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Wrongful Life: An Infant's Claim to Damages

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WRONGFUL LIFE: AN INFANT'S CLAIM TO DAMAGES

INTRODUCTION

Scientific development in the field of human genetics has greatly increased our understanding of genetic diseases. Specifically, advances in medicine enable physicians to detect the presence of some genetic disorders in fetuses with ninety-nine percent accuracy.[1] A legal problem arises, however, when physicians negligently perform the genetic prediction tests. The law has struggled with the question of what remedy, if any, is available to parents and/or their offspring when incorrect genetic information leads to the birth of a genetically defective infant.[2] Consequently, litigation of the issue has produced inconsistent results.[3]

Case law generally indicates that the law will not allow physicians free reign in the genetic counseling field. Until recently, however, no court had ever recognized a cause of action brought on behalf of an infant for injuries received from negligent genetic test-

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1. *See* National Registry for Amniocentesis Study Group, *Midtrimester Amniocentesis for Prenatal Diagnosis*, 236 J. AM. MED. A. 1471, 1475 (1976). The accuracy rate for detecting the presence of Tay Sachs or Downs Syndrome is 99.4%. *See* Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (Cooke, J. dissenting). Prospective parents are administered a simple blood test to determine if either one or both are potential carriers of Tay Sachs. If either one or both are suspected, a second test, amniocentesis, is performed by drawing amniotic fluid from the sac in which the child rests. The National Institute of Health advocates that a much simpler screening test be used prior to the above steps being taken. *See Antenatal Diagnosis: What Is Standard?*, 241 J. AM. MED. A. 1666 (1979).

2. Parents may seek genetic counseling either *before* conception or *after* conception to determine if their potential offspring will be afflicted with genetic disease. This Comment proceeds from the basic position that the two situations are indistinguishable as to the effect on an infant's claim to damages. Thus, one purpose of genetic testing is to inform the parents of the status of the fetus. If the genetic tests are negative, *i.e.*, if they show a genetic deformity, the parents may wish to abort the fetus. An abortion to prevent the birth of a genetically defective infant is termed "eugenic," while one to prevent harm to the mother is termed "therapeutic." Speck v. Finegold, 268 Pa. Super. Ct. 342, 348 n.4, 408 A.2d 496, 499 n.4 (1979).

3. In New York parents are allowed to recover costs expended for medical treatment of genetically defective children, but not emotional damages when medical professionals provide them with inaccurate genetic counseling. *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *But see*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (New Jersey allows parents to recover for emotional harm but not economic damage).

ing.[4] A recent California decision, *Curlender v. Bio-Science Laboratories*,[5] became the first decision to recognize an infant's cause of action for wrongful life.[6] The basic issue involved in wrongful life litigation concerns whether genetically deformed infants can recover damages from medical professionals for professional malpractice by claiming that but for the faulty genetic counseling they would never have been born.[7] This Comment will analyze solely infants' claims for wrongful life.

Wrongful life claims are brought in tort as negligence actions within a medical malpractice framework. Consequently, the legal issues raised by the claim are defined in terms of the traditional tort framework for establishing negligence.[8] Each of the elements

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4. The Second Department of the New York Appellate Division had recognized an infant's claim for wrongful life only to be overruled by the New York Court of Appeals. *See* Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (2d Dep't 1977); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977). Both of these decisions were overruled as companion cases. *See* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The Court of Appeals specifically overruled the Second Department's reasoning that there was a fundamental right of a child to be born as a whole functioning being. Other state courts have reached the same conclusion. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (child born with injuries caused by mother having had rubella during pregnancy; physician allegedly failed to warn of risk); Gildinir v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D.Pa. 1978) (child born with Tay Sachs after parents were allegedly informed that amniocentesis test was negative); Speck v. Finegold, 268 Pa. Super. Ct. 342, 408 A.2d 496 (1979) (child born with neuraframatosis after disease manifested itself in child's siblings; physician failed to investigate). All courts denied the infant's claim for relief.

5. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). Defendant's appeal to the Supreme Court of California was denied. At this point no state's highest court has recognized the cause of action although the California Supreme Court recognized it implicitly by refusing to review the decision.

6. Wrongful life claims, for the purpose of analyzing an infant's cause of action, pertain specifically to situations where medical professionals have negligently conducted genetic testing causing a child to be born with genetic defects by removing the choice to abort the fetus from the parents. The analysis in this Comment will not include parents' claims in any way nor will it include infants' claims against their parents for bastardy, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976), or against the state for bastardy. Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966). In bastardy cases infants allege an injury to their status by being born illegitimately. No court has ever awarded an infant damages for a bastardy claim.

7. Infants obviously cannot allege that the medical professional caused the genetic disease. Rather, they allege that the negligent conduct caused the birth to occur which carries with it the suffering associated with genetic disease. The faulty genetic counseling removes the eugenic abortion choice from the parents.

8. W. PROSSER, LAW OF TORTS § 30 (4th ed. 1971). The elements of a negligence cause of action are: that the defendant owes the plaintiff a duty of care, that the defendant breached that duty, that the defendant's breach was the proximate cause of the plaintiff's

of a negligence cause of action presents a legal issue in wrongful life litigation. Public policy is also an important issue in wrongful life litigation. Recognition of this new tort must prove to be sound policy before courts will open the door to a new class of litigants. In some circumstances, policy issues merge with the negligence elements to present legal issues of whether sound policy recognizes both a duty in genetic counseling situations and damages where that duty is breached. The basic question involved in wrongful life litigation underlies these legal issues: is there a right to recover damages for negligence when the alternative is non-existence?[9] The answer to this question influences how courts will view the legal issues in wrongful life claims.

This Comment will show that wrongful life claims are viable tort actions which can be effectively placed within the traditional tort framework for establishing negligence. The Comment will initially examine the landmark decision in *Curlender* and then proceed to an in-depth analysis of each of the legal issues involved. Analysis will show that wrongful life plaintiffs can establish all of the elements of a negligence cause of action and that this claim, supported by sound policy considerations, is thus a viable tort action. The *Curlender* decision reflects this conclusion although the court's analysis leaves some questions unanswered.

I. Analysis of Curlender

A. *The Facts and Decision*

The facts surrounding the *Curlender* controversy presented the court with a classic claim for wrongful life damages.[10] The plaintiff's parents had retained the defendant laboratory to administer certain tests to determine if either parent or both were carri-

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injury and that the plaintiff was in fact injured.

9. In essence, wrongful life plaintiffs want courts to recognize that some parents may consider eugenic abortion as a remedy for predictable genetic disorders even though the alternative for the child is non-existence. The parents need an opportunity to exercise that choice.

10. The appellate court in *Curlender* was ruling on the sufficiency of the plaintiff's complaint as the defendant had successfully demurred to the complaint in the trial court. The trial court sustained the demurrer in that the plaintiff had failed to plead a cause of action. A demurrer in California has the effect of admitting all of the allegations in the complaint but not the legal conclusions. This posture was important because it allowed the court to accept the plaintiff's allegations as true and allowed the court to formulate the cause of action based on these allegations.

ers of genes which would cause their offspring to be born with Tay Sachs disease, medically defined as amauratic familial idiocy.[11] The infant plaintiff alleged that the defendants failed to perform the tests properly and consequently misinformed the parents about their carrier status.[12] The plaintiff was born with Tay Sachs disease allegedly because of this negligence.[13] It was further alleged that due to the disease the plaintiff suffers from a variety of extreme physical ailments including a limited life expectancy of four years.[14]

The court held that the plaintiff had established a legal cause of action for wrongful life premised on the defendant's negligence.[15] The court concluded that the claim was consistent with applicable California negligence principles and that the claim was supported by public policy considerations.[16]

B. *The Court's Analysis*

Shauna Curlender's wrongful life claim was a case of first impression in California.[17] Consequently, the court surveyed the decisional law of other jurisdictions and found a progression in the law towards recognizing an infant's cause of action even though other courts had not recognized it.[18] The court used the dissents in the

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11. *See* Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) for how that determination is made. *See* SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE (1980). Tay Sachs is a fatal progressive degenerative disease of the nervous system which primarily affects the Eastern European Jewish population and their progeny. It is hereditary and it affects children of four months to twelve years.

12. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 815, 165 Cal. Rptr. 477, 480 (1980).

13. Due to insufficient pleadings the court was unaware of whether the parents relied on the laboratory's incorrect information in conceiving the plaintiff or whether they relied on it in failing to avail themselves of amniocentesis. *Id.* at 815, 165 Cal. Rptr. at 480. Apparently, the two situations were indistinguishable to the court.

14. Other symptoms of Tay Sachs include mental retardation, susceptibility to other diseases, convulsions, sluggishness, apathy, failure to fix objects with the eyes, inability to take an interest in the surroundings, loss of motor reactions, inability to sit up or hold head up, loss of weight, muscle atrophy, blindness, pseudobulpar palsy, inability to feed orally, decerebrate rigidity, and gross physical deformity. *Id.* at 816, 165 Cal. Rptr. at 481-82.

15. *Id.*

16. *Id.*

17. *Cf.*, Stills v. Gratton, 55 Cal. App.3d 698, 127 Cal. Rptr. 652 (1976). The court distinguished *Stills* on the basis of the injury complained of. The plaintiff in *Curlender* exhibited definite physical injury while in *Stills* the plaintiff's injury related to his status which the court found to be a dubious injury in modern times.

18. The court made an exhaustive analysis of the related decisional law to determine if

related case law to bring the issues into focus.[19] The dissents consistently pointed out that wrongful life plaintiffs are seriously injured and that barring recovery sanctions professional misconduct at the expense of the injured plaintiffs. Moreover, the dissents properly focused their analysis on the duty owed to unborn via the informed decision making of the parents. Once the court identified the competing interests involved in wrongful life claims, it proceeded to place the cause of action into California's negligence framework.

The court analyzed the issue of duty in light of the public policy considerations formulated in *Rowland v. Christian.*[20] Without elaboration, the court found that it was sound policy to recognize a legal duty owed the infant in genetic counseling situations. The court described this duty as one of ordinary care under the circumstances, but did not include a further duty to accurately disclose the test results to the parents although it was implicit in their reasoning and was alluded to later in the opinion.[21] The duty to dis-

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there was a recurring thread in the cases that had denied wrongful life claims. The arguments and issues raised by the other cases will be discussed in Section IV of this Comment, *infra.*

19. For example, the dissent in Gleitman v. Cosgrove, 49 N.J. 22, 50, 227 A.2d 689, 703 (1967) (Jacobs, J. dissenting), argues strongly that the majority's decision sanctioned medical malpractice for no good reason. Additionally, Judge Jacobs criticized the majority's position that the inability to compute damages required that they ban recovery.

The New Jersey Supreme Court retreated from a no damage position in Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). Nevertheless, they continued to ban recovery because of public policy reasons. The dissent found this position untenable and argued that the duty a medical practitioner owes an unborn mandates that the parents have the opportunity to decide the unborn's future. *Id.* at 439-40, 404 A.2d at 18. This view properly focuses on the duty due the unborn operating under an implicit agency theory.

Finally, Judge Cooke, dissenting in Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977), looked to the state of the art of genetic counseling to find that, given the advanced medical procedures available, it would not be unreasonable to at least investigate for possible problems via a genotological history. His analysis was premised on the informed decision making of the parents and the virtually miniscule added burden this would place on the profession. *Id.* at 117, 366 N.E.2d at 69, 397 N.Y.S.2d at 368 (Cooke, J. dissenting).

20. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Before a legal duty is recognized in California the court will analyze the following considerations: the forseeability of harm to the plaintiff, the certainty of the injury, the defendant's conduct as a proximate cause, the moral blame of the defendant, the deterrent factor, the burden on the defendant and consequences on the community of imposing a duty, and the availability and the cost and prevalence of insurance for the risk involved. The court apparently found that all of these policy considerations favored recognition of wrongful life claims.

21. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 830, 165 Cal. Rptr.

close should have been linked to the defendant's duty as part of the professional standard of care for genetic counselors. This failure was critical to a sound analysis of the infant's cause of action.

After finding a duty owed the plaintiff by the defendant, the court found a clear breach of that duty in this case. Proximate causation was the crucial legal issue facing the plaintiff according to the court.

The court found proximate causation by looking at the plaintiff's condition. They concluded that the infant both existed and suffered because of the defendant's negligence. Moreover, the injury was also forseeable because the certainty of impairment was present, for, if performed properly, the test would have definitively indicated the presence of Tay Sachs. A much simpler view would hold that the plaintiff suffered a definite injury which was forseeable by the defendant. Nevertheless, the court found that a wrongful life claim is a viable negligence action and that recognition of the claim depended upon public policy considerations.[22]

The court premised its policy analysis on the basic California tort law policy that there should be a remedy for every wrong.[23] Since *Roe v. Wade*[24] had removed any public policy against abortion per se from the analysis, the court concluded that deterrence of professional misconduct was the essential social policy involved and it tipped the scales in favor of the plaintiff. The court held that a reverent appreciation for life combined with social policy considerations gave the infant the right to be redressed for the serious injury received as a result of the defendant's negligence.[25]

477, 488 (1980). The duty to accurately disclose the test results to the parents was discussed in conjunction with intervening causation rather than with the defendant's duty of care. The court found that if the parents were accurately informed they should be liable to the infant if they allowed the birth in spite of negative genetic test results. This dicta was irrelevant to the case before the court and was worthless from a practical standpoint. It is simply impossible for a severely retarded infant to sue his parents. The only possibility of the parents being held liable would be if the state sued them on behalf of the child. Such a result is highly unlikely.

22. *Id.* at 830, 165 Cal. Rptr. at 489.

23. *See* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1968) (concept of a remedy for every wrong used to find insurance company committed tort when it failed to accept a reasonable settlement offer on behalf of the plaintiff thus exposing the plaintiff to liability beyond the coverage of the policy).

24. 410 U.S. 113 (1973). The landmark decision in *Roe* came after the *Gleitman* case was decided in New Jersey. The *Curlender* court implied that a public policy against abortion had influenced that decision and subsequent decisions based on *Gleitman*.

25. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d at 811, 830, 165 Cal. Rptr.

The court concluded its opinion by definitively structuring the possible damages award.[26]

The *Curlender* court fashioned new law but its scant analysis of the legal issues will create problems for future litigants. The scope of the decision is unknown because of this factor. Although the court was ruling on a laboratory's duty to an unborn plaintiff, its superficial analysis will most likely be applied to physicians in the future. The most disturbing aspect of the decision lies in the formulation of the ordinary care standard for the duty owed the plaintiff. An affirmative duty standard is more appropriate in these situations and is implicit in the court's reasoning. The duty owed is the key to the infant's cause of action because it relates to all of the legal issues facing wrongful life plaintiffs. The strength of the decision lies in the court's recognition of its responsibility to establish and limit a physician's duty in genetic counseling.[27] With this principle as a backdrop, this Comment will show that wrongful life claims are viable tort actions which are supported by sound legal analysis. A more workable framework for wrongful life claims is possible and it hinges on the formulation of an affirmative duty as the professional standard of care in genetic counseling situations.[28]

II. WRONGFUL LIFE—A NEGLIGENCE FRAMEWORK

A. *Duty*

The most important legal issue in wrongful life litigation concerns the question of duty, the threshold issue in any negligence action.[29] The definition of duty in wrongful life cases is the essen-

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477, 489 (1980).

26. *Id.* at 830-31, 165 Cal. Rptr. at 489-90. The court limited Shauna's damages to pain and suffering over her limited life span plus any special pecuniary loss incurred because of her impaired condition. The court specifically rejected a damages award which would be based on a normal life or on a right not to be born, thus avoiding comparison with nonexistence. Moreover, structuring the award in this manner defeats the impossibility of computing damages argument posited against the claim. Consequently, the award hardly amounts to a windfall for the parents as the eventual recipients of the award.

27. The court borrowed this view from one commentator. *See* Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978).

28. The *Curlender* court's analysis of the issues presented by wrongful life claims was superficial, but the case illustrates the problems involved in wrongful life litigation. Therefore, the decision will be used as a reference point when the cause of action is placed within the negligence framework in this Comment.

29. W. PROSSER, LAW OF TORTS § 31 (4th ed. 1971).

tial element in the cause of action because this definition will control the resolution of the remaining issues involved in wrongful life litigation. It is important to focus on the care owed the infant in genetic counseling situations as distinguished from the care owed the parents.[30] Proper focus on this duty will show that medical personnel owe infant plaintiffs a duty of care; this duty is adequately discharged only when the personnel involved meet an affirmative duty to screen for genetic defects as part of standard prenatal care. An affirmative duty standard is reasonable in genetic counseling situations and the imposition of that standard can be justified by a comprehensive analysis of the situation.

It is established that medical personnel owe a duty of care to an unborn infant during prenatal treatment.[31] Normally, the standard of care in any medical treatment process is one of reasonable care, exercised by one with the professional skills and knowledge of the ordinary medical practitioner.[32] An ordinary care standard is inappropriate in genetic counseling situations because there is no single standard of norms established for genetic counselors. Genetic counseling has developed too rapidly to have established standards of care.[33] Consequently, physicians clearly owe unborn infants a duty of care but the nature of the duty is uncertain.

Normally, the medical profession formulates its own professional standard of care for a given medical process.[34] This policy recognizes that medical practitioners are professionals who are ac-

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30. Proper focus on the duty owed the infant is extremely important to an analysis of the infant's cause of action because the parents merely act as the child's agents after the test results have been conveyed to them. The agency theory does not attach until that point.

31. *See* Bonbrest v. Kotz, 65 F. Supp. 138 (1946). The court held that an infant could recover damages for injuries received before birth which were caused by a physician's malpractice.

32. *See* Napier v. Greenzweig, 256 F. 196 (2d Cir. 1919). The court formulated the standard to hold that a physician breached his duty of care to the plaintiff by applying a plastic cast to the plaintiff's leg in a manner that cut off the plaintiff's circulation. *See* Harris v. Fall, 177 F. 79 (7th Cir. 1910) (The standard is appropriately modified upward for professionals holding themselves out as possessing special skills in a particular field. Obstetricians fall into this latter category.).

33. *See* Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618 (1979), for a discussion of how the emergence of genetic counseling as a discipline has created a problem because there are no established standards to guide genetic counselors.

34. Mason v. Geddes, 258 Mass. 40, 154 N.E. 519 (1926) (testimony of fellow physicians allowed to show that the defendant complied with the profession's established standard of care). The case stands for the proposition that the medical profession is allowed to formulate their own standard of care guidelines for medical procedures.

countable for their acts as a matter of ethical medical practice.[35] Courts will only overturn the professional standard when it is patently unreasonable.[36] Defining the standard of care in genetic counseling situations thus requires an analysis of what the profession considers an appropriate standard of care for genetic counselors.

The medical profession has been unable to agree on a single professional standard of care for genetic counselors. One faction of the profession urges a duty to test for the possibility of genetic disease in a fetus only when prospective parents request such an investigation and indicate an intent to abort if the test results indicate the presence of a severe genetic defect.[37] This formulation of the standard is not supportable if focus is properly placed on the duty owed the unborn plaintiff because it attempts to switch the focus of the duty from the infant to his parents, thus mixing two duties to the denigration of both. Moreover, this scheme assumes that all prospective parents have considered the possibility of their offspring having genetic disease. That presumption cannot be maintained. Thus, it is virtually impossible for physicians to discharge their duty to the fetus under an ordinary care standard.[38]

Another group within the medical profession has advocated that an affirmative duty to screen for genetic defects should be the professional standard of care in prenatal practice.[39] Under

35. The soundness of self-policing is buttressed by the fact that physicians must comply with strict licensing procedures and are subject to loss of license or censure for professional misconduct. In New York the authority to revoke a license or censure a physician is vested in the Board of Regents under the authority of the Education Law. *See* N.Y. EDUC. LAW § 610 (McKinney).

36. *See, e.g.*, Helling v. Carey, 84 Wash. 2d 514, 519 P.2d 981 (1974) (failure of ophthamologist to test for glaucoma as standard part of eye examination was held to be unreasonable in light of the easy and relatively inexpensive method available). This rarely happens, but since human genetics is such a sensitive area it may be appropriate for courts to impose the legal standards if the profession either fails to set a standard or sets an unreasonable one. The law thus has an opportunity to aid in the establishment of realistic guidelines from the outset. For a discussion of this unique opportunity *see* Milunsky & Reilly, *The "New" Genetics: Emerging Medicolegal Issues in the Prenatal Diagnosis of Hereditary Disorders in America*, J.L. & MED. 71 (1 March 1975).

37. *See, e.g.*, McKusick, *The Growth & Development of Human Genetics as a Clinical Discipline*, 27 AM. J. HUM. GEN. 261 (1975). *See also*, Teplitz, *Genetics*, 241 J. AM. MED. A. 1397 (1979).

38. This position is obviously self-serving to physicians who want to limit their liability as much as possible.

39. At a recent National Institute of Health conference, the members recommended that obstetricians administer a standard questionnaire to parents who seek prenatal care to

this standard obstetricians would screen all potential parents who seek prenatal care for possible genetic defects in the fetus. This standard would keep the focus of the duty owed on the fetus, and blanket routine screening would be the only reasonable method of discharging that duty. Moreover, it also avoids the problem of to whom the physician owes a paramount duty in genetic counseling.[40]

An affirmative duty standard is also reasonable in light of the benefits gained from employing it. It is an antidote for the problem of there being no established standard of care for genetic counselors to follow. Additionally, the minimal added expense of administering a questionnaire as part of prenatal care is decidedly outweighed by the benefits which flow from accurate genetic prediction. Even if the screening yielded a miniscule percentage of cases warranting further investigation it would still be worth the extra expense. The discharge of an affirmative duty, however, attaches significance to the information obtained in testing. This results in a further duty to adequately disclose the test results to the parents. This added duty functions under the doctrine of informed consent.[41]

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determine if amniocentesis should be considered. *See Antenatal Diagnosis: What Is Standard?*, 241 J. AM. MED. A. 1666 (1979).

40. Capron, *supra* note 33. Professor Capron points out that medical practitioners may face a problem in these situations because of their perception of their duty. The physician may feel he has a paramount duty to insure the infant's birth, a paramount duty to protect society from genetic disease burdens, or a paramount duty to treat the mother of the child. This dilemma is solved by an affirmative duty standard as the professional standard of care. For example, under the guise of protecting the fetus, some clinics will not disclose certain negative diagnoses to parents for fear that they will abort. Professor Capron points out that such non-disclosure can never be justified. Indeed, proper professional conduct should include full disclosure of all possible diagnoses and forms of treatment so that any treatment decisions will be based on adequate information.

41. Informed consent had its genesis in cases where physicians were, in some way, invading their patient's bodies. The patients were deemed to have consented to this invasion, thus to have allowed the battery. Genetic counseling is only a first step toward an ultimate invasion, but the severity of the resultant harm justifies invoking informed consent principles from the outset. This will ensure that the parents participate in all decisions germane to the treatment. *See* Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972) (physician breached duty of informed consent by failing to apprise the plaintiff of the risk involved in X-ray procedure which caused plaintiff to receive radiation burns). This case formulated the doctrine of informed consent and established its parameters. The elements of a breach of informed consent include: the existence of a material risk unknown to the patient; the failure to disclose the risk to the patient; that the patient would have chosen a different course of treatment had the risk been disclosed; and the injury resulted from the failure to use the alternative treatment. *See also* Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852 (1974)

After the results have been adequately disclosed to the parents an agency theory attaches. Since unborn infants are incapable of determining their choice of treatment, their parents become their agents for that purpose. Consequently, to make an informed decision about the possible use of eugenic abortion, the parents must be accurately informed of the test results and the choices of treatment available. It is, therefore, imperative that the further duty to adequately disclose the test results become part of the professional standard of care.[42]

The proper conclusion is that an affirmative duty standard of care is the only reasonable standard for genetic counseling situations in light of the duty owed the fetus and the state of the art.[43] Additionally, physicians have a duty to stay abreast of scientific changes occurring in their field and genetic prediction is one of those developments.[44] The only possible negative aspect of an affirmative duty standard is that it expands physicians' potential liability for malpractice during prenatal care.[45]

B. *Breach of Duty*

A breach of duty occurs anytime a defendant fails to comply with a duty of care owed the plaintiff.[46] Defining a breach of duty

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(breach of informed consent found when physician failed to warn of all material risks present in liver biopsy treatment when an alternative procedure was available). Thus, in pregnancy situations an alternative treatment is always present because the risk of genetic deformity is always present. The rule is ameliorated somewhat by the requirement that the plaintiff has the burden of proving a breach of informed consent. Miller v. Kennedy, *id.* Further, the physician can always justify nondisclosure when the well-being of the patient dictates such. *See* Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (risk involved in appendectomy justifiably withheld in view of patient's state of health and apprehension). It would be difficult for a genetic counselor to justify nondisclosure.

42. The agency theory is completely dependent upon adequate disclosure via informed consent. This view does not entail an advocacy of abortion but merely advocates that the parents' choice to abort be preserved. For other commentaries expounding the informed consent view, *see* Note, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 WM. & MARY L. REV. 125 (1978); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, *supra* note 27.

43. *See* note 1 and accompanying text *supra*.

44. *See, e.g.*, Zotterell v. Repp, 187 Mich. 319, 153 N.W. 692 (1915) (physician not allowed to plead ignorance of side effects of surgical process when it was established part of treatment). Physicians thus have a duty to keep up with changes occurring in their field. *See* Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968).

45. This is a policy problem which will be discussed in Section IV *infra*.

46. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31 (4th ed. 1971).

in genetic counseling situations turns entirely on the nature of the duty owed unborn infants under the professional standard of care. Presently, it would be virtually impossible to establish a breach under an ordinary care standard due to the lack of a uniform standard.[47] The *Curlender* court was able to apply that standard because the defendants' actions fell well below any standard. Since not all cases are that easily resolved, a breach of duty is more readily ascertainable under an affirmative duty professional standard of care.

A breach of duty could arise in several instances under an affirmative duty standard. First, it would be a breach of duty to fail to conduct the genetic screening. If the screening is performed it would be a breach of duty to conduct the tests improperly so that the results are incorrect. Finally, it would be a breach of duty to fail to adequately disclose the results to the parents or, if adequately disclosed, to fail to inform them of the alternative treatment choice of abortion. If the screening yields results which indicate further testing is necessary, it would be a breach to fail to continue the investigation.[48] If further testing is warranted, the same types of negligent breaches could occur in subsequent testing which may include amniocentesis. An affirmative duty standard of care merely prescribes that physicians perform further tests if warranted, perform them properly, and accurately disclose the results to the parents.[49]

The formulation of an affirmative duty standard thus lends itself to defining specific situations where a breach of duty occurs. Finding breaches in these situations ensures that physicians are adequately discharging the duty they owe unborn infants. It also has the desired effect of bringing the unborn's parents, as agents, into the treatment process at an early stage when eugenic abortion remains possible.[50] As a legal policy matter a breach of duty under

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47. *See* note 33 *supra*.

48. Further tests may entail blood tests and/or amniocentesis. *See* Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

49. It may be argued that if parents indicate an intent not to abort, all further testing should cease. This view is not tenable because the physician's duty to adequately disclose the exact nature of all the risks present cannot be discharged until the tests confirm the diagnosis. Moreover, the parents may wish to change their mind about abortion in face of reliable information that the fetus has irreparable genetic disease.

50. Depending on the jurisdiction, the applicable state law may prohibit aborting a "viable" fetus as defined in Roe v. Wade, 410 U.S. 113 (1973).

an affirmative duty standard is easier to prove. It also would protect medical personnel from unfounded claims because they could more easily prove they had complied with the professional standard of care.

C. *Proximate Causation*

Wrongful life plaintiffs must also prove that the defendant's breach of duty was the proximate cause of their injuries.[51] Any failure by a physician to properly inform the parents about the unborn's genetic makeup, thereby removing their choice to abort, provides the proximate cause link to the plaintiff's injuries. Causation is established because adequate discharge of the defendant's duty could have prevented the manifestation of the genetic disease in the infant.

Proximate causation is usually analyzed in terms of the forseeability of the defendant's conduct causing injury to the plaintiff.[52] Forseeability is best illustrated by the ability of physicians to accurately predict the presence of some genetic diseases with near 100% accuracy.[53] In those circumstances, the forseeability of injury turns into a certainty of injury.[54] If physicians adequately discharge the duty owed to the fetus there is no proximate causal link between their conduct and the injury. But if a breach of duty results in an injury, wrongful life plaintiffs face the problem of proving proximate causation.

Proof may be difficult to establish in wrongful life cases where the tests were conducted but failed to indicate the genetic disease. Normally, plaintiffs in medical malpractice litigation prove breach of duty and causation by using expert testimony when the average person is unfamiliar with the established standard of care.[55] With-

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51. *See, e.g.*, McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 99 (1911).

52. *See* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

53. The *Curlender* court focused on this aspect when they stated, "[T]he certainty of genetic impairment is no longer a mystery." Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1980).

54. *See* note 1 *supra*.

55. Any time the standard of care is not well-known or readily understandable by a lay juror, it is necessary for the plaintiff to establish it and a breach of it using expert testimony. *See, e.g.*, Edwards v. United States, 519 F.2d 1137 (5th Cir. 1975). For this and other reasons, a simple unified standard of care for all people who function as genetic counselors is most desirable. *See* Capron, *supra* note 33, at 623 n.17.

See Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852 (1974). Many problems are

out a unified standard of care, however, there is little for an expert to attest to. An affirmative duty standard together with the accuracy rate would provide strong proof of negligence in this situation. Consequently, courts may apply the doctrine of *res ipsa loquitur* to ameliorate the plaintiff's proof problem.[56] Proof would be more readily available and plaintiffs would be able to establish a case without the need for a parade of experts. Consequently, an affirmative duty standard of care would lessen many of the problems inherent in medical malpractice litigation.

Establishing proximate causation in wrongful life litigation depends upon the nature of the physician's duty in genetic counseling situations. An affirmative duty standard would aid both plaintiffs and defendants if litigation results. An ordinary care standard would only create many problems. Determining proximate causation, however, is the same under either standard; it is forseeable that negligent genetic counseling could result in the birth of a genetically defective infant because it removes the eugenic abortion choice from the parents.

III. PUBLIC POLICY

Public policy considerations, including the issue of damages,[57] have been the chief grounds for denying wrongful life claims in

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associated with using expert testimony in medical malpractice actions. Among these are the "conspiracy of silence" in which physicians are reluctant to testify against one another. *See, e.g.*, Markus, *Conspiracy of Silence*, 14 CLEV-MAR. L. REV. 520 (1965), and the conflicting expert testimony offered at trial requiring juries to choose which expert they like best.

56. Literally, the thing speaks for itself. In negligence actions it is used to create an inference or presumption that the defendant was negligent and caused the plaintiff's injuries. *See* Cox v. Northwest Airlines, 379 F.2d 893, *cert. denied*, 389 U.S. 1044 (1967) (airplane crashes do not normally occur without someone's negligence causing them and, therefore, *res ipsa loquitur* applies). To apply the doctrine courts require that the defendant be in exclusive control of the instrumentalities surrounding the event so that any information and/or proof arising from the event is in the exclusive control of the defendant. *See* Brannon v. Wood, 251 Or. 349, 444 P.2d 558 (1968). The doctrine is more amenable to medical malpractice actions because, as a policy matter, the defendant is most likely to have access to any proof of the negligence. *Res ipsa loquitur* allows plaintiffs to recover without requiring them to "finger" the party responsible as there are a variety of medical personnel attending to a patient in any medical process. Whether the doctrine creates an inference of negligence or a presumption of negligence depends upon the jurisdiction. *See* George Foltis Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941). *But see* Schechter v. Hann, 305 Ky. 794, 205 S.W.2d 690 (1947).

57. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

other jurisdictions.[58] In *Gleitman v. Cosgrove*,[59] the court found that the plaintiff had not suffered any legally cognizable damage because it was logically impossible to measure such damage. Alternatively, the court found that a decision to allow recovery was a negation of the value of life and, therefore, contrary to public policy.[60] Twelve years later the New Jersey Supreme Court denied a wrongful life claim solely on public policy grounds in *Berman v. Allan*.[61] The court concluded that sound policy required a finding that any existence "with or without a physical handicap is more precious than non-life."[62] The court thus eschewed any analysis that failed to find that the infant plantiff had been injured, evidencing significant retreat from that stance. The cases indicate that public policy as it relates to damages or the cause of action in general is used to bar recovery. This section will examine the various policy arguments advanced against wrongful life claims. The analysis shows that policy considerations actually favor recognition of a wrongful life cause of action.

A. *Damages*

Courts create critical problems for wrongful life plaintiffs by refusing to recognize any injury. The *Gleitman* court carried this argument further by finding that even if the plaintiff had been legally injured, the damages could not be computed because of the impossibility of comparing life with infirmities to non-existence to form a damage basis.[63] These arguments are not defensible in light of the proper analysis of the duty owed unborn plaintiffs by physicians.

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58. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). *See also* Speck v. Finegold, 268 Pa. Super. Ct. 342, 408 A.2d 496 (1979).

59. 49 N.J. 22, 227 A.2d 689.

60. The court noted that, "[T]he Roe v. Wade case played a substantial part in the partial retreat from the *Gleitman* holding by the New Jersey Supreme Court majority in Berman v. Allan." Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 820, 165 Cal. Rptr. 477, 483 (1980). The court later referred to Roe v. Wade as having "monumental implications" in the eugenic abortion area. *Id.* at 828, 165 Cal. Rptr. at 487.

The *Gleitman* case was decided in 1967 before abortions were held to be constitutionally protected in the *Roe* decision. Public policy at that time was conceivably anti-abortion.

61. 80 N.J. 421, 404 A.2d 8 (1979).

62. *Id.* at 429, 404 A.2d at 12-13.

63. Damages are compensatory and the usual method of calculation attempts to make good the plaintiff's loss by a comparison of the plaintiff's situation before and after the tortious act. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1 (1973).

By refusing to find an injury, the court failed to focus on the duty of care owed the infant. The plaintiff's birth, with its concomitant suffering, is an injury which could have been prevented but for the defendant's negligence. The birth is a cognizable injury because of the implications it carries for the infant. Moreover, as the dissent in *Gleitman* pointed out, barring recovery allows a serious wrong to go unredressed while serving to provide no deterrent to professional irresponsibility.[64] A policy which ignores a severe injury while shielding physicians from liability for malpractice is not justifiable.

A recognition of damage in wrongful life cases should be premised on the infant's legal rights.[65] The plaintiff's pain and suffering gives him the right to seek damages from the physician who stripped the infant's parents of the opportunity to prevent the pain and suffering. The injury is cognizable and it seems unconscionable to hold that an infant born with Tay Sachs disease has suffered no legally cognizable injury as a policy determination.[66] Thus, the requisite injury is present and it can be shown that it is possible to compute a damage award.

The *Curlender* court recognized that tort policy prescribes that there be a remedy for every wrong committed.[67] This principle permeates tort law and has lead to the formulation of actions for many injuries which cannot be precisely compensated in dollars and cents.[68] Moreover, it is established that the difficulty of computing damages does not justify denying liability.[69] It is inconsistent to find an injury but to bar recovery because the damages are difficult to compute.[70] Furthermore, computation of damages in

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64. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

65. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 828, 165 Cal. Rptr. 477, 488 (1980).

66. *See* note 14 *supra*, for the symptoms of Tay Sachs disease alleged in the *Curlender* complaint.

67. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 830, 165 Cal. Rptr. 477, 489 (1980). The court cited Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433, 58 Cal. Rptr. 13, 18 (1967), to support this point. *See* text accompanying note 23 *supra*.

68. For example, property damage is usually amenable to a precise award of damages. Personal injuries, on the other hand, are highly speculative because the value of a leg or an arm or percentage thereof is not subject to a precise valuation.

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

70. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 3.1, 3.33 (1973) and Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); *see also* Note, *An Action for Wrongful Life Brought on Behalf of a Wrongfully Conceived In-*

any tort action is always arbitrary and speculative as the value of a bodily injury is incapable of precise valuation. The impossibility of computing damages argument fails under this analysis.

Proper analysis of wrongful life claims shows that wrongful life plaintiffs have been seriously injured and that damages can be computed. The *Curlender* court defined the parameters of the plaintiff's damage award in a reasonable manner.[71] Public policy, thus, should not be used to hold that wrongful life claimants are lacking the requisite injury because a damage basis cannot be formed.

B. *The Value of Life as a Fundamental Principle of Our Society*

The underlying theme of the other public policy arguments of the *Gleitman* and *Berman* courts encompasses moral beliefs held in our society concerning the value of life. The courts transposed their subjective beliefs about the value of life into a public policy against eugenic abortion as a remedy for genetic disease. This view is not founded on legal analysis of wrongful life claims, but on metaphysical principles. Nonetheless, the argument is formidable because of the emotional impact on society of any decision that supports the use of abortion. One commentator posited this argument by stating that it is a fundamental principle of our society that each being is valuable.[72]

The problem with this position is that it is a conclusion which is not supportable either logically or empirically. Courts would not, however, negate the value of life by allowing wrongful life plaintiffs to recover damages. Allowing recovery would merely recognize that

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fant, 13 WAKE FOREST L. REV. 712 (1977). These authors argue that courts are not incapable of fashioning remedies for wrongful life plaintiffs. Professor Dobbs expressed disbelief that this argument was used to defeat the cause of action.

71. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 831, 165 Cal. Rptr. 477, 490 (1980). *See* note 26 *supra*. The court would also award punitive damages if the plaintiff could establish them, under the CAL. CIV. CODE § 3294 (West), by showing that the defendant was guilty of oppression, fraud or malice, either express or implied. Punitive damages are awarded for exemplary reasons to punish the defendant. The practical effect of the court's damages guidelines is that in many instances the cost of litigation will exceed the potential recovery.

72. *See* Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 W.U.L.Q. 919. The author analyzes the history of tort law to conclude that wrongful life is not a tort within the traditional meaning of tort law. The author found that there must be an injury to a person's dignity in order for a person to recover in tort and wrongful life plaintiffs do not suffer such an injury by being born.

infant plaintiffs are seriously injured by professional malpractice in wrongful life cases. The injury gives them the right to be redressed. Moreover, as with terminally ill patients, it may not be correct to hold that life with infirmities is more precious than non-existence. Such a value judgment is beyond the scope of the court's authority. Finally, it is questionable whether it is a fundamental principle of our society that each being is valuable.[73] Assuming *arguendo* the validity of the proposition, the principle should also include a respect for a person's right to live, if possible, free from pain and suffering.

The policy analysis of the *Gleitman* and *Berman* courts was, therefore, of dubious validity. If the values they espoused are properly analyzed under public policy principles, the only conclusion possible is that the principles favor recognition of the cause of action.

C. The Added Burden on the Medical Profession—Defensive Medicine

It is also argued by some that liability for wrongful life claims places an undue burden on the medical profession that will hinder effective medical practice.[74] The logical extension of this argument is that physicians will practice defensive medicine to avoid liability.[75] The added use of medical procedures where they were not used previously is certainly a waste of valuable resources if this argument has any force.[76] While this argument may be somewhat tenable under an ordinary care standard, it is wholly obviated by an affirmative duty standard of care.

Defensive medicine is not a problem when the physician is merely complying with the professional standard of care in any given medical procedure. Screening for genetic defects as part of

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73. The fact that abortions are constitutionally protected and that states may constitutionally execute prisoners for capital offenses leads one to question whether it is valid to hold that it is a fundamental principle of our society that each being is valuable.

74. *See* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). Defensive medicine (as it flows from an added burden on the medical profession) was one of the major concerns of the New York Court of Appeals in denying recovery for wrongful life torts.

75. *See, e.g.*, S. LAW & S. POLAN, PAIN AND PROFIT (1978). Defensive medicine refers to the overemployment of medical procedures for the purpose of avoiding legal liability rather than as a part of proper medical procedure.

76. *Id.*

standard prenatal care would be proper medical procedure rather than defensive practice. Consequently, amniocentesis will only be utilized in cases where it should be used.[77] It could only be used defensively under an ordinary care standard. Moreover, improved technology will undoubtedly make genetic prenatal investigation mandatory in the future. The burden of an affirmative duty will, thus, be merged into the professional standard of care in the future even if it is not accepted at this point. Imposition of an affirmative duty standard at this point is reasonable as it defeats the problems posed by defensive medicine.

Public policy considerations should include the desire to promote effective medical practice without encouraging the practice of defensive medicine. An affirmative duty standard would meet this goal. The added burden of an affirmative duty is also decidedly outweighed by the benefits that will flow from such a standard.[78] The procedure used to investigate possible genetic problems is too simple and inexpensive to constitute an added burden on the profession.

D. *Social Policy*

Opponents of wrongful life actions also argue that even if the claim is recognized the recovery of a few plaintiffs will not alter the incidence of genetic disease.[79] Thus, allowing the cause of action will not remedy the social side effects of genetic disease. Careful analysis of the social aspects of genetic disease will show that social policy considerations favor, rather than disfavor, allowing the cause of action.

Allowing the cause of action will admittedly not lead to the

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77. Amniocentesis entails a risk of injury in less than 1% of the women it is performed on. This rate should not be affected by an affirmative duty standard. *See* The Report to the Medical Research Council by their Working Party on Amniocentesis, *An Assessment of the Hazards of Amniocentesis*, 85 BRIT. J. OB. & GYN. 1 (Supp. II 1978).

78. The argument fails under a pure cost/benefit analysis. For example, it also costs more to immunize children from polio but it cannot be maintained that the cost of the procedure should mandate its discontinuance. While the example is extreme, it illustrates that a certain amount of increased cost is necessary to promote advances in medicine. The minimal added expense of administering a questionnaire cannot defeat the need for it. Moreover, it can only be conjectural at this point whether allowing the cause of action will increase the cost of prenatal care because increases in malpractice insurance will be passed on to the medical consumer.

79. *See* Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1494 (1978).

eradication of genetic disease. An affirmative duty standard of care would, however, eventually tend to lessen the burden of genetic disease on society because more parents would be given the opportunity to prevent the manifestation of the disease in their offspring. This is important in view of the staggering social burden genetic disease imposes on society.[80] Recognizing these burdens, the *Curlender* court concluded that social policy should be concerned with social welfare as it relates to sound medical practice.[81]

Social interests, therefore, dictate that the law establish and limit the duty of physicians in genetic counseling situations.[82] Moreover, it cannot be maintained that allowing wrongful life claims is injurious to social welfare because allowing recovery should at least foster more efficient prenatal care. In this instance social policy considerations favor allowing the cause of action. The prospect of genetic manipulation in the future serves to buttress this argument.

E. Dual Recovery and Fraud

It is also argued that allowing both the parents and the infant to recover for the same negligent act amounts to a dual recovery. There is, however, no dual recovery in wrongful life cases because both parents and child suffer distinct injuries. The child's injury pertains to his birth,[83] while his parents' injury is economic[84] and/or emotional.[85] These injuries are clearly distinguishable. Moreover, no dual recovery exists in fact, even though the parents receive the damages awards for both injuries. Careful structuring of

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80. *See, e.g.*, A. Day & B. Holmes, *The Incidence of Genetic Disease in a University Hospital Population*, 25 AM. J. HUM. GEN. 257 (1973). The study showed that 20% of all hospitalized children deaths and 40% of all childhood deaths are attributable to genetic disease. *Accord*, P. REILLY, GENETICS LAW AND SOCIAL POLICY (1978).

81. *See* Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1494 (1978). The *Curlender* court cites this article to buttress their argument on this point. *See* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 824, 165 Cal. Rptr. 477, 487 (1980).

82. *Id.* at 821, 165 Cal. Rptr. at 483.

83. *Id.*

84. *See* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895. A finding of liability to one of the plaintiffs would not be res judicata to the other plaintiff. The only res judicata effect would be that the plaintiff in the second action could claim that the defendant was collaterally estopped from claiming no negligence if the first action found so.

85. *See* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

the infant's damages award, as done in *Curlender*,[86] ensures that the infant's award will cover the cost of care. Consequently, parents receive no financial windfall when they receive the infant's damages.

The possibility of fraudulent claims arising by allowing a wrongful life cause of action is obviated by an affirmative duty standard. If a physician can prove adequate compliance with this standard of care it would be impossible to advance a fraudulent claim. Moreover, it would also be very difficult to feign the requisite genetic disease in the infant. Consequently, there is no merit to the dual recovery or fraud arguments.[87]

F. *Tort Policy*

The emergence of wrongful life claims requires an analysis of whether the claim falls within recognized tort law policies, principally compensation and deterrence.[88] The purpose of compensation is to make a plaintiff whole for the injury received.[89] Money damages are awarded because there are no other remedial measures available.[90] In wrongful life cases money damages will enable infants to relieve the cost burden that their genetic disease places on their parents or society. Since the disease could have been prevented by adequate genetic counseling, compensation for the resultant injury is consistent with a policy that shifts costs to the responsible party, especially when there is insurance available to

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86. The structure of the damages award is illustrated in note 71 *supra*.

87. Another argument along this line was discussed by the *Curlender* court. The court answered those who argue that if the claim is allowed that there would be nothing stopping infants from extending the cause of action to suits against the infants' parents. The court found no reason to shield the parents in such situations if they allowed the child's birth in spite of negative test information. For the practical problems involved in this approach, *see* note 21 *supra*. The only possible legal theory in which this could occur would entail gross neglect within state statutes allowing such actions. *See* Brown & Truitt, *Civil Liability in Child Abuse Cases*, 54 CHI.-KENT L. REV. 753 (1978).

88. Williams, *The Aims of the Law of Tort*, 4 CURR. LEG. PROB. 137 (1951). For a discussion of the goals of tort law as they relate to justice and public policy, *see* G. CALABRESI, THE COSTS OF ACCIDENTS (1970). Professor Calabresi argues that any deterrent effect is largely theoretical. This argument is not dispositive of a deterrent effect under an affirmative duty standard of care in genetic counseling situations because such a standard would deter noncompliance if liability for wrongful life were attached to failure to exercise the duty. *See also* Capron, *supra* note 33, at 857-58.

89. *See, e.g.*, Williams, *supra* note 88.

90. *See, e.g.*, Tinnenholm v. Parke Davis & Co., 285 F.Supp. 432, *aff'd*, 411 F.2d 48 (2d Cir. 1969).

cover the cost.[91]

Deterrence of professional misconduct may also be accomplished by allowing the cause of action. Justice Bryan, dissenting in the *Gleitman* case, summed up this policy best by stating that barring recovery "permits a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility. . . ."[92] Allowing wrongful life claims is clearly consistent with a policy of deterrence. Moreover, it is an insufficient deterrent to compensate only the parents because the object of deterrence in wrongful life cases is to encourage compliance with a duty of care owed to the unborn infant. Again, proper focus on the duty owed the unborn is crucial to this analysis.

Wrongful life claims are thus clearly consistent with the goals of tort law. Consequently, there are no public policy arguments which are dispositive of the cause of action. The public policy arguments examined herein show that public policy supports finding wrongful life claims as viable tort actions.

CONCLUSION

There exists a clear tendency in tort law to compensate all persons who have been injured by another's wrong.[93] Wrongful life claims are viable tort actions which should be brought under this umbrella. The *Curlender* decision indicates that the law is willing to extend legal protection to infants who are injured by negligent genetic counseling.

The legal impediments involved in wrongful life litigation can be overcome by wrongful life plaintiffs and the claim can consequently be placed into the traditional tort framework for establishing negligence actions. Analysis of the cause of action shows that the legal issues involved are largely dependent on the nature of the duty owed the unborn infant by medical professionals.

An affirmative duty standard of care is the only reasonable standard to impose on genetic counselors in light of the legal issues present. An affirmative duty standard is also a panacea for many of the public policy arguments advanced against the claim. Moreover

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91. *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). For a general discussion of the effect of tort law on shifting costs and other tort objectives *see* CALABRESI, *supra* note 88.

92. *See* Gleitman v. Cosgrove, 49 N.J. 22, 37, 227 A.2d 689, 703 (Jacobs, J., dissenting).

93. *Id.* at 35-36, 227 A.2d at 703.

that standard brings wrongful life claims into proper focus by illuminating the connection between the defendant's conduct and the plaintiff's injury. Even if an affirmative duty standard is not imposed at this time, it will certainly be considered as ordinary prenatal care in the future as the technology of the field grows. In light of the desire to have a uniform ethical standard of care for geneticists to follow, it is logical to formulate an affirmative duty standard at this point.

The cases that preceded *Curlender* illustrate that the judiciary was perplexed by the cause of action.[94] The precedential impact of those decisions is severely hampered by the lack of a unifying thread running through those cases. Moreover, the policy considerations used to defeat wrongful life claims in the past are subject to critical scrutiny. An analysis of those policies shows that they favor allowing the claim, or at least they are not dispositive of it.

The competing interests at stake in wrongful life litigation also affect an analysis of the cause of action. The infant's interest in avoiding an existence fraught with pain and suffering decidedly outweighs the physician's interest in avoiding liability. The prospect of further development of the science of human genetics makes it easier to meet the infant's interest in these cases. The possibility in the future of genetic construction and reconstruction mandates that the law become involved in establishing appropriate guidelines for the profession to protect the unborn infants' interests *before* they are adversely affected. Wrongful life claims are thus one avenue open to legal control of this highly sensitive science.

The impact the *Curlender* decision will have on future wrongful life litigation is unclear. It could open the door to wrongful life plaintiffs or it could be limited to its facts.[95] At a minimum the

94. *See* note 4 *supra.*

95. Two recent decisions have refused to follow the *Curlender* analysis. In Phillips v. United States, 508 F.Supp. 537 (D.S.C. 1980), the court down-played the *Curlender* decision because it emanated from an intermediary California appellate court. They neglected, however, to note the effect of the California Supreme Court's refusal to review the decision by finding that the refusal's meaning is unclear. Moreover, the *Phillips* court limited *Curlender* to cases involving pre-conception negligence although it was not clear whether that was the case and whether the *Curlender* court's holding was so limited. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 816, 165 Cal. Rptr. 477, 480. Even if the *Phillips* court characterized the facts correctly, it is difficult to understand what distinguishes pre-conception negligence from post-conception negligence when both result in the same injury. *See also* Roback v. United States, 503 F.Supp. 982 (N.D. Ill. 1980), where that court also refused

decision broke legal ground for wrongful life plaintiffs, even if the court's analysis was questionable. The case stands for the basic proposition that parents must be given the opportunity to prevent their offspring from experiencing the severe pain and suffering associated with genetic disease. A major unanswered question, however, concerns the parameters of the cause of action.

Since parents are allowed to legally abort any fetus in prescribed circumstances, the major problem lies in the limits of physicians' liability. Courts will have to decide what constitutes a sufficient genetic injury to warrant holding a physician liable.[96] Circumstances will exist where a wrongful life plaintiff can establish a cause of action, but the injury may be *de minimis* in view of the alternatives facing the child. The limits of the cause of action are thus a formidable question.[97]

The conclusion is that wrongful life is a viable tort claim under applicable tort law standards which is supported by public policy considerations. The key to effective legal analysis of the claim is the formulation of an affirmative duty to screen for genetic defects as part of the professional standard for prenatal care. The future of the cause of action will depend largely on how the law establishes and limits that duty.[98]

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to follow the *Curlender* court's reasoning.

96. To illustrate this aspect one might look to hypothetical cases: Is a missing limb a sufficient injury to justify imposing liability? If so, is a missing finger? There are an infinite number of genetic defects which could occur in a fetus in the nuclear age. The result is that the courts will inevitably be called upon to draw lines on where liability for genetic defects will stop.

97. A discussion of the limits of the cause of action is beyond the scope of this Comment.

98. The *Curlender* court stated emphatically that recognition of the claim would not involve future courts in the task of defining the extent of liability. The position is untenable in light of the analysis in note 96 *supra*.