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Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action

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*Brian M. Peters***

I. INTRODUCTION

Recent advances in medical technology and genetic study permit physicians to predict, with varying degrees of accuracy, the likelihood of prospective parents giving birth to a defective offspring.[1] This information, when provided to prospective parents prior to conception or during pregnancy, allows them the choice of preventing conception or birth of potentially defective children by utilizing contraceptive techniques or terminating the pregnancy with an abortion. Because of these genetic and technological advances, courts increasingly have been called upon to adjudicate claims based on a physician's failure to detect or to disclose the possibility that a defective child will be born. The effect of the physician's failure denies the parents, on their own and on the child's behalf, the choice of preventing the conception or birth of the defective infant. Specifically, the physician's failure results in the infant's birth and subsequent existence as a severely handicapped or diseased individual. Lawsuits on behalf of or in the name of the child, based upon such physician failures, are called "wrongful life" actions.[2] To date, however, no appellate court of last resort has recog-

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1. For a discussion of those advanced techniques for predicting defective offspring, *see* notes 76-82 and accompanying text *infra*.

2. *See* Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967). For a proper understanding of the wrongful life cause of action it is essential to note at the outset of this article that the cause of action is brought only by the child or, if deceased, by the administrators of his/her estate. Any action brought by the child's parents for any injury they may have suffered due to the child's birth and/or subsequent death is separate and distinct from the child's action. Due in part to the complexity of the wrongful life issue and the necessity to focus this article, the authors concentrate solely on the issue of wrongful life and leave for another time the discussion of the related parental causes of action.

nized this cause of action.[3]

In contrast, courts have recognized that parents in their own right can sue the physician for failing to inform prospective parents of the potentiality of their giving birth to a defective child. The parents' cause of action is properly called "wrongful birth,"[4] although courts have applied various labels to describe the same type of claim.

This article focuses on the wrongful life issue, sets forth an explanation for the courts' failure to permit such claims by defective children and establishes a basis within the current legal framework for the recognition of the wrongful life cause of action. Specifically, the authors examine the genesis of the wrongful life cause of action; the barriers to the recognition of such a claim; the ultimate barrier, cultural lag; and the reasons why these barriers are inappropriate.

II. "WRONGFUL LIFE"—THE REJECTED CAUSE OF ACTION

A. *Genesis of "Wrongful Life*

In 1967, a state court in New Jersey was the first to be confronted with a wrongful life cause of action. In *Gleitman v. Cosgrove*,[5] the plaintiff's mother consulted the defendant, Dr. Cosgrove, an obstetrician and gynecologist, two months into her pregnancy, and told him that she had contracted German measles (rubella) during the prior month. Dr. Cosgrove advised that this would have no effect at all on her child, although his testimony at trial showed that he withheld his true opinion in the furtherance of his personal beliefs and opinion.[6] For

3. *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 470, *hearing denied* (1980). For discussions of the wrongful life cause of action, see Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966) [hereinafter cited as Tedeschi]; Note, *Park v. Chessin: The Continuing Judicial Development of the Theory of "Wrongful Life,"* 4 AM. J. L. & MED. 211 (1978) [hereinafter cited as *Theory of "Wrongful Life"*] Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978) [hereinafter cited as *Inadequate Genetic Counseling*]. See *also* Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706 (1977); Comment, *Preconception Torts: Foreseeing the Unconceived*, 48 U. COLO. L. REV. 621 (1977); Note, *An Action Brought on Behalf of the Wrongfully Conceived Infant*, 13 WAKE FOREST L. REV. 712 (1977).

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

5. 49 N.J. 22, 227 A.2d 689 (1967). In *Gleitman*, the first count in the complaint was brought on behalf of Jeffrey Gleitman, an infant, for his birth defects. The second count was brought by his mother for the effect on her emotional state caused by her son's condition. The third count was brought by the father for the costs incurred in caring for Jeffrey. *Id.* at 24, 227 A.2d at 690.

6. At trial, Dr. Cosgrove admitted that ten to twenty percent of fetuses exposed to rubella during the first trimester are born with anomalies. Yet this information was

the three months after her initial visit with Dr. Cosgrove, Mrs. Gleitman received prenatal care at the army base where her husband was stationed. She told the army doctors about the German measles and they advised her to discuss the matter with her regular physician when she returned home. After she returned home, Mrs. Gleitman again asked Dr. Cosgrove about the effects of her exposure to German measles, and again received a reassuring answer. Subsequently, Mrs. Cosgrove gave birth to a son with serious visual, hearing and speech impairments.[7]

Suing for its wrongful life, the infant asserted that Dr. Cosgrove's negligent advice precluded his mother from obtaining an abortion. Thus, the infant plaintiff's birth with defects was alleged to be the proximate consequence of Dr. Cosgrove's advice. The trial court refused to recognize the wrongful life claim as a matter of law.[8] Affirming the decision of the trial court, the New Jersey Supreme Court denied recovery for two reasons. First, the court denied recovery because there were no damages cognizable at law, finding that it was impossible to measure the difference between the infant's life with defects against the "utter void" of nonexistence.[9] The court reached this conclusion by attempting to assess damages under a traditional tort valuation, where the remedy afforded an injured party is designed to place that party in the position he would have occupied but for the negligence of the defendant. Application of this standard led the court to conclude that it could not "weigh the value of life with impairments against the nonexistence of life itself."[10] Second, the court determined that even if damages were cognizable at law, a claim would be precluded by the "countervailing public policy supporting the preciousness of human life."[11]

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withheld from Mrs. Gleitman because he believed that "some doctors would recommend and perform an abortion for this reason but that [it was not] proper to destroy four healthy babies because the fifth one would have some defect." *Id.* at 26, 227 A.2d at 691.

7. *Id.* at 25, 227 A.2d at 690.

8. *Id.* at 26, 227 A.2d at 691.

9. *Id.* at 28, 227 A.2d at 692.

10. *Id. See also* Tedeschi, note 3 *supra.*

11. 49 N.J. at 31, 227 A.2d at 693. The court reasoned that "if Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all." *Id.* at 30, 227 A.2d at 693. The court was undoubtedly swayed in reaching this conclusion by the New Jersey law which prohibited at that time any abortion "without lawful justification." N.J. STAT. ANN. § 2A:87-1 (West 1969) (repealed 1979). In a lengthy concurring opinion devoted to the question of whether an abortion of Mrs. Gleitman's fetus would have violated that statute, Judge Francis concluded that indeed, it would have. Since medical science had not yet advanced to the point of determining the *degree* of a fetus' defect, it would have been improper to abort when

One year later, relying on the *Gleitman* decision, the New York Supreme Court of King's County partially set aside the jury decision in *Stewart v. Long Island College Hospital*[12] and dismissed the infant plaintiff's action for wrongful life.[13] The suit was brought against a hospital by the infant girl Stewart, who was born with serious physical and mental disabilities. Mrs. Stewart, who had contracted German measles (rubella) in the first trimester of her pregnancy, had been advised by her physician that her child might be afflicted with congenital disabilities. She later entered defendant hospital to obtain a eugenic abortion. Upon reviewing her case history, the hospital determined that no therapeutic abortion was needed and advised Mrs. Stewart that she should not seek an abortion.[14] She subsequently gave birth to the defective infant plaintiff.

The infant alleged that her wrongful life was the proximate result of the hospital's failure to disclose that two of the doctors consulted by the defendant believed the pregnancy should be terminated. It was argued that but for this failure to disclose, Mrs. Stewart would have sought an abortion.[15] The court rejected these allegations, relying primarily upon the two rationales set forth by the *Gleitman* court. First, damages would be impossible to assess because a court could not "weigh the value of life itself with the impairment against the nonexistence of life itself."[16] Second, public policy concerns compelled the preservation and not the prevention of human life. The court concluded that there is no remedy for being born under a handicap when the only

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such defect may have been minor. *Id.* at 40, 227 A.2d at 699 (Francis, J., concurring). Judge Francis emphasized that since the abortion was not justifiable, only the public policymakers who created the criminal offense should make determinations as to the availability of this procedure; they would be better equipped than courts to reach an informed judgment on such a controversial and emotional matter. *Id.* at 48, 227 A.2d at 703 (Francis, J., concurring).

12. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

13. *Id.* at 436, 296 N.Y.S.2d at 46. The *Stewart* complaint consisted of two additional counts. The second count was brought by the mother alleging negligence on the hospital's part for its failure to inform the mother of the conflict of opinion regarding the need for an abortion. The third count, brought by the father, was derived from the mother's cause of action. *Id.* at 437-39, 296 N.Y.S.2d at 46-48. Both counts were rejected on appeal. 35 App. Div. 2d at 532, 313 N.Y.S.2d at 503.

14. In fact, two of the four doctors who examined Mrs. Stewart's case history were of the opinion that an abortion should be performed. Two believed that no abortion should be performed. 58 Misc. 2d at 433, 296 N.Y.S.2d at 43. That no abortion was performed was probably due to the lack of evidence that Mrs. Stewart's health was in any way endangered by her child's birth.

15. *Id.* at 438-39, 296 N.Y.S.2d at 47-48.

16. *Id.* at 435-36, 296 N.Y.S.2d at 45-46.

alternative is not to have been born at all.[17] Therefore, although the roots of the wrongful life cause of action have been established in certain jurisdictions, courts have continued to assert these two rationales for rejecting the cause of action.[18]

The systematic rejection of wrongful life claims rests upon three grounds. First, it has been held that the physician defendant does not owe a duty of care to the unborn or unconceived because neither were considered to be legal beings at the time of the alleged negligent act.[19] From that conclusion, it followed that the defendant could not be viewed as having committed a negligent act. Second, courts have refused to recognize a damage[20] in wrongful life actions because life of any quality has been considered to be of greater value than nonexistence.[21] Finally, wrongful life causes of action conflict with momentous public policy considerations.[22]

Traditionally, these barriers are the work of judges deciding "questions of law" rather than of juries making "findings of fact."[23] Some courts even refuse to consider the seemingly legal questions of duty, proximate cause and damages because "public policy" makes legal resolution impossible.[24] Ironically, these same courts, although refusing to recognize the role of the jury, hold that the issues of wrongful life should be settled by legislators, as spokesmen for the people, rather than by courts.[25]

The identified barriers can be designated as belonging to one of two specific categories: artificial barriers and real barriers. The distinction between the two is that the artificial barriers are actually emotionally

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17. *Id.* at 436-37, 296 N.Y.S.2d at 45-46.

18. Interestingly, although no court recognizes the child's claim in wrongful life lawsuits, two state supreme courts, in 1975, recognized for the first time the parental cause of action previously denied by, among others, the *Gleitman* and *Stewart* courts. *See* 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). *See also* Berman v. Allen, 80 N.J. 421, 434, 404 A.2d 8, 15 (1979) (Handler, J., concurring in part and dissenting in part). For a scholarly exposition of the parental causes of action in cases of wrongful life, see Kass & Shaw, *The Risk of Birth Defects: Jacobs v. Theimer and Parents' Right to Know*, 2 AM. J. L. & MED. 213 (1976-77).

19. *See* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

20. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *See also* Tedeschi, *supra* note 3, at 529.

21. *See* Tedeschi, *supra* note 3, at 529.

22. *See* Gleitman v. Cosgrove, 49 N.J. at 30, 227 A.2d at 693; Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis*, 55 MINN. L. REV. 58, 74 (1970); *Inadequate Genetic Counseling, supra* note 3, at 1502.

23. *See* notes 24-27 and accompanying text *infra*.

24. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

25. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

inspired; there is no basis for these barriers in tort law. In contrast, the real barriers are inspired by cultural lag; modern medical technology, producing more accurate predictive and diagnostic capabilities, has outpaced beliefs that rest on technologies long outdated.

B. *Artificial Barriers*

As in any cause of action based upon negligence, the plaintiff in a wrongful life case must demonstrate the existence of a duty and that the breach of that duty was the proximate cause of the damages suffered.[26] Prior to 1946, there was no recognized duty of care owed to an unborn child because the child was regarded as being separate from its mother only after its birth. The United States District Court for the District of Columbia, in *Bonbrest v. Kotz*,[27] revolutionized this area of law by holding that actions for prenatal injuries were allowable if the "child" was viable at the time of the injury and it survived birth. Recognition of the "child's" rights was further expanded in 1953, when a New York court held, in *Kelly v. Gregory*,[28] that a duty of care is owed to an infant from the very point of its conception. Every jurisdiction now recognizes suits brought by children for prenatal injuries[29] occurring after conception. This duty of care was subsequently expanded to include children not yet conceived at the time the tortious conduct occurred.

For example, in *Zepeda v. Zepeda*,[30] the Illinois Appellate Court

26. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965); W. PROSSER, THE LAW OF TORTS 143-45 (4th ed. 1971) [hereinafter cited as PROSSER].

27. 65 F. Supp. 138 (D.D.C. 1946).

28. 282 App. Div. 2d 542, 125 N.Y.S.2d 696 (1953).

29. *E.g.*, Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Kelly v. Gregory, 282 App. Div. 2d 542, 125 N.Y.S.2d 696 (1953). The cases following *Bonbrest* "brought about the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." PROSSER, *supra* note 26, at 336-37. In 1967, Texas became the last jurisdiction to overturn the rule denying recovery for prenatal injuries. *See id.* at 337. Moreover, "[a]lmost all of the jurisdictions have allowed recovery even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick." *Id.*

30. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). In *Zepeda*, the infant plaintiff alleged that the defendant, his father, had induced his mother to have sexual relations by promising to marry her. This promise was not kept, and could not be kept because unbeknownst to the mother, the defendant was already married. The infant plaintiff charged, *inter alia*, that the defendant had injured him in his person, property and reputation by causing him to be born an adulterine bastard. *Id.* at 245-46, 190 N.E.2d at 851. In short, the infant's suit sought after-birth damages for a preconceptual tort (fraud).

The *Zepeda* court went out of its way in its attempt to sustain this cause of action, although the tort law at that time did not recognize the legal existence of a child until it had actually been conceived. But the court, seeking to make preconceptual torts actionable, reasoned:

determined that a physician owed a child a duty prior to conception, concluding that it was foreseeable that a child ultimately conceived would be harmed by the physician's negligence. Specifically, the court ruled that the wrong "progressed as did [the child] from essence to existence. When . . . [the child] became a person the nature of the wrong became fixed."[31] Ten years later, in *Jorgensen v. Meade Johnson Laboratories, Inc.*,[32] the United States Court of Appeals for the Tenth Circuit similarly concluded that there is a duty owed to a child not yet conceived. In *Jorgensen*, it was alleged that birth control pills taken by the child's mother prior to conception caused the child's injury.[33] The court, in concluding that a preconception duty existed, reasoned that "[i]f the view prevailed that tortious conduct occurring prior to conception is not actionable on behalf of the infant ultimately injured by the wrong, then an infant suffering personal injury from a defective food product, manufactured before his conception, would be without remedy."[34] In 1977, this preconception duty was reaffirmed by the Illinois Supreme Court in *Renslow v. Mennonite Hospital*,[35] where it was

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> But what if the wrongful conduct takes place before conception? Can the defendant be held accountable if his act was completed before the plaintiff was conceived? Yes, for it is possible to incur . . . "a conditional prospective liability in tort to one not yet in being." It makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them.

Id. at 250, 190 N.E.2d at 853. Although the court was able to hurdle the legal obstacle of duty of care, it was stymied by the public policy considerations inherent in the recognition of such a claim. The court poignantly assessed these considerations as follows:

> What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.
>
> . . . How long will it be before a child so produced sues in tort those responsible for its being?

Id. at 260, 190 N.E.2d at 858. These considerations forced an otherwise willing court to reject a cause of action for wrongful birth. Fearful of opening a veritable "Pandora's Box" of litigation, the *Zepeda* court sidestepped the issue by concluding that because of these weighty public considerations, the "policy of the State should be declared by representatives of the people" and not by the courts. *Id.* at 263, 190 N.E.2d at 859.

31. *Id.* at 253, 190 N.E.2d at 855.

32. 483 F.2d 237 (10th Cir. 1973).

33. *Id.* at 238-39.

34. *Id.* at 240.

35. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). For a discussion of *Renslow* and the nature of the claim asserted in that case, see Note, *Prenatal Injuries Caused by Negligence Prior to Conception: An Expansion of Tort Liability*, 54 CHI.-KENT L. REV. 568 (1977); *A New Theory of Liability*, note 3 *supra*; 44 MO. L. REV. 143 (1979); 52 TUL. L. REV. 893 (1978); 31 VAND. L. REV. 218 (1978); 12 VAL. U.L. REV. 603 (1977).

alleged that the child's injury was caused by an improper blood transfusion given to the child's mother prior to its conception. As the Illinois Supreme Court ruled, it has long been recognized that "a duty may exist to one foreseeably harmed though he be unknown and remote in time and place,"[36] and that it would be "illogical to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child, unbeknownst to him, been conceived prior to his act."[37]

Zepeda, Jorgensen and *Renslow* show that where duty is viewed alone, there can be no doubt that physicians owe both the unconceived and conceived plaintiff children in wrongful life causes of action a duty. Thus, courts that have trouble finding a duty of care are erecting artificial barriers for reasons that are personal to the judges.

As with any other malpractice-based tort, once a duty has been established it is necessary to decide if there has been a breach of that duty. This determination is a question of fact to be decided by the jury after weighing the expert testimony as to the applicable professional standards of medical care. Because none of the courts rejecting wrongful life causes of action have based their rulings on plaintiffs' inability or failure to demonstrate a breach of duty, the more relevant issues of proximate causation and damages will be explored.

In cases involving allegations of wrongful life, the defendant physician does not cause the child's defect. Rather, the defendant physician allegedly causes the defective child to be born by denying its mother the choice of aborting a defective fetus. This aspect of the wrongful life cause of action has caused courts to confuse the elements of the prima facie case, particularly that of proximate cause. That this confusion, when coupled with the emotional elements associated with this cause of action, further obfuscates the issues, is clearly demonstrated by *Becker v. Schwartz*,[38] a 1978 pronouncement on wrongful life causes of action.

In *Becker*, the New York Court of Appeals refused to recognize the wrongful life cause of action, reasoning that first, the infant had not suffered any legally cognizable injury because there was no precedent determining that a child had the fundamental right to be born as a whole, functional human being.[39] Second, the court noted that the remedy in a negligence action is designed to return the party to the position he would have occupied had the tortfeasor not acted in a negli-

36. 67 Ill. 2d at 357, 367 N.E.2d at 1254-55.
37. *Id.* at 357, 367 N.E.2d at 1255.
38. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).
39. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. The *Park* and *Becker* cases were decided together by the New York Court of Appeals.

gent manner.[40] This standard is difficult to apply in wrongful life cases because restoration of the infant to the position he would have occupied but for the failure of the defendant would result in depriving the infant plaintiff of his very existence. Therefore, the *Becker* court determined that "wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence."[41]

The New York Court of Appeals did not accept the notion that the physician should be liable for causing the existence of a defective infant. Possibly, the court did not view the choice from the pragmatic perspective that the cost of supporting a defective existence clearly exceeds the cost of nonexistence. From this point of view, there is a real choice involved. It could also be argued that a physician's failure to warn of the potentiality of a defective existence, which ultimately comes to fruition, does not differ from a defendant whose negligent advice causes a client (or patient) to suffer financial loss or, alternatively, causes the accrual of a financial obligation that would otherwise have been avoided. Liability should attach in all such circumstances if the jury is satisfied as to the existence of duty and a breach of that duty which proximately caused the injury. The *Becker* court reached a contrary conclusion, possibly because of the judges' personal belief that life of any quality is preferable to nonexistence. This might explain the confusion as to the issue of proximate cause.

The confusion could be rectified if the determination of proximate cause were placed back in the power of the jury. It has been suggested that proximate cause exists if it can be established that the defendant's conduct was the cause of the tortious event and if that conduct was a material element and substantial factor in bringing about the injury.[42] The determination whether the conduct was a substantial factor should be made by the jury unless the issue is so clear that reasonable men could not differ.[43]

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40. *Id.* at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

41. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. The *Becker* court's analogy of the "Hobson's choice" is worth exploring to provide insight to the rationale of the court for its decision to reject the claim for wrongful life. Thomas Hobson (1544-1631) was an innkeeper in Cambridge, England. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1076 (1966); 14 ENCYCLOPEDIA AMERICANA 564 (1974). He required every traveler who wanted a horse to "choose" the one from the stall nearest the door. Thus, he exercised each of his horses on a rotating basis. Imagine, however, that Hobson had an unridable or dangerous horse in his stable, and that this dangerous horse was in the stall nearest the door. Although Hobson did not make the horse dangerous, would he not be liable to a traveler injured by the horse if his failure to warn the traveler of the potential risk denied the traveler the choice of skipping the trip?

42. PROSSER, *supra* note 26, at 236-43.

43. *Id.* at 242-43.

Proximate causation in wrongful life cases should not be placed in the category of issues "so clear that reasonable men could not differ." Thus, because a physician's duty for preconception or postconception torts has been recognized, and because questions of proximate causation, if they arise, should be treated as questions of fact for the jury, judicial grants of summary or accelerated judgment on the pleadings for plaintiff's failure to state a legally cognizable claim should only occur where there are no damages as a matter of law. Moreover, whether there are damages should depend upon the values of the plaintiff and society rather than upon the values of a judicial panel.

The damages question is the final, and most confusing, element of the prima facie case for the wrongful life cause of action. The issue is most perplexing because it involves the unresolved dilemma of mere existence versus the quality of life. Recent advances in medical technology, which enable hospitals to artificially prolong life by means of extraordinary methods, have forced courts to approach this issue, as well as the question of whether a person has the right to die.

The right to die cases, most notably *Superintendent of Belchertown State School v. Saikewicz*[44] and *In re Quinlan*,[45] have moved the debate on life versus quality of life from schools and seminaries into the courts. Increasingly, the recognition of the individual's interest in quality of life is supplanting society's prior value of life of any quality over death.[46] As the technologies that promoted the debate of life versus quality of life continue to evolve, the debate, if it has not already been won, will continue to favor those who recognize that the individual, and only the individual, can decide whether quality of life is more important than a defective life. And when the individual is incompetent (in a coma or unborn) the courts are increasingly likely to allow guardians or parents to choose on behalf of the incompetent.[47] Thus, where parents plead that they would have chosen to abort or avoid conception if the defendant physician had properly disclosed the information necessary to allow the parents to make an informed judgment on their own and on the child's behalf, the courts should recognize the jury's right to determine the damages precipitated by a defective existence.

This logic has yet to prevail in an appellate level decision in a wrongful life case, although such a notion has been alluded to at the

44. 370 N.E.2d 417 (Mass. 1976).

45. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

46. For an excellent discussion of the role that right to die cases have in the wrongful life cause of action, see 4 AM. J. L. & MED. 211, 222-24 (1978).

47. *See* notes 48-49 and accompanying text *infra*.

trial level, as was the situation in *Park v. Chessin.*[48] In *Park*, a suit was brought against two obstetricians by the parents of an infant born with a degenerative genetic disease.[49] Mrs. Park gave birth in June, 1969 to a baby who, afflicted with polycystic kidney disease,[50] died only five hours after birth. Concerned with a possible recurrence of this disease in a child conceived in the future, the Parks consulted the defendant obstetricians, who had treated Mrs. Park during her first pregnancy, to determine the likelihood of this contingency. In response to the Parks' inquiry, the defendant obstetricians misinformed the Parks that inasmuch as polycystic kidney disease was not hereditary, the chances of their conceiving a second child afflicted with this

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48. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), *modified*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

49. The Park complaint consisted of five separate counts. The analysis in this article deals principally with the allegations in the first count—the child's action for wrongful life. The second count was for damages for the emotional and physical injuries suffered by the mother as a result of the birth of her child. The third count was for damages for emotional injuries and expenses suffered by the husband. The fourth count was for damages for the injury suffered by the husband occasioned by the loss of his wife's services. The fifth count was for the damages on behalf of both the wife and husband, as administrators of their child's estate, for wrongful death. 46 N.Y.2d at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 877.

50. Polycystic kidney disease is a condition "characterized by numerous cysts scattered diffusely throughout the kidneys, sometimes resulting in organs that tend to resemble grapelike clusters of cysts." STEDMAN'S MEDICAL DICTIONARY 744 (4th ed. 1976). Multiple cysts form in the kidney of patients with polycystic kidney disease. The abnormality begins in fetal life and progresses throughout the life of the individual. It involves both kidneys, and frequently progresses somewhat symmetrically on both sides. Usually one kidney seems to be affected more than the other. Occasionally, on clinical examination, it may be difficult to demonstrate the disease in both kidneys, one of the pair seeming to be free of the disorder. Cysts are almost invariably found if sections of the apparently free kidney can be obtained for microscopic study. Kidneys have been seen in which apparent freedom from the disease was present in half of one kidney, the other half being affected by cysts, and all of the opposite kidney being affected. 4 A. R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE 286.65 (3d ed. 1979) [hereinafter cited as GRAY]. Two varieties of the disease seem to prevail. In one variety, cysts form largely in the medullary (medulla is the inner portion of an organ) portion of the kidney and produce so great a deformity early in fetal life that the baby dies shortly after birth or in the earliest stages of infancy. Such kidneys show a myriad of cysts of fairly uniform size which give the kidneys the appearance of a sponge. In the second variety, the cyst formation is largely confined to the cortex (the outer layers of an organ) instead of the medulla; the degree of destruction is somewhat less in its early stages; and the disease progresses more slowly. In individuals afflicted with the second variety, the presence of polycystic kidney disease may not be detected until adult life. Not infrequently, the finding is made at autopsy in the elderly, the patient having died of causes other than renal disease. *Id.* at 286.65(1). Although the court in *Park* did not indicate which one of the two varieties of the disease the child suffered from, its early death suggests that the disease afflicted the medullary portion of the child's kidney.

disease were "practically nil."[51] Based upon this misinformation, the Parks made a conscious choice to conceive a second child. Thus, Mrs. Park became pregnant and gave birth in July, 1970 to a child who similarly suffered from polycystic kidney disease. Unlike their first child, however, the Parks' second child survived for two and one-half years before succumbing to this progressive disease. The parents' suit on behalf of the child for wrongful life alleged negligence on the part of the obstetricians for advising them to conceive and bear a child when it was foreseeable that the child would suffer from congenital defects.[52]

In an unprecedented decision, the Supreme Court of Queens County sustained the cause of action.[53] The court sidestepped the heretofore insurmountable question of damage valuation by simply holding that resolution of the question "should be the pragmatic determination of the trier of facts upon a complete analysis of the evidence presented at trial."[54] This approach, although not fully developed in an extensive opinion, makes good sense. Allowing the jury to evaluate the parents and other witnesses according to the quality of life values held by the parents pays heed to sensitivities of the parents over the antiquated doctrinaire value that life of any quality is better than death. Moreover, what societal group is in a better position than a jury to respond to evolving social values?

On appeal, however, the New York Court of Appeals reversed the decision of the lower court.[55] The majority dismissed the wrongful life cause of action on its own professed inability to calculate the extent and amount of damages, inferring from that inability that no legally cognizable injury had been suffered.[56] Therefore, the issue could not be

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51. 46 N.Y.2d at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. On the contrary, polycystic kidney disease is a congenital deformity; it is also an hereditary defect. It is carried by the male and female alike, and if one of the parents is afflicted it appears frequently in the offspring. It may also appear in the offspring of parents who themselves do not seem to have the disease, but if a survey is made of the ancestry of such a patient the disease will be found to be present in other members of the family. GRAY, *supra* note 50, at 286.65(2). Indeed, polycystic kidney disease is found very frequently in our general population. It occurs probably as frequently as 1 in 5,000 individuals who seek medical aid for illness. *Id.* at 286.65(3).

52. 46 N.Y.2d at 406-07, 386 N.E.2d at 809, 413 N.Y.S.2d at 897.

53. 88 Misc. 2d 222, 387 N.Y.S.2d 204, *modified*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *aff'd*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *See also* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477, *hearing denied* (1980).

54. 88 Misc. 2d at 232, 387 N.Y.S.2d at 211.

55. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

56. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. It is important to note that the New York Court of Appeals recognized the *parents'* claim for the costs of raising the defective child. Unfortunately, it rightfully gave money to the wrong parties—the parents. No probate court and no guardian can ensure that the money provided for the

submitted to the jury because there would be no legal standards which the jury could apply to the factual considerations of a given case.[57]

The New York Court of Appeals chose not to recognize an important aspect of the damage issue which could have been construed as a basis for establishing the wrongful life claim. As the Supreme Court of Queens County correctly reasoned, the trier of fact and not the court should determine the existence or nonexistence of damages.[58] This is especially true where, as in causes of action such as wrongful life, the finding of damage depends on the resolution of moral, religious and quality of life determinations that can only be made by the jury. Indeed, it increasingly appears that the wrongful life cause of action, and particularly the question of damage, is not a question of law, but rather is a question of fact that should be submitted to the jury. Although, as suggested by the New York Court of Appeals, legislatures are capable of making this determination,[59] legislators have demonstrated an unwillingness to address controversial moral issues (*e.g.*, abortion). Therefore, the only alternative is to have juries proclaim the societal values that should prevail. This would ensure that both the plaintiff's and defendant's interests are protected by an adversarial process in which the evidence and interests of the parties are weighed by the jury. Ironically, whether wrongful life and the issue of damages are legal or factual questions is, in the long term, a moot issue. As the zeitgeist changes, the attitudes of judges will change so that today's judge deciding wrongful life as a question of law on the basis of his values will tomorrow view that question as an issue

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care and maintenance of the child will enure to the child's benefit. Arguably, nothing prevents the parents from using that money for their own purpose. Further, no court or guardian may intervene to prevent the parents from delegating the defective child to the state and its taxpayers, with a windfall accruing to the parents.

Admittedly, the parents may suffer a loss as a result of the defendant physician's wrong; however, the money awarded for the support of the defective child should go to the child or the child's legal representative so that probate supervision can be provided. Nothing in such an analysis would prohibit the parents from recovering whatever damage they could demonstrate on a traditional negligence theory.

Whether controversial damages, especially pain and suffering, should be recoverable on a wrongful life cause of action should be decided by the jury with definitional instructions from the court. Because the existence and measure of damages depends in large part on the values of the parents and the emerging values of society, the question of damages should be answered by the jury on a case-by-case basis. Such an approach would also solve the thorny problem of deciding what degree of defect should exist before compensation would flow, by moving from an "all or nothing" model to one of gradation. Likewise, both the plaintiff's and defendant's interests would be protected by an adversary process in which the parties' proofs and interests are weighed and balanced by the jury.

57. *Id.* at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900-01.

58. 88 Misc. 2d at 232, 387 N.Y.S.2d at 211.

59. 46 N.Y.2d at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

of fact, appropriate for resolution by the jury. Unfortunately, this approach denies the defective child his day in court today, as a matter of law.

In sum, this discussion shows that artificial barriers are antithetical to the traditional values of tort law. Further, the legal foundation exists upon which the cause of action for wrongful life can be predicated. It has been established that duty, breach of duty, proximate cause and damages may exist in any given case and, therefore, the jury should be given the opportunity to make determinations of liability according to each factual setting.

C. *Real Barriers*

Certain public policies constitute real barriers to the acceptance of the wrongful life cause of action. These barriers include the mistaken belief that wrongful life plaintiffs are claiming the right to be born whole and unimpaired; the "old saw" that recognizing wrongful life will produce a flood of litigation; the quandry posed by the alleged need to determine, in advance, what defects of what degree are compensable; and the logically inconsistent fear that recognition of wrongful life would prompt defensive physicians to recommend abortion. These barriers, however, should be broken down and reevaluated so as to permit recognition of the wrongful life claim.

Plaintiffs in wrongful life cases do not claim the right to be born whole. Rather, they claim the right not to be born. The distinction between the two is the difference between a costly defective existence and nonexistence. Another difference is the unborn child's right to choose, through its parents, a defective existence as opposed to nonexistence. Accordingly, each plaintiff would be required to prove that if the defendant physician had made the choice possible, the choice elected would have been nonexistence. Assertions that wrongful life plaintiffs claim a right to be born whole and without defect would only apply if the physician caused the defect, and this, by definition, is not the claim made in the wrongful life actions.

The "floodgates" spectre as a basis upon which to reject the wrongful life cause of action is equally groundless. No plaintiff in a wrongful life action can recover unless a deviation from the medical standard of care is demonstrated. And, if such a deviation is shown, the courts should not deny these plaintiffs the rights all other negligence plaintiffs enjoy. The mere presence of a child with a defect does not establish the wrongful life cause of action unless the plaintiff child can show that the birth would not have occurred but for the negligence of the defendant physician.

The problem as to what degree of defect must exist before a

recovery can be made does not create an insurmountable barrier either. Any degree of defect, where there is a causative wrong, should justify a recovery, and the amount of the recovery should be for the jury to determine.[60]

Difficulty in the estimation of a monetary value has not been allowed to constitute a barrier to a plaintiff's recovery.[61] There need only be a basis for the reasonable ascertainment of damages.[62] One court has expressed this rule of damages in the following strong language: "[W]here a wrong itself is of such a nature as to preclude the computation of damages with precise exactitude, it would be a 'perversion of fundamental principles of justice to deny all relief to the injured [party], and thereby relieve the wrongdoer from making any amend for his acts.'"[63]

Finally, the argument that recognizing wrongful life will cause physicians to recommend abortion is misguided. The physician's negligent conduct in wrongful life causes of action is his failure to adequately or accurately inform prospective parents of the likelihood that a defective child will be born. Whether the response to that information is a decision to have an abortion is the parents' choice alone. The physician provides a service for the patient, but it is the patient alone who is ultimately responsible for the decision as to her medical treatment.

It is interesting to note that these so called real barriers reflect a sense of artificiality in that they have been constructed partially on the basis of emotional objections to wrongful life. Therefore, the validity of the conclusions drawn from these factors becomes suspect, and militates against their adoption as support for judicial rejection of the wrongful life cause of action. All of the barriers identified, both real and artificial, are actually symtomatic of the single greatest barrier—cultural lag. Only when this barrier is overcome will the arguments, refuting the noted ancillary barriers, be resolved in favor of recognition of the wrongful life cause of action.

III. THE ULTIMATE BARRIER TO RECOGNITION OF WRONGFUL LIFE—CULTURAL LAG

The wrongful life cause of action should, and eventually will, be sustained. The failure of courts and legislatures to take the appropriate steps to permit the defective child to sue for its wrongful life is an ex-

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60. *See* notes 42-43 and accompanying text *supra*.

61. Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978); Betancourt v. Gaylor, 136 N.J. Super. Ct. 69, 344 A.2d 336 (1975).

62. Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978).

63. Berman v. Allen, 80 N.J. 421, 428, 404 A.2d 8, 12 (1979) (quoting Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931)).

ample of what has sometimes been described as cultural lag. Sociologist William Fielding Ogburn stated his "hypothesis of cultural lag" in 1922:

> Where one part of culture changes first . . . through some discovery or invention, and occasions changes in some part of culture dependent upon it, there frequently is a delay. . . . The extent of this lag will vary . . . but may exist for . . . years, during which time there may be said to be a maladjustment.[64]

The mechanical invention and scientific discovery in the fields of genetics and medicine have resulted in a cultural lag between those advances and the laws fashioned by the courts and legislatures. Although "technology cracks the whip," judicial and governmental institutions do not always develop correspondingly. The result is that these "institutions of society slip out of gear and humanity suffers because of it."[65] It is within this context that wrongful life may be examined.

Examining wrongful life within the context of the theory of cultural lag requires satisfaction of the theory's four steps:

(1) the identification of at least two variables;
(2) the demonstration that these two variables were in adjustment;
(3) the determination by dates that one variable has changed while the other has not changed or that one has changed in greater degree than the other; and
(4) that when one variable has changed earlier or in greater degree than the other, there is less satisfactory adjustment than existed before.[66]

Proceeding to the first step, the two variables to be identified in wrongful life are the courts and medical technology. Courts and the law, by their very nature, are resistant to change. Lawyers and the courts cherish stability and do not like to have it disarranged by invention.[67] Indeed, the common law is a codification of certain old customs on vital matters.[68] Thus, these common laws serve crucial functions as

64. W. OGBURN, SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE 201 (1922) [hereinafter cited as SOCIAL CHANGE]. For other discussions of the theory of cultural lag *see generally* S. CHASE, THE PROPER STUDY OF MANKIND (1948); H. Hart, *Social Theory and Social Change*, in SYMPOSIUM ON SOCIOLOGICAL THEORY (1959); H. Hart, *The Hypothesis of Cultural Lag: A Present Day View*, in TECHNOLOGY AND SOCIAL CHANGE (1957); W. OGBURN, ON CULTURE AND SOCIAL CHANGE (1964) [hereinafter cited as ON CULTURE].

65. ON CULTURE, *supra* note 64, at 143.

66. *Id.* at 89.

67. *Id.* at 142.

68. *Id.*

they relate to stationary aspects of our society. But what of those areas that change and continue to develop? New laws are fashioned and the purpose of these new laws, like the old, is to make rules that society can follow.[69] However, these rules are only applicable to situations that are continuing. Thus, Ogburn observed that:

> [L]aw-makers and law-administrators seem to have the functions of laying out grooves for the flow of human behavior and of trying to force human beings to fit into the grooves. Such an assignment is quite in conformity with life as found in a stationary society. But in our changing society, technology is continuously breaking up many of the grooves that law makes and administers. Thus law and technology are opponents as in a battle. So it is natural that the courts should hark back to precedent, and the administrator is under oath to enforce the law, *no matter what the changes may bring about.*[70]

The courts therefore represent a unique institution, constantly under seige from forces promoting change.[71] At the opposite end of this continuum of change is medical technology. The medical researcher strives for change and can never become satisfied with the status quo. His profession demands that he always be on the verge of some new discovery that will enhance or protect life. Indeed, without invention the need for his very existence would cease.

Having identified two crucial variables, the second requirement is satisfied by illustrating that at one time the courts and technology, in terms of predicting genetic defect, were in adjustment. Up until about fifteen years ago science was not capable of detecting harmful inherited traits. This was because the methods and instruments utilized to detect and predict the occurrence of such traits were often inexact. Even when a genetic defect appeared in the families of a couple who wished to have children, a reliable evaluation of the risk of reoccurrence of the undesired trait was seldom possible.[72] Indeed, such predictions were often based solely on the pattern of a trait's occurrence among an affected individual's family;[73] and this method was at times supplemented by more general population data derived from empirical observation of other families with afflicted relatives.[74] Thus, unless a

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69. *Id.*

70. *Id.*

71. Meanwhile, in our rapidly changing society, legislatures have a difficult task, with their large membership and their tradition of deliberation, of keeping up with the new and changing conditions brought about by technology. Thus, legislatures could easily be included in the cultural lag theory as a third variable.

72. *See Inadequate Genetic Counseling, supra* note 3, at 1492.

73. *Id.* The effectiveness of this type of study is limited because accurate information is often difficult to obtain. *See* Fraser, *Survey of Counseling Practices*, in ETHICAL ISSUES IN HUMAN GENETICS 7, 12 (1973) [hereinafter cited as Fraser].

74. Fraser, *supra* note 73, at 12. This method must still be relied on when there ex-

healthy couple had already had an affected child, there could be no certainty of actual risks, and no means were available to detect the presence of defects in the fetus.[75] During this time the courts were properly in no position to impose liability upon physicians who failed to detect or to predict genetic diseases.

However, the ability to predict the occurrence and recurrence of genetic disorders has improved greatly. The mode of inheritance has been determined for an increasing number of traits, and biochemical tests have been developed that allow more definite preconception predictions for many types of genetic risk.[76] Additionally, recently developed medical technology has afforded the opportunity to make informed procreative decisions. Amniocentisis[77] and ultrasonography[78]

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ists no well-tested model of heritability upon which to base more definite predictions. The approach is used in analyzing polygenic traits, chromosomal anomalies, and other disorders in which genetic factors may or may not be implicated. *See* Nitowsky, *Genetic Counseling: Objectives, Principles, and Procedures*, 19 CLINICAL OBSTETRICS & GYNECOLOGY 919, 932 (1976). *See also* Fraser, *supra* note 73, at 12 n.19.

75. Fraser, *supra* note 73, at 12.

76. *Id.*

77. Amniocentesis involves the "transabdominal aspiration of fluid from the amniotic sac." STEDMAN'S MEDICAL DICTIONARY 55 (4th ed. 1976). Performed on women in the early months of their pregnancy, the test yields results which are a fairly accurate indicator of existing chromosomal abnormality. In this procedure, a long needle is inserted into the mother's uterus, and a sample of amniotic fluid containing living fetal cells is removed. These cells are then placed in culture to grow so that further tests can be performed. W. FUHRMAN & F. VOGEL, GENETIC COUNSELING 91-92 (2d ed. 1976). The sex of the fetus as well as the presence of gross chromosomal anomalies can be determined by karyotype analysis, a procedure in which the number and structure of chromosomes are examined after straining at the time of cell division. A. EMERY, ELEMENTS OF MEDICAL GENETICS 54-59 (3d ed. 1974). Prenatal diagnosis is at least potentially available for approximately sixty to ninety metabolic defects, including Tay-Sachs disease, Colbus, *The Antenatal Detection of Genetic Disorders*, 48 OBSTETRICS & GYNECOLOGY 497, 500-01 (1976); Milunsky, *Prenatal Diagnosis of Genetic Disorders*, 295 NEW ENG. J. MED. 377, 378 (1976), and for the neural tube defects such as anencephaly and spina bifida. Editorial, *Screening for Neural-Tube Defects*, 1 (8026) LANCET 1345 (1977); *United Kingdom Collaborative Study on Alpha-Fetoprotein in Relation to Neural-Tube Defects, Maternal Serum-Alpha-Feto-Protein Measurement in Antenatal Screening for Anencephaly and Spina Bifida in Early Pregnancy*, 1 (8026) Lancet 1323 (1977). *See also Inadequate Genetic Counseling, supra* note 3, at 1493 n.21.

78. Ultrasonography is defined as the "location, measurement or delineation of deep structures by measuring the reflection or transmission of ultrasonic waves." STEDMAN'S MEDICAL DICTIONARY 1508 (4th ed. 1976). The increasing sophistication in the use of ultrasound to detect anatomical abnormalities, including such polygenic traits as the neural tube defects, is particularly desirable since the technique seems to present no discernible risk to the fetus. Hirchhorn, *Prenatal Diagnosis of Genetic Disease*, in DEVELOPMENTAL GENETICS 87, 93 (C. FENOGLIO, R. GOODMAN & D. KING eds. 1976). *See Inadequate Genetic Counseling, supra* note 3, at 1493 n.22.

are two of the most widely used and dependable tests.[79] These techniques, together with the legally permitted practice of abortion,[80] now permit prospective parents to abort fetuses afflicted with genetic defects.[81]

Despite the advent of these and other techniques,[82] which clearly possess the capability of detecting genetically diseased fetuses, courts have been negligent in failing to fully encourage their application in appropriate circumstances. While courts have uniformly permitted recovery of damages by parents for the negligent failure of physicians to utilize the various tests available,[83] they have failed to hold these same physicians amenable to suits brought by children with defects

79. Recent studies indicate that amniocentesis is highly accurate and represents a combined risk of less than one percent of complications ranging from spontaneous abortion and fetal death to amniotic fluid leakage and maternal infection. *See, e.g.*, Simpson, Dallaire, Siminovich, Hamerton, Miller & McKeen, *Prenatal Diagnosis of Genetic Disease in Canada: Report of a Collaborative Study*, 115 CANADIAN MED. A.J. 739 (1976) (99.4% accuracy in 1223 cases); *NICHD National Registry for Amniocentesis Study Group, Midtrimester Amniocentesis for Prenatal Diagnosis*, 236 J.A.M.A. 1471, 1472 (1976) (99.4% accuracy in 1040 cases). *See also Inadequate Genetic Counseling, supra* note 3, at 1493 n.21.

80. In Roe v. Wade, 410 U.S. 113 (1973), the Court sustained the limited right to elective abortions, holding that a state statute which prohibits or severely restricts the performance of abortions violates a woman's unqualified constitutional right to privacy. *Id.* at 147-64. Legal commentators have exhaustively analyzed the *Roe* decision. *See* Bryant, *State Legislation on Abortion After Roe v. Wade: Selected Constitutional Issues*, 2 AM. J. L. & MED. 101 (1976); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 58 B.U.L. REV. 765 (1973); Tribe, *The Supreme Court, 1972 Term—Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Article, *Roe v. Wade: Its Impact on Rights of Choice in Human Reproduction*, 5 COLUM. HUMAN RIGHTS L. REV. 497 (1973); Comment, *State Limitations Upon the Availability and Accessibility of Abortions After Wade and Bolton*, 25 KAN. L. REV. 87 (1976); Note, *Haunting Shadows From the Rubble of Roe's Right of Privacy*, 9 SUFFOLK L. REV. 145 (1974).

81. An excellent example of this is the screening for spina bifida, a congenital anomaly. Spina bifida is "a defect in the spinal column, consisting in [the] absence of the vertebral arches, through which the spinal membranes, with or without spinal cord tissue, may protrude." STEDMAN'S MEDICAL DICTIONARY 1312 (4th ed. 1976).

82. Fetoscopy, a variation of amniocentesis, involves the addition of an optical system to permit the physician to look inside the uterus. It is used to obtain samples of fetal blood so that the presence of various hemoglobin disorders, such as sickle cell anemia, can be detected. *Inadequate Genetic Counseling, supra* note 3, at 1493 n.21.

83. Courts have had little difficulty sustaining parental claims for pecuniary loss. *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); 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). Courts have, however, consistently denied these same plaintiffs the right to recover for psychic or emotional harm alleged to have occurred as a consequence of the birth of their infants in an impaired state. *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900; Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

born due to their negligence. In essence, courts are denying relief to the very class this technology was designed to protect—fetuses, potential human beings and society. The result is that there now exists a "lag" largely because these inventions have increased in volume faster than the courts have made adaptations to them.[84]

History has proven that lags are eventually reduced. Sooner or later societal attitudes permit adjustment among the variables. Such will be the case with wrongful life. Courts will not continue to ignore the high degree of accuracy and predictability inherent in today's technology. On the contrary, they will view this technology as the vehicle which will enable judicial recognition of the wrongful life claim and at the same time prevent wrongful life from becoming an unmanageable cause of action.

IV. CONCLUSION

Barriers to the recognition of "wrongful life" causes of action have been constructively designated "real" and "artificial." The artificial barriers should rapidly disappear from decisions of courts rejecting the wrongful life cause of action because those barriers lack substance. And, the real barriers associated with cultural lag will disappear over time, as beliefs and social mores "catch up" to technological advances.

In addition, the role of the jury as the proper body to decide many of the crucial questions in a wrongful life case should increase. Many of the unresolved questions are questions of fact; courts that dismiss wrongful life cases as a matter of law will soon see their decisions reversed on both law and fact. The jury, applying specific standards based upon traditional notions of tort law, should be allowed to hear and determine liability in wrongful life cases.

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84. ON CULTURE, *supra* note 63, at 95.