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Birth Related Torts: Can They Fit the Malpractice Mold

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Birth Related Torts: Can They Fit the Malpractice Mold?

Shelton v. Saint Anthony's Medical Center[1]

The growing controversy over birth related rights, coupled with great medical advances in pre-natal health care, has caused many plaintiffs to seek recovery for birth related torts. A recent Missouri Supreme Court case[2] allowed recovery for emotional distress in a birth-related malpractice action. The case is noteworthy because Missouri has both case law[3] and a statute[4] proscribing so-called "wrongful birth" claims.

I. FACTS AND HOLDING

The plaintiff in *Shelton v. Saint Anthony's Medical Center* gave birth to a deformed child. She instituted a malpractice claim against the treating physician and the independent radiology lab where she underwent tests.[5]

On May 7, 1986 and September 11, 1986, the plaintiff, who was then pregnant, underwent ultrasound tests at the offices of defendant South County Radiologists, Inc. The defendants failed to accurately interpret the test results. As a result, they did not inform plaintiff that her fetus had congenital deformities and was developing without arms.[6] Plaintiff alleged that the defendants failed to advise her of her options as to termination of her pregnancy and that as a result of the negligence of the defendants, she was denied her right to choose whether or not to terminate her pregnancy.[7]

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1. 781 S.W.2d 48 (Mo. 1989).

2. *Id.*

3. *See* Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988), *cert. denied*, 488 U.S. 893 (1988).

4. *See* MO. REV. STAT. § 188.130.2 (1986).

5. *Id.*

6. *Shelton*, 781 S.W.2d at 48.

7. *Id.* at 48-49. Plaintiff alleged that as a result of being denied the right to choose to terminate her pregnancy, she incurred extraordinary medical expenses of approximately $25,000 for medical care, treatment, special education, nursing care, physical therapy, medication, special equipment and artificial limbs. Plaintiff also alleged that she would incur similar expenses for the life of her daughter, loss of consortium, loss of the right to lead a normal life, and that she has suffered and will continue to suffer from emotional distress. *Id.* at 49.

Defendants moved to dismiss on grounds that the suit was barred by the Missouri Supreme Court's decision in *Wilson v. Kuenzi*[8] and by Missouri Revised Statute section 188.130.2. The statute prohibits claims where the plaintiff alleges that but for the defendant's negligence, the plaintiff would have chosen to abort the pregnancy.[9] The trial court granted the motion to dismiss[10] and the Court of Appeals affirmed.[11] The Missouri Supreme Court granted transfer and determined the cause as an original appeal.[12] The supreme court reversed and remanded the cause for reinstatement of the petition.[13] The court held that since the mental distress the mother suffered as a result of learning about her child's defect at birth instead of before birth was attributable to the defendants regardless of whether plaintiff would have had an abortion, the petition stated a valid malpractice claim and was not prohibited by Missouri statute or the *Wilson* decision.[14]

II. LEGAL HISTORY

A. Brief Definition of Birth Related Torts

Birth related torts have developed as a specialized branch of medical malpractice. In general, courts recognize three distinct causes of action: wrongful birth, wrongful life, and wrongful conception (also called wrongful pregnancy).[15] All three actions differ from fetal injury claims because the provider did not directly injure the fetus.[16]

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8. 751 S.W.2d 741 (Mo. 1988), *cert. denied*, 488 U.S. 893 (1988).

9. MO. REV. STAT. § 188.130.2 (1986). The statute provides that "[n]o person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted." *Id.*

10. *Shelton*, 781 S.W.2d at 49.

11. Shelton v. Saint Anthony's Medical Center, No. 55030 (Mo. Ct. App. Jan. 24, 1989). The court affirmed the dismissal in accordance with Mo. R. Civ. P. 84.16(b) without an extended written opinion.

12. Article V, § 10 of the Missouri Constitution allows for the transfer of cases from courts of appeals to the supreme court "because of the general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law, or pursuant to supreme court rule." MO. CONST. art. V, § 10.

13. *Shelton*, 781 S.W.2d at 49.

14. *Id.* at 50.

15. Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2017 n.4. (1987).

16. RESTATEMENT (SECOND) OF TORTS § 869 (1977) requires that the wrongdoer tortiously causes harm to an unborn child for the tortfeasor to be subject to inability for fetal injury.

In a wrongful birth suit, the parents of a deformed child sue a health care provider for failing to diagnose some deformity in the fetus[17] or failing to inform the parents of risks threatening the fetus.[18] The premise is that the provider's negligence deprived the parents of the choice between carrying the pregnancy to term or obtaining an abortion.[19] Damages allowed typically include the expenses of the ordinary and extraordinary medical care and education of the deformed child, the expenses and pain and suffering of the mother during pregnancy, and the emotional distress of the parents.[20] Currently, eighteen states recognize wrongful birth claims to some extent.[21]

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17. Usually these cases involve genetic defects for which the provider either tests for but fails to diagnose, *see, e.g.,* Nelson v. Krusen, 678 S.W.2d 918, 919 (Tex. 1984) (physician negligently advised plaintiff that she was not a carrier of muscular dystrophy; plaintiff subsequently had child affected with the disease), or fails to test at the outset, *see, e.g.,* Blake v. Cruz, 108 Idaho 253, 254, 698 P.2d 315, 316 (1984) (physician failed to test for rubella upon patient's request; child was born suffering from congenital defects resulting from exposure to rubella in the womb).

18. Common cases are the provider's failure to test for Down's Syndrome through amniocentesis when the mother is more than thirty-five-years-old or has a family history of the disease. *See* Phillips v. United States, 575 F. Supp. 1309 (D. S.C. 1983) (child born with Down's Syndrome to mother who had positive family history of Down's Syndrome; no amniocentesis done); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988) (en banc) (child born with Down's Syndrome to thirty-seven-year-old mother; no amniocentesis done). Cases also include situations in which provider fails to inform the mother about the effects of rubella during the early stages of pregnancy. *See* Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984) (child born with rubella syndrome which caused eye lesions, heart disease and auditory defects because doctor failed to diagnose mother's german measles).

19. *See* Note, *supra* note 15; Note, *Legislative Prohibition of Wrongful Birth Actions*, 44 WASH. & LEE L. REV. 1331 (1987).

20. Note, *supra* note 15, at 2017 n.4.

21. *See* Gallagher v. Duke Univ., 852 F.2d 773 (4th Cir. 1988) (North Carolina law); Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (Alabama law); Haymon v. Wilkerson, 535 A.2d 880 (D.C. 1987); Moores v. Lucas, 405 So.2d 1022 (Fla. Dist. Ct. App. 1981); Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Siemieniec v. Lutheran Gen. Hosp., 117 Ill. 2d 230, 512 N.E. 2d. 691 (1987); Pitre v. Opelousas General Hosp., 517 So.2d 1019 (La. App. 1987) (parents still could recover for expenses and for pain and suffering), *aff'd in part, rev'd in part,* 530 So.2d 1151 (La. 1988); Proffit v. Bartolo, 162 Mich. App. 35, 412 N.W.2d 232 (1987); Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983); James G. v. Caserta, 332 S.E.2d 872 (W. Va.

A wrongful life cause of action is brought by or for the deformed[22] child against the health care provider. The child also alleges that but for the provider's negligence, the child would not have been born in the first place to suffer the pain of the deformities.[23] Only three jurisdictions currently recognize this claim.[24] The courts usually deny the claim as a result of the difficulty of ascertaining damages because the trier of fact, in determining damages, would have to measure monetarily the difference between the child's existence in an impaired state and non-existence. Tort damages are compensatory. They seek to put the plaintiff in the same state he or she would have been in but for the defendant's negligence.[25] The New York Court of Appeals stated the dilemma in *Becker v. Schwartz*:

> Thus, the damages recoverable on behalf of an infant for wrongful life are limited to that which is necessary to restore the infant to the position he or she would have occupied were it not for the failure of the defendant to render advice to the infant's parents in a nonnegligent manner. . . . Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make.[26]

1985); Dumer v. Saint Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975).

22. Healthy children have also sought recovery on a wrongful life theory. Courts are reluctant to allow the claim. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (illegitimate child; wrongful life action denied); Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App. 1982) (child of large, poor family; court held parents had a wrongful conception case, but child had no cause for wrongful life). This Note will assume that the child was born with a deformity when referring to a wrongful life claim.

23. Note, *supra* note 15, at 2017 n.4.

24. Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

25. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON TORTS 6 (4th ed. 1984).

26. 46 N.Y.2d 401, 411-12, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978). *See also* Goldberg v. Ruskin, 113 Ill. 2d 482, 489, 499 N.E.2d 406, 409 (1986); Eisbrenner v. Stanley, 106 Mich. App. 357, 363-64, 308 N.W.2d 209, 212 (1981); Gleitman v. Cosgrove, 49 N.J. 22, 63, 227 A.2d 689, 711 (1967).

This characterization of the damages, however, may not be the correct one. From the standpoint of fairness, the child should be compensated in some way for all of the pain and suffering he or she would endure. Some compensation is better than none at all; saying that damages are difficult to measure is not an excuse for failing to award them.

Another reason some courts do not allow wrongful life claims is that being born cannot constitute an injury.[27] This reasoning goes hand in hand with the inability to calculate damages, because if the court finds that being born is indeed an injury, the trier of fact must calculate damages. In a wrongful birth claim, by comparison, the child's birth is a legally cognizable injury,[28] but the injury is to the parents, not the child; thus, damages are calculable.[29]

A wrongful conception/pregnancy cause of action arises when the mother has a healthy child after a health care provider fails to successfully perform sterilization on either parent,[30] the health-care provider fails to successfully perform an abortion,[31] or the health-care provider prescribes a birth control device that fails to prevent conception.[32] The trend among state courts is to allow a claim for wrongful conception/pregnancy.[33] In most cases, the courts allow recovery for medical expenses, pain and suffering during the pregnancy, and loss of consortium.[34] In some cases, the courts direct that any damages awarded be offset by the benefits of having a child.[35]

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27. *See* Liniger v. Eisenbaum, 764 P.2d 1202, 1210 (Colo. 1988) ("[A] person's existence, however handicapped it may be, does not constitute a legally cognizable injury relative to non-existence.")

28. *See Shelton*, 781 S.W.2d at 49.

29. See *Liniger*, 764 P.2d at 1207 n.8 for a discussion of damages awards in wrongful birth cases.

30. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (plaintiff alleged physician negligently performed an operation removing a portion of the fallopian tubes; plaintiff later conceived a child).

31. *See* Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986) (plaintiffs alleged physician negligently performed unsuccessful abortion).

32. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (plaintiff alleged that pharmacist negligently filled oral contraceptive prescription with tranquilizers).

33. *See* Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Coleman v. Garrison, 349 A.2d. 8 (Del. 1975); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985).

34. *See supra* notes 30-33 and cases cited therein.

35. *See Sherlock*, 260 N.W.2d at 176; *Troppi*, 31 Mich. App. at 254-55, 187 N.W.2d at 518. *See also* RESTATEMENT (SECOND) OF TORTS § 920 (1977) which states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so 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.

Some courts that do allow the parents to recover damages for emotional distress in wrongful birth and wrongful conception/pregnancy cases also impose the special benefits rule of section 920 of the Restatement (Second) of Torts.[36] Thus, any damages the parents recover must by offset by the benefit of having a child, even if the child is deformed.[37] Some courts have criticized this application of the special benefits rule, arguing that section 920 applies only when the injury and benefits relate to the same interest; the emotional benefits of rearing a child cannot offset the economic costs of the child's deformities.[38]

B. Missouri Cases

The Missouri courts have considered several cases dealing with birth related torts. These cases find their basis in the doctrine of informed consent, articulated in *Aiken v. Clary*.[39] In that case the court noted that the basic argument in malpractice cases is that the doctor failed to adhere to a reasonable standard of medical care and as a result the services performed by the doctor were negligent.[40] The court noted that the doctor could be negligent not only where the alleged malpractice consists of improper care and treatment, but also where "it is based, as here, on an alleged failure to inform the patient sufficiently to enable him to make a judgment and give an informed consent if he concludes to accept the recommended treatment."[41]

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36. See cases cited in *supra* note 35.

37. *See* Phillips v. United States, 575 F. Supp. 1309, 1319-20 (D. S.C. 1983) (in wrongful birth case, only the damages attributable to emotional distress were reduced by fifty percent; the benefits rule should not improperly restrict the scope of permissible damages); University of Ariz. v. Superior Ct., 136 Ariz. 579, 584, 667 P.2d 1294, 1299 (1983) (in a wrongful pregnancy action, trier of fact may consider both pecuniary and nonpecuniary elements of damages pertaining to rearing of the child, but must also consider both pecuniary and nonpecuniary benefits which the parents will receive from their relationship with the child as an offset); *see also Liniger*, 764 P.2d at 1206 n.7 (discusses use of the special benefit rule in wrongful birth and wrongful life cases); Blake v. Cruz, 108 Idaho 253, 258-59, 698 P.2d 315, 320-21 (1984) (in a wrongful birth case, damages for expense of supporting the child beyond the age of majority were allowed; damages for emotional injury were balanced against the benefit of having the child).

38. *See* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 274, 425 N.E.2d 968, 970 (1981) ("[R]ewards of parenthood should not be allowed in mitigation of rearing costs because 'these rewards are emotional in nature and, great though they may be, do nothing whatever to benefit the plaintiff's injured financial interest.'").

39. 396 S.W.2d 668 (Mo. 1965)

40. *Id.* at 673.

41. *Id.*

The first Missouri case directly dealing with wrongful birth and wrongful life was *Miller v. Duhart*.[42] In *Miller*, the plaintiffs sought damages for the wrongful life or wrongful birth of a healthy child born after the allegedly negligent performance of a bilateral tubal ligation.[43] The court held that the cause of action was really one of wrongful conception.[44] An action for wrongful conception, said the court, is merely a descriptive name for a form of malpractice, and malpractice claims have strong support in the law.[45] Wrongful conception, as a malpractice claim, gives rise to damages that are measurable and compensatory such as prenatal and postnatal medical expenses, the mother's pain and suffering during pregnancy and delivery, loss of consortium, and the cost of a second sterilization procedure.[46]

The court noted in discussing the alleged wrongful birth claim that the child was born healthy. The court gave three reasons for not allowing the wrongful life claim. First, recognizing the wrongful life claim would require a finding that a child has a right not to be born. Such a finding would require the judiciary to decide when a life is wrongful. Second, it is difficult to assess damages in a wrongful life case. The court would have to measure the difference between existence and non-existence, and the value of life versus non-life is impossible to quantify. Third, the child has no cognizable injury, because the child has no right to be born or not to be born into a family which planned for or wanted the child.[47]

The wrongful birth claim was brought by the child's siblings. The court said there was no basis in law for an action by siblings for the birth of an additional child to their family.[48] As a result of this analysis, only the wrongful conception claim stood.[49]

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42. 637 S.W.2d 183 (Mo. Ct. App. 1982).

43. *Id.* at 184.

44. *Id.* at 188. The court concluded that any injury the parents suffered was suffered at the time of conception. The court noted that "causes of action involving the alleged failure of a surgeon to competently perform a sterilization procedure are more appropriately termed 'wrongful conception.'" *Id.*

45. *Id.* This characterization is important because in *Shelton*, the court allowed the action because the plaintiff plead the injuries and damages in malpractice terms. It is unclear to the author how wrongful conception is considered malpractice and wrongful birth is not. In both cases, there is negligence on the part of the health care provider which causes an unwanted child to be born.

46. *Id.* In Wilson v. Kuenzi, 751 S.W.2d 741, 742 (Mo. 1988) (en banc), the Missouri Supreme Court allowed *Miller* to stand.

47. *Miller*, 637 S.W.2d at 186-87.

48. *Id.* at 187.

49. Under the facts of the case, however, the suit was barred by the two-year statute of limitations for malpractice actions. MO. REV. STAT. § 516.105 (1986).

The Missouri statute barring wrongful birth and wrongful life suits became effective on August 13, 1986.[50] A wrongful birth case, *Rolf v. Youngblood*,[51] was heard by the court of appeals in 1988. The court flatly denied the cause of action, referring to the statute.[52] The plaintiffs also challenged the constitutionality of the statute. The court noted that it had no jurisdiction in a matter challenging the validity of a Missouri statute. Also, since no common law action for wrongful birth ever existed in Missouri, there can be no abridgement of the cause of action by the statute; thus, the court never reached the constitutionality of the statute.[53]

In *Wilson v. Keunzi*, [54] the Missouri Supreme Court held that even though section 188.130 did not have retroactive application, the wrongful birth and wrongful life claims would still be barred.[55] In *Wilson*, the mother gave birth to a child with Down's Syndrome. The mother was thirty-six years old at the time of conception.

The defendant doctor neither told the parents about the chances of the baby being born with a defect due to the mother's age nor about having an amniocentesis test to detect any defects.[56] The parents brought a wrongful birth action, alleging "the mother was . . . denied the ability to make an informed decision to abort the pregnancy, which she alleges she would have done, had she been advised of the fact that the fetus was afflicted with the disorder."[57] The minor child also brought a wrongful life action.[58] The Missouri statute barring wrongful birth and wrongful life claims became effective in 1986, and the court held that the legislature did not intend for it to have retroactive application.[59] Thus, the court had to decide whether a common law action for wrongful birth or wrongful life existed in Missouri before the statute.[60]

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50. See *supra* note 9 for text of the statute.

51. 753 S.W.2d 24 (Mo. Ct. App. 1988).

52. *Id.* at 25.

53. *Id.*

54. 751 S.W.2d 741 (Mo. 1988).

55. *Id.* at 746. See *infra* notes 82-91 and accompanying text for further discussion of *Wilson*.

56. *Wilson*, 751 S.W.2d at 742. The court noted that the risk of Down's Syndrome is approximately 1 in 1000 for women in their twenties, but that the risk increases to approximately 1 in 300 for a women at age thirty-six. The court noted further that the defect can be detected through the amniocentesis test, which is administered during or after the fourteenth week of pregnancy. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* The child was born on June 23, 1983. *Id.* at 741.

The supreme court upheld the dismissal of the wrongful life claim of the child, "shar[ing] the view of the overwhelming majority of courts."[61] In its analysis of the parents' wrongful birth claim, the court relied heavily on the New York decision in *Becker v. Schwartz*.[62] The court ultimately found that the wrongful birth action did not exist in Missouri prior to the enactment of the statute. Judge Welliver, writing for the majority, was concerned that a woman's testimony that she would have chosen an abortion had she known about the defect is not verifiable.[63] Judge Blackmar, in his concurring opinion, pointed out that the only damage the plaintiff claimed was that had the plaintiff known about the defect, she would have had an abortion. Blackmar agreed with the majority that the court "should not award damages of the kind claimed."[64] Thus, Judges Welliver and Blackmar erected two roadblocks to recovery in the *Wilson* case: first, proof of the harm must be verifiable and not self-serving, and second, the recovery of damages must not violate Missouri's policy against reproductive freedom. The court set the stage for *Shelton*, where the plaintiffs managed to avoid these roadblocks.[65]

Finally, the *Wilson* court stated that since Missouri does not recognize a wrongful life or wrongful birth cause of action at common law, there was no need to address the constitutionality of section 188.130.[66]

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61. *Id.* at 743.

62. 46 N.Y.2d 401, 417-22, 386 N.E.2d 807, 816-19, 413 N.Y.S.2d 895, 904-07 (1978). "The heart of the problem in these cases is that the physician cannot be said to have caused the defect." *Id.* See *supra* note 26 and accompanying text for further discussion of Becker.

63. *Wilson*, 751 S.W.2d at 745-46. "In the wrongful birth action, the right to recovery is based solely on the woman testifying, long after the fact and when it is in her financial interest to do so, that she would have chosen to abort if the physician had but told her of the [deformity]." *Id.*

64. *Id.* at 746 (Blackmar, J., concurring). It appears as if Judge Blackmar's main concern is upholding Missouri's strong policy against abortion.

65. *See infra* notes 82-103 and accompanying text.

66. *Wilson*, 751 S.W.2d at 746. The North Carolina Supreme Court also has found wrongful birth actions to be proscribed under common law negligence theories. *See* Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986).

C. *Impact of Statutes Barring Birth Related Claims*

Six states, including Missouri,[67] have enacted statutes barring both wrongful birth and wrongful life claims.[68] One commentator argues that these statutes are the result of lobbying efforts by anti-abortion groups.[69] Only one state, Maine, has enacted a statute specifically allowing wrongful birth claims.[70]

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67. MO. REV. STAT. § 188.130.1 (1986) provides in pertinent part, that "[n]o person shall maintain a cause of action or receive an award of damages on behalf of himself or herself based on the claim that but for the negligent conduct of another, he or she would have been aborted." See *supra* note 9 for the text of § 188.130.2.

68. *See* IDAHO CODE § 5-334 (1990); MINN. STAT. § 145.424 (1989); 42 PA. CONS. STAT. ANN. § 8305 (Purdon 1982 & Supp. 1990); S.D. CODIFIED LAWS ANN. §§ 21-55-1 to -55-4 (1987); UTAH CODE ANN. § 78-11-24 (1987). The Idaho statute is typical, stating, "A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted." IDAHO CODE § 5-334 (1990). Missouri's statute closely parallels those statutes cited above. *See supra* notes 9, 67.

69. Note, *supra* note 15, at 2018-19. It is unfortunate that politicians, succumbing to the pressure of special interest groups, have taken away a cause of action allowed in eighteen other states. They seem to forget that abortion is still a legal choice for women until the Supreme Court decides otherwise.

70. ME. REV. STAT. ANN. tit. 24, § 2931 (1990) provides:

> (1) Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.
>
> (2) Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.
>
> (3) Birth of an unhealthy child; damages limited. Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child.
>
> (4) Other causes of action. This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred or handicap, disease, defect or deficiency of an individual prior to birth would have been prevented,cured

The Minnesota statute[71] was the first statute to survive constitutional challenge. It was upheld by the Minnesota Supreme Court in *Hickman v. Group Health Plan*, Inc.[72] The court held that the due process and equal protection clauses of the Fourteenth Amendment did not apply because there was no state action.[73] The court further stated that even if there was sufficient state action, the statute did not violate *Roe v. Wade*.[74] To violate *Roe*, the state must impose a significant burden on a woman's right to an abortion.[75] Section 145.424 did not interfere with the mother's right to choose an abortion; the doctor and the patient were left free to choose whatever course of action they thought appropriate.[76] Finally, the court held that subdivision three of the statute,[77] which allows wrongful conception claims, did not violate the equal protection clause because no suspect classification was involved.[78]

Hickman was an early case where a wrongful birth statute received constitutional scrutiny. Missouri held in *Wilson v. Keunzi*[79] that wrongful birth and wrongful life claims did not exist at common law, even before the

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or ameliorated in a manner that preserved the health and life of the affected individual.

71. MINN. STAT. § 145.424 (1990) states:

Subdivision 1. Wrongful life action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but or the negligent conduct of another, a child would have been aborted.

Subd. 2. Wrongful life action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.

Subd. 3. Failure or refusal to prevent a live birth. Nothing in this section shall be construed to preclude a cause of action for intentional or negligent malpractice or any other action arising in tort based on the failure of a contraceptive method or sterilization procedure or on a claim that, but for the negligent conduct of another, tests or treatment would have been provided or would have made properly which would have made possible the prevention, cure or amelioration of any disease, defect, deficiency, or handicap. The failure or refusal of any person to perform or have an abortion shall not be a defense in any action, nor shall that failure or refusal be considered in awarding damages or in imposing a penalty in any action.

72. 396 N.W.2d 10, 13-15 (Minn. 1986).
73. *Id.* at 13.
74. 410 U.S. 113 (1973).
75. *See* Maher v. Roe, 432 U.S. 464 (1977).
76. *Hickman*, 396 N.W.2d at 14.
77. *See supra* note 71.
78. *Hickman*, 396 N.W.2d at 14.
79. *Wilson*, 751 S.W.2d 741.

statute was enacted. Thus, the *Wilson* court avoided constitutional scrutiny of the Missouri statute.[80] Commentators have noted, however, that similar statutes in other states that did allow common law actions would not survive constitutional scrutiny.[81] The passage of more statutes barring wrongful life and wrongful birth claims would significantly restrict plaintiffs' ability to recover for birth related torts; plaintiffs could only recover under the traditional confines of the malpractice claim.

III. THE DECISION IN *SHELTON V. SAINT ANTHONY'S MEDICAL CENTER*

In the instant case, the court found that the plaintiff's claim was not be precluded by the Missouri statute or by the decision in *Wilson v. Kuenzi.* The plaintiff in *Shelton* sought damages which could be separated from damages arising from the possibility that, but for the defendants' negligence, the child would have been aborted.[82] Also, the plaintiff claimed damages for mental distress. The court found, as a result of these two facts, that the harm to the plaintiff was attributable to the defendants regardless of whether the plaintiff would have had an abortion.[83]

The majority distinguished *Shelton* from *Wilson v. Kuenzi.* In *Wilson,* a plurality opinion[84] struck down a cause of action brought for wrongful birth. The court defined wrongful birth as an action "brought by one or both of the parents of a child born as a result of some form of negligence by the defendant."[85] The court noted that in *Wilson,* the only damage claimed was that the plaintiff would have aborted the pregnancy had an amniocentesis been performed indicating that her child had abnormalities.[86] The court refused to allow the recovery of damages for that claim; however, the court noted that the petition would have plead an adequate claim for medical malpractice if the

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80. *Id.* at 746. Note that the court allowed the petition in *Shelton* only insofar as it stated a normal malpractice claim.

81. *See* Note, *supra* note 15, at 2023-34 (arguing that the statutes violate due process and equal protection); Note, *supra* note 19, at 1351 (arguing that even though the statutes do not violate a woman's constitutional right of privacy under Roe v. Wade, wrongful birth and wrongful life actions should still be allowed).

82. *Shelton,* 781 S.W.2d 48, 50.

83. *Id.*

84. Judge Welliver wrote the opinion; Judges Blackmar, Robertson and Donnelly concurred in separate opinions. Judges Higgins, Billings and Rendlen dissented. *Wilson,* 751 S.W.2d at 746.

85. *Id.* at 743.

86. *Shelton,* 781 S.W.2d at 49.

element of damages had "adequately appeared."[87] Judge Blackmar switched to the majority in *Shelton* because the damages allowed were not related to abortion, his main concern in the *Wilson* case.[88] The three dissenters in *Wilson*, plus Blackmar's concurrence, comprise the majority in *Shelton*.

The *Wilson* court declined retroactive application of section 188.130.2, which became effective on Aug. 13, 1986.[89] In the instant case, since the statute became effective during the pregnancy of the plaintiff, the court had to determine first when the plaintiff's action accrued in order to determine whether the statute applied.[90] The court noted that a cause of action accrues at the time the plaintiff has a present right to maintain an action.[91] The court found that in this case, the harm did not exist until the child was born; thus, the plaintiff could not institute suit until her child was born. Birth was the point of reference. Since the statute was in effect at the time of birth, any part of the plaintiff's claim which fell within the statute's provisions would be barred.[92]

The court next examined the extent to which the statute served as a bar to the plaintiff's claim. The court noted that in ruling on a motion to dismiss, the plaintiff's petition must be liberally construed.[93] The court held that the plaintiff's petition stated a viable malpractice claim and should be reinstated to the extent that it plead malpractice.[94] The claim fell within the rule of *Aiken v. Clary*,[95] noted by Judge Higgins in his dissent to *Wilson*: "a doctor who fails to adhere to the standard of reasonable care is guilty of malpractice whether consisting of improper care and treatment or of failure to inform sufficiently to enable the patient to make a judgment and give informed consent with respect to treatment."[96]

In the instant case, the petition alleged a breach of the duty to inform the patient sufficiently for her to make a judgment about her pregnancy. It also

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87. *Wilson*, 751 S.W.2d at 746.

88. *Id.* (Blackmar, J. concurring).

89. *Id.* at 742.

90. *Shelton*, 781 S.W.2d at 49.

91. *Id.* (quoting Brinkman v. Common School Dist. # 27, 238 S.W.2d 1, 5 (Mo. Ct. App. 1951)).

92. *Id.*

93. *Id* ("If the facts pleaded and the reasonable inferences to be drawn therefrom looked at most favorably from the plaintiff's standpoint show any ground upon which relief may be granted, the plaintiff has the right to proceed.") (quoting Laclede Gas Co. v. Hampton Speedway Co., 520 S.W.2d 625, 630 (Mo. Ct. App. 1975)).

94. *Id.* at 49.

95. 396 S.W.2d 668, 673 (Mo. 1965).

96. *Wilson*, 751 S.W.2d at 748.

alleged damages flowing from that breach.[97] The plaintiff alleged mental distress and counsel asserted at oral argument[98] that the mental distress resulted from the shock of finding out about the deformities of the child at birth without adequate information of the defects before birth. Had she known earlier, she could have obtained counseling on how to deal with the defects. These damages, according to the court, are readily separable from damages arising from the possibility that, but for the negligent conduct of the defendants, the child would have been aborted.[99] In the court's view, the mental distress resulting from the defendants' conduct is a harm attributable to the defendants' negligence regardless of whether plaintiff would have chosen to have an abortion. Thus, the pleading stated a malpractice claim outside the provisions of section 188.130 because the damages were distinguishable from those claimed in *Wilson v. Kuenzi*.[100] The court concluded that under a liberal construction of the petition, the claims of loss of consortium and loss of the right to lead a normal life may also be interpreted to allege damage occurring after the birth of the child, as a result of defendants' failure to inform. To that extent, the damages also would not be barred by either the statute or by *Wilson*.[101]

Three judges dissented in *Shelton*. In short, the dissent stated that the petition clearly claimed the prohibited argument that but for the negligence of the doctors, the plaintiff was denied the right to choose to abort her child.[102] The dissent noted that absent the implication that she would have chosen to abort, the plaintiff did not allege any damages had the ultrasound images been accurately read.[103] In short, the dissent held that the plaintiff's petition alleged a claim for damages "all of which flow from the allegation that, but for the negligent conduct of another, a child would have been aborted." Judge Covington, for the dissenters, voiced concern that the plaintiff first alleged at oral argument that she would have obtained counseling had she been advised of the child's deformities prior to birth. Her petition did not allege this

97. *Shelton*, 781 S.W.2d at 50.

98. The fact counsel asserted this type of mental distress only at oral argument and not in the petition is a fact that bothered the dissent. *See id.* at 51. (Covington, J., dissenting).

99. *Id.* at 50.

100. *Id.*

101. *Id.*

102. *Id.* at 51.

103. *Id.*

damage; it alleged only the abortion related damages.[104] As a result, the plaintiff's claim should be barred by the statute.[105]

IV. COMMENT

Shelton v. Saint Anthony's Medical Center is a significant case in Missouri because it allows some recovery for a birth related tort. The key difference between the damages allowed in *Shelton* and those prohibited by *Wilson v. Kuenzi* and by the statute is that in *Shelton*, the mother would have suffered the emotional distress whether or not she chose abortion. If Julia Shelton were adamantly opposed to abortion, she still would have suffered emotional distress at the time of birth when she discovered the defects. In *Wilson*, the damages alleged resulted from the fact that the mother was denied enough information to choose an abortion. If the mother in *Wilson* were adamantly opposed to abortion and chose to have the deformed child, she would have willingly borne the expenses and the emotional distress of the pregnancy and for the birth and education of the deformed child; the court would not have awarded her damages for these things. The mother in *Shelton* was not awarded damages for any of these things either. She only got a small piece of all the possible damages for the emotional distress she suffered because she was not informed of her child's defects in time to prepare mentally to deal with them. At this writing, Missouri is the only state to award this "piece" of the damages in a wrongful birth type case. Certainly, none of the other states with statutes similar to section 188.130.2 allow such a recovery.

The court in *Wilson* articulated two major policy reasons for not allowing the cause of action. Judge Welliver, writing for the majority in *Wilson*, had the self-serving proof problem as a major concern.[106] He felt a mother could always allege that she would have had an abortion if she had known of her child's defects; there is really no way to prove whether she would or would not have chosen abortion in that context. Judge Blackmar articulated the other important policy for barring the claim in his concurring opinion in *Wilson*. He was concerned that awarding damages for a wrongful birth claim would violate Missouri's policy against abortion.[107] The damages awarded in *Shelton* avoided these two pitfalls because the harm existed regardless of

104. *Id.* at 51-52 (Covington, J., dissenting). Perhaps Judge Covington would have allowed the damages awarded in *Shelton* if they had been pleaded properly in the petition.

105. *Id.* at 52.

106. *See Wilson*, 751 S.W.2d at 746.

107. *Id.*

whether the mother would have had an abortion. The damages did not hinge on the abortion decision.

The only problem with the damage award in *Shelton* was that the plaintiff asserted in her petition that if she had known about the defects, she would have had an abortion. Thus, even though the damages she actually received were not contingent on whether she would have had an abortion, all of the other damages she plead were contingent on her having an abortion. They would be disallowed by *Wilson* and the statute. The plaintiff was trying to have it both ways, and the dissent was justly concerned about this issue.[108] The ideal plaintiff here would be one who vehemently opposed abortion and would have had the child even if she had known about the defects. Such a plaintiff could then allege that the health care provider's negligent failure to accurately read the ultrasound and to inform her in advance of the defects was the cause of emotional distress. This claim would not run afoul of *Wilson* and the statute. It would be, in effect, a normal malpractice claim. What seems to have happened in *Shelton* was that the plaintiff, having lost all the damage claims resulting from denial of an informed choice of abortion, won back a small amount of damages on the emotional distress claim at oral argument.

Shelton allows damage recoveries for emotional distress suffered at the time of birth when the health care provider fails to diagnose defects in the child and fails to inform the mother about them. The next question would be whether there are any other non-abortion related damages in a wrongful birth action. Since the pregnant mother plans to have the child, she must point to harms suffered because she did not know about the defect until birth. Any damages for the pregnancy itself, such as pain and suffering, lost wages and loss of consortium, would not be recoverable, because any pregnant woman suffers these harms. One instance where damages could be recoverable under *Wilson* and the statute would be when the fetus could be treated *in utero*. There, failure to diagnose and treat the fetus would be a non-abortion related malpractice claim; however, this claim may accrue to the child, not the mother.

In *Shelton*, the court allowed recovery once the harm was phrased to avoid the two policy problems noted in *Wilson*. That case, coupled with the statute, prevents most of the recovery for the claim in a tort system whose purpose is to compensate plaintiffs for their injuries. Clearly, the plaintiff in *Shelton* was not fully compensated for all the expenses and harm she incurred as a result of the defendants' failure to accurately read the ultrasound. Thus, one must question whether the decision in *Shelton* furthers basic tort policies. One may conclude that it does not for several reasons.

First, the decision in *Shelton* represents an incorrect allocation of the burdens. The health care provider did not directly cause the harm to the child,

108. *See Shelton*, 781 S.W.2d at 51-52 (Covington, J., dissenting).

but her negligence caused harm to the family as a whole. The parents, on the other hand, were wholly innocent. In addition, health care providers are highly educated professionals. In allocating the expenses for raising and educating the deformed child, it is appropriate to hold the health care professional responsible when the parents were robbed of their decision to continue the pregnancy. This allocation is even more appropriate in cases where the parents are ignorant, indigent or simply have no health insurance. The health care provider was negligent, and the plaintiff should not have to bear the costs of this negligence.

Second, not allowing full recovery does nothing to deter future negligence or to increase safety. The basic problem here was that the health care provider did not accurately read the ultrasound. If the health care provider had to pay a large jury award or settlement, the provider would arguably exercise more care to avoid future litigation. The current law sends a signal that the health care provider may get away with providing negligent care because the plaintiff, in most birth related cases, will not be allowed to plead a case. If the plaintiff can plead her case within Missouri's policy confines, the possible damage award will be much smaller; one wonders whether the emotional distress claim allowed in *Shelton* would be large enough to justify litigating in the first place.

Finally, the decision in *Shelton* illustrates yet another example of politics invading the tort system and narrowing the remedies available to plaintiffs. The statute and case law preceding and including *Shelton* are another way in which Missouri politicians have successfully restricted reproductive freedoms without attacking the *Roe* decision head-on. This line of law may not be enough of a restriction to impair access to abortion under current Supreme Court analysis; however, it does demonstrate how reproductive rights may be narrowed by addressing other situations connected to the abortion procedure.

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