

4-1-1985

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### Recommended Citation

Mayo, Kevin L. (1985) "The Legal Recognition of Medical Malpractice Tort Claims Based upon Theories of Wrongful Birth and Wrongful Life," *North Carolina Central Law Review*: Vol. 15 : No. 2 , Article 5.  
Available at: <https://archives.law.nccu.edu/ncclr/vol15/iss2/5>

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## The Legal Recognition of Medical Malpractice Tort Claims Based Upon Theories of Wrongful Birth and Wrongful Life

### I. INTRODUCTION

The birth of a child is often referred to as a blessed event. There are, however, circumstances where a child's birth may give rise to a lawsuit against a physician<sup>1</sup> for negligence.<sup>2</sup> Such circumstances have fostered two new theories for the recovery of damages which have been applied recently in medical malpractice cases. The first cause of action, wrongful birth, arises when a physician's negligence results in pregnancy and the birth of an unwanted<sup>3</sup> child. The second cause of action, wrongful life, compensates for the birth of a retarded or severely deformed child, although the child was not necessarily unwanted.

The typical wrongful birth claim is brought by the parents<sup>4</sup> to recover damages for medical expenses, emotional pain and suffering, and child support.<sup>5</sup> The typical wrongful life claim<sup>6</sup> is brought by the parents, but

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1. For a listing of wrongful birth and wrongful life cases filed against persons other than physicians, see *infra* note 12.

2. Such claims have also given rise to contract-based actions. See, e.g., *Bishop v. Byrne*, 265 F. Supp. 460 (S.D. W. Va. 1967); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Clegg v. Chase*, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977); *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974); *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957).

While there are a few advantages in pursuing recovery on a contract theory as opposed to a tort theory, the contract-based action has a number of distinct disadvantages which appear to make the tort theory of recovery the plaintiff's most favorable option in the majority of cases. See Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J.L. & MED. 131, 145-48 (1978).

3. The term "unwanted" is used here to refer to "unplanned" children. Many parents feel they have a moral obligation to raise as best they can a child who was unwanted at conception. In most cases an emotional bond between parent and child develops early, even in cases where the child was unwanted at its conception. However, it is clear that no court can say as a matter of law that every mother seeking wrongful birth damages, wed or unwed, is required to abort or place the child up for adoption. See *Troppi v. Scarf*, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (1971).

4. Wrongful birth claims have also been brought by older siblings of a child born as a result of a physician's negligence. The basis of these claims is that because of the physician's negligence, the additional child was born, consequently reducing the older sibling's share of future parental care, love, training, and financial support. E.g., *Cox*, 77 Misc. 2d at 155, 352 N.Y.S.2d at 834 (cause of action not recognized).

5. Claims have also been filed for the husband's loss of consortium and the mother's lost wages during the pregnancy. See *infra* note 42. For a brief discussion of a case where damages were sought for the wrongful death of a spouse during childbirth stemming from a "wrongful conception," see *infra* note 30.

6. The "wrongful life" suit should not be confused with the "dissatisfied life" suit. The "dissatisfied life" suit is typically brought by illegitimate children against their father to recover for harm suffered by being born with the stigma of illegitimacy. Such claims have been uniformly rejected. See, e.g., *Pinkney v. Pinkney*, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967); *Zepeda v. Zepeda*, 41 Ill.

on behalf of the handicapped child, to recover for the physical and emotional pain and suffering associated with the handicap.

Until recently, courts have been reluctant to recognize wrongful birth claims and are less willing to accept those of wrongful life.<sup>7</sup> Legalized abortion,<sup>8</sup> increased use of birth control, and medical advances which improve the chances of detecting birth defects early in pregnancy<sup>9</sup> have increased the ability to terminate and to prevent undesired pregnancies.<sup>10</sup> These social changes and medical advances should lead courts, which have previously rejected the theories of wrongful birth and wrongful life, to reevaluate the validity of such claims.<sup>11</sup>

Part II of this Comment examines the wrongful birth claim, its surrounding public policy, and the proposed assessments of damages for a successful claim. Part III similarly examines the wrongful life claim. This Comment concludes that while courts have been, and probably will continue to be reluctant to recognize wrongful life claims, there presently exists a trend among courts to recognize claims of wrongful birth.

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App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1964); Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127 (1966).

In addition, both wrongful birth and wrongful life claims should be distinguished from "wrongful death" claims. Wrongful death claims are premised on a life that was terminated wrongfully whereas the former claims center on the fact that a life has evolved wrongfully. See *Park v. Chessin*, 60 A.D.2d 80, 91-92, 400 N.Y.S.2d 110, 116 (1977) (Titone, J., dissenting).

7. The future recognition of wrongful life claims is not, however, an absolutely pessimistic proposition. As of 1983, the highest courts in at least two states have stepped into the forefront by recognizing wrongful life claims. For a discussion of these cases, see *infra* notes 100-121 and accompanying text.

8. In *Roe v. Wade*, 410 U.S. 113, 162-66 (1973), the Court held that a woman has a federal constitutional right to an abortion during the first trimester of her pregnancy. The Supreme Court reasoned that such a right emanates from the penumbras of the constitutional right of privacy.

9. See *Goss, Strict Liability: A "Lady in Waiting" for Wrongful Birth Cases*, 11 CAL. W.L. REV. 136, 136 (1974).

10. One relatively new method of detecting prenatal birth defects is the amniocentesis procedure which involves the insertion of a long needle into the mother's uterus to extract amniotic fluid samples for laboratory analysis. For a description of the amniocentesis procedure, see *Friedman, Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 97-99 (1974); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1493 (1978).

11. In *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), the New Jersey Supreme Court reevaluated its prior holding in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), and although it ultimately rejected a wrongful life claim, the court did allow a limited claim for wrongful birth to recover damages for emotional anguish but not for childbearing costs. Regarding the issue of public policy influence on case decisions involving these claims, the *Berman* court concluded:

In light of changes in the law which have occurred in the [twelve] years since *Gleitman* was decided, the second ground relied upon by the *Gleitman* majority can no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth. The Supreme Court's ruling in *Roe v. Wade* . . . clearly establishes that a woman possesses a constitutional right to decide whether her fetus should be aborted, at least during the first trimester of pregnancy. Public policy now supports, rather than militates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision.

80 N.J. at 431-32, 404 A.2d at 14.

Despite this trend, courts should take the opportunity, when presented, to expressly approve or disapprove of the causes of action at issue here.

## II. THE CONCEPT OF WRONGFUL BIRTH

The phrase "wrongful birth" denotes a suit brought by parents to recover money damages from a negligent physician,<sup>12</sup> where that negligence has proximately caused the wrongful birth of a child. Although wrongful birth suits are of relatively recent vintage, their advocacy has already occasioned considerable controversy. Much of this controversy has been attributed to the highly emotional nature of the concepts, "birth" and "life." For this reason, it is not surprising that plaintiffs' counsel have, on occasion, chosen to address juries by using phrases such as "wrongful pregnancy" or "wrongful conception" in place of the emotionally charged phrases, "wrongful birth" and "wrongful life."<sup>13</sup> However, use of these latter phrases serves to distinguish claims brought by parents from claims brought by parents or guardians on behalf of their children. The distinction is critical for at least two reasons. First, each of the claims involves fundamentally different issues. Second, if the distinction is not made, the danger arises that the arguments used to defeat the wrongful life claim may also be effective in defeating an otherwise valid wrongful birth claim.

Wrongful birth claims have been filed in at least four distinguishable fact situations.<sup>14</sup> Claims have been filed where a physician negligently performed an ineffective abortion<sup>15</sup> or sterilization operation;<sup>16</sup> where a pharmacist negligently dispensed contraceptives;<sup>17</sup> where a genetic counselor negligently gave erroneous advice to the parents regarding the very

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12. Although this Comment primarily focuses on the negligence of physicians, reported cases have revealed a number of wrongful birth and wrongful life claims based upon the negligence of persons other than physicians. See, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (1971) (genetic counselor gave erroneous preconception advice to the parents regarding the higher-than-average risk of bearing a child afflicted with Tay-Sachs disease); see also, e.g., *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), *rev'd*, 25 A.D.2d 906, 269 N.Y.S.2d 786, *aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (child sued the State of New York alleging that she had been born to a state mental institution inmate who had been raped); cf. *Pinkney v. Pinkney*, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967) (illegitimate children brought "dissatisfied life" suit against their father).

13. See, e.g., *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974).

14. The discussion here is limited to those cases which have been reported and does not purport to be an exhaustive list of all possible fact situations in which a wrongful birth claim could arise.

15. E.g., *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

16. Many states now recognize a wrongful birth claim under these circumstances. E.g., *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977); *Martineau v. Nelson*, 311 Minn. 92, 247 N.W.2d 409 (1976); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

17. E.g., *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); *French Drug Co. v. Jones*, 367 So. 2d 431 (Miss. 1978).

high risk of bearing a child afflicted with a particular disease,<sup>18</sup> and where a physician's negligence in failing to advise a mother of the increased possibility of giving birth to a congenitally deformed child precluded the mother's exercise of the right to choose an abortion.<sup>19</sup> Wrongful birth cases can be subcategorized even further into cases involving the wrongful birth of a severely handicapped child and cases involving the wrongful birth of a healthy, but unwanted child.<sup>20</sup>

Despite the various factual contexts in which wrongful birth claims can arise, a common theme in such claims is that "but for" the negligence of a physician, a child would not have been born. Indeed, the birth of an unplanned child, whether healthy or handicapped, is the focal point of the parents' claim for money damages. Another thread common to wrongful birth cases is that, with a few minor variations, the same arguments have been used repeatedly to defeat the legal recognition of wrongful birth claims. Some of these arguments will now be examined.

### A. *Public Policy Issues*

Many courts have refused to recognize wrongful birth claims as a matter of policy, either on the basis of the "overriding benefits of parenthood" theory or the "emotional bastard" theory, or both.

#### 1. The "Overriding Benefits of Parenthood" Theory

Many courts<sup>21</sup> have erroneously concluded that the "overriding benefits of parenthood" theory is a rule of damages which exemplifies the "benefits" rule set forth by the *Restatement (Second) of Torts*.<sup>22</sup> The *Re-*

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18. *E.g.*, *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *aff'd*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977).

19. These claims have recently been recognized by a number of courts. *E.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (37-year-old pregnant woman with higher risk of bearing a defective child not tested by physician); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (physician failed to diagnose pregnant woman's contraction of German measles); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (physician failed to diagnose pregnant woman's contraction of German measles); *but see Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (no claim recognized where physician failed to inform pregnant woman with German measles of high risk of bearing a congenitally defective child). *But cf. Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (no claim where parents were not advised of the higher than average risk that they might bear a child with Tay-Sachs disease; duty owed only to child). *See also Johnson v. Yeshiva Univ.*, 53 A.D.2d 523, 384 N.Y.S.2d 455 (1976), *aff'd*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977) (claim recognized by standard of reasonable care not breached by not advising the mother about amniocentesis procedures).

20. For an overview of how the courts have treated these claims, see Comment, *Pregnancy After Sterilization: Causes of Action for Parent and Child*, 12 J. FAM. L. 635 (1972-73).

21. *See, e.g.*, *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); *Wilmington Medical Center v. Coleman*, 298 A.2d 320 (Del. 1972); *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

22. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

statement states that:

(w)hen 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.<sup>23</sup>

The "benefits" rule could completely nullify the plaintiff-parents' wrongful birth damage recovery. Where the defendant-physician's tortious conduct has resulted in the wrongful birth of a child, the burden of having the child is the "harm to the plaintiff." However, the conduct has also conferred a special benefit, the birth of a child. Consequently, the "joys of parenthood" may be a "value" to the plaintiff which could be used by the court to reduce the damage award. Moreover, a court could take the position that, since the benefits from the birth of a child defy precise measurement, the value to the parents will always outweigh any alleged economic harms as a matter of law. Aside from the foregoing analysis it is important to remember that the "benefits" rule of the *Restatement* is a mitigation of damages rule, while the "overriding benefits of parenthood" theory is a public policy which manifests a possible complete bar to recovery. Confusion of these principles is responsible for various errors and differing results in the courts.

In *Terrell v. Garcia*,<sup>24</sup> the Texas Court of Civil Appeals rejected the parents' wrongful birth claim and concluded that:

[T]he satisfaction, joy, and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents, are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parents pride in a child's achievement? Though we may consider the economic point of view only, a child remains some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child.<sup>25</sup>

It appears that the *Terrell* court, like many other courts, followed public policy reasoning for rejecting a wrongful birth claim. In effect, these courts have found that not only is it impossible to compare economic costs of raising a child with "intangible benefits of parenthood," but also the result in every such comparison should be, as a matter of law, that the latter outweighs the former.

However, the view that modern society should consider every birth of a child a "blessed event" is unacceptable for at least two reasons. First,

23. *Id.*

24. 496 S.W.2d 124 (Tex. Civ. App. 1973).

25. *Id.* at 128.

in many cases "the birth of a child may be a catastrophe not only for the parents and the child itself, but also for previously born siblings."<sup>26</sup> This is particularly true when a handicapped child is born. Regarding the wrongful birth of a handicapped child, some courts have held that the parents can only recover the difference between the cost of raising the handicapped child and the cost of raising a normal, healthy child.<sup>27</sup> Second, if the parents decided not to have another child because the economic cost of raising a child outweighs the intangible benefits of parenthood, it would appear to be a great miscarriage of justice to allow a court, as a matter of law, to re-decide this issue for the parents. As was stated by one commentator:

the fact that the parents love the child and feel responsible for its welfare once it has been born does not mean that they would not have been generally happier without it or that its birth constitutes a "blessed event" in every way. An inability to provide for and educate their previously born children as they had anticipated or to maintain a higher standard of living once contemplated may be a constant source of sorrow for which the joy derived from the newest child compensates only inadequately.<sup>28</sup>

Nonetheless, some courts have persisted in their use of the "overriding benefits of parenthood" theory to reject wrongful birth claims.

## 2. The "Emotional Bastard" Theory

Another approach that courts have used to defeat wrongful birth claims is the "emotional bastard" theory. Under this theory, it is believed that any award of damages to the parents might cause psychological damage to the child when the child later learns of its parents' wrongful birth suit.<sup>29</sup> While this policy may appear sound at first glance, it can be effectively mitigated since it is better for the parents to recover an award of damages that will permit the child to be properly raised and educated, even at the risk that the child will later learn of the parents' prior lawsuit. By the time the child does learn of the suit, it is hoped that the child will be mature enough to distinguish between an unplanned and an unwanted child, especially if the parents have continuously provided the child with a loving home environment.

### B. Money Damage Assessments

Once the plaintiff has successfully established the elements of a claim for wrongful birth, and the court has recognized the claim, the court must then determine what element of damages is appropriate and how

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26. *Id.* at 131 (Codena, J., dissenting).

27. *See, e.g., Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

28. Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 435 n.79 (1965).

29. Note, *Damages—The Not So "Blessed Event"*, 46 N.C.L. REV. 948, 951-52 (1968).

those damages should be measured. The controversial nature of the wrongful birth action becomes apparent when considering the nature of damages sought in the typical suit. Damages have been sought under a variety of headings, including: the parents' emotional pain and suffering in watching their congenitally deformed child suffer, medical expenses, support costs, lost wages, loss of consortium, and the wrongful death of the mother during childbirth.<sup>30</sup> Assuming a court is willing to allow any or all of these damages, it is readily apparent that some of these damages will be easier to measure than will others. For example, to calculate damages incurred in regard to medical expenses, the plaintiff need only present a verified list of expenditures. Although slightly more difficult, lost wages are, in most cases, relatively simple to calculate. Courts, however, have more difficulty calculating damages for the economic costs of raising and educating the child and the parents' emotional pain and suffering in watching their handicapped child suffer.

Additional problems arise in calculating support costs. Should damages be based subjectively upon the family's standard of living or should they be calculated objectively according to the normal expenses an average family incurs in raising a child to the age of majority? The traditional tort law principle that a defendant "takes his victim as he finds him,"<sup>31</sup> implicitly demands an adoption of the subjective test. While an application of the subjective test would appear to be the better view, especially in the context of ensuring justice to the plaintiff-parents, judicial expediency and uniformity among cases would be attained most easily using the objective test.

As a general proposition, there are at least three distinct views on the issue of what damages are recoverable in a wrongful birth suit. The first line of cases allows recovery only of damages related to the pregnancy and birth but deny recovery for support costs.<sup>32</sup> The second line of cases allows the parents to recover all damages and expenses, including the cost of the unsuccessful sterilization operation, the mother's lost wages, and the economic costs of rearing the child.<sup>33</sup> The third line of cases allows recovery of all damages flowing from the physician's negligence

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30. See generally *infra* notes 35-79 and accompanying text. At least one case has arisen involving a claim for the wrongful death of a spouse in which it was alleged that the plaintiff's wife became pregnant after a negligently performed sterilization operation and subsequently died during childbirth. The action was partially successful. See *Foran v. Carangelo*, 153 Conn. 356, 216 A.2d 638 (1966) (minor children's claim for damages for lost future care and affection of mother denied, but plaintiff's claim for antemortem but not postmortem damages allowed).

31. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 43, at 291 (5th ed. 1984) [hereinafter cited as *PROSSER AND KEETON*].

32. Hereinafter this view shall be referred to as the "limited resulting damage" view. See *infra* notes 35-41 and accompanying text.

33. This view shall be referred to hereinafter as the "full damages" view. This view appears to be the minority view. See *infra* notes 42-55 and accompanying text.



but requires the court to offset the benefits incurred.<sup>34</sup>

### 1. The "Limited Resulting Damages" View

To illustrate the "limited resulting damages" view, the case of *Boone v. Mullendore*<sup>35</sup> shall be examined. In *Boone*, the Alabama Supreme Court was asked to determine the proper measure of damages in a suit for the wrongful birth of a healthy, but unplanned child. In that case, the defendant-physician informed the plaintiff-mother that she was sterile as a result of surgery performed by the defendant to remove both of the plaintiff's fallopian tubes. Relying on this information, the plaintiff did not use any contraceptives, subsequently became pregnant, and gave birth to a healthy, but unplanned child. Thereafter, the plaintiff initiated a wrongful birth suit to recover compensatory damages for medical expenses and support costs.<sup>36</sup> In rejecting the "benefits rule"<sup>37</sup>, the court held that the plaintiff's recovery was not limited to out-of-pocket medical expenses and concluded that once liability is established, damages recoverable by the plaintiffs include: (1) damages for the mental and physical pain and suffering sustained by the mother as a result of the pregnancy; (2) damages for the husband's loss of comfort, companionship, services, and consortium of the wife during pregnancy and immediately after the birth; and (3) medical expenses. The court, however, refused to allow an award of support costs because "[a]ny additional damages would tend to be extremely speculative in nature, and . . . could have a significant impact upon the stability of the family unit and the subject child."<sup>38</sup> Moreover, the court expressly limited its holding to cases involving the wrongful birth of a *healthy, but unplanned* child.<sup>39</sup>

The concurring opinion in *Boone* urged adoption of a rule of damages which would hold the defendant-physician fully liable for his negligence but would allow an offset under the "benefits" rule.<sup>40</sup> The concurrence

34. Hereinafter this view shall be referred to as the "Restatement" or the "offsetting benefits" view. This view appears to be the majority view. See *infra* notes 56-67 and accompanying text.

35. 416 So. 2d 718 (Ala. 1982). A number of states have also adopted the "limited resulting damages" view. See, e.g., *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied*, 104 S. Ct. 149 (1983); *Schork v. Huber*, 648 S.W.2d 861 (Ky. 1983); *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W.2d 568 (1982); *Mason v. Western Hosp.*, 499 Pa. 484, 453 A.2d 974 (1982); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975).

36. The plaintiff alleged that the defendant-physician was negligent either in his failing to remove her fallopian tubes or, alternatively, in misrepresenting that he did remove them. *Boone*, 416 So. 2d at 719.

37. The Alabama Supreme Court rejected the "benefits" rule because adoption of such a rule would "invite speculative and ethically questionable assessments of damages that in the long run would cause a great emotional impact on the child, its siblings, and the parents." *Id.* at 722. For a discussion of the "benefits" rule, see *supra* notes 21-28 and accompanying text.

38. *Boone*, 416 So. 2d at 721.

39. *Id.* at 723.

40. *Id.* at 724 (Faulkner, J., concurring).

also pointed out that the majority's refusal to allow full recovery for the plaintiff's injuries infringed upon their constitutionally protected right to determine the size of their family.<sup>41</sup>

## 2. The "Full Damages" View

In *Custodio v. Bauer*,<sup>42</sup> Appeals was asked to determine the proper measure of damages in a suit for the wrongful birth of a healthy, but unplanned child which resulted from an unsuccessful sterilization operation performed by the defendant-physician on the plaintiff-mother.<sup>43</sup> The purpose of the sterilization operation was to prevent the birth of additional children<sup>44</sup> which could aggravate an existing bladder and kidney condition and to allow Mrs. Custodio's "nervous condition" to improve.<sup>45</sup> Subsequent to the birth of the child, the parents filed a wrongful birth suit<sup>46</sup> to recover damages for medical expenses,<sup>47</sup> the "great mental, physical and nervous pain and suffering" suffered by Mrs. Custodio,<sup>48</sup> support costs,<sup>49</sup> punitive damages for fraud and deceit,<sup>50</sup> and special damages for breach of contract.<sup>51</sup> The *Custodio* court not only allowed recovery in all of the categories, but also stated in *dicta* that had the mother died during childbirth, damages for the "value of her society, comfort, care, protection and . . . support" would be recoverable in any wrongful death action filed by either the husband or the nine surviving children.<sup>52</sup> The court also approved of an award to the husband for loss of his wife's services, loss of consortium and medical expenses had Mrs. Custodio been crippled by childbirth to the extent that she could no

41. *Id.* at 725.

42. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). At least one other court has opted for the "full damages" view. *See, e.g.,* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968, *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983).

43. The specific alleged negligent act of the defendant-physician was an insufficient cutting of Mrs. Custodio's fallopian tubes coupled with a failure to relocate the tubes anatomically so as to avoid regeneration. *Custodio*, 251 Cal. App. 2d at 312, 59 Cal. Rptr. at 469.

44. Prior to the birth of the child here involved, plaintiffs were the parents of nine children. *Id.* at 323, 59 Cal. Rptr. at 476.

45. *Id.* at 307-08, 59 Cal. Rptr. at 466.

46. The plaintiff-parents' wrongful birth claim alleged a total of seven separate causes of action which included:

- (1) negligent treatment in the performance of the operation;
- (2) negligent treatment in failing to inform plaintiffs of the consequences of the operation;
- (3) negligent misrepresentation;
- (4) negligence in failing to fully advise Mrs. Custodio of other treatment procedures;
- (5) recovery of damages for the husband based upon the four aforementioned negligent acts;
- (6) fraud and deceit; and,
- (7) breach of contract.

*Id.* at 308, 59 Cal. Rptr. at 466.

47. Plaintiffs sought \$1500 for pre- and post-natal care and hospitalization costs. *Id.* at 308, 59 Cal. Rptr. at 467.

48. Plaintiffs sought a total of \$250,000 on this claim. *Id.* at 309, 59 Cal. Rptr. at 467.

49. Here, plaintiffs sought a total of \$50,000. *Id.*

50. Plaintiffs sought a total of \$500,000 on this claim. *Id.*

51. Plaintiffs sought a total of \$51,500 here. *Id.*

52. *Id.* at 323, 59 Cal. Rptr. at 476.

longer perform her marital duties.<sup>53</sup> Regarding the tort causes of action,<sup>54</sup> the court concluded: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by [the California Civil Code], is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."<sup>55</sup>

### 3. The *Restatement* or "Offsetting Benefits" View

To illustrate how the *Restatement (Second) of Torts*<sup>56</sup> has been applied in the context of wrongful birth claims, we shall examine *Ochs v. Borrelli*.<sup>57</sup> In *Ochs*, the Supreme Court of Connecticut, in a case of first impression, was asked to determine the proper measure of damages in a "wrongful conception" suit<sup>58</sup> involving the birth of a child with orthopedic defects.<sup>59</sup> The first count of the parents' complaint sought damages for medical expenses incurred directly from the unsuccessful sterilization operation and for the pain and suffering occasioned by the operation.<sup>60</sup> The second count of the complaint sought damages for the medical expenses incurred as a result of the infant's orthopedic therapy and for the cost of raising the infant to majority.<sup>61</sup>

On appeal, the defendant-physicians conceded that they were negligent in their performance of a sterilization operation on Mrs. Ochs,<sup>62</sup> but argued that damages should be limited to orthopedic treatment costs and

53. *Id.*

54. This cause is distinguished here from the cause of action for breach of contract.

55. 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 477 (citations omitted). As to the contract cause of action, the court concluded that:

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by (the California Civil Code), is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

*Id.* (citations omitted).

56. See RESTATEMENT (SECOND) OF TORTS § 920 (1977).

57. 187 Conn. 253, 445 A.2d 883 (1982). A number of other courts have adopted this view. See, e.g., *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Stills v. Gratton*, 55 Cal. App 3d 698, 127 Cal. Rptr. 652 (1976); *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

58. For our purposes, "wrongful conception" is the same as "wrongful birth". Many plaintiffs' lawyers opt to use the terms "wrongful conception" or "wrongful pregnancy" in place of the more emotionally charged term "wrongful birth" for purposes of not detrimentally arousing jurors. See *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974).

59. The Ochs' infant was born with two orthopedic problems known as forefoot metatarsus adductus and flatfoot. The forefoot adductus was corrected by casts and therapy at a cost of \$230. The only remaining treatment required was the use of an arch support in her shoes. The flatfoot condition and a mild knock-knee still existed. 187 Conn. at 255, 445 A.2d at 884.

60. The jury awarded the plaintiff-parents \$49,985 in damages on this count. *Id.*

61. The jury awarded the plaintiff-parents damages in the amount of \$56,375 on this count. *Id.*

62. The sterilization procedure performed on Mrs. Ochs is known as a laparoscopic tubal ligation. Mrs. Ochs consented to the procedure because she had already given birth to two children with orthopedic defects, and she had a gynecological history of miscarriage and ovarian surgery. *Id.* at 254-55, 445 A.2d at 883.

exclusive of childrearing expenses since, as a matter of public policy, "the birth of a child is always a blessing to its parents and . . . this benefit must, as a matter of law, totally offset concomitant financial burdens."<sup>63</sup> In rejecting the physicians' argument, and upholding the jury award on both counts of the complaint, the court stated that "public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right."<sup>64</sup> The court went on to explain that a better rule would allow recovery of the costs of rearing the child until it reaches majority,<sup>65</sup> but would offset under the "benefit" rule that amount determined by the jury which reflects the value of the benefits conferred upon the parents by the child.<sup>66</sup> The court concluded that although this case-by-case "balancing test" would require a jury to mitigate economic damages by weighing them against non-economic factors, this weighing process is not "impermissibly speculative."<sup>67</sup>

#### 4. The Indescript Views

Cases remain that do not fit neatly into any of the aforementioned categories. For example, in *Berman v. Allan*<sup>68</sup> the New Jersey Supreme Court was asked to reassess the legal validity of their prior holding in *Gleitman v. Cosgrove*<sup>69</sup> which had rejected, *inter alia*, the plaintiff-parents' wrongful birth claim against a negligent physician.<sup>70</sup> In *Berman*, the plaintiff-parents alleged that the defendant-physician negligently failed to inform Mrs. Berman during her pregnancy of the existence of amniocentesis procedures which could detect prenatal birth defects.<sup>71</sup> Due to Mrs. Berman being thirty-eight years of age at the time of her pregnancy, the plaintiffs alleged that there was a high probability that Mrs. Berman could give birth to a child afflicted with Down's Syndrome. Therefore, had the physician so informed the Bermans, Mrs. Berman al-

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63. *Id.* at 256, 445 A.2d at 884.

64. *Id.* at 258, 445 A.2d at 885.

65. *Id.*

66. *Id.* at 259-60, 445 A.2d at 886.

67. *Id.*

68. 80 N.J. 421, 404 A.2d 8 (1979).

69. 49 N.J. 22, 227 A.2d 689 (1967).

70. *Id.* In *Gleitman*, the parents of a congenitally defective child sued a physician who negligently failed to inform the parents of the effects on the unborn fetus of the plaintiff-mother's contraction of German measles during her pregnancy. The plaintiffs alleged that the defendant-physician's negligence precluded the mother's exercise of her constitutional right to an abortion. In rejecting the infant's wrongful life claim the court concluded that the claim was not actionable since the infant suffered no legally cognizable damages by being born, even if born in a severely handicapped condition. In rejecting the parents' wrongful birth claim the court concluded that the intangible, unmeasurable, and complex benefits of parenthood far outweigh any alleged emotional or economic harm. In addition the court based its conclusion on the inalienable right to life and the public policy view that supports the preciousness of human life. *Id.*

71. For information concerning amniocentesis procedure, see Friedman, *supra* note 10.

leged that she would have undergone the amniocentesis procedure, discovered that the child had Down's Syndrome, and, consequently, undergone an abortion.<sup>72</sup>

Mrs. Berman indeed gave birth to a child with Down's Syndrome. The plaintiff-parents sued to recover damages for, *inter alia*, the emotional pain and suffering in watching their child suffer, medical expenses, and support costs.<sup>73</sup> The New Jersey court held that the parents could recover damages for the emotional anguish associated with watching their child suffer but rejected the claim for medical expenses, and child-rearing and support costs. The *Berman* court concluded that:

[a]lthough these costs were caused by defendants' negligence in the sense that but for the failure to inform, the child would not have come into existence, we conclude that this item of damage should not be recoverable. In essence, Mr. and Mrs. Berman's desire to retain all the benefits inherent in the birth of the child—i.e., the love and joy they will experience as parents — while saddling defendants with the enormous expenses attendant upon her rearing. Under the facts and circumstances here alleged, we find that such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians.<sup>74</sup>

The *Berman* court, in essence, followed the reasoning of the Wisconsin Supreme Court in the case of *Rieck v. Medical Protective Co.*<sup>75</sup> However, this reasoning is unacceptable for at least two reasons. As was stated earlier, it is inappropriate for a court to assume that the birth of a child will be beneficial to the parents in every case.<sup>76</sup> Indeed, especially in the *Berman* case, the court's assumption of a "benefit" to Mr. and Mrs. Berman upon the birth of a child with Down's Syndrome is untenable. Second, the *Berman* court's refusal to at least award damages for the difference between the costs of rearing a handicapped child as opposed to a healthy child is tantamount to granting partial immunity to a negligent

72. *Berman*, 80 N.J. at 425, 404 A.2d at 10.

73. *Id.*

74. 80 N.J. at 432, 404 A.2d at 14.

75. 64 Wis. 2d 514, 219 N.W.2d 242 (1974). In *Rieck*, the court denied the plaintiff-parent's claim for childrearing and support costs by stating that:

Even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because: (1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden (in the case before us, upon physicians and obstetricians); or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

*Id.* at 517-18, 219 N.W.2d at 244.

76. See *supra* notes 27-28 and accompanying text.

physician at the expense of the relatively innocent plaintiff-parents.<sup>77</sup>

By allowing an award of damages for the emotional anguish of watching their handicapped child suffer, while disallowing an award for medical expenses and support costs, it has been suggested that *Berman* cannot properly be labeled as a case exemplifying any sort of trend among the courts toward eventual full recoveries in wrongful birth suits.<sup>78</sup> In fact, it has been suggested that the *Berman* decision, and others like it, is an example of a judicial trend which will establish staunch limitations on damage recovery in future wrongful birth suits.<sup>79</sup>

## II. THE CONCEPT OF WRONGFUL LIFE

The term "wrongful life"<sup>80</sup> denotes a suit brought by the parents on behalf of their child to recover for the physical and emotional pain and suffering associated with being handicapped. In essence, the child claims nonexistence would have been preferable to living a handicapped life; therefore, he should be awarded money damages to compensate for having to live that life. In most cases a suit by the parents for wrongful birth will be accompanied by a claim on behalf of the child for wrongful life. Although wrongful life claims, like wrongful birth, are a relatively recent legal development, wrongful life claims are considered by many to be more controversial than those of wrongful birth.

Prior to 1980, every state in the United States with the opportunity to decide the legal validity of wrongful life claims had refused to recognize such claims. In 1980 the California Court of Appeals, in *Curlender v. Bio-Science Laboratories*<sup>81</sup> became the first appellate court in the nation to recognize a wrongful life claim. Two years later, in *Turpin v. Sortini*,<sup>82</sup> the California Supreme Court became the first state high court in the United States to recognize a wrongful life claim. In 1983, in *Harbeson v.*

77. At least two courts have adopted the view that in cases involving the wrongful birth of a defective child, the plaintiff-parents can properly recover the difference between the cost of rearing a defective child and the cost of raising a healthy child. See *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

78. See Comment, *Wrongful Birth and Wrongful Life: Berman v. Allen*, 8 HOFSTRA L. REV. 257 (1979).

79. *Id.*

80. "Wrongful life," "dissatisfied life," "wrongful death," and "wrongful birth" suits should each be distinguished from the other. Each rests its claim for damages upon distinguishable factual premises.

81. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). In *Curlender*, a child born with Tay-Sachs disease was allowed full compensatory and punitive damages against the defendant-genetic testing laboratory who negligently failed to give accurate information to the parents concerning their status as carriers of Tay-Sachs disease. *Id.*

82. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). For a discussion of the decision in *Turpin*, see *infra* notes 100-110 and accompanying text.

*Parke-Davis, Inc.*,<sup>83</sup> the Washington Supreme Court became the second state supreme court to recognize a wrongful life claim.

### A. Public Policy Issues

The majority of courts has advanced at least three arguments to defeat and routinely reject claims of wrongful life.<sup>84</sup> It has been argued that a defendant-physician could not possibly owe a legal duty to the child-plaintiff since the child was not a legal being when the physician's alleged negligent act occurred. It also has been argued that the subject child did not suffer any legally cognizable damages that a court can measure practically since it is illogical for an individual to claim that he should not be alive and because public policy has always favored life over nonexistence. Lastly, it has been argued that recognition of such claims would result in undesirable consequences, such as a flood of spurious and collusive suits by infants against their parents, and that such recognition would place an intolerable burden upon physicians.

#### 1. Duty

To prevail in a medical malpractice action, the plaintiff must establish, by the "greater weight of the evidence," the existence of at least four essential elements: (1) the duty of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's breach of duty.<sup>85</sup> The existence of a duty in a given case is a question of law and will depend upon how far the court is willing to extend liability. The primary problem with wrongful life claims, however, is that courts generally refuse to recognize that the defendant could owe a duty to someone who was not a "legal being" at the time of the defendant's negligent act. However, some courts recently have concluded that a child-plaintiff can recover damages for physical and mental pain and suffering in a wrongful life suit.<sup>86</sup> The continued reluctance of the majority of courts to recognize wrongful life claims is unacceptable in this context if such reluctance is based only upon the lack of judicial precedent.

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83. 98 Wash. 2d 460, 656 P.2d 483 (1983). For a discussion of the decision in *Harbeson*, see *infra* notes 111-121 and accompanying text.

84. Actually there are at least five separate reasons in all that have been advanced by the courts. Only three of these can be properly categorized as "public policy" reasons and analyzed here.

85. *Turpin v. Sortini*, 31 Cal. App. 3d at 229-30, 643 P.2d at 960, 182 Cal. Rptr. at 343 (citing *Budd v. Nixen*, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971)).

86. See, e.g., *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); *Kenslow v. Menmonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *aff'd*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977).

## 2. No Legally Cognizable Harm

As part of his *prima facie* case, the child-plaintiff must show that he suffered harm which was proximately caused by the defendant-physician's conduct. In the typical wrongful life suit, the child-plaintiff does not allege that the defendant-physician in any way caused the defects with which the child is afflicted. Rather, it is alleged that because of the physician's negligence, the child was born and, hence, "harmed" since the "utter void of non-existence" is preferable to living life as a severely handicapped person.

In *Berman v. Allan*,<sup>87</sup> the New Jersey Supreme Court ultimately rejected a wrongful life claim for a child with Down's Syndrome. At one point the court commented that "[o]ne of the most deeply held beliefs of our society is that life—whether experienced with or without major physical handicap—is more precious than non-life."<sup>88</sup> The *Berman* court went on to examine the federal and New Jersey Constitutions which were found to be "replete with references to the sanctity of life without any indication in these documents that impaired life was any less valuable."<sup>89</sup> The court also found that the most severe criminal sanctions are imposed upon defendants who have deprived others of life.<sup>90</sup> Lastly, the court took note of the fact that society holds physicians in high esteem because they are the preservers of life.<sup>91</sup>

Many courts have rejected wrongful life claims through reasoning similar to that of the *Berman* court. However, recent "right to life" decisions, such as *In re Quinlan*,<sup>92</sup> illustrate that under certain circumstances public policy may dictate that non-life is preferable to life. Indeed, it is

87. 80 N.J. 421, 404 A.2d 8 (1974).

88. *Id.* at 429, 404 A.2d at 12. A similar result had been reached by the New Jersey Supreme Court in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) not more than seven years before *Berman*. In rejecting the handicapped infant's wrongful life claim, the *Gleitman* court maintained that the right to life is inalienable in our society and that history is replete with examples of men who have attained great achievements and led meaningful and worthwhile lives despite their physical handicaps. 49 N.J. at 30, 227 A.2d at 693.

89. 80 N.J. at 429, 404 A.2d at 12-13.

90. *Id.* at 429, 404 A.2d at 13.

91. *Id.* at 430, 404 A.2d at 13.

92. 70 N.J. 10, 355 A.2d 647 (1976). In *In re Quinlan* the plaintiff-father sought court authorization for the termination of all artificial life support apparatus and procedures for sustaining his 22-year-old comatose daughter's life processes. The daughter was in a noncognitive, vegetative state and the attending physicians concluded that there was no reasonable possibility of the victim's ever emerging from her comatose condition. The court found that the constitutional right to privacy is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances. On the issue of the preference of death over life under certain circumstances, the court stated:

We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition she could effectively decide upon discontinuing the life-support apparatus, even if it meant the prospect of natural death.

*Id.* at 39, 355 A.2d at 663.



now permissible for a competent person to choose to refuse life-prolonging treatment, absent a compelling state interest.<sup>93</sup> It is difficult to see how the courts can justify holding non-life preferable to life in the "right to die" context, but not in that of wrongful life. One could conclude here that it is possible, though not likely, that tomorrow's courts could find that a severely handicapped infant-plaintiff has suffered a legally cognizable "harm" by being born.<sup>94</sup>

Despite apparent theoretical difficulties, it is possible to formulate workable damages standards in wrongful life suits. Recognizing that life, even with severe birth defects, has some value, compensation could be measured by the mental and physical pain and suffering sustained by the infant as a result of his birth, minus the value of life with severe birth defects. Damages computed by the jury in this fashion would compensate the plaintiff for the detrimental effects of the defendant's negligence and avoid the theoretical difficulties which have been attributed to attempted money value assessments of "non life."<sup>95</sup>

### 3. Undesirable Consequences

It has been argued that judicial recognition of wrongful life claims will result in a "parade of undesirable consequences," such as fraudulent suits, suits by children against their parents, a "flood of litigation," and the placing of an intolerable burden upon the medical profession.<sup>96</sup> These concerns are untenable. In regard to fraudulent claims, it is feared that parents might claim that had they been properly advised of the risk of bearing a severely deformed child, they would have aborted the fetus when in truth, they might never have aborted. Obviously, the trial court is in the best position to assess the credibility of the parents' allegations. Assessing the credibility of witnesses is indeed one of the many functions of a trial court.<sup>97</sup> The fear of a "flood of litigation" is an argument often made by courts who wish to avoid decisions on difficult, controversial, or politically- or emotionally-charged issues. A noted commentator has suggested that the "flood of litigation objection has been demolished many times, and it is threshing old straw to deal with [it]."<sup>98</sup> The final argument—that recognition of wrongful life suits would place an intolerable burden upon physicians—also cannot be supported. Even if judi-

93. See *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

94. For a discussion of at least two courts that have come to this conclusion see *infra* notes 99-120 and accompanying text.

95. Cf. Comment, *Illegitimate Child Denied Recovery Against Father for "Wrongful Life": Zepeda v. Zepeda*, 49 IOWA L. REV. 1005, 1009 (1964); Comment, *Illegitimate Child Allowed Action for "Wrongful Life": William v. State*, 50 MINN. L. REV. 593, 599 (1966).

96. *Park v. Chessin*, 60 A.D.2d 80, 94-95, 400 N.Y.S.2d 110, 118 (1977) (Titone, J. dissenting).

97. See Fed. R. Civ. P. 52.

98. PROSSER & KEETON, *supra* note 31, § 54 at 327.

cially recognized, recovery under a wrongful life claim would be so rare that the alleged burden on the medical profession would be slight. Assuming arguendo the medical profession would be somewhat burdened by the recognition of wrongful life claims, this burden is substantially outweighed by the burdens that might otherwise be endured by the innocent child-plaintiff.

## B. Money Damage Assessments

Assuming that the child-plaintiff has successfully established a recognized cause of action for wrongful life, the issue then becomes one of appropriately assessing damages. The majority of courts have routinely rejected wrongful life claims on the ground that damages are impossible to measure since the court would be forced to weigh the value of a handicapped life against the value of nonexistence.<sup>99</sup> However, the decisions of two courts set the stage for the future recognition of wrongful life cases. These decisions by the California and Washington Supreme Courts shall now be examined.

### 1. *Turpin v. Sortini*<sup>100</sup>

In *Turpin*, the parents took their first daughter, Hope,<sup>101</sup> to the defendant-physician's office for a hearing examination. Hope was examined by the defendant-physician who was a licensed hearing and speech defects specialist. After the examination, the defendant incorrectly advised Mr. and Mrs. Turpin that Hope had normal hearing ability. In reality, Hope was "stone deaf" as a result of a hereditary hearing ailment.<sup>102</sup> In reliance upon the defendant's erroneous diagnosis, and before Mr. and Mrs. Turpin were able to learn Hope's true condition, the Turpins conceived the plaintiff-infant, Joy. This second child was born with the same hereditary hearing ailment. Subsequently, the plaintiff-parents filed a wrongful life action<sup>103</sup> on behalf of the infant against the

99. See, e.g., *Elliot v. Brown*, 361 So. 2d 546 (Ala. 1978); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975); Note, *Toward Rational Boundaries at Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1445.

100. 31 Cal. App. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

101. At the time the parents brought the child to the defendant-physician's office, Hope was the only child born to the plaintiff-parents. *Id.* at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339.

102. *Id.*

103. The wrongful life action was the plaintiff-parent's second cause of action. Actually, the Turpins filed a total of four causes of action. The first cause of action was brought on behalf of the first child, Hope, to recover for damages suffered due to the defendant-physician's negligent delay in diagnosing her hearing ailment. The third and fourth causes of action were brought by and on behalf of the plaintiff-parents to recover special damages for Joy's medical, childrearing and support costs and general damages for the mental anguish suffered by the parents "attendant to raising and caring of a totally deaf child." *Id.* at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.

defendant-physician,<sup>104</sup> to recover: (1) general damages for being "deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness" and (2) special damages for the "extraordinary expenses for specialized teaching, training and hearing equipment" which she will incur during her lifetime as a result of her hearing impairment.<sup>105</sup>

The California Supreme Court rejected the claim for general damages and reasoned as follows:

In requesting general damages in a wrongful life case, the plaintiff seeks monetary compensation for the pain and suffering he or she will endure because of his or her hereditary affliction under (the "benefits" rule of the Restatement of Torts); however, such damages must be offset by the benefits incidentally conferred by the defendant's conduct 'to the interest of the plaintiff that was harmed.' With respect to general damages, the harmed interest is the child's general physical, emotional and psychological well-being, and in considering the benefit to this interest which defendant's negligence has conferred, it must be recognized that as an incident of defendant's negligence the plaintiff has in fact obtained a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering. Because of the incalculable nature of both elements of this harm-benefit equation, we believe that a reasoned, nonarbitrary award of general damage is simply not obtainable.<sup>106</sup>

The *Turpin* court further concluded that tort damages are generally compensatory<sup>107</sup> and not punitive in nature and that there was nothing the defendants could have done which would have afforded the plaintiff-infant with an unimpaired life.<sup>108</sup> However, the *Turpin* court did allow the plaintiff-infant's claim for special damages for the extraordinary expenses necessary to treat the hereditary hearing ailment.<sup>109</sup> Regarding the issue of special damages, the *Turpin* court concluded that "[w]hile the law cannot remove the heartache or undo the harm, it can afford some reasonable measure of compensation toward alleviating the financial

104. The hospital, the rehabilitation center, and "various Does" were also joined as defendants in this action. *Id.*

105. The plaintiffs alleged that the nature of the hearing ailment was such that there is "a 'reasonable degree of medical probability' that the hearing defect would be inherited by any offspring of (plaintiff-parents)." The plaintiffs further alleged that but for the defendant's negligence, they would have chosen not to conceive the second child. *Id.*

106. *Id.* at 236-37, 643 P.2d at 964, 182 Cal. Rptr. at 347.

107. Compensatory damages are awarded in tort not to punish but rather to help restore an injured person to the position he or she would have been in had the wrong not been committed. *Id.* at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344. See RESTATEMENT (SECOND) OF TORTS § 901 Comment a (1977).

108. 31 Cal. 3d at 220, 643 P.2d at 961, 182 Cal. Rptr. at 337.

109. The plaintiff-infant's claim here relates only to medical expenses to be incurred by her after the age of majority. The plaintiff-parents' claim for special damages seeks medical expenses to be incurred by the parents during the plaintiff-infant's minority. *Id.* at 237 n.11, 643 P.2d at 965 n.11, 182 Cal. Rptr. at 348 n.11.

burdens.”<sup>110</sup>

## 2. *Harbeson v. Parke-Davis, Inc.*<sup>111</sup>

Approximately eight months after the California Supreme Court decided *Turpin v. Sortini*,<sup>112</sup> Washington became the second state to recognize a wrongful life claim. In *Harbeson*, the parents of two children suffering from “fetal hydantoin syndrome”<sup>113</sup> filed a wrongful life claim<sup>114</sup> against three Army physicians. To control her epileptic seizures, the plaintiff-mother took an anticonvulsant drug as prescribed by an Air Force doctor.<sup>115</sup> Upon relocating to another base, the plaintiff-parents were incorrectly advised by three defendant-Army physicians that the continued use of the drug would not cause any serious birth defects in any future-born children.<sup>116</sup> In April 1974 and May 1975, the plaintiff-mother gave birth to the plaintiff-infants, both of whom had fetal hydantoin syndrome.<sup>117</sup> “But for” the defendants’ negligence, the plaintiff-parents allegedly would have decided not to have any more children.<sup>118</sup>

In allowing the plaintiff-infants to recover for the cost of future medical care<sup>119</sup> attributable to their birth defects, the court concluded 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>120</sup> The court went on to say that because these immense medical costs could continue after the infants reached majority, unless otherwise provided, these expenses would fall upon the parents or the state. In order to prevent this result, the court concluded that the plaintiff-infants’ claim for future medical costs should be allowed so as to “place the burden . . . on

110. *Id.* at 239, 643 P.2d at 965, 182 Cal. Rptr at 348 (citing *Gleitman v. Cosgrove*, 49 N.J. at 49, 227 A.2d at 703) (Jacobs, J., dissenting).

111. 93 Wash. 2d 460, 656 P.2d 483 (1983).

112. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr 337 (1982).

113. Fetal hydantoin syndrome is characterized by mild to moderate growth deficiencies and developmental retardation, wide-set eyes, droopy eyelids, hypoplasia of the fingers, small nails, a broad nasal ridge, a low-set hairline and a host of other possible birth defects. *Harbeson*, at 463, 656 P.2d at 486.

114. The parents also filed a wrongful birth claim which was also successful. *Id.* at 462, 656 P.2d at 486.

115. The doctor who originally prescribed the anticonvulsant drug is *not* the defendant-physician with who we are concerned in this case.

116. Each of the doctors had told the plaintiff-parents that the drug could cause cleft palate and temporary hirsutism in the mother but none of the physicians consulted any outside sources to see if the drug could cause birth defects in future children. *Harbeson*, 98 Wash. 2d at 463, 656 P.2d at 486.

117. *Id.*

118. *Id.*

119. Future medical expenses here refer to those medical expenses that will be incurred by the plaintiff-infants *after* they have reached the age of majority. *Id.* at 479, 656 P.2d at 495.

120. *Id.*

the party whose negligence was . . . a proximate cause of the child's continuing need for such special medical care and training."<sup>121</sup>

#### IV. CONCLUSION

While a number of courts have had the opportunity to address the legal validity of wrongful birth and wrongful life claims, many courts have yet to decide these issues. Once uniformly rejected, reported cases presently show a tendency among courts to allow some recovery under the heading of wrongful birth, though to a limited degree. However, this leniency should not be confused with a trend towards the eventual uniform recognition of wrongful birth claims. Even those courts which have allowed recovery have been careful not to appear overzealous in their recognition of wrongful birth claims. Still, among those courts which have allowed such claims, there is considerable disagreement as to the appropriate measure of damages. Many seemingly insurmountable hurdles also have been placed in the path leading to legal recognition of wrongful life claims. Among these "hurdles" are: (1) the philosophical imponderables of appearing to favor nonexistence over life; (2) the asserted difficulty of assessing damages; (3) the question of the existence of a legal duty to the unborn infant; (4) the fear of a "flood of litigation"; (5) the fear of fraudulent suits; and (6) the fear of placing an intolerable burden upon the medical profession. While a relatively small minority of courts have chosen to recognize wrongful life claims, despite these aforementioned hurdles, most courts have unequivocally rejected claims of wrongful life.

This Comment has sought to determine whether it is beyond the province of our courts to assess the validity of wrongful birth and wrongful life claims. Many judges, lawyers, and legal commentators have debated whether the responsibility for assessing the legal validity of wrongful birth and wrongful life claims properly rests upon the legislatures or the United States Supreme Court, rather than upon state courts. It is interesting to note that in the seventeen years or more since wrongful life and wrongful birth claims were first introduced into our courts, neither the United States Supreme Court nor any legislature has directly addressed the legal validity of these claims. In this context, it might be reasonable to infer that by their silence, the United States Supreme Court, Congress, and state legislatures have implicitly acquiesced in how the courts have disposed of wrongful birth and wrongful life claims.

Wrongful birth and wrongful life claims have provided our courts with a totally new array of interesting and complex legal issues. For the sake of all courts, a definitive determination by the Supreme Court most likely

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121. *Id.*

will be a welcomed event. Meanwhile, the courts should not sidestep their responsibility of affirmatively allowing or disallowing either a wrongful birth or wrongful life claim, or both. Indeed it is the duty of our courts to make precedent where a wrong requires redress.

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