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A Cause of Action for "Wrongful Life": Pennsylvania's Judicial and Legislative Reaction

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A CAUSE OF ACTION FOR "WRONGFUL LIFE": PENNSYLVANIA'S JUDICIAL AND LEGISLATIVE REACTION

I. INTRODUCTION

The earliest "wrongful life" cases were the so-called "bastard" cases in which the plaintiff child sought damages from one of the parents, usually the father, for being born illegitimate.[1] A typical claim was brought by a healthy, however, an illegitimate child. In the leading case, *Zepeda v. Zepeda*,[2] plaintiff's biological father coerced the plaintiff's mother to have sexual relations with him, promising to marry her.[3] When the two biological parents did not marry, the plaintiff child filed suit to recover various damages which allegedly flowed as the result of being born illegitimate.[4] The Illinois Appellate Court denied recovery holding that illegitimacy was an unactionable injury.[5]

A case similar to *Zepeda* is *Williams v. State of New York*[6] in which the plaintiff daughter filed suit against the state alleging negligence on the part of the state for the care and custody of the plaintiff's mother who was sexually assaulted and had conceived the plaintiff while in a state mental institution.[7] The plaintiff's claim was based on deprivation of property rights, a normal childhood and home life, proper parental care and rearing, and also the burden of bearing the stigma of illegitimacy.[8] While the court acknowledged that there may have been neglect which resulted in the child bearing some burden, the court found "the absence from our legal concepts

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1. Schedler, *Women's Reproductive Rights—Is There a Conflict With a Child's Right to be Born Free From Defects?* 7 J.LEGAL MED. 357, 360 (1986).
2. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). *See also* Pinkney v. Pinkney, 198 So.2d 52 (Fla. Dist. Ct. App. 1967); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).
3. 190 N.E.2d at 851.
4. *Id.*
5. *Id.* at 859.
6. 18 N.Y.2d 481, 223 N.E.2d 343 (1966).
7. *Id.* at 482, 223 N.E.2d at 343.
8. *Id.*

of any such idea as a 'wrong' ".[9] Citing *Zepeda*, the court gave no compensation for the burden of illegitimacy.[10]

"Dissatisfied life" might be a better term to describe actions of this type, as opposed to wrongful life, because the plaintiffs are not claiming a legally cognizable injury as a result of their *birth*, but rather they complain about the *stigma* and other *negative effects* of being born a bastard.[11]

Other causes of action which are often confused with "wrongful life" are "wrongful birth"[12] and "wrongful pregnancy".[13] A "wrongful birth" claim is an action brought by parents of a child, generally afflicted with birth defects, against a physician or other medical entity.[14] The parents allege that because of the defendant's post-conception conduct the parents were not able to make an informed decision regarding whether or not to continue the preg-

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9. *Id.* at 484, 223 N.E.2d at 344.

10. While the court did cite to *Zepeda*, it was in the following context: "[n]o such theory of suit has ever before, it seems, been put forward in any court anywhere (the closest being Zepeda v. Zepeda)"(citations omitted). *Id.* at 483, 223 N.E.2d at 343.

11. Schedler, *Women's Reproductive Rights—Is There A Conflict With a Child's Right To Be Born Free From Defects?*, 7 J. LEGAL MED. 357, 360 (1986).

Being illegitimate no longer has the negative connotations associated with it as it once had. Being born out of wedlock does not really shoulder the child with a "burden".

See 10 AM. JUR. 2d Bastards § 8 for a discussion of how the status and rights of illegitimate children have changed from common law.

12. For more recent commentaries on "wrongful birth" *See* Symmons, *Policy Factors in Actions for Wrongful Birth*, 50 MOD. L. REV. 296 (1987); Snyderman, *Wrongful Life and Wrongful Birth Claims: Judicial Recognition and Acceptance*, 32 MED. TRIAL TECH. Q. 15 (1985); Scheid, *Benefits v. Burdens: The Limitation of Damages in Wrongful Birth* 23 J. FAM. L. 57 (1984); Comment, *The Legal Recognition of Medical Malpractice Tort Claims Based Upon Theories of Wrongful Birth and Wrongful Life*, 15 N.C. CENT. L.J. 274 (1985); Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017 (1987); *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 FORDHAM L. REV. 1107 (1985).

13. For more recent commentaries on "wrongful pregnancy" *see* Franz, *Calculating Damages in Wrongful Pregnancy Cases*, 30 PRAC. LAW. 73 (1984); Hampton, *The Continuing Debate over Recoverability of the Costs of Child-Rearing in "Wrongful Conception" Cases: Searching for Appropriate Judicial Guidelines*, 20 FAM. L.Q. 45 (1986); Weisberg, *Misconception of Wrongful Conception*, 16 TRIAL LAW. Q. 36 (1984); Comment, *By What Measure? The Issue of Damages for Wrongful Pregnancy*, 16 N.C. CENT. L.J. 59 (1986); Note, *Flowers v. District of Columbia: Another Court Refuses to Settle the Question of Damages in Wrongful Conception Cases*, 34 CATH. U.L. REV. 1209 (1985).

14. DeVries, Jr. and Rifkin, *Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the Birth-Related Torts*, 20 F. 207 at 209 (1984-85) [hereinafter *DeVries*].

nancy.[15] The parents normally seek damages for their expenses in caring for the deformed child and for the parents' suffering.

The courts basically use the term "wrongful pregnancy" to apply to pre-conception cases.[16] While the post-conception "wrongful birth" action is based on the parents' right to terminate a planned pregnancy, the pre-conception "wrongful pregnancy" is an action dealing with a healthy, but *unplanned* child.[17] "Wrongful pregnancy" cases are filed by the parents asserting that the physicians or medical attendants' negligence caused an unplanned and unwanted pregnancy. The plaintiff in a typical "wrongful pregnancy" case will aver that a physician negligently performed a sterilization procedure.[18]

The "wrongful life" action, as it is used today, is different from "wrongful birth" and "wrongful pregnancy" because a "wrongful life" claim is by, or on behalf of, a child. While "wrongful life" and "wrongful birth" causes of action both arise from the same negligent conduct, the child's "wrongful life" claim is unique because the child claims his very life is wrong and but for the defendant's negligence, the child's mother would have aborted the fetus thus sparing the child from his defective existence.[19] With a "wrongful life" claim there is no differentiation between pre-conception and post-conception negligence. "Wrongful life" looks at the child's life itself as being wrong.

II. The Development of a "Wrongful Life" Cause of Action

Not until 1967 was the term "wrongful life" used to describe a cause of action brought by a deformed child against a physician. This was in the seminal case of *Gleitman v. Cosgrove*.[20] In *Gleitman*, the mother contracted German measles during the first trimester of her pregnancy.[21] When Mrs. Gleitman relayed this information to

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15. *Id.* It must be noted that a wrongful birth suit is based on the constitutional right to terminate a pregnancy during the first trimester of that pregnancy. *See also infra* notes 34 and 35 and accompanying text.

16. *DeVries, supra* note 14, at 210.

17. *Id.*

18. *See, e.g.*, Hartke v. McKelway, 526 F. Supp. 97 (D.D.C. 1981), *aff'd* 707 F.2d 1544 (D.C. Cir. 1983) *cert. denied*, 464 U.S. 983, 104 S. Ct. 425 (1983).

19. Fain, *Wrongful Life: Legal and Medical Aspects*, 75 Ky. L.J. 585 at 588 (1986-87).

20. 49 N.J. 22, 227 A.2d 689 (1967)(overruled in part by Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979)).

21. 49 N.J. at 24, 227 A.2d at 690.

the defendant, Dr. Cosgrove, the physician informed her that the measles would have no effect on her unborn child.[22] Upon the birth of the child, and because of his serious physical impairments,[23] the child filed suit against Dr. Cosgrove on the theory that the doctor had been negligent in not informing the mother of the effects German measles could have on newborns.[24] The claim also stated that had the mother been properly informed, she would have aborted the fetus.[25]

The court's reasoning in *Gleitman* has established the obstacles which a plaintiff must overcome in order to bring a successful "wrongful life" action. The *Gleitman* court stated that the child's complaint was not actionable because "the conduct complained of, even if true, does not give rise to damages cognizable at law."[26] The court also noted that the conduct of the doctor was not the cause of the plaintiff's impaired condition.[27] The second and third counts of the complaint[28] were also denied by the court by applying the same rationale used to defeat the "wrongful life" cause of action. The court reiterated that the complaint did not give rise to cognizable damages and "even if such alleged damages were cognizable, a claim for them would be precluded by the countervailing public policy supporting the preciousness of human life."[29] The reasoning given by the court for denying the parental "wrongful birth" claim did not continue after the case as a bar to recovery.[30]

The increase of wrongful life claims in the years to follow *Gleitman* can be attributed, in large part, to the medical advances made in the late 1960's and early 1970's. By the mid 1970's prenatal

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22. *Id.*

23. *Id.* When Jeffrey Gleitman was delivered at the Margaret Hague Maternity Hospital in Jersey City he appeared to be a normal newborn. It was a few weeks after his birth that Jeffrey's substantive defects in sight, hearing and speech became detectable. As of the time of the case Jeffrey had undergone several operations and was attending a special institution for blind and deaf children. *Id.*

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

25. *Id.* at 25, 227 A.2d at 691.

26. *Id.* at 29, 227 A.2d at 692.

27. *Id.*

28. *Id.* at 24, 227 A.2d at 690. The second count was filed by Mrs. Gleitman for the negative effect on her emotional status as a result of her son's condition. Mr. Gleitman filed the third count for the costs incurred in caring for his son. *Id.*

29. *Id.* at 31, 227 A.2d at 693.

30. Note, *Wrongful Life: Exploring the Development of a New Tort*, 21 NEW ENG. L. REV. 635, 641 (1985-86).

diagnosis through amniocentesis[31] and related procedures was an accepted practice and could detect certain severe congenital[32] abnormalities and hereditary diseases.[33]

Upon detection, the mother could then make an informed decision as to whether or not to abort the fetus. In addition to the medical advancements, also adding to the increased litigation were the landmark United States Supreme Court decisions in *Roe v. Wade*[34] and *Doe v. Bolton*[35] which place qualified abortions under the constitutionally protected right of privacy. It was at this time that "wrongful birth" actions were being accepted. Because of these factors, the filing of "wrongful life" suits became more popular.

Park v. Chessin[36] and *Becker v. Schwartz*,[37] in 1977, represented the first judicial recognition of a "wrongful life" claim by an intermediate appellate court. However, the two cases were consolidated for appeal and the "wrongful life" issue was reversed by the New York Court of Appeals, allowing only the "wrongful birth" cause of action to remain.[38]

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31. The most important post-conception genetic testing procedure is amniocentesis which "consists of puncturing the anesthetized abdominal wall with a needle and withdrawing . . . a small amount of the amniotic fluid from the amniotic sac. The cells in the fluid are used immediately for diagnosis or are cultivated for later diagnosis." Stern, *Principles of Human Genetics*, 808-09 (3d ed. 1973).

32. Dorland's Medical Dictionary defines "congenital" as follows: "existing at, and usually before, birth; referring to conditions that are present at birth, regardless of their causation." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 336 (27th ed. 1988).

33. Rogers, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, (1981-82).

34. 410 U.S. 113 (1973), *reh'g denied*, 410 U.S. 959 (1973) (During the first trimester of pregnancy, a state may not ban nor even closely regulate abortions.)

35. 410 U.S. 179 (1973), *reh'g denied*, 410 U.S. 959 (1973) (*Doe*, decided simultaneously with *Roe*, is of interest because it deals with the procedural issues incident to the abortion process.) *See also* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, (1976); Bellotti v. Baird (Bellotti I), 428 U.S. 132, (1976); Beal v. Doe, 432 U.S. 438, (1976); Maher v. Roe, 432 U.S. 464, (1977); Bellotti v. Baird (Bellotti II), 443 U.S. 622, (1979); Harris v. McRae, 448 U.S. 297, (1980); Williams v. Zbaraz, 448 U.S. 358, (1980); and H.L. v. Matheson, 450 U.S. 398, (1981).

36. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E. 2d 807, 413 N.Y.S.2d 895 (1978).

37. 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

38. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

In *Park*, Mrs. Park had given birth to a baby who died after five hours[39] due to a fatal hereditary disease called polycystic kidney disease.[40] Upon the death of this first child, the Parks consulted with the defendant regarding the chances of giving birth to a second child afflicted with the fatal disease.[41] After Dr. Chessin informed the parents that the chances of a second child born with the disease were "practically nil,"[42] the parents conceived and gave birth to another baby who was born with polycystic kidney disease and who lived for about two and one-half years before passing away.[43]

As a result of the defective birth, the parents filed the "wrongful life" action on behalf of the second child, Lara Park, based on the doctor's negligence in not informing the parents of the hereditary nature of the birth defect and thus denying them the opportunity to make an informed decision regarding the conception of another child.[44] The Special Term Court upheld the "wrongful life" cause of action[45] and the Appellate Division affirmed stating that the claim was judicially cognizable.[46]

The Appellate Division did not discuss the "wrongful life" claim in any detail, however, the court did note that "decisional law must keep pace with expanding technological, economic and social change."[47] Conspicuously absent from the majority opinion was the public policy argument regarding the value of life which had been advanced in *Gleitman*.[48]

In *Becker v. Schwartz*[49] the plaintiff child was born with Down's Syndrome.[50] The "wrongful life" cause of action was filed by the

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39. 60 A.D.2d at 83, 400 N.Y.S.2d at 111.

40. Polycystic kidney disease often involves, not only the kidney, but the liver and pancreas, as well. With the disease, cysts form in the cortex of the kidney. The cysts enlarge and, by pressure, cause destruction of adjacent tissue. No specific therapy is available. Krupp, Chatton, *Current Medical Diagnosis & Treatment* 545 (1981) [hereinafter *Current Medical Diagnosis*].

41. 60 A.D.2d at 83, 400 N.Y.S.2d at 111.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 84, 400 N.Y.S.2d at 112.

46. *Id.* at 88, 400 N.Y.S.2d at 114.

47. *Id.*

48. *See supra* note 28 and accompanying text.

49. 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

50. Dorland's Medical Dictionary describes Down's Syndrome as a chromosome disorder "characterized by a small, anteroposteriorly flattened skull, short, flat-bridge nose, epicanthal fold, short phalanges, widened spaces between the first and second digits of hands and feet, and moderate to severe mental retardation, with Alzheimer's disease developing in the fourth or fifth decade . . ." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1634 (27th ed. 1988).

parents on behalf of the child based on the theory that, despite the mother's age of thirty-seven, the defendants never warned the mother of the potential dangers of giving birth, and as a result, the mother could not have made an informed decision as to whether or not to carry the child to term.[51] The Appellate Division of the Supreme Court, relying primarily on *Park*,[52] held that there was a valid "wrongful life" cause of action.

Park and *Becker* were then consolidated for appeal and the "wrongful life" issue was reversed by the New York Court of Appeals.[53] The court of appeals in reversing the *Park* and *Becker* courts found "two flaws in plaintiff's claim on behalf of their infants for wrongful life."[54] The flaws which the court espoused parallel the rationale found in *Gleitman*.

The court stated the first problem as:

> [I]t does not appear that the infants suffered any legally cognizable injury . . . whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.[55]

The court's second argument was:

> [A] cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make.[56]

In 1971, the New Jersey Supreme Court again grappled with the "wrongful life" issue. In *Berman v. Allan*,[57] the court's opinion began with reference to the *Gleitman* case[58] which had been decided twelve years previously. In *Berman*, the plaintiffs filed two medical malpractice actions against Drs. Allan and Attardi based on the

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51. 60 A.D.2d at 587, 400 N.Y.S.2d at 119, 120. The risk of Down's Syndrome increases from 1:2000 live births at maternal age 20, to 1:300 at age 35, to 1:100 at age 40, and to 1:40 at age 45. *See Current Medical Diagnosis, supra*,note 40, at 987.

52. *Id.* at 588, 400 N.Y.S.2d at 120.

53. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895. While the "wrongful life" cause of action was struck down, the "wrongful birth" action was allowed to remain.

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

55. *Id.*

56. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

57. 80 N.J. 421, 404 A.2d 8 (1979).

58. *See supra* notes 20-28 and accompanying text.

doctors' failure to inform the plaintiffs of the prenatal testing procedures available to Mrs. Berman.[59] Plaintiffs alleged that because Mrs. Berman was not informed of the available amniocentesis procedure, she was not made aware of the potentiality of birth defects to her child.[60] Unaware of the risk, Mrs. Berman chose not to abort and delivered an infant afflicted with Down's Syndrome.[61]

The first cause of action was a claim for damages based upon "wrongful life" filed on behalf of the child and the second claim was for "wrongful birth" filed by the parents.[62] The court rejected the "wrongful life" claim, however, it sustained the parents' claims for "wrongful birth".[63] Although the court refused to overrule *Gleitman* in regard to the "wrongful life" issue, the rationale of the two opinions is quite different. While the *Gleitman* majority based its refusal to recognize the "wrongful life" cause of action on the impossibility to ascertain damages[64] the *Berman* court stated: "were the *measure* of damages our sole concern, it is possible that some judicial remedy could be fashioned which would redress plaintiff, if only in part, for injuries suffered."[65]

The court stated that damages are not the sole, or even primary concern, but rather the court's opinion is premised on the fact that the child "has not suffered any damages cognizable at law by being brought into existence."[66] With this absence of cognizable damages in mind, the court stated that "life—whether experienced with or without a major physical handicap—is more precious than non-life."[67] Thus, this case can be seen as a refinement of the previous New Jersey Supreme Court case, *Gleitman*, because of *Berman*'s recognition of wrongful life damages as uncognizable, rather than unascertainable. Also, the *Berman* court, due to the *Roe v. Wade*[68]

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59. 80 N.J. at 424, 404 A.2d at 10.

60. *Id.* at 425, 404 A.2d at 10. Citing numerous medical authorities, the court noted that approximately 60 to 90 metabolic defects can be discovered by prenatal diagnosis. Recent reports state that amniocentesis is highly accurate in uncovering chromosomal defects. The procedure itself poses less than a 1% risk of damaging the mother or the fetus during the testing. *Id.*

61. *Id.* at 425, 404 A.2d at 10.

62. *Id.* at 423, 404 A.2d at 10.

63. *Id.* at 430, 432, 404 A.2d at 13, 14.

64. *Id.* at 427, 404 A.2d at 13, 14.

65. *Id.* at 428, 404 A.2d at 12 (emphasis in original).

66. *Id.* at 428-29, 404 A.2d at 12.

67. *Id* at 429, 404 A.2d at 12.

68. *See supra* notes 34 and 35 and accompanying text.

decision retreated from the anti-abortion rationale found in *Gleitman*.[69]

Curlender v. Bio-Science Laboratories,[70] a 1980 decision of the California Court of Appeals, was the next case to recognize a "wrongful life" claim. *Curlender* was the first case which established the validity of "wrongful life" suits in California. In *Curlender*, the infant's parents had requested the defendant to administer certain tests to them to reveal whether either of the parents carried genes which would lead to the conception of a child inflicted with Tay-Sachs disease.[71] Because of the defendants' negligence, the wrong results were related to the parents and, therefore, the parents relied on the inaccurate information and chose to deliver the child rather than abort the fetus.[72] The plaintiff child was subsequently born afflicted with Tay-Sachs disease.[73]

After a thorough review of the "wrongful life" decisional law,[74] the court, in announcing some general observations stated, "[w]e note that there has been a gradual retreat from the position of accepting 'impossibility of measuring damages' as the sole ground for barring the infants right to recovery . . ."[75] The court cited the *Roe v. Wade* decision and the dramatic increase in medical knowledge and expertise as important factors in a wrongful life decision.[76] The court characterized the crux of the problem to be "whether the breach of duty was the proximate cause of *an injury cognizable at law*. The injury, of course, is not the particular defect with which a plaintiff is afflicted . . . but it is the birth of plaintiff with such defect".[77]

The *Curlender* court held that the defendant had a duty to the parents, and also to the child, to perform the tests accurately[78] and

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69. 49 N.J. 22, 30-31, 227 A.2d 689, 693-94 (1979).

70. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

71. *Id.* at 815, 165 Cal. Rptr. at 480. Tay-Sachs disease is an autosomal recessive disease that is clinically apparent by age 5-6 months and invariably leads to death by age 3-4 years. A particular enzyme is absent which leads to an accumulation of ganglioside in the ganglion cell. The disease occurs primarily in people of Jewish heritage who have emigrated from northeastern Europe. *See Current Medical Diagnosis, supra* note 40, at 996.

72. *Id.* at 815, 165 Cal. Rptr. at 480.

73. *Id.* at 816, 165 Cal. Rptr. at 480. In addition to a listing of the plaintiff child's numerous problems, the complaint also alleged that the child's life expectancy was estimated at four years. *Id.* at 816, 165 Cal. Rptr. at 480, 481.

74. *Id.* at 818-826, 165 Cal. Rptr. at 481-86.

75. *Id.* at 826, 165 Cal. Rptr. at 486.

76. *Id.* at 826, 165 Cal. Rptr. at 487.

77. *Id.* at 828-29, 165 Cal. Rptr. at 488 (emphasis in original).

78. *Id.* at 828, 165 Cal. Rptr. at 488.

that the breach of the duty was the proximate cause of the plaintiff child's injury.[79] As a result, the injury was held to be legally cognizable.[80] Damages for pain and suffering, based on her life expectancy of four years was granted to the plaintiff.[81] In addition, "[w]e see no reason in public policy or legal analysis for exempting from liability for punitive damages a defendant who is sued for committing a 'wrongful-life' tort"[82]

Two years later, in *Turpin v. Sortini*,[83] the California Supreme Court retreated somewhat from the *Curlender* opinion. In *Turpin*, the defendant physicians had previously examined the plaintiff's sister in a negligent manner telling the parents that the sibling's hearing was within normal range when in reality the child was "stone deaf" as a result of a hereditary ailment.[84] After receiving this information, the parents conceived the plaintiff who also suffered from total deafness.[85] The Turpins alleged that had they known of the hereditary disease, they would not have given birth to the second child.[86]

The *Turpin* court tightened the *Curlender* analysis by limiting the plaintiff's wrongful life recovery to special damages only.[87] In holding that the plaintiff's claim for pain and suffering should be denied, the court gave two reasons.[88] First, it is impossible to determine whether the plaintiff actually suffered an injury by being born rather than not having been born[89] and secondly, even if the

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79. *Id.* The court characterized the birth as the injury.

80. *Id.* at 829, 165 Cal. Rptr. at 488. The court's analysis was as follows:

> The reality of the "wrongful life" concept is such that a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.

Id.

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

82. *Id.* at 832, 165 Cal. Rptr. at 490.

83. 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982). For a critical discussion of this case, *see Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 CALIF. L. REV. 1278, 1286-87, 1292-93 (1983).

84. 31 Cal.3d at 223, 182 Cal. Rptr. at 339, 643 P.2d at 956.

85. *Id.* at 224, 182 Cal. Rptr. at 339, 643 P.2d at 956.

86. *Id.* at 224, 182 Cal. Rptr. at 339, 643 P.2d at 956.

87. *Id.* at 238, 182 Cal. Rptr. at 348, 643 P.2d at 965.

88. *Id.* at 235, 182 Cal. Rptr. at 346, 643 P.2d at 963.

89. *Id.*

first doubt could be overcome, it would be impossible to ascertain general damages.[90]

The *Turpin* court did, however permit recovery of special damages for the extraordinary expenses accrued because of the disease.[91]

> Here, the harm for which plaintiff seeks recompense is an economic loss, the extraordinary, out-of-pocket expenses that she will have to bear because of her hereditary ailment. Unlike the claim for general damages, defendants' negligence has conferred no incidental, offsetting benefit to this interest of plaintiff.[92]

The Supreme Court of Washington, in *Harbeson v. Parke-Davis, Inc.*[93] followed the lead of the *Turpin* court and held that the children plaintiffs could recover special damages for their "wrongful life" cause of action. The case involved two infant plaintiffs who suffered from "fetal hydantoin syndrome."[94] Mrs. Harbeson, who was an epileptic, was given the drug Dilantin, by the defendant physicians, to control her seizures.[95] The Harbeson's spoke with the defendants regarding their interest in having more children and any possible effects the Dilantin might have on children.[96] The defendants, without doing any research or investigation, informed the Harbesons that the drug could cause cleft palate and *temporary* hirsutism.[97] Relying on the defendants' assurances, the Harbesons proceeded to conceive the two infant plaintiffs. Both the "wrongful

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90. *Id.*

91. *Id.* at 238-39, 182 Cal. Rptr. at 348-49, 643 P.2d at 965. The court recognized that such expenses were incurred due to defendants' negligence and, therefore, the defendants were liable for the costs of any necessary care. In addition, it was also noted by the court that is would be illogical to allow parents, in a wrongful birth action, to recover these expenses, but to not allow a child's recovery. *Id.* at 238, 182 Cal. Rptr. at 348, 643 P.2d at 965.

92. *Id.* at 239, 182 Cal. Rptr. at 349, 643 P.2d at 966.

93. 98 Wash.2d 460, 656 P.2d 483 (1983). For a critical discussion of this case, *see* Note, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis*, 58 WASH. L. REV. 649, 667-69, 674, 677-78 (1983).

94. 656 P.2d at 486. The children "suffer from mild to moderate developmental retardation, wide-set eyes, lateral ptosis (dropping eyelids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects." *Id.*

95. 656 P.2d at 486. Dilantin is an anticonvulsant drug which was regularly used in the treatment of epilepsy. *Id.*

96. *Id.*

97. *Id.* A cleft palate is defined as a palate having a congenital fissure, which is a groove, in the median line. *Dorland's Illustrated Medical Dictionary*, 1083 (24th ed. 1965). Hirsutism is a noticeable difference in the amount of body hair in a woman. Hirsutism can signal more serious disorders, other than the increased hair growth. *See Current Medical Diagnosis, supra* note 40, at 699.

birth" and the "wrongful life" actions were recognized by the Washington Supreme Court.[98] The analysis the court employed in awarding the special damages for the "wrongful life" cause of action was similar to that used to consider the "wrongful birth" action.[99] The four traditional tort concepts of duty, breach, injury and proximate cause were used.[100]

The court held "that a duty may extend to persons not yet conceived at the time of a negligent act or omission."[101] Acknowledging that some courts are reluctant to recognize this duty, the *Harbeson* court explained that this is because with recognition comes "a disavowal of the sanctity of a less-than-perfect human life."[102] After acknowledging the duty, the court found that the defendants breached their duty by failing to observe the appropriate standard of care.[103] The proximate cause requirement was satisfied for the court because "were it not for the negligence of the physicians, the minor plaintiffs would not have been born . . ."[104]

The third state supreme court to recognize some award for "wrongful life" was New Jersey in *Procanik v. Cillo*.[105] In *Procanik*, the infant plaintiff alleged that the defendant doctors were negligent in diagnosing that his mother had contracted German measles in the first trimester of the pregnancy.[106] This diagnostic failure left the parents ignorant of potential birth defects, and therefore, the inability of the parents to make an informed decision as to termination of the pregnancy.[107] Shortly after the plaintiff's birth he was diagnosed as suffering from congenital rubella syndrome.[108]

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98. 656 P.2d at 494, 497.
99. 656 P.2d at 495.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. 656 P.2d at 497.
105. 97 N.J. 339, 478 A.2d 755 (1984).
106. *Id.* at 342, 478 A.2d at 757.
107. *Id.*
108. *Id.* at 344, 478 A.2d at 748. The child was born with multiple birth defects, including eye lesions, heart disease, and auditory defects. *Id.* "An infant acquiring the infection in utero may be normal at birth but more likely will have a wide variety of manifestations, including growth retardation, maculopapular rash, thrombocytopenia, cataracts, deafness, congenital heart defects, organomegaly, and many other manifestations." The prognosis for congenital rubella has a high mortality rate. The congenital defects associated with the disease require numerous years of medical and surgical treatment. *See Current Medical Diagnosis, supra* note 40, at 803.

The *Procanik* court found that the defendant doctors owed a duty to the infant, which duty was breached because of their negligence toward the mother, thus depriving the parents of the choice of terminating the pregnancy.[109] The court also stated that "[n]otwithstanding recognition of the existence of a duty and its breach, policy considerations have led this court in the past to decline to recognize any cause of action in an infant for his wrongful life."[110]

The *Procanik* court went on to hold "that a child or his parents may recover special damages for extraordinary medical expenses incurred during infancy, and that the infant may recover those expenses during his majority."[111] The majority did qualify its reason for allowing special damages by stating that the recovery "is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living."[112] Finding that "the infant's claim for pain and suffering and for a diminished childhood presents unsurmountable problems,"[113] recovery for general damages was denied.[114] The court stated the crux of the problem as the inability to calculate the difference between non-existence and existence with impairment.[115]

The "wrongful life" cause of action was also recognized by the Colorado Court of Appeals as a proper claim for relief in *Continental Casualty Co. v. Empire Casualty Co.*[116] In this case a doctor was negligent in treating Mrs. Peek's blood type as RH positive when in fact she was RH negative.[117] Mrs. Peek's husband had RH positive blood which caused a risk of RH incompatibility in any child they would conceive.[118]

Unaware of the potential difficulties, Mrs. Peek became pregnant for the third time but for this pregnancy she employed the services of a different obstetrician who discovered the RH incompatibility.[119]

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109. 97 N.J. at 348-49, 478 A.2d at 760.
110. *Id.* at 349, 478 A.2d at 760. The court here was referring to *Gleitman v. Cosgrove* and *Berman v. Allan.*
111. 97 N.J. at 352, 478 A.2d at 762.
112. *Id.* at 353, 478 A.2d at 763.
113. *Id.*
114. *Id.*
115. *Id.*
116. 713 P.2d 384 (Colo. App. 1985).
117. *Id.* at 388.
118. *Id.*
119. *Id.*

When the Peek's son was born he suffered from a hemolytic disease[120] known as erythroblastosis fatalis[121] and, because of the premature delivery required by his condition, the infant had a stroke which left him with substantial brain damage.[122]

After quoting language from *Berman* regarding the idea that mere existence does not allow for damages, the Colorado court stated, "we are not willing to say as a matter of law that life, even with the most severe and debilitating of impairments, is always preferable to non-existence."[123] While the court did hold that a "wrongful life" action is a proper claim for relief, damages recoverable for "wrongful life" were not at issue in the case and, therefore, the court did not decide whether a limited damage rule was applicable.[124] The court, however, did make reference to "a trend ha[ving] emerged in recent years which allows an impaired child to maintain an action for wrongful life and to recover as special damages . . ."[125] The court then referred to *Turpin, Harbeson* and *Procanik* as evidence of the trend.[126]

An Illinois appeals court allowed a "wrongful life" type of recovery in *Siemieniec v. Lutheran General Hospital.*[127] In *Siemieniec*, when the plaintiff parents consulted with defendant physicians regarding the possibility of a prospective child of theirs being born with hemophilia, the defendants assured the parents that the possibility was a "low risk."[128] Relying on this information, Mrs. Siemieniec gave birth to a son, the other plaintiff, who was afflicted with hemophilia.[129] The parents sought damages for extraordinary

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120. *Id.* A hemolytic disease is one pertaining to, characterized by, or producing hemolysin. Hemolysis is the "disruption of the integrity of the red cell membrane causing release of hemoglobin. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 749 (27th ed. 1988).

121. *Id.* Erythroblastosis fetalis is another name for a hemolytic disease. Immunization against this disease in a newborn is possible with administration of Rho(D) immune globulin (RHo GAM). *Id.*

122. 713 P.2d at 388.

123. *Id.* at 393.

124. *Id.* at 394.

125. *Id.*

126. *Id.* For a discussion of the cases *see supra Turpin*, notes 83-92 and accompanying text; *Harbeson*, notes 93-104 and accompanying text; *Procanik*, notes 105-113 and accompanying text.

127. 134 Ill. App. 3d 823, 480 N.E.2d 1227 (1985).

128. 480 N.E.2d at 1228.

129. *Id.* Hemophilia, if hereditary, is a tendency to bleed which is caused by a genetically determined deficiency of some factor which should be in the blood. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 749-50 (27th ed. 1988).

medical expenses and also compensation for the infliction of emotional distress. The child's claim was for extraordinary expenses he would incur upon reaching adulthood.[130]

In holding that the child had a cause of action on his own behalf for extraordinary medical expenses during his adult life,[131] the court refused to characterize the action as one for "wrongful life." "In our opinion, what Adam seeks are not damages for "wrongful life"; plainly, he seeks the same legal rights for redress of otherwise cognizable damages that every other person possesses."[132]

In deciding to allow the child's recovery, the court used the traditional elements of negligence. The court stated that "*[w]e believe that there is a right to be born free from pre-natal injuries foreseeably caused by a breach of duty to the child's mother.*"[133] By stating that the defendants breach of the duty profoundly affected the child, the court implied that the child's injury was birth itself. To buttress this position the court disagreed with the *Berman* rationale that recognition of the claim would disavow the sanctity of life.[134] Although the court drew the line at characterizing the child's claim as one of "wrongful life" the pro-"wrongful life" rationale and the award of special damages is present in the case.

As of this time, the overwhelming number of states do not allow any recovery, general or special damages, for a "wrongful life" cause of action.[135] California,[136] Washington[137] and New Jersey [138]

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130. 480 N.E.2d at 1228.
131. *Id.* at 1235.
132. *Id.*
133. *Id.* at 1234 (emphasis in original).
134. *Id.*
135. A partial listing of states and cases disallowing the "wrongful life" claim includes:

Alabama: Elliott v. Brown, 361 So.2d 546 (Ala. 1978); *Delaware*: Coleman v. Garrison, 281 A.2d 616 (1971); *Florida*: DiNatale v. Lieberman, 409 So.2d 512 (Fla. App. 1982); Moores v. Lucas, 405 So.2d 1022 (Fla. App. 1981); *Georgia*: Fulton-DeKalb Hospital Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 654 (1984) (dicta); *Idaho*: Blake v. Cruz, 698 P.2d 315, 321-22 (Idaho 1984); *Kentucky*: Schork v. Huber, 648 S.W.2d 861 (1983); *Massachusetts*: Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171, 181-82 (1982); *Michigan*: Strohmaier v. Associates in Obstetrics and Gynecology, P.C., 122 Mich. App. 116, 332 N.W.2d 432, 433-35 (1982); Dorlin v. Providence Hosp., 118 Mich. App. 831, 325 N.W.2d 600, 601-02 (1982); Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209, 211-13 (1981); *Missouri*: Miller v. Duhart, 637 S.W.2d 183, 185-87 (Mo. App. 1982)(dicta); *New Hampshire*: Smith v. Cote, 513 A.2d 341 (N.H. 1986); *New York*: Alquijay v. St. Luke's Roosevelt Hosp. Center, 63 N.Y.2d 978, 473 N.E.2d 244, 245-46 (1984); Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807, 812 (1978); *North Carolina*: Azzolino v. Dingfelder N.C., 337 S.E.2d

have allowed the infant plaintiff to recover special damages, however, general damages have been denied. Illinois[139] has taken an interesting approach in allowing for special damages but refusing to characterize the action as a "wrongful life" claim. This court treats the claim in the same manner as claims that all other persons have for cognizable damages. While a Colorado court[140] stated that a "wrongful life" claim would be allowable, it is uncertain what type of damages would have been granted since those particular damages were not at issue in the suit. In sum, five states appear to allow some recovery and/or recognition of this "wrongful life" cause of action.

III. The Pennsylvania Judicial Experience

The Pennsylvania courts, and a federal court applying the Commonwealth's law, have followed the majority approach toward the treatment of "wrongful life" claims. The Commonwealth's judiciary has refused to recognize the "wrongful life" cause of action filed on behalf of an infant born with a defect.

In 1978, in *Gildiner v. Thomas Jefferson Univ. Hospital*,[141] the United States District Court for the Eastern District of Pennsylvania was presented with the question of whether "wrongful birth" and "wrongful life" claims should be recognized under Pennsylvania law. The record showed that upon realization of her pregnancy, Mrs. Gildiner went to the defendant physicians to discuss her concerns regarding the possibility of Tay-Sachs disease afflicting her unborn child.[142] The Gildiners informed the doctors that Mrs.

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528 (1985); *South Carolina*: Phillips v. United States, 508 F.Supp. 537 (D.S.C. 1980); *Texas*: Nelson v. Krusen, 678 S.W.2d 918, 924-25 (Texas 1984), Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); *West Virginia*: James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985); *Wisconsin*: Damen v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372, 374-76 (1975).

136. Turpin v. Sortini, 31 Cal.3d. 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982), *See supra* notes 83 to 92 and accompanying text.

137. Harbeson v. Parke-Davis, Inc., 98 Wash.2d 460, 656 P.2d 483 (1983). *See supra* notes 93 to 104 and accompanying text.

138. Procanik v. Cillo, 97 N.J. 239, 478 A.2d 755 (1984). *See supra* notes 105 to 113 and accompanying text.

139. Siemieniec v. Lutheran General Hospital, 134 Ill. App. 3d. 823, 480 N.E.2d 1227 (1985). *See supra* notes 126 to 133 and accompanying text.

140. Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384 (Colo. App. 1985). *See supra* notes 115 to 124 and accompanying text.

141. 451 F. Supp. 692 (E.D. Pa.) 1978.

142. *Id.* at 693.

Gildiner would obtain an abortion unless they were assured the fetus would not have Tay-Sachs disease.[143]

Dr. Kessler recommended that an amniocentesis be performed to determine whether or not the fetus was affected with the disease.[144] The defendants informed the prospective parents that the amniocentesis showed no possibilities of the Tay-Sachs disease and advised the parents to proceed with the pregnancy.[145] After a son, Andrew Lane Gildiner, was born with Tay-Sachs, the parents filed the "wrongful life" cause of action on his behalf.[146]

Quoting from *Gleitman,* the district court, in a short opinion, held that "Andrew Lane Gildiner has failed to state a claim upon which relief may be granted, because he has not sustained damages cognizable at law."[147] The court also mentioned a state action, *Speck v. Finegold*,[148] which had been heard by the Allegheny County Court of Common Pleas and which, at the time of the *Gildiner* decision, was pending for appeal before the Pennsylvania Superior Court.[149]

The seminal case of *Speck v. Finegold*[150] was decided by the Pennsylvania Supreme Court in 1981. The procedural history of the case began when the parents, Frank and Dorothy Speck, filed their four-count complaint[151] in the Court of Common Pleas of Allegheny County, Pennsylvania.[152] In the common pleas court the daughter's claim for "wrongful life" was dismissed.[153] A divided Pennsylvania Superior Court affirmed the dismissal of the wrongful life claim.[154]

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143. *Id.* at 693-694.

144. *Id.* at 694.

145. *Id.*

146. *Id.* The child's life expectancy was gauged to be five years or less. *Id.*

147. *Id.*

148. C.P. Allegheny Co., G.D. No. 76-07752 (July 21, 1976).

149. 451 F.Supp. at 694.

150. 268 Pa. Super. Ct. 342, 408 A.2d 496 (1979), *aff'd in part, rev'd and remanded in part*, 497 Pa. 77, 439 A.2d 110 (1981).

151. The first count was brought by the parents against Dr. Finegold for the birth of their daughter, Francine. Count two was filed against Dr. Schwartz also for damages associated with Francine's birth. The third count sought damages from both physicians and the fourth count, filed on behalf of Francine sought recovery from the doctors because she was born with neurofibromatosis. The fourth count was the "wrongful life" claim. 497 Pa. at 81, 439 A.2d at 112.

152. *Id.* at 82, 439 A.2d at 110-11.

153. *Id.* at 82, 439 A.2d at 113. The court held that the Specks could not assert a claim as a result of the daughter's birth but would be allowed damages flowing from the immediate effects of the two doctors' alleged negligence. *Id.*

154. *Id.* The superior court allowed the parents to receive damages for the cost of raising Francine. However, the Specks' claim for compensation for mental anguish, emotional distress and physical inconvenience was denied. *Id.*

Six Justices[155] of the Pennsylvania Supreme Court heard the case. On the "wrongful life" issue, whether the child's cause of action was legally cognizable, the court was evenly divided and, as a result, the lower courts' dismissal of the action was affirmed.[156]

The facts of the case were as follows: Frank Speck, Jr. and his two daughters were victims of the disease neurofibromatosis.[157] Concerned about conceiving another child with the disease, Mr. Speck obtained a vasectomy operation which was performed by the defendant, Dr. Finegold.[158] Although Dr. Finegold informed Mr. Speck that the vasectomy was successful and he was sterile, Mrs. Speck became pregnant.[159] The Specks then went to Dr. Schwartz to obtain an abortion.[160] Again, although the operation was characterized as successful, it obviously was not, and Mrs. Speck subsequently delivered a premature child afflicted with neurofibromatosis.[161]

Justice Flaherty, the author of the opinion for three of the Justices[162] ruled that a "wrongful life" cause of action should stand

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155. The case was heard by Chief Justice O'Brien and Justices Roberts, Nix, Larsen, Flaherty and Kauffman.

156. 497 Pa. at 80, 439 A.2d at 112.

157. *Id.* at 81-2, 439 A.2d at 112. Justice Flaherty gave the following definition of neurofibromatosis:

> Neurofibromatosis (von Recklinghausen's Disease) is a disease resulting from a hereditary defect, due to an autosomal dominant gene, characterized by development changes in the nervous system, muscles, bones and skin. Skin changes vary from trivial (Cafe au lait spots) to *extremely* disfiguring. The condition is marked superficially by the formation of many pedunculated soft tumors (neurofibromas); however, neurofibromas are also found on cranial nerves and nerve roots. Bilateral acoustic (organs of hearing) neurofibromata (tumors on tumors) occasionally complicate neurofibromatosis in children.
>
> Bone changes are often seen. Neurofibromata are benign and malignant change is rare. Yet, in the central nervous system malignant tumors may appear, the most common of which is glioma of the optic nerve. The condition is both congenital and heredofamilial (inherited by more than one member of a family). The clinical course is variable, making prognosis at any given time difficult. There is no known treatment or cure for the disease. Baker, *Clinical Neurology*, Vol. 3, Chapter 47, p.38 (Rev. ed. 1980); DORLAND'S MEDICAL DICTIONARY, pp. 1040, 1041 (25th ed. 1974); Lichtenstein, "Neurofibromatosis," *Archives of Neurology and Psychiatry,* Vol. 62, pp. 822, 829 (1949); Matthews and Miller, *Disease of the Nervous System,* pp. 283, 284 (2nd ed. 1972, 1975).

Id. at f.n. 2, 81-2, 439 Pa. at f.n. 2, 112.

158. *Id.* at 82, 439 A.2d at 113.

159. *Id.*

160. *Id.*

161. *Id.*

162. Justices Flaherty, Larsen and Kauffman voted to reverse the Order of the Superior Court which had denied the "wrongful life" cause of action.

and they stated that "[e]xistence in itself can hardly be characterized as an injury . . ."[163] However, Justice Flaherty phrased the issue as "whether tort recovery for a negligently inflicted injury will be permitted in broadened circumstances."[164] Noting the procedural setting of the case, Justice Flaherty argued that the question of damages was not before the court but only the issue of whether the "wrongful life" claim should be heard by the trier of fact, to which the three Justices ruled in the affirmative.[165]

Justice Nix filed an opinion in support of affirmance of the superior court's opinion denying a wrongful life cause of action.[166] Phrasing the issue differently than the other half of the court, Justice Nix stated, "[t]he real question is whether the negligent failure to prevent the birth of an *unwanted* child should be compensable."[167] Justice Nix's primary reason for disallowing the cause of action appears to be his belief that "wrongful life" "is an area best left to legislative resolution."[168] Justice Nix, citing *Roe v. Wade* and its progeny,[169] refuted any intimation that acceptance of a "wrongful life" cause of action is mandated by the Constitution.[170] Finally, the Justice relied on an Act of the Commonwealth which expresses a policy favoring child birth, to argue against allowance of this cause of action.[171]

Although *Speck v. Finegold* dismissed the "wrongful life" cause of action, the position was indeed precarious due to the evenly divided court.

In 1980, after *Speck* was decided by the superior court, but before it was heard or decided by the Pennsylvania Supreme Court, the superior court was again faced with the "wrongful life" cause of action in *Stribling v. Quevedo*.[172] The record shows that Mrs.

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163. *Id.* at 87, 439 A.2d at 115.

164. *Id.*

165. *Id.* at 86, 439 A.2d at 115.

166. Justice Roberts and Mr. Chief Justice O'Brien were the other two members voting to uphold the superior court.

167. 497 Pa. at 95, 439 A.2d at 119 (emphasis in original).

168. *Id.* at 100, 439 A.2d at 122. This theme runs throughout the Justice's entire opinion. *Id.* at 93-100, 439 A.2d at 119-122.

169. *See supra* notes 34 and 35 and accompanying text.

170. 497 Pa. at 96, 439 A.2d at 120.

171. *Id.* at 99, 439 A.2d at 121. "Since it is the public policy of the Commonwealth to favor childbirth over abortion . . . . Act of June 13, 1967, P.L. 31, No. 21, § 453, added December 19, 1980, P.L. 1321, No. 239, § 1." *Id.* at 99, note 8, 439 A.2d at 121, note 8.

172. 288 Pa. Super. 436, 432 A.2d 239 (1980).

Stribling had gone to appellants to have a bilateral tubal ligation performed.[173] Despite the operation, Mrs. Stribling gave birth to a son who was born with dextrocardia.[174] The parents filed a three count complaint, the third count on behalf of the child for damages resulting from being born with the disease.[175]

The superior court, in holding that the "wrongful life" cause of action should be dismissed,[176] did not address the issue in any length. The court did, however, include the following quote which had been included in the *Speck* opinion:

> Thus, a cause of action brought on behalf of an infant seeking recovery for 'wrongful life' on grounds [he] should not have been born demands a calculation of damages dependent on a comparison between Hobson's choice of life in an unimpaired state and non-existence. This the law is incapable of doing.[177]

Rubin v. Hamot Medical Center[178] presented a third opportunity for the Pennsylvania Superior Court to address the "wrongful life" cause of action. The court's treatment of *Rubin* did not differ from the disposition of the two previous cases. In this case Mr. and Mrs. Rubin had been tested at the defendant Center, however, the results which indicated presence of the disease were never conveyed to them.[179] Unaware of any problems, the Rubins proceeded with the pregnancy. The plaintiff child was born with Tay-Sachs disease;[180] his innovative claim was based on the theory that he was a third party beneficiary of the contract between his parents and the defendants for the medical and testing procedures.[181]

A large part of the court's opinion in *Rubin* is devoted to a rehash of the *Speck* case. After stating the *Speck* rationale, the court wrote, "[t]hese considerations are also determinative of the novel argument advanced on behalf of Daniel that he was a third party beneficiary . . .".[182] In declining to recognize a wrongful life

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173. *Id.* at 438, 432 A.2d at 240.
174. *Id.* at 438-39, 432 A.2d at 241. Dextrocardia is a condition in which a person's heart is located farther to the right than is normal. *Id.*
175. *Id.* at 439, 432 A.2d at 241.
176. *Id.* at 444, 432 A.2d at 243.
177. *Id.* at 444, 443 A.2d at 242 (quoting 342 Pa. Super. at 364, 408 A.2d at 508).
178. 329 Pa. Super. 439, 478 A.2d 869 (1984).
179. *Id.* at 441, 478 A.2d at 870.
180. *Id.* at 442, 478 A.2d at 870.
181. *Id.* at 442, 478 A.2d at 870.
182. *Id.* at 445, 578 A.2d at 872.

claim, the court noted that it would continue to so hold "[u]nless and until the law is altered by the Legislature or the Supreme Court . . ."[183]

Ellis v. Sherman,[184] in October of 1986, presented the Pennsylvania Supreme Court with the opportunity to alter the law; however, in a six to one opinion, the Commonwealth's highest court chose to solidify the precarious position taken in *Speck*. It is interesting to note that Justice Flaherty, who supported a "wrongful life" cause of action in *Speck*, was the author of the *Ellis* majority opinion which denied the cause of action.[185]

In *Ellis*, the plaintiff, Donald L. Ellis, III, was born with neurofibromatosis[186] which was genetically transmitted by his father.[187] The complaint alleged that although the father had received continuous treatment for his disease, neither his medical doctor not the surgeon who treated him ever informed either Mr. or Mrs. Ellis of the nature of the disease and the fact that it could be genetically transmitted.[188] Suit was also filed against Mrs. Ellis' obstetricians for failing to inquire further into the nature of and potential negative effects of the disease.[189]

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183. *Id.*

184. 512 Pa. 14, 515 A.2d 1327 (1986).

185. Justice Flaherty acknowledged this switch at the end of his opinion: "I am fully aware that this view represents a retrenchment from my position in Speck v. Finegold, 497 Pa. 77, 439 A.3d [sic] 110 (1981). Although the facts of *Speck* are strikingly different from the facts in this case, the ultimate question in both cases is whether the life of a diseased child constitutes an injury for which it should be able to recover. In *Speck*, I took the position that the child should be able to recover, but since that time, I have become increasingly persuaded that the injury in a case of this type is primarily an injury to the parents, for which recovery is permitted, and that the extension of recovery in cases of this type beyond that which is necessary to provide for the child's necessary care and treatment during its life can serve only to put further strains on an already overburdened tort system." 512 Pa. at 20-1, 515 A.2d at 1330. Of the other two Justices that supported the cause of action in *Speck*, Justice Kauffman was no longer on the bench in 1986 and Justice Larsen, holding true to this original opinion, authored the lone dissenting opinion in *Ellis*. Justice Larsen's position basically was that although the damages are difficult to calculate, that is no reason to deny recovery. Secondly, the Justice characterized failure to adequately inform the parents as negligence and since the plaintiff child would experience suffering and financial expenses as a result of that negligence, he should be compensated. 512 Pa. at 21-3, 515 A.2d at 1330-31.

186. For a definition of neurofibromatosis *see supra* note 155.

187. 512 Pa. at 16, 515 A.2d at 1327-28.

188. *Id.* at 17, 515 A.2d at 1328.

189. *Id.*

The Court of Common Pleas of Dauphin County dismissed the "wrongful life" count and appeal was taken to the Pennsylvania Supreme Court.[190] That court ruled that the lower court properly held that a "wrongful life" action is not legally cognizable in the Commonwealth.[191]

It is interesting to note that although there is basically unanimity among commentators and courts in recognizing that a few states do allow a "wrongful life" cause of action, Judge Hoffman, in writing for the superior court, stated:

> [A]ppellants would have us consider and accept the positions of the California and Washington Supreme Courts, which, according to appellants, have clearly recognized actions for "wrongful life" on behalf of minor children . . . It is unfortunate that the Washington Court chose to characterize the particular cause of action it recognized as one for "wrongful life". In separating the cause of action from its label, and in considering the context of the Washington Court's pronouncement, we are convinced of the inaccuracy of appellant's assertion that a "wrongful life" action, such as the one brought on Donnie's behalf has been found legally cognizable.[192]

The Pennsylvania Supreme Court premised the child's recovery on his ability to prove the traditional tort elements required in any medical malpractice action.[193] The highest court found that the child-plaintiff could not establish that he had been injured and, therefore, had no cause of action.[194] The court gave two reasons why the child had not, in fact, been injured. First, the court stated that whether the child has been injured by his birth is too speculative a determination.[195] The court concluded its first argument with:

> Because we have no way of knowing what opportunities will be available to this child or how the child will respond to life in general we cannot say how the child's pain and suffering will compare to the benefits of its life, and thus, we cannot determine that its life constitutes an injury.[196]

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190. *Id.*

191. *Id.*

192. 330 Pa. Super. 42, 42-3, 478 A.2d 1339 at 1339, 1340.

193. 512 Pa. at 18, 515 A.2d at 1328. "[T]he plaintiff must prove that doctor-defendant(s) owed him a duty of care; that they breached that duty; that the plaintiff was injured; and that the injuries were proximately caused by the defendant(s)". *Id.*

194. *Id.*

195. *Id.* at 18, 515 A.2d at 1329.

196. *Id.* The court then referred to the benefit rule which provides: "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." RESTATEMENT (SECOND) OF TORTS, § 920 (1977).

Second, quoting from the definition of "injury" in Black's Law Dictionary,[197] the court concluded that the child's condition was not inflicted upon him by the defendants but rather by the child's genetic constitution.[198] As a result, there was no legal injury. "Legal injury connotes interference from without; it connotes the *disruption* of internal controls. Here the alleged interference was the *absence of interference* in a natural process."[199]

After *Ellis v. Sherman*, the issue of whether a "wrongful life" judicial cause of action exists in Pennsylvania appears to be settled. The Commonwealth has definitely joined the ranks of those states which disallow recovery for both general and special damages which flow from a "wrongful life" claim.

IV. Public Policy Reasons to Oppose a Wrongful Life Cause of Action

Most American jurisdictions do not recognize a "wrongful life" cause of action brought on behalf of, or by, a defective child. While courts generally base their rejection of the action on either the absence of a legally cognizable injury or the impossibility of measuring damages,[200] there are also numerous public policy reasons which need to be considered.

A. Policy Against Abortion

One of the public policy considerations in denying a "wrongful life" cause of action expressed in *Gleitman v. Cosgrove*[201] was that the parents' only alternative to having the deformed child was to abort the fetus, which was, at that time, prohibited by law. Although the United States Supreme Court's decision in *Roe v. Wade*[202] provides constitutional protection to a woman's right to decide

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197. 512 Pa. at 19, 515 A.2d at 1329. Black's Law Dictionary defines "injury" as follows: "Any wrong or damage *done to another*, either in his person, rights, reputation or property . . . *An act* which damages, harms or hurts." (*Black's Law Dictionary*, 402 (5th ed. 1979).(emphasis added by court.) *Id.*

198. *Id.*

199. *Id.* at 20, 515 A.2d at 1329 (emphasis added by the court).

200. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)(overruled in part by Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979)). *See supra* notes 20-29 and accompanying text.

201. *Id.*

202. 410 U.S. 113 (1973), *reh'g. denied* 410 U.S. 959 (1973). *See supra* notes 34 and 35 and accompanying text.

whether or not she wants an abortion, this "right" is not unconditional.[203] Since *Roe*, the Court has repeatedly acknowledged the legitimacy of the state's countervailing interests in protecting an unborn life.[204]

In accordance with these decisions, the Commonwealth of Pennsylvania adopted the Abortion Control Act of 1982.[205] This Act specifically provides that "the public policy of this Commonwealth [is to] encourage childbirth over abortion.[206]

While the Commonwealth cannot disallow qualifying abortions, since this right is constitutionally protected, the Pennsylvania Legislature has articulated a public policy that *encourages* childbirth. This policy directly contravenes with the "wrongful life" cause of action which is premised on the idea that an abortion should have been performed.

In *Berman v. Allan*[207] the New Jersey Supreme Court dealt with a similar state policy. "Our own state constitution proclaims that the "enjoying and defending [of] life" is a natural right. N.J. CONST. (1947), § Art. I, § 1."[208] While all states might not have an *express* policy preferring childbirth over abortion, it is hard to conceive of a state having a policy that favors abortion over life.

B. What Degree of Defect is Necessary?

A question of line-drawing becomes paramount in considering a "wrongful life" cause of action. The facts in *Turpin v. Sortini*[209] show that concern over line-drawing is in fact very real.

In *Ellis v. Sherman*,[210] the plaintiff was born with neurofibromatosis.[211] A disease such as neurofibromatosis shows another problem with the question of how defective is defective? According to

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203. *Id.* at 154.

204. *See* Harris v. McRoe, 448 U.S. 297 (1980); Mahre v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

205. Act of June 11, 1982, P.L. 476, No. 138, Section 1, 18 Pa. C.S.A. § 3201 et. seq.

206. *Id.* § 3202(c).

207. 80 N.J. 421, 404 A.2d 8 (1979). *See supra* notes 57-69 and accompanying text.

208. 80 N.J. at 429, 404 A.2d at 12.

209. 31 Cal.3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982). *See supra* notes 83-92 and accompanying text. In *Turpin*, the cause of action for "wrongful life" was filed on behalf of the child who was born deaf.

210. 512 Pa. 14, 515 A.2d 1327 (1986).

211. *Id.* at 16, 515 A.2d at 1327-28.

the National Neurofibromatosis Foundation, Inc., individuals who are genetic carriers of the disease have, for example, a fifty percent chance of transmitting the condition to their children.[212] Of those children who contract the disease, only a small percentage exhibit its more severe form.[213] Using these statistics, in *Ellis*, the plaintiff's chances of being born with serious deformities were remote. Therefore, even if the child's parents had received proper genetic counseling prior to his birth, would they have decided to have an abortion? The *mere possibility* of having a defective child should not be a sufficient basis upon which a "wrongful life" cause of action is tethered.

C. *Recognition of a Suit for "Wrongful Life" is an Impermissible Act of Judicial Legislation*

The "wrongful life" cause of action involves controversial public choices regarding the quality of a handicapped person's life and potential, abortion, birth control and other areas. The *policy* of "wrongful life" should not be created by the judiciary but, rather, the decision of whether or not a "wrongful life" cause of action will be allowed to exist more properly lies with the elected legislature.

In *Speck v. Finegold*,[214] Justice Nix in his dissent stated, "I initially approach the problem from the premise that this Court is being requested to *judicially legislate* two *new* causes of action heretofore non-existent in this Commonwealth."[215] After devoting several paragraphs to the topic, the Justice concluded with, "[i]n an area that is as provocative as the one in question, discipline must be exercised to avoid personal views from clouding legal judgment. A court may only properly become involved in judicial lawmaking where it is directed to do so by constitutional mandate, legislative direction, or when it is articulating public policy."[216] Justice Nix, joined by Justice McDermott, again expressed this same opinion in *Mason v. Western PA Hospital*.[217]

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212. The National Neurofibromastosi's Foundation, Inc., *Questions and Answers about Neurofibromatosis.*

213. *Id.*

214. 268 Pa. Super. 342, 408 A.2d 496 (1979), *aff'd in part, rev'd and remanded in part*, 497 Pa. 77, 439 A.2d 110 (1981).

215. 497 Pa. at 94, 439 A.2d at 119 (emphasis in original).

216. *Id.* at 95-6, 439 A.2d at 119-20.

217. 499 Pa. 484, 453 A.2d. 984 (1982).

The right and responsibility to define what policies the Commonwealth should be pursuing are usually reserved for the legislature.[218] The 1941 case of *Mamlin v. Genoe*[219] described the limited area in which the judiciary is free to articulate public policy:

> The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and considerations. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well defined, universal public sentiment, deeply integrated in the customs and belief of the people and in their conviction of what is just and right and in the interest of the public wealfare. . . . Only in the clearest cases, therefore, can a court make an alleged public policy on the basis of a judicial decision.[220]

Clearly, it can not be said that in Pennsylvania, or any other state, there is a unanimity of opinion that a deformed fetus or a potentially deformed fetus should be aborted or that an unborn child should have a cause of action against a physician if he is not aborted. As Justice Nix stated in *Speck*:

> Clearly, there is not the unanimity of opinion in regard to either sterilization or abortion that would justify embracing a cause of action for . . . 'wrongful life.' I can think of no issue where the residents of the Commonwealth are more divided than the question of abortion.
>
> Here, there is without question an absence of the unanimity of public opinion that would justify the urged causes of action. To ignore that fact is a flagrant misuse of our role as a tribunal designed to implement societal values and not to create them.[221]

D. Claims Against Parents

If a deformed child is successful in a "wrongful life" suit filed against a physician, the next logical step appears to be that a deformed child would sue his parents for not aborting him when the possibility of defect was known. If the "injury" to a child is

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218. *See* Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985); Knecht v. St. Mary's Hospital 392 Pa. 75 140 A.2d 30 (1958).

219. 340 Pa. 320, 17 A.2d 407 (1941).

220. *Id.* at 325, 17 A.2d at 409.

221. 497 Pa. at 99, 439 A.2d at 121-22.

the creation or continuation of life, a parent with knowledge of a fetus' possible defects would then be forced to bear the liability for failing to prevent that life. Clearly implied in a "wrongful life" cause of action is that parents of "less-than-perfect" fetuses are under a duty to terminate the pregnancy.

While this possibility was not actually at issue in *Curtender v. Bio-Science*[222] the problem was alluded to when the court stated "we see no sound policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring."[223] The recognition of this type of "wrongful life" extension would clearly impact on a couple's decision to have children and would impact on the decision to abort. This type of claim recognition would cause undesirable interference with the family unit.[224]

E. Other

Several other public policy reasons exist for disallowing a "wrongful life" cause of action. These include a court's inability to be able to determine a child's reaction to his infirmed condition,[225] the possibility of increased insurance costs[226] and the potentiality of frivolous suits being filed.[227]

For all of the above-stated reasons, it is this author's belief that the Pennsylvania courts have acted responsibly in not allowing a "wrongful life" cause of action.

V. THE PENNSYLVANIA LEGISLATURE'S RESPONSE

On April 13, 1988, with the signature of Pennsylvania Governor Robert Casey, the Commonwealth enacted a statute which expressly prohibits a cause of action for "wrongful life."[228] The Act's pertinent section reads as follows:

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222. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

223. *Id.* at 829, 165 Cal. Rptr. at 488.

224. *See* Waters, *Wrongful Life: The Implications of Suits in Wrongful Life Brought by Children Against Their Parents*, 31 DRAKE L. REV. 411 (1981-82).

225. *See* Ellis v. Sherman, 515 A.2d at 1329.

226. *See* Snyderman, *Wrongful Life and Wrongful Birth Claims: Judicial Recognition and Acceptance*, 23 MED TRIAL TECH. Q. 29 (Summer 1985).

227. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 259-60, 190 N.E.2d 849, 858 (1963).

228. Section 8305(b), Act 47 of 1988. In addition to disallowing a "wrongful life" cause of action, the Act also expressly prohibits the "wrongful birth" cause of action. *Id.* at § 8305(A).

(B) Wrongful Life.—There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.[229]

Much controversy surrounded the passage of the statute with such groups as the American Civil Liberties Union of Pennsylvania, Pennsylvania Catholic Conference, Pennsylvania Pro-Life Federation and Planned Parenthood participating in the process. Interestingly, this was not the first time a Pennsylvania Legislature has sent a "wrongful life" bill to the Governor.

On July 3, 1984, then Governor Dick Thornburgh vetoed Senate Bill 750 which contained "wrongful life" language. However, the Governor's complaint was not directed at the "wrongful life" part of the bill. "I have no objection to the provisions in this bill which would bar as a defense in certain tort and support actions the claim that the child involved should have been aborted."[230] Rather, the Governor's objection, and the reason for the veto, dealt with the "wrongful birth" language.[231]

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229. Section 8305(B), Act 47 of 1988.

230. Veto Message from Governor Dick Thornburgh (July 3, 1984).

231. The veto message included the following regarding "wrongful birth":

I have serious reservations, however, about the portion of this bill which would close the courts to cases of so-called "wrongful birth" claims. Under current law, Pennsylvania courts have not recognized actions for so-called "wrongful life." Only three of the 50 states have enacted statutes which bar claims for "wrongful birth."

I recognize and concur in the belief expressed by proponents of S.B. 750 that every life is sacred and that the life of a handicapped or retarded child is of no lesser value than the life of a healthy child. However, the issue presented by S.B. 750 is not on the comparative value of lives, but whether prospective parents are entitled to relevant information regarding the risks of conception and birth to the mother and the child so they might make an informed decision and whether medical staff should be held legally liable for the effective delivery of care.

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Also, the enactment of blanket immunity for doctors, hospitals and medical personnel for acts of neglect or malpractice in these situations could, unfortunately lead to a reduction in the level of care and quality of treatment in certain cases of pregnancy. As a result, opportunities which exist to detect and mitigate certain potential diseases and defects in the developing fetus could be lost.

. . . The reservations I have set forth cause me sufficient concern to reject the imposition of the blanket legal immunity provided for in this measure. Accordingly, I am herewith returning S.B. 750 without my signature.

Id.

Several times the Pennsylvania courts have commented that the judiciary should not decide the "wrongful life" issue but instead should leave that issue to the legislature.[232] It appears that since the enactment of Senate Bill 646, the legislature has solidified the state courts' non-recognition of a "wrongful life" cause of action.

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232. *See* Speck v. Finegold, 497 Pa. 77 at 100, 439 A.2d 110 at 122 (1981) (Nix, J., dissenting). This theme runs throughout the Justice's entire opinion. *Id.* at 93-100, 439 A.2d at 119-122; Rubin v. Hamot Medical Center, 329 Pa. Super. 439, 445, 578 A.2d 869, 872 (1984).