a pregnancy, to carry out a sterilization operation, or to

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349. *Id.* at 1206-07.

350. For a discussion of the duty concept, see *supra* Part I.

procure an abortion with due care and skill. As a result of her breach of this duty, a healthy child has entered the world.

This Article does not dispute the fact that under the ordinary principles of medical negligence, a plaintiff should be able to recover for any injury suffered from the failed procedures themselves. The precise calculation of these damages is discussed below. The more controversial question, however, whether parents can recover the costs of the child's life itself is not nearly as obvious.

Compensating parents for the living costs of their healthy baby, which they have chosen to keep, is a unique form of action that needs careful consideration. Unlike the ordinary case of medical negligence where the doctor must compensate the plaintiff for the injury inflicted upon the person of that plaintiff, a wrongful pregnancy action involves a plaintiff who asks not only to be compensated for the negligent procedure, but also for the total costs of the resulting life of the child. Naturally, the scale of the damages is much larger than in the ordinary case. Furthermore, sensitive issues of morality arise, especially when considering the manner in which the parents have been injured, and the desirability of encouraging courts to declare not only that a child is unwanted; also, parents deserve to be compensated for the "affliction" of having given birth to a healthy child. Therefore, one has to ask whether it is desirable for the law to impose a duty to the parent upon doctors to prevent the birth of a healthy child. As supported below, the law should not recognize any such duty.

The usual way of measuring damages for the birth of a child has been to balance the burdens of having a child against the benefits that it provides. This test is neither practical nor desirable. The obvious question that must be addressed is whether it is possible to measure either the "benefits" or the "burdens" of a healthy child. As was pointed out in *Terrell v. Garcia*,<sup>351</sup> it is virtually impossible to place "a price tag on a child's smile" or upon parental pride in that child's achievement.<sup>352</sup> It also is possible that the benefits a child may provide later in life to his or her ailing parents may outweigh the burdens that the parents suffered at the outset of the life of the child, even from an economic standpoint. A child often can provide various different

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351. 496 S.W.2d 124 (Tex. 1973).

352. *Id.* at 128.

types of security for parents in their old age. *Udale v. Bloomsburg Area Health Authority*<sup>353</sup> provides an interesting demonstration of the kind of results that are achieved if courts are forced to measure the intangible. Justice Jupp applied the benefits and burdens balance by declaring that "if I had to award damages to Mrs. Udale under the disputed heads, I would have to regard the financial disadvantages as offset by her gratitude for the gift of a boy after four girls."<sup>354</sup>

Arguably, the difficulty of assessing damages should not, without more, rule out an action. There would have to be strong social reasons to allow a claim, however. In this instance, such a claim would do far more harm than good. It is highly undesirable for a child to be publicly declared so unwanted that the trouble that it gives to its parents outweighs the joys that healthy children are supposed to cause. Critics all argue that this sentiment rests on the notion that the birth of a baby is always a blessing.<sup>355</sup> The argument that the use of contraception shows that the birth of a child is not always a blessing is irrelevant to the issues involved. The fact that birth control measures are publicly accepted certainly is not evidence that public approval extends to the granting of compensation to parents when contraception has failed as a result of some form of medical negligence.<sup>356</sup>

Moreover, any test that requires parents to prove that their child is more of a burden than a benefit before they can recover damages necessarily requires that they devalue the worth of their child before they could win such an action. It seems contrary to the morals of any civilized society to require the law to recognize an action that provides greater rewards to those who are best able to demonstrate a severe loathing of their children. The more a parent rejects parenthood, the more damages would be forthcoming. To recognize that a child was initially unplanned is one thing; to declare in a court of law that the child is unwanted and causes despair to its parents once it is alive, sufficient to merit recovery of substantial tort damages, is quite another. If a child were to comprehend the action, he or she not only would suffer significant

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353. [1983] 2 All E.R. 522.

354. *Id.* at 531.

355. See, *inter alia*, Diana Brahams, *Damages for Unplanned Babies - A Trend to be Discouraged?*, 133 NEW L.J. 643, 645 (1983).

356. See C.R. Symmons, *Policy Factors in Actions for Wrongful Birth*, 50 MOD. L. REV. 269, 282 (1987).

and foreseeable distress, but society also would have to ask whether such an action did not, in reality, destroy any foundation of family stability that the law has for centuries been encouraged to promote.<sup>357</sup>

It is important to note that, unlike actions for wrongful life where the child is the litigant, it is the parents who claim that the birth of their child was "wrongful". A United States decision acknowledged that allowing a wrongful pregnancy action "would undermine society's need for a strong and healthy family relationship."<sup>358</sup> Allowing an action for wrongful pregnancy would potentially encourage parents to bring fraudulent claims in an attempt to receive extra money for themselves. A wrongful pregnancy complaint alleges that parents would have pursued a different course of action had they been informed of their pregnancy. The focus is on the firm testimony of parents testifying about their intention to procure an abortion and that such an intention was certain and unalterable. If recovery was allowed based upon subjective testimony of parents about their state of mind, the temptation to invent an intention to abort would be significant indeed.

It is dangerous for legal actions to encourage mothers to feign a lack of affection for their offspring. Legitimization of a wrongful pregnancy action will do exactly that. Furthermore, courts fear that parents will receive damages for the cost of raising their child, only to later place the child for adoption. If parents choose to proceed in this manner after the normal period of time for appeal, there is no clear way to overcome this problem.

It can also be damaging to the child to find out that his life is being funded entirely by a medical authority with whom he has absolutely no connection. Equally important is the effect that an action for wrongful life may have on the medical profession itself. Allowing recovery for child rearing expenses places the medical profession under an unreasonable burden. The action enables

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357. See P.R. Glazebrook, *Capable of Being, But No Right to be, Born Alive?*, 50 CAMBRIDGE L.J. 241, 243 (1991), which states:

It is not deeply shocking that his own parents should, in the hope of obtaining some financial help towards his care, have been driven in their desperation to claim in the courts that he *should* (and would) have been killed before he was born? . . . Is not such a claim so offensive to all ordinary decent people that the action should, without more ado, have been struck out on that ground?

358. *Wilbur v. Kerr*, 628 S.W.2d 569, 571 (Ark. 1982).



parents to keep their child, while shifting the child's entire cost onto the physician. In effect, this establishes a new category of substitute parents. Every benefit of a child—such as its smile, the bond of love and affection within the family, the parental pride to which it could give rise, the future contribution by the child to the welfare and well-being of the family—would only be felt by the parents. Every burden, such as the financial cost of the child's life, his feeding, clothing, and education, would shift firmly onto the medical profession. In the unique and financially arduous circumstance of finding a remedy to compensate the parents for a failed gynecological procedure, it is fairly apparent that the punishment does not fit the crime.

The limits on a doctor's liability remain uncertain when considering potential plaintiffs and the various injuries for which the doctor could be liable. The decision in *Custodio v. Bauer* has been followed by a number of subsequent cases in allowing siblings of the new baby to claim a loss of a portion of the family's wealth and parental attention.<sup>359</sup> Fortunately, this action was denied in other cases.<sup>360</sup> Once one allows parents to recover monetary damages because they claim that child to be intolerable, the doors are open to allow brothers, sisters, and possibly all other relatives of the disadvantaged new child to also declare that the child is a despicable creature who ought never to have been born and is utterly unbearable now that he is alive.

No clear measure exists for calculating damages to be awarded to parents, thereby leaving the medical profession faced with increasing uncertainty about the precise extent of its liability. In fact, in a trend that tends to ignore traditional tortious principles and does not consider financial need, recent English cases curiously have begun to award the largest damages to the wealthiest families. In *Benarr v. Kettering Health Authority*,<sup>361</sup> the fourth child born to a wealthy family was a result of a negligently performed vasectomy. The three prior children were conceived by choice. Mr. Benarr, the father, had a stable and lucrative job. Despite his uncontested ability to pay for the expenses himself, he sued to recover the expenses for his volun-

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359. 59 Cal. Rptr. 463 (1967).

360. *Aronoff v. Snider*, 292 So. 2d 418 (Fla. Dist. Ct. App. 1974); *Cox v. Stretton*, 352 N.Y.S.2d 834 (N.Y. Sup. Ct. 1974).

361. 138 New L. J. 179 (1988).

tarily decision to send his fourth child to a private school.<sup>362</sup> In addition to other child rearing costs, the court ordered the health authority to pay Mr. Benarr an extra 19,500 (\$35,000).<sup>363</sup> More recently, in *Allen v. Bloomsbury Health Authority*,<sup>364</sup> the issue of recovering for the cost of a private education was considered. The court held that, as the law now stood, in cases where parents sent all of their other children to expensive private boarding schools for their entire education, "a very substantial claim for the cost of private education of a healthy child of a reasonably wealthy family might have to be met from the funds of the health authority responsible for the doctor's negligence."<sup>365</sup>

These decisions emphatically illustrate the senselessness of allowing claims for wrongful pregnancy. The culpability of the defendant has to be weighed against the loss incurred by the plaintiff. In wrongful pregnancy actions, balancing of interests must be addressed. The medical profession is charged with providing care and treatment to those in society who need it most. The resources are severely limited, and it makes little sense to compel the medical community to pay the largest awards to those people who need it the least. Limited resources are much better spent on the dire need for primary patient care. Conferring the highest awards on people with the most money, from limited funds that exist to provide essential and necessary treatment to the poorest in society, reflects a paradox of such absurdity that no sensible legal system should be prepared to accept it.

Public policy should preclude the imposition of duty on a doctor to prevent the birth of a healthy child. Otherwise, liability is imposed on a physician for the entire financial burden of a child's life, while experiencing none of the joys that the child's parents enjoy.

Undoubtedly, a medical professional owes a duty to a patient to perform a medical procedure with due care and skill. If she performs the procedure negligently, the medical professional is liable under ordinary principles of medical malpractice. A physician should not be held liable for the patient's child by paying the total costs of the child's life. The law should not encourage

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362. *Id.*

363. *Id.*

364. [1993] 1 All E.R. 651.

365. *Id.* at 662.

parents to declare in a court of law that their child is unwanted and that the burdens override any benefit that the child may provide to them. Medical professionals should not be required to pay damages that impose an unreasonable burden upon them, completely disproportionate to their culpability. This is particularly true when these disproportionate awards could necessarily deprive future patients of essential health treatment.

*b. The Injury*

To successfully recover, the plaintiff must suffer some form of legally recognized harm. With respect to the negligently performed procedures themselves, there is little doubt that the plaintiff has suffered harm, physical or emotional, as with any medical malpractice suit. The scope and precise amount of this harm is discussed below.

To successfully recover child rearing and maintenance costs in a wrongful pregnancy action, parents must prove that they suffered a legal injury from gaining a healthy child. The established facts of relevant cases, as well the parents' decision to raise the child, tend to show that parents did not suffer an injury that ought to be recognized by a court of law.

The *Cockrum*<sup>366</sup> court stated: "in a proper hierarchy of values, the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization."<sup>367</sup> Furthermore, the parents' reaction in some cases are illuminating. In the English cases *Thake*<sup>368</sup> and *Udale*,<sup>369</sup> the parents were delighted with their children when they were ultimately born. If the births were happy occasions, it is difficult to comprehend how a birth can be regarded as a legally cognizable harm. The American case, *Ball v. Mudge*,<sup>370</sup> articulates the point more strongly. The evidence showed that the parents deeply cherished their child, which was born as a result of a negligently performed sterilization.<sup>371</sup> The parents were thrilled to have

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366. *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983).

367. *Id.* at 389.

368. [1984] 2 All E.R. 513.

369. [1983] 2 All E.R. 522.

370. 391 P.2d 201 (Wash. 1964).

371. *Id.* at 204.

given birth to a healthy child.<sup>372</sup> They refused to consider placing the child for adoption, and “would not sell for \$50,000.”<sup>373</sup> The court understandably concluded that, on these facts, it could not be said that the parents suffered any legally cognizable injury.

Unfortunately, cases exist where parents are not as delighted with the birth of a healthy child. These parents may genuinely feel that they have been harmed and the law must decide the manner in which to deal with their “injury.” Several cases have suggested that parents do not suffer any harm in instances where they chose to have an abortion. This argument is relevant to traditional tort concepts that require a plaintiff to mitigate damages as far as practicable. Further, the argument contends that parents cannot suffer if they consciously decide to proceed with the birth of the child. In *Emeh v. Kensington Area Health Authority*,<sup>374</sup> Justice Park declared that the mother’s decision to refuse an abortion under the circumstances was “so unreasonable as to eclipse the defendant’s wrongdoing.”<sup>375</sup> This part of the decision was correctly reversed by the court of appeal.<sup>376</sup> Lord Justice Slade stated that the defendants did not have a right to expect that a mother would procure an abortion after a negligently performed procedure.<sup>377</sup> This ruling was particularly applicable where negligence by the doctors was what “faced [the mother] with the very dilemma which she had sought to avoid by having herself sterilized.”<sup>378</sup> Many U.S. cases<sup>379</sup> and statutes<sup>380</sup> agree that it is never unreasonable for a mother to refuse to have an abortion.

It is abhorrent for defendants to be able to force a woman to procure an abortion because of a pregnancy that resulted solely from their own negligent acts. This course of action overlooks the

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372. *Id.*

373. *Id.*

374. *Emeh v. Kensington Area Health Auth.*, [1984] 3 All E.R. 1044, 1045.

375. *Id.* at 1052-53.

376. *Id.* at 1044.

377. *Id.* at 1053.

378. *Id.*

379. *See, e.g., Troppi v. Scarf*, 187 N.W.2d 511 (Mich. 1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977).

380. *See, e.g., CAL. CIV. CODE* § 43.6(b) (West 1994) (“The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.”).

established tort principle that a tortfeasor must "take his victim as he finds her." Abortion is perhaps the most controversial issue in today's society, fueled as it is with passions arising from religious, moral, and ethical beliefs. The law could not subvert these powerful influences by declaring that a mother not only can but must have an abortion following the negligent acts of a medical practitioner. As was reiterated in *Troppe*,<sup>381</sup> if the mental and emotional make-up of an individual mother prevents her from procuring an abortion, the tortfeasor should not complain that the damages are more than they would have been had the plaintiff terminated her pregnancy.

The same cannot be said to be true with regard to adoption. The primary issue under consideration, however, is whether any legally cognizable injury to the parents has occurred. The measure of damages, or the size of the injury, is the extent to which the burden of having a healthy child outweighs its benefits. This Article is not advocating that parents should be *required* to place their child for adoption once a negligent medical procedure has resulted in its birth. The decision of the parents about whether or not to keep their child, however, is probative of whether the burdens caused by their child actually outweigh the benefits. If one reduces a wrongful pregnancy claim to its bare essentials, one sees that the parents are doing nothing more than appearing in court and proclaiming that the birth of their child was worse than not having it all. If this is true, then it does not seem unreasonable to inquire of the parents about why they did not place their child for adoption.

The adoption issue is really a reflection of the parents' credibility in these actions. While the law certainly should not obligate parents to find alternative homes for their children, it should not immediately accept the parents' contention at face value that having their child left them in a worse position. It is reasonable to presume that parents, who adamantly argue that looking after their child is so burdensome that they felt compelled to bring a lawsuit, could have been spared considerable "distress," legal expenses, and anxiety if they placed their child in a more loving home.

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381. 187 N.W.2d 511 (Mich. 1971).

Once again, the consequence of a successful wrongful pregnancy action would place all the benefits of the child on the parents while shifting the child's financial burden onto a third party. If the child, once born, is a welcome member of the family, it is difficult to posture that the plaintiffs have suffered any injury in reference to the birth of the child.

While adoption has never been considered in British wrongful pregnancy cases, the issue has been raised in U.S. courts. The *Troppe* court found it unreasonable to require parents to place the child for adoption.<sup>382</sup> The fundamental issue for the court to consider was the best interests of the child. The court relied on the law's preference to encourage the natural parents to raise the child.<sup>383</sup> A living child gives rise to emotional and spiritual bonds that a parent would be reluctant to break.<sup>384</sup> Furthermore, the court stated that, regardless of whether the parents wanted to conceive and rear a child, they could feel a legal and moral obligation to love the child and raise the child in the best way they could rather than allowing it to be raised by unknown persons.

Such assertions, however, clearly overlook the argument that parents are not being forced to place their children for adoption. The argument is only that if parents don't, the law should presume that the benefits of the child outweigh its burdens. Therefore, the plaintiffs suffered no legal injury for which they should receive compensation. It is up to the parents to decide what action to take. If the parents' bond to the child is sufficiently strong to prevent them from pursuing adoption, the outcome to an apparent unfortunate situation is a positive one. This also shows that the benefits of the child overcome its burdens. The parents are free to decide whether they wish to keep the child, or whether to place it for adoption. If they do not choose the latter, they must necessarily be prepared, not only to raise the child, but to do so at their own expense.

Furthermore, adoption is very different from abortion in that it does not raise the same intensity of religious or moral feeling. Religious and political organizations that oppose abortion support adoption as an alternative for a pregnant woman who does not

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382. *Id.*

383. *Id.* at 520.

384. *Id.* at 519.

want to raise her child.<sup>385</sup> Many people are desperately seeking to adopt, with an estimated two million families wanting to adopt in the United States alone.<sup>386</sup> In 1984, over eight thousand children were adopted by American families from outside the United States, and there are up to 100,000 inter-American adoptions each year.<sup>387</sup> Obviously, there is no shortage of willing recipients for unwanted children.

Moreover, contrary to the holding in *Troppi*,<sup>388</sup> adoption in these cases may well be in the child's best interests. Placing an infant for adoption at birth presents little danger to the newborn's emotional ties. In fact, placing a child with adoptive parents who truly want him is preferable to leaving the child with parents who did not plan for or initially want him, and who may subsequently resent that child's birth. It is further questionable whether a child's best interests are served by allowing wrongful pregnancy actions that will obligate someone else to pay for his upbringing because his parents did not plan for him, nor wish to contribute to his upbringing.

In short, there is little support for the proposition that, as a matter of law, placing a child for adoption is not in the child's best interests and, therefore, it is an unreasonable action for the parents to take. Wrongful pregnancy actions should be denied on the ground that the plaintiff parents have not suffered any legally cognizable injury in the birth of their child. If the benefits of the child are explicitly stated by the parents to be overwhelming, then they clearly override the burdens. Accordingly, decision by the parents to keep and nurture their child, rather than choosing to place him for adoption, implies the same result.

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385. See Norman M. Block, *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 FORDHAM L. REV. 1107, 1117 n.59 (1985) (citing religious and political literature supporting adoption, including NAT'L RIGHT TO LIFE NEWS, Jan. 12, 1984, at 4, which sets forth alternatives to abortion, NAT'L RIGHT TO LIFE NEWS, Oct. 28, 1982, at 5-8, which includes special adoption insert, and O'Connor, *Human Lives, Human Rights*, CATHOLIC NEW YORK, Oct. 18, 1984, at S4-S5, which discusses adoption services offered through the church).

386. *Id.* at 1117 (citing statistics listed in NATIONAL COMMITTEE FOR ADOPTION, INC., ADOPTION FACTS SUMMARY - 1984).

387. *Id.* at 1117.

388. 187 N.W.2d 511 (Mich. 1971).

*c. The Damages*

The preceding section makes clear that no recovery should be allowed for the costs of the child itself. The physician cannot be exonerated, however, from his negligence in carrying out a reproductive procedure. The plaintiff must be compensated for the injury that follows from the negligence. There can be little question about the issue of liability. The physician undoubtedly owed the plaintiff a duty to carry out the required procedure with due care and skill. This duty clearly was breached when the procedure was performed negligently. In every case, the plaintiff was injured because the pregnancy that followed was precisely what the parents sought to avoid when undergoing the particular procedure.

Moreover, the issues of foreseeability and proximate cause can hardly be in doubt. If a physician is asked to carry out a vasectomy or an abortion, it seems difficult to argue that it was sought for any reason other than to avoid pregnancy. Therefore, if a pregnancy ensues as a result of negligence by the medical practitioner, one could hardly pretend that it was an unforeseeable event.

Damages should be awarded where a doctor negligently fails to diagnose a pregnancy because a sterilization or other method of contraception has failed, or because an abortion was negligently performed, and the parents subsequently claim they would have terminated that pregnancy had a proper diagnosis taken place. There should be compensation for the physical pain and suffering caused by the unanticipated pregnancy and delivery of the child, including any pain that is experienced in the subsequent period of recuperation. Furthermore, the medical expenses for the care and treatment of the mother during the pregnancy and delivery should be recovered, in addition to lost wages caused by the pregnancy, delivery, or rehabilitation following the birth. Finally, damages for the mother's emotional distress resulting from the actual or anticipated physical pain and suffering associated with the pregnancy and delivery should be compensable.

In cases where a doctor negligently has failed to detect a pregnancy that the mother would have terminated had she been given proper advice, an offset naturally would have to be made for the benefits to the mother for not undergoing an abortion. There are instances where the decision about whether to abort or



whether to place the child for adoption can cause the parents great mental trauma. There is no good reason why parents cannot also make a claim for the emotional distress they suffer in having to pursue these actions. Any mental anguish that is caused by the decision to adopt or abort should be considered as part of the damages.

## 2. Cases Involving the Birth of Unhealthy Children

All of the preceding considerations regarding healthy children naturally should apply to those children made to experience life with the added complication of a disability. Any other result effectively would proclaim that the lives of handicapped children are immediately considered less valuable by courts of law. In these situations, it is neither easier nor more desirable to evaluate the respective benefits and burdens of a child's life than in the previous section, unless the law shamelessly declared that a presumption existed that the burden of a handicapped child always outweighed its benefits. To do so would be to overlook completely the vast contribution that handicapped children provide to their families and to society as a whole. The same policy considerations are applicable in cases involving the birth of children suffering from disabilities including the possibility of fraudulent claims, the unreasonable burden of the costs upon the medical profession, and the ability of any set of parents to place their child for adoption.

In determining whether parents should be able to recover for the "wrong" that they have "suffered," there should be no distinction between the birth of a healthy and an unhealthy child. The basis for a claim following a negligently performed vasectomy or abortion is the same whether the outcome is a healthy child or a child who suffers particular disabilities. In order to establish tort liability, the central issue is whether the negligent act should give rise to a claim. Therefore, if duty, breach, injury, and damage considerations rule out the possibility of a cause of action in circumstances where a physician has negligently performed a sterilization or an abortion, the fact that a child is born healthy as opposed to unhealthy, is irrelevant. The claim arises, if at all, on the basis of the negligent *act*, not on the basis of the *result* of that act.

The majority of "wrongful birth" cases, however, do not arise in situations where handicapped children are born as a result of a negligently performed medical operation. It is far more common

to base these claims on the doctor's failure to diagnose a medical condition or to detect a genetic defect, which led the parents to give birth to a child suffering from disabilities. Unlike the trend established by English and American courts, there is an additional and stronger reason to deny the parents a claim in these circumstances.

Critics of wrongful life actions by the child, on the basis that it devalues the lives of disabled persons, rely on an excellent rationale for denying a cause of action, but apply it to precisely the wrong situation. It is not denigrating to allow disabled persons to claim necessary financial support to help them enjoy their lives to the greatest extent. There can be no greater insult to these individuals than to allow other members of society to come to court and walk away with compensatory damages for the "injury" they sustained in giving birth to one who they view as less "valuable" than themselves.

It was argued in the first part of this section that the courts in England and the United States have been more inclined to award damages in cases of children with defects, holding that the "harm" to the parents in such cases is more definite and certain. Finding injury to the parents whose child was born with defects is foreseen to such a degree that many courts begin from the premise that "the real question as to injury, therefore, is not the existence of the injury, but the extent of that injury."<sup>389</sup> The concept of parents attempting to prove that their child is so disabled that she constitutes an injury to them is as intolerable as it is offensive. It cannot represent anything other than a value-judgment on behalf of society that the lives of the handicapped are worth considerably less than those of a "normal" person. This is particularly true when giving birth to a handicapped child in itself merits legal compensation while the birth of a healthy child, in similar circumstances, does not.

The labels of the actions alone reflect the value-judgment by society in allowing greater compensation to parents of disabled children than to those of healthy ones. If the result of a medical procedure is the birth of a healthy baby, it is merely the "pregnancy" that is "wrongful." If the child is less than perfect according to society's standard, it is the "birth" itself that is "wrongful."

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389. *Harbeson v. Parke-Davis*, 656 P.2d 483, 492 (Wash. 1983).

Courts and commentators, alike, do not appear to question their use of "wrongful pregnancy" and "wrongful birth" to distinguish the actions, despite their explicit reflection of societal prejudices which lie behind the claims.<sup>390</sup> *Ramey v. Fassoulas*<sup>391</sup> is one of many cases that do not allow recovery for child-rearing expenses because the parents gave birth to a healthy child. The court makes an exception and allows recovery in situations where the child was born with physical or mental defects. One must certainly agree that these decisions are "contrary to fundamental common sense."<sup>392</sup>

If it is legal principle to deny recovery for child-rearing costs in cases where the negligence of a doctor led to the birth of an unwanted child, there is no logical ground for changing this principle where the child is disabled. In each case the doctor has caused only the birth, not the handicap. It does not make sense, therefore, to hold the physician liable for child-rearing costs in the latter situation while refusing to do so in the former. The doctor could not have done anything to remedy the condition of the child in a "wrongful birth" case. The extent of the defendant's negligence is solely for causing the birth itself. The parents of a child born with defects, therefore, are in no different position than parents of a healthy child. The decision to treat similar cases differently cannot be one based upon legal principle or reasoning. Thus, it is necessary to analyze the darker forces that lie behind the inconsistent results.

Every action that denies recovery to parents of a healthy child, while granting it to those of a disabled child, in cases based upon identical facts, "must imply that handicapped people are to be valued less than are healthy ones, which is deeply insulting to handicapped people, and to those who care for them."<sup>393</sup> Unlike an action for wrongful life, which is made on behalf of the child for its own needs because of its disabilities, in "wrongful birth" cases, it is a third party, usually the parents, who sue for injury to themselves caused by giving birth to a child with defects. To emphasize the point, some courts have gone so far as to compen-

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390. For an example of such a classification, see *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985). See also KIONKA, *supra* note 259.

391. 414 So. 2d 198 (Fla. Dist. Ct. App. 1982).

392. David D. Wilmoth, *Wrongful Life and Wrongful Birth Causes of Action - Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 640 (1980).

393. Weir, *supra*, note 124, at 227.

sate parents for the mental anguish that *they* suffered from the delivery of the "abnormal" child.

Allowing a person who suffers from disabilities to bring her own claim for necessities to ease her condition is very different from allowing others to assess her relative worth. Once other people are allowed to claim that they were injured by the existence of a handicapped person within their family, or even within society, one is creating the very "Hitlerian elimination of the unfit" that is wrongfully condemned by critics of the proposed action for wrongful life. Once others are allowed to claim that they were harmed by the existence of the handicapped, society is making nothing more than a denigrating statement about the relative worthlessness of such lives. It is dangerous to allow society to bring a claim on its own behalf, rather than on behalf of the child, thereby granting it the theoretical power of life or death over those who it chooses not to consider to be "normal."

The majority of wrongful birth cases arise when a doctor has failed to diagnose some form of genetic condition, consequently resulting in the birth of an unhealthy child. The parents are not necessarily stating that they did not want that child. In fact, a child is exactly what they wanted. What they are saying, however, is that they did not want a disabled child. Therefore, the basis for the claim is not the child itself, but the fact that the child is disabled. Parents who bring claims in such circumstances are clearly making a value judgment that the live of a handicapped child. At worst, those who bring an action for wrongful birth are implying that a handicapped child's life is worthless to such an extent that giving birth to the child constitutes a sufficiently significant injury that it should be legally compensable. A claim such as this is not only highly offensive to any legal system that is supposed to exercise a modicum of morality, it extremely denigrates handicapped persons within society who are entitled to the same fundamental rights and freedoms that belong to every individual.

Any duty that a doctor owes to parents in informing them of genetic deficiencies is one that must be owed to them on behalf of the child. Anything short of this allows a third party to decide whether the lives of handicapped persons are worth preserving. No civilized society should make decisions about the relative worth of the lives of its individual members. Actions like ones for

wrongful birth that lead to the vilification of handicapped persons should be denied on policy grounds alone.

### III. CONCLUSION

Naturally, there is a vast difference in the legal system and the legal culture that exists between the United States and England.

It is readily apparent, however, that the courses of action available to people who consider themselves injured as a result of the birth of an unanticipated child, caused by the negligence of another, are virtually identical in both countries. With the notable exception of a small minority of states, the legal solution in both countries appears to be that a child cannot bring a claim in her own right, whereas parents can recover, often for the child's entire upbringing. Examining the approaches of two distinct, yet similar, cultures to the same issue is not useful simply because one merely discovers the answers that are provided. Far more revealing is an analysis of the methods that are used to achieve their goal. The comparative value of this study has been to highlight the errors that are clearly apparent in the reasoning used, regardless of the cultural background. The conclusions outlined in this Article are equally applicable in both societies. The nature and importance of the problem to be addressed can clearly transcend cultural barriers. Each society needs to reassess the justice of the claim. In doing so, each needs to formulate a new approach to a serious problem which traditionally has not been subject to the critical analysis which it deserves.

Actions for wrongful life, wrongful pregnancy, and wrongful birth have been settled on a piecemeal basis, leading to inconsistent and unjust results. This Article has attempted to return to basics by examining all three actions together so as to delineate the approach which the law should take regarding difficult legal, ethical, and social problems. By simply highlighting the essential features of each claim, the suggestions contained herein provide solutions that better fulfill the needs of both legal principle and public policy.

A child that is born suffering from a crippling and debilitating disease or handicap, as the result of the negligence of another, needs support. Because of the negligence of a third party, she was born, is alive, and suffers. The negligence led to the present excruciating pain suffered by the innocent infant. The function of the law is not to immunize negligent physicians from liability no

matter how culpable their negligent act or how significant the suffering is that they have caused. The role of the law in these circumstances is to provide the unfortunate victim with a cause of action for wrongful life. This claim simply helps those children who suffer from the severest and most distressing forms of disability to bear the burden of their unnecessary affliction. It provides them with essential relief from their condition. Far from devaluing their existence, a claim for wrongful life recognizes the inherent worth of the lives of those suffering from disabilities. The cause of action states that a handicapped person has the same right to receive the full measure of legal and non-legal rights and privileges which are accorded to all members of society. An action provides them with nothing less than justice, compassion and the necessary support. It has been shown that the action clearly fits into the tort elements of duty, breach, causation and injury to the plaintiff. Frivolous claims would be difficult to develop because the disabilities must be extremely severe in order to show that the burdens of the condition outweigh the benefits of being alive. When the requirements for the action have been met, however, social justice demands that a child should receive the support of the law. An award to the child's parents in these circumstances does not take into account the child's own pain and suffering, the factor that forms the basis of the action. Moreover, it provides no guarantee of continued support for the child once she reaches majority and all parental responsibilities cease.

Parents should not be allowed to recover for the rearing costs of either a healthy or a handicapped child. A child should not be declared so unwanted in a court of law that the dissatisfaction felt by his parents far outweighs the joys that he provides. Parents should not be allowed to recover greater damages by expanding the degree to which they can prove the intolerable burden caused to them by their child. Parents have not suffered legal injury if they freely decide to keep and nurture the child themselves. The situation is not different when dealing with children who suffer from disabilities, unless the law is clearly willing to declare that the lives of the handicapped are worthless, a declaration that should make any civilized society writhe with shame.

The medical profession should be liable for the extent to which its negligent acts have led to injuries, but no further. This Article attempts to strike a fair balance between the needs of those members of society who are injured by medical malpractice

and the public interest in having a workable system of health care that is able to provide for the primary treatment of its patients. To compensate victims or the harm which they have suffered is as essential as ensuring that no unreasonably excessive burden is placed upon the medical profession, disproportionate to its culpability.

Therefore, where a doctor has negligently failed to diagnose a genetic defect or the effects of a disease and this negligence leads to the birth of a child who suffers from disabilities, the child should be able to bring her own claim for wrongful life if her disabilities are so severe as to outweigh the benefits of being alive. She should be entitled to compensation for her pain and suffering, as well as any extraordinary medical expenses which are necessitated because of her condition. Her parents, however, should have no legal action, as it would be highly denigrating to their child and to the handicapped population in general.

In situations where a child is born as a result of a failed medical procedure, such as a negligently performed sterilization or abortion, the child should only have a claim where the burden of being alive outweighs the benefit. If a child is either healthy or suffers from only a minor defect, he should not be able to successfully bring a cause of action. Should the disability be acute, however, he should be entitled to bring a wrongful life action.

Parents are entitled to a limited form of recovery in wrongful pregnancy and wrongful birth situations. They are entitled to bring an action for the injury they suffered as a direct result of the negligently performed procedure, such as damages for their pain and suffering and financial losses associated with the pregnancy, delivery and immediate effects of the childbirth itself. They should be denied any compensation, however, for the costs of the maintenance of their child. The benefits of having given birth to a child outweigh the burdens of any responsibilities that naturally follow as a result. This is true whether the child is healthy or handicapped, supported by the same principle, discussed above, that society must not differentiate and thereby necessarily devalue the lives of the handicapped.

The actions discussed balance the needs of the plaintiff against the wrongdoing of the defendant. In actions for wrongful life the physician is held liable, but only to the extent of the harm he caused. By requiring a disabled child to show that her disabilities outweigh the burdens of being alive, the physician is being held

liable for the child's wrongful life that he negligently caused. In cases where children claim they suffer in some way, however, but not to such a degree that their injuries outweigh the benefits of their lives, should be rejected. The negligent act of the doctor did not cause the injury itself, which would have arisen in any event through a genetic defect or a crippling disease. The action ensures that a doctor is held liable for the harm only to the extent it was caused by his negligence. A doctor should be liable for a wrongful *life*, but not for an injury that would have arisen without any negligence on his part.

In actions for wrongful pregnancy and wrongful birth, the doctor is held liable for the extent of the injuries that his negligence actually caused to the parents, and nothing further. For this reason, parents can bring an action to recover for the costs of the failed procedure itself but not for child-rearing costs. They should not be able to enjoy all the benefits that their child brings to them, while placing all financial burdens on the medical profession. If a child is born suffering from a severe disability, the parents should not be given an action for their own disappointment about having given birth to a child who does not meet their opinion of a "perfect" child. Denying this action to the parents, however, does not leave the child without legal redress. The child can bring a claim for her own pain and suffering and extraordinary costs on the basis of a wrongful life action previously discussed.

These solutions ensure equity and compassion for all parties in each situation. It is not unreasonable for society to expect that its legal system will provide fairness, consistency, and true justice. Through its suggestions, this Article hopes to have taken a small step to promote that noble goal.



