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WRONGFUL BIRTH: THE EMERGING STATUS OF A NEW TORT

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Presently, abortion and contraception are highly inflammatory subjects since they tend to raise questions involving rights of privacy and basic social mores.[1] As part of the controversy engendered by these extreme fluctuations in public opinion, the courts have been faced with an increasing amount of litigation concerning actions for "wrongful birth," that is, actions for wrongfully causing a child to be born. Judicial recognition of such actions has been hampered by the questionable ability of the courts to accurately discern rapidly changing public policy,[2] and to measure damages with reasonable certainty.[3]

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1. Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637 (1976). The abundance of material in this area evinces the level of public concern. *See, e.g.*, Coburn, *Sterilization Regulations: Debate Not Quelled by HEW Document*, 183 SCIENCE 935, 937 (1974) (indicating possibility of governmental coercion in connection with welfare programs and sterlization of Blacks in the South); Degnan, *Law, Morals, and Abortion*, 100 COMMONWEAL 305 (1974) (explanation of various moral and legal positions on abortion); Edelstein, Herman, & Herman, *Moral Consistency and the Abortion Issue*, 100 COMMONWEAL 59, 60 (1974) (deploring prevailing inconsistency between right to life before and after birth); Larned, *The Greening of the Womb*, NEW TIMES, Dec. 27, 1974, at 35 (criticizing the increasing use of the hysterectomy as a means of family planning); *Furor Over the Abortion Issue—Hotter Than Ever*, U.S. NEWS & WORLD REPORT, March 4, 1974, at 43 (indicating a steep rise in abortions since 1968); *Second Thoughts About Abortions*, U.S. NEWS & WORLD REPORT, March 3, 1975, at 78 (discussing implications of conviction of Boston physician for murdering fetus by performing an abortion). The demographic effects of liberalized abortion and contraception have been analyzed for the United States in Sklar & Berkov, *Abortion, Illegitimacy, and the American Birth Rate*, 185 SCIENCE 909, 914 (1974) (concluding that through 1971 liberalized abortion depressed overall fertility, and particularly illegitimate fertility). The observed experience of the United States for a short period of time is in accord with the postwar experience of the Eastern European countries, as shown in McIntyre, *The Fertility Response to Abortion Reform in Eastern Europe: Demographic and Economic Implications*, THE AMERICAN ECONOMIST, Vol. 16, No. 2, Fall 1972, at 45, 61.

2. *Compare* Custodio v. Bauer, 59 Cal. Rptr. 463, 475 (Ct. App. 1967) (stating that in action by parents of a normal child born as the result of unsuccessful sterilization, birth of child is not always a blessed event) *with* Christensen v. Thornby, 255 N.W. 620, 622 (Minn. 1934) (holding that birth of a normal child is a blessing, even when unplanned). The term "wrongful birth" is used in this paper as a generic term including actions brought by both parents and children, corresponding to the phrase "wrongful life" used by the courts, because it more accurately reflects the gravamen of the cause of action.

3. Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967). The court, faced with a claim by a deformed infant that he should have been aborted, held that the traditional

The action for wrongful birth seems to be an outgrowth of the tangled skein created by the escalating conflict between two recent trends in the law of torts. These two developments reflect the divergent attitudes of society toward the rights of both unborn children and the women who must bear those children. The first and most recognized trend, although the slowest to develop, is the right of a child to recover for prenatal injuries. While the common law was at first adamant in its refusal to allow such an action,[4] initial recognition came in 1946, and today the action is universally allowed.[5]

Accompanying this recognition was a movement toward an expansion of the right of privacy to include a woman's right to control her own bodily functions - including the right to terminate her pregnancy.[6] As a result of these antithetical developments, the status of the fetus as a legal entity has become a modern dilemma.[7] This quandary has contributed to the reluct-

compensatory damages could not be measured where it entailed a comparison between life with defects and the void of nonexistence.

4. Dietrich v. Northampton, 138 Mass. 14, 15 (1884) (Holmes, J.) (no recovery for injuries sustained by child in its mother's womb). While the common law rule precluded recovery, the rule was not unanimously accepted. In Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) a strong appeal was made for recognition of a right of action for injuries to a viable fetus that was subsequently born alive. The rationale of *Dietrich* was nevertheless accepted in Texas. Magnolia Coca-Cola B. Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

5. Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946) (initial recognition). The early cases following *Bonbrest* required that the fetus be viable at the time of injury. Damasiewicz v. Gorsuch, 79 A.2d 550, 561 (Md. 1951); Stegall v. Morris, 258 S.W.2d 577, 581 (Mo. 1953); Mallison v. Pomeroy, 291 P.2d 225, 228 (Ore. 1955). More recent decisions have not stressed the requirement of viability. Daley v. Meier, 178 N.E.2d 691, 694 (Ill. Ct. App. 1961); Womack v. Buchhorn, 187 N.W.2d 218, 222 (Mich. 1971); Labree v. Major, 306 A.2d 808, 818 (R.I. 1973). "Viability" means that the fetus is capable of living outside the womb. Sylvia v. Gobeille, 220 A.2d 222, 223 (R.I. 1966). When first recognizing the right of recovery for prenatal injuries in Leal v. Pitts Sand & Gravel, Inc., 419 S.W.2d 820, 821 (Tex. 1967), the Texas Supreme Court held that the cause of action was limited to a viable fetus, but in Delgado v. Yandell, 468 S.W.2d 475, 478 (Tex. Civ. App.—Fort Worth), *aff'd*, 471 S.W.2d 569 (1971) the court of civil appeals abandoned the limitation of viability. Universal recognition of the cause of action for prenatal injuries occurred in 1972, when Alabama allowed recovery. Huskey v. Smith, 265 So. 2d 596, 598 (Ala. 1972) (inexplicably limiting recovery to a viable fetus). Alabama abandoned the limitation of viability in Wolfe v. Isabell, 280 So. 2d 758, 761 (Ala. 1973). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 335 (4th ed. 1971) (prenatal injuries); 2 J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER V-46 (1975) (defining viability); Annot., 40 A.L.R.3d 1222 (1971) (prenatal injuries).

6. Doe v. Bolton, 410 U.S. 179, 194 (1973) (Georgia criminal abortion statute held unconstitutional); Roe v. Wade, 410 U.S. 113, 163-65 (1973). In *Wade* the Texas criminal abortion statutes were held unconstitutional as violative of a woman's fundamental right to decide whether or not to terminate her pregnancy. Abortions in the first trimester of pregnancy were held to be outside the realm of state regulation, but abortions during the second trimester may be regulated in the interest of the health of the mother. Subsequent to viability, however, the State may proscribe abortion.

7. The conflict between the two trends is even more apparent when one considers the status of the fetus as regards the law of property. The common law regarded an

ance of the courts to extend the rights of the fetus when faced with suits by children alleging that they have been damaged by the very fact of their birth, and who seek compensation for their wrongful life. Consequently the courts have, with only one exception, emphatically refused to create a new cause of action for wrongful birth in favor of an infant.[8] Indeed the novelty of the phrase itself has caused courts to deny recovery in actions brought by parents who seek recovery for the birth of a child.[9] The problem of whether the law should recognize a cause of action in favor of a child against those responsible for its being, or whether to do so is "to enter an area in which no one could find his way,"[10] has been hampered by the failure of some courts to distinguish true wrongful birth actions from actions which merely contain *elements* of a wrongful birth action. The result has been an indiscriminate application of the reasoning of the wrongful birth cases in actions where basic negligence principles should have been applied.[11]

CAUSE OF ACTION FOR WRONGFUL BIRTH

Actions for wrongful birth have been litigated under warranty, tort, and contract.[12] Because of the special difficulties involved in suits on contract

unborn child as capable of receiving a legacy, a copyhold estate, and to take an estate limited to its use when subsequently born, as if alive when the event occurred. 1 W. BLACKSTONE, COMMENTARIES * 130. The conflict can be illustrated by a hypothetical. Suppose that a woman, in the first trimester of pregnancy, learns that a bequest has been made to her and her children. While the present law indicates that she could increase her share by aborting the fetus, logic and equity dictate that this result should not be permitted. *See* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 369 (1971).

8. *Recovery denied*: Smith v. United States, 392 F. Supp. 654, 656 (N.D. Ohio 1975); Zepeda v. Zepeda, 190 N.E.2d 849, 859 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964); Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967); Williams v. State, 276 N.Y.S.2d 885, 887 (1966); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (Sup. Ct. App. Div. 1970), *aff'd*, 332 N.Y.S.2d 640 (1972); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 377 (Wis. 1975). *Cause of action stated*: Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 241 (10th Cir. 1973).

9. Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967). The parents of a child with birth defects seeking damages for the failure of physician to inform them of the effects of rubella were denied recovery based on the reasoning that tort damages should not be recoverable for the denial of the opportunity to take embryonic life. Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (Sup. Ct. App. Div. 1970) (parents' suit for damages due to defendant's failure to abort rubella stricken fetus was dismissed).

10. Gleitman v. Cosgrove, 227 A.2d 689, 711 (N.J. 1967) (Weintraub, J., dissenting in part).

11. *See* Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (Sup. Ct. App. Div. 1970) (court dismissed parents' action as unknown to law without adequately discussing tort theory).

12. In Zepeda v. Zepeda, 190 N.E.2d 849, 852 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964), a child born out of wedlock as the result of a seduction, unsuccessfully sued his putative father alleging in one count that he was a third party beneficiary of the father's promise of marriage. Ball v. Mudge, 391 P.2d 201, 203 (Wash. 1964) (action by husband and wife alleging breach of warranty in failure to render husband sterile). In Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975), mother and child sued in

or warranty theories,[13] the majority of the wrongful birth suits have occurred in tort.[14] While free from the burden of proving the elements of a contract-warranty action, recovery under negligence has also encountered numerous problems. Recovery has been denied on grounds of public policy, the difficulty of measuring damages, lack of causation, absence of statutory authority, lack of duty, and because the concept is without foundation in law or logic.[15]

Recovery in tort for wrongful birth was at first uniformly denied by the courts,[16] but in recent years recovery has been allowed in a small but growing number of jurisdictions.[17] A careful examination of the cases,

tort for the defendant's failure to diagnose rubella so that the fetus could be aborted; the child's claim was denied and the mother's allowed. *Id.* at 376-77.

13. Plaintiffs in warranty and contract actions must prove the existence of a contract to achieve a specific medical result. Absent this contract, the physician does not warrant the success of the operation. Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D.W. Va. 1967). In proving the contract, the courts distinguish between a "therapeutic reassurance" to the patient of the physician's opinion and the making of a warranty. Rogala v. Silva, 305 N.E.2d 571, 574 (Ill. Ct. App. 1973). The courts may require that the warranty be express, that the plaintiff prove his reliance on the warranty, and the payment of a separate consideration. *Id.* at 573. These difficulties may be aggravated by the standard practice of signing a disclaimer of warranties upon admission to the hospital. Herrera v. Roessing, 533 P.2d 60, 61 (Colo. Ct. App. 1975). *See generally* Annot., 43 A.L.R.3d 1221 (1972). The principal advantage in the contract-warranty action is the longer statute of limitations. Doerr v. Villate, 220 N.E.2d 767, 770 (Ill. Ct. App. 1966). This advantage, however, is dissipated in those jurisdictions that have adopted the discovery rule. Under this rule, a cause of action for medical malpractice accrues and the statute of limitations begins to run when the patient discovers, or in the exercise of reasonable care for his own welfare, should have discovered the resulting injury. Teeters v. Currey, 518 S.W.2d 512, 517 (Tenn. 1974). *See also* Annot., 27 A.L.R.3d 906 (1969); Annot., 80 A.L.R.2d 368, 388 (1961).

14. Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975); Custodio v. Bauer, 59 Cal. Rptr. 463, 466 (Ct. App. 1967); Coleman v. Garrison, 327 A.2d 757, 760 (Del. Super. Ct. 1974); Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App. 1974); Pinkney v. Pinkney, 198 So. 2d 52, 53 (Fla. Ct. App. 1967); Zepeda v. Zepeda, 190 N.E.2d 849, 852 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964); Gleitman v. Cosgrove, 227 A.2d 689, 691 (N.J. 1967); Stewart v. Long Island College Hosp., 332 N.Y.S.2d 640, 641 (1972), *aff'g* 313 N.Y.S.2d 502 (Sup. Ct. App. Div. 1970); Williams v. State, 276 N.Y.S.2d 885, 886 (Sup. Ct. 1974); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 374 (Wis. 1975); Slawek v. Stroh, 215 N.W.2d 9, 21 (Wis. 1974).

15. Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975) (lack of causation); Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App. 1974) (without foundation in law or logic); Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967) (public policy); Cox v. Stretton, 352 N.Y.S.2d 834, 840 (Sup. Ct. 1974) (lack of duty); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 376 (Wis. 1975) (damages); Slawek v. Stroh, 215 N.W.2d 9, 22 (Wis. 1974) (absence of statutory authority).

16. *E.g.*, Zepeda v. Zepeda, 190 N.E.2d 849, 859 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964); Pinkney v. Pinkney, 198 So. 2d 52, 54 (Fla. Ct. App. 1967); Williams v. State, 276 N.Y.S.2d 885, 887 (1966).

17. *See, e.g.*, Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 241 (10th Cir. 1973) (action by mongoloid children for birth defects); Custodio v. Bauer, 59 Cal. Rptr. 463, 477 (Ct. App. 1967) (action for cost of raising child by parents of normal child born after unsuccessful sterilization); Jackson v. Anderson, 230 So. 2d 503 (Fla. Ct. App. 1970) (suit by patient for negligently failing to sterilize, who gave birth to a normal child, not barred by public policy); Betancourt v. Gaylor, 344 A.2d 336, 340

however, reveals confusion as to the true nature of a suit for wrongful birth. The present trend is merely the result of the discernment by the courts of the distinction between an action for wrongful birth and an action for medical malpractice that contains elements of the wrongful birth action.[18] By classifying the cases according to the party bringing the action and the character of the recovery sought, certain factual distinctions become clear and an alternative method of characterization may be suggested.

The Potential Plaintiffs

The obvious method of distinguishing the various cases encompassed by the phrase "wrongful birth" is by determining who brings the action. Actions by parents for the wrongful birth of their children have frequently followed an unsuccessful sterilization and have been brought on both contract-warranty and tort theories.[19] Numerous actions have been brought by parents seeking damages for a physician's failure to diagnose rubella, which resulted in their child being deformed at birth.[20] Another unique contem-

(N.J. Super. Ct. 1975) (action by patient who became pregnant after tubal ligation termed "wrongful pregnancy"); Ziemba v. Sternberg, 357 N.Y.S.2d 265, 267 (Sup. Ct. App. Div. 1974) (action by woman for failure of doctor to diagnose her pregnancy in time for her to terminate it); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (suit by parents of child born with rubella syndrome against doctor who failed to diagnose it).

18. In Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974), the court distinguished a cause of action for wrongful birth or life from a cause of action for wrongful pregnancy, holding that an action would lie for the latter, but not for the former. Similar distinctions have been noted by other courts. *See* Betancourt v. Gaylor, 344 A.2d 336, 339 (N.J. Super. Ct. 1975); Cox v. Stretton, 352 N.Y.S.2d 834, 841 (Sup. Ct. 1974); Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975). *But see* Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967) (parents of deformed child born as result of defendant's failure to diagnose rubella had no cause of action); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (Sup. Ct. App. Div. 1970) (no cause of action for parents of deformed child for defendant's failure to abort child).

19. Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D.W. Va. 1967) (warranty); Custodio v. Bauej, 59 Cal. Rptr. 463, 466 (Ct. App. 1967) (contract); Rogala v. Silva, 305 N.E.2d 571, 572 (Ill. Ct. App. 1973) (warranty) Cox v. Stretton, 352 N.Y.S.2d 834, 837 (Sup. Ct. 1974) (contract). In the male, the sterilization operation is called a vasectomy. It is a minor surgical operation involving the ligation of the vas deferens. 2 J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER V-13 (1975); Kaufman, *Vasectomy: Medical and Legal Aspects*, TRAUMA Vol. 1, No. 5, at 110, 115 (1960). In the female, the operation is termed a tubal ligation, and involves the severing and tying of the fallopian tubes. Wolfe, *Female Sexual Sterilization*, 41 J. KY. MED. ASS'N. 87 (1973); Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 416 (1965).

Examples of tort actions are: Coleman v. Garrison, 327 A.2d 757, 760 (Del. Super. Ct. 1974); Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App. 1974); Betancourt v. Gaylor, 344 A.2d 336, 337 (N.J. Super. Ct. 1975); Terrell v. Garcia, 496 S.W.2d 124, 125 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974).

20. Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502 (Sup. Ct. App. Div. 1970), *aff'd*, 332 N.Y.S.2d 640 (1973); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975). Rubella, or German measles, is an acute

porary example is a suit by the parents for the failure to diagnose a pregnancy so that the mother, for purely personal reasons, could obtain an abortion.[21] It is apparent that these actions by the parents contain elements of a wrongful birth action because the gravamen of the cause of action is the birth of a child.[22] Nevertheless, it is important to distinguish actions which allege the wrongful birth of a person other than the plaintiff, from those which allege that the plaintiff himself should not have been born.[23] When the plaintiff alleges that his own birth was wrongful, in effect he asks the court to judicially determine that he should not have been allowed to live,[24] but when another person such as a parent alleges that the infant should not have been born, the parent does not seek to negate his own present existence.[25] The parent is in reality seeking damages for injuries causally related to the fact of birth, but not for the birth itself.[26] Thus, the parents are not placed in the anomalous position of trying to sue themselves into oblivion, as are the children. The parents' action for damages for the birth of a child born subsequent to an unsuccessful sterilization operation is not subject to the logical difficulties present in actions by the children. In spite of the obstacles of logic, however, children have sued claiming that they should not have been born.

Three classes of children have brought actions for wrongful birth: prior born, illegitimate, and deformed children. Typically, a prior born child brings an action against the doctor whose sterilization operation on one of the parents was a failure, seeking damages for the diminution of his share of love, affection, and pecuniary inheritance due to the subsequently born child.[27] Without exception, these claims have been denied, apparently since

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infectious fever that has only mild effects on the pregnant mother, but when contracted in the first trimester of pregnancy it may have a devastating effect on the fetus. The primary deformities include congenital heart disease, cataracts, and hearing defects. The probability of deformation, once thought to be 100 percent, is now estimated at between 10 and 20 percent. 1 J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER G-14 (1974); Anderson, *Viruses*, TRAUMA Vol. 8, No. 4, at 19, 23 (1966); Ferguson, *Pregnancy—Normal and Abnormal*, in 5 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 239, 313 (P. Cantor, ed. 1961).

21. Ziemba v. Sternberg, 357 N.Y.S.2d 265, 267 (Sup. Ct. App. Div. 1974); Rieck v. Medical Protective Co., 219 N.W.2d 242, 243 (Wis. 1974).

22. *See, e.g.*, Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975); Hays v. Hall, 477 S.W.2d 402, 404 (Tex. Civ. App.—Eastland 1972), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1973); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 373 (Wis. 1975).

23. This distinction has been noted by several courts. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974); Betancourt v. Gaylor, 344 A.2d 336, 338 (N.J. Super. Ct. 1975); Cox v. Stretton, 352 N.Y.S.2d 834, 841 (Sup. Ct. 1974); Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975).

24. Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967).

25. *See* Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974); Cox. v. Stretton, 352 N.Y.S.2d 834, 841 (Sup. Ct. 1974).

26. Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975).

27. Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App. 1974).

the prior born children cannot find a satisfactory basis of liability.[28] The children did not contract with the doctor, therefore, no recovery is possible in contract or warranty unless the children can be viewed as third party beneficiaries of the contract to sterilize their parent. This is unlikely since only intended beneficiaries have any rights under a contract, and the children at best would be only incidental beneficiaries.[29] Nor may recovery in tort be sustained, since the basic elements of a tort are absent. The physician's duty is to his patient and not to the prior born children. Absent this duty, no liability arises. Even if the existence of a duty is to be assumed, the breach of it is only actionable if it injures the plaintiff. Where the plaintiff is injured and has no vested right in the interest he claims, he cannot recover.[30] Thus, any action by prior born children for the birth of another child is "without foundation in law or logic,"[31] and no recovery should be allowed.

An equally novel approach has been taken by those illegitimate children who bring suit, against one of their parents, for allowing them to be born illegitimate. In fact, the phrase "wrongful life" originated in such an action.[32] These cases normally involve a situation in which the illegitimate child is bringing suit for damages against his putative father for deprivation of a normal home life and the stigma of illegitimacy.[33] The courts have been unmoved by the recitation of the burdens of bastardy when compared with non-existence, and have denied recovery in all cases.[34] The status of

28. In Coleman v. Garrison, 281 A.2d 616, 618 (Del. Super. Ct. 1971), the trial court held that an action by prior born children against a doctor who negligently sterilized their mother was not barred by public policy. On appeal, the case was remanded for error in submitting a question of law to the jury. Wilmington Medical Center v. Coleman, 298 A.2d 320, 322 (Del. 1972). On remand, the action of the prior born children was not discussed and summary judgment was granted the defendant due to insufficiency of the pleadings. Coleman v. Garrison, 327 A.2d 757, 762 (Del. Super. Ct. 1974). In Cox v. Stretton, 352 N.Y.S.2d 834, 841 (Sup. Ct. 1974), the cause of action on behalf of the prior born children was dismissed as unknown to the law.

29. This claim has not been raised in any case involving prior born children.

30. Cox v. Stretton, 352 N.Y.S.2d 834, 840 (Sup. Ct. 1974).

31. Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App. 1974).

32. Zepeda v. Zepeda, 190 N.E.2d 849, 858 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964); *see* Note, 50 A.B.A.J. 682 (1964); Note, 28 ALBANY L. REV. 174 (1964); Note, 77 HARV. L. REV. 1349 (1964); Note, 49 IOWA L. REV. 1005 (1964); Note, 25 OHIO S. L.J. 145 (1964); Note, 112 U. PA. L. REV. 780 (1964).

33. Zepeda v. Zepeda, 190 N.E.2d 849, 851 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964).

34. Pinkney v. Pinkney, 198 So. 2d 52, 54 (Fla. Ct. App. 1967) (action by illegitimate daughter against her father for causing her to be born in a state of illegitimacy); Zepeda v. Zepeda, 190 N.E.2d 849, 858 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964) (suit by illegitimate son against putative father for fraudulently inducing plaintiff's mother to have sexual relations with defendant by promise of marriage); Williams v. State, 269 N.Y.S.2d 786, 787 (1966) (action by illegitimate child of inmate in state mental hospital against the State for its negligence in failing to protect plaintiff's mother from sexual assault resulting in birth of plaintiff); Slawek v. Stroh, 215 N.W.2d 9, 22 (Wis. 1974) (father of illegitimate child sued mother and child for

the law is questionable, however, in Illinois and Florida despite denials of recovery. In *Zepeda v. Zepeda*,[35] the Illinois Court of Appeals denied recovery, but nevertheless held that the father's conduct was tortious as to the plaintiff.[36] Denial of recovery was predicated on public policy grounds, even though the court recognized the inconsistency of such a decision.[37] In *Pinkney v. Pinkney*,[38] the Florida Court of Appeals denied the existence of such a cause of action, but *Pinkney* was expressly overruled by the Florida Supreme Court in *Brown v. Bray*.[39] Unfortunately, the *Brown* decision misconstrued the holding of *Pinkney*, making the status of the portion of *Pinkney* concerning wrongful birth actions uncertain.[40] Despite these anomalies, the prevailing view is that no cause of action should be recognized in favor of an illegitimate child for the fact of his birth, absent legislative sanction.[41]

The cases that have caused the courts the most difficulties have been those brought by deformed children who seek to recover for their impairments. Despite the sympathy evoked by such claims, the courts have uniformly denied recovery.[42] The landmark decision in this area is *Gleitman v.*

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declaration of his visitation rights and was answered with counterclaim by child alleging wrongful birth).

35. 190 N.E.2d 849 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964).

36. *Id.* at 852.

37. *Id.* at 855-56. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 2 (4th ed. 1971) (damages are essential part of tort action).

38. 198 So. 2d 52 (Fla. Ct. App. 1967).

39. 300 So. 2d 668 (Fla. 1974).

40. The Florida Supreme Court in *Brown v. Bray*, faced with an action to determine the constitutionality of a Florida bastardy statute, purported to overrule the *Pinkney* decision upon the rationale of Levy v. Louisiana, 391 U.S. 68 (1968). In *Levy*, the United States Supreme Court held that an illegitimate child could recover for the wrongful death of his parent. *Id.* at 72. This decision implies that the Florida court viewed *Pinkney* as holding that an illegitimate child could *not* recover for the wrongful death of the parent. *Pinkney* did not so hold, but rather held that the father's acts in defending himself from the mother's assault did not constitute a wrong under the wrongful death statute. Pinkney v. Pinkney, 198 So. 2d 52, 54 (Fla. Ct. App. 1967). Thus, *Brown* overruled *Pinkney* on a proposition of law not established by *Pinkney*, and by expressing disapproval of the entire *Pinkney* decision, *Brown* cast doubt on the portion of *Pinkney* dealing with wrongful birth.

41. Slawek v. Stroh, 215 N.W.2d 9, 22 (Wis. 1974) (noting the social ramifications of action and deferring problem to the legislature).

42. Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975) (recovery denied for lack of causation and because infant's damages were not cognizable at law); Gleitman v. Cosgrove, 227 A.2d 689, 691-93 (N.J. 1967) (recovery denied on grounds of causation, impossibility of measuring damages, and public policy); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (Sup. Ct. App. Div. 1970), *aff'd*, 332 N.Y.S.2d 640 (1972) (action by infant for circumstances of his birth not cognizable at law); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 376 (Wis. 1975) (infant's action rejected on grounds of causation and damages). *Contra*, Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 240 (10th Cir. 1973), *vacating and remanding* 336 F. Supp. 961 (W.D. Okla. 1972) (recovery for deformities of mongolism originally denied, but allowed on appeal).

Cosgrove.[43] *Gleitman* involved a suit by an infant and his parents against a physician who allegedly failed to inform the parents of the possible effects on their child of the rubella contracted by the mother. The parents sought damages for the emotional distress suffered by the mother and for the costs to the father of rearing the child, while the infant sought damages for his birth defects. The court noted the inability of the defendant to alleviate the infant's condition by any means short of eliminating the infant's existence, and noted the lack of any causation attributable to the defendant.[44] These two factors, in addition to the difficulty of measuring damages and the court's conception of public policy, required a denial of recovery on the infant's cause of action.[45]

This reasoning was followed without exception insofar as actions by the infant were concerned until *Jorgensen v. Meade Johnson Laboratories, Inc.*[46] There the action was brought by two mongoloid children who alleged that the defendant's birth control pills formerly taken by their mother caused chromosome mutations which resulted in the infants' deformities. The complaint on appeal was held to state a cause of action on two theories. First, the court believed that favorable consideration should be given to the plaintiffs' claim on motion to dismiss.[47] Second, the appellate court stated that after conception the infants' chromosomes were affected by the altered chromosome structure of the mother's body.[48]

The *Jorgensen* decision is a sharp reversal from the previous cases where suit was brought by a child. While *Jorgensen* is clearly distinguishable from the prior actions in that the deformities were not caused by rubella, it is by no means free from problems of causation. The court recognized that on remand causation would have to be proven, but ignored the medical facts that would preclude proof of causation.[49] It is recognized today that the genetic character of an individual is determined at the moment of conception,[50] so that for the court to state that a genetic deformity in the fetus may be caused after conception by a change in the mother's chromosomes is factually incorrect. The value of the decision as precedent is further

43. 227 A.2d 689 (N.J. 1967).

44. *Id.* at 691-92.

45. *Id.* at 691-92. The court's conception of public policy is reflected by their statement that "the right to life is inalienable in our society." *Id.* at 693.

46. 483 F.2d 237 (10th Cir. 1973).

47. *Id.* at 238. Under the appliciable law, a complaint should not be dismissed for failure to state a cause of action unless it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief. *Id.* at 239.

48. *Id.* at 239. The district court had refused to recognize a cause of action for the plaintiffs on the ground that a child may not recover for injury to the ovum of its female parent before it unites with the sperm in conception. Jorgensen v. Meade Johnson Laboratories, Inc., 336 F. Supp. 961, 962 (W.D. Okla. 1972).

49. Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 240 (10th Cir. 1973).

50. H. CURTIS, BIOLOGY 399 (1968).

weakened by the presumptions in favor of the plaintiff attendant to the procedural form of the action.[51] Apparently the *Jorgensen* decision is incorrect. While the mother was clearly damaged if her chromosomes were distorted by the use of the contraceptive, and it is conceivable that her damages would include the deprivation of her ability to have a normal child, it is very difficult to view the defendant's conduct as wrongful toward an unconceived, potential fetus.

The Measurement of Damages

Wrongful birth actions by infants who complain of their very existence have not gained recognition. Furthermore, actions by parents for damages for the birth of a child have received a mixed reception because of the close relationship between the two types of actions. One of the primary causes of this confusion, and one of the chief obstacles to recovery in both instances has been the difficulty encountered in the measurement of damages.[52]

In both tort and contract actions, the purpose in awarding monetary damages is compensation.[53] In contract actions, the objective of a court is to place the plaintiff in the same position he would have been in had the breach not occurred, while in tort actions the objective is to return the plaintiff to his position prior to the wrongful act.[54] Implicit in this scheme of compensation is knowledge of a plaintiff's prior condition so that a nonspeculative comparison can be made. This problem has plagued plaintiffs in wrongful birth actions, and although the difficulty is particularly acute where the infants are concerned, the parents have also encountered impediments in proving damages. These obstacles may be illustrated by an examination of the types of damages sought by the various plaintiffs and the disposition of their claims by the courts.

The parents who have sued for damages as a result of the birth of a child fall into two categories: parents of children who were born with birth defects, and those whose children were normal, although unplanned or unwanted. In actions by the parents of a normal child, the uniformly recognized rule

51. Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 239 (10th Cir. 1973) (all facts favorable to plaintiff are presumed on motion to dismiss).

52. *See, e.g.*, Smith v. United States, 392 F. Supp. 654, 656 (N.D. Ohio 1975); Zepeda v. Zepeda, 190 N.E.2d 849, 858 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964); Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967); Hays v. Hall, 477 S.W.2d 402, 406 (Tex. Civ. App.—Eastland 1972), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1973).

53. Miller v. Robertson, 266 U.S. 243, 257 (1924); Wicker v. Hoppock, 73 U.S. 94, 99 (1867); United States v. Hatahley, 257 F.2d 920, 923 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958).

54. Miller v. Robertson, 266 U.S. 243, 257 (1924) (contract); Tucker v. Calmar Steamship Corp., 356 F. Supp. 709, 711 (D. Md. 1973) (tort). *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.1, at 1299 (1956); H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 1, at 1 (rev. ed. 1961).

prior to 1967 was that apart from the question of liability for the performance of an unsuccessful sterilization operation, no damages resulted from the birth of a normal child where no permanent harm was incurred by the mother.[55] The rationale for this view was that the birth of a normal child could not be considered an injury, and that an award of such damages would be against public policy.[56] The initial decision in this line of cases, *Christensen v. Thornby*,[57] expressed the view that damages incident to the bearing of a child were too remote from the purpose of a sterilization operation.[58] Stating a prediction, the court declared that the parents had as much chance of recovering for the expense of childbirth as they did for the cost of supporting and educating the child during its minority.[59] Within a few years, parents were seeking such damages.[60]

The rationale of the *Christensen* decision denying the possibility of any damages for the birth of a normal child was first questioned in *Custodio v. Bauer*.[61] There the parents sought to recover damages following an unsuccessful sterilization operation for the medical expenses incident to the operation, physical pain and mental anguish incident to the pregnancy, and for the economic loss occasioned by the unwanted child. The California Court of Appeals rejected the reasoning of *Christensen* and allowed recovery for the provable economic loss,[62] thus explicitly recognizing that the birth of a child may be less than a "blessed event."[63] Since *Custodio* other courts have awarded damages to the parents for the birth of a normal child.[64] Neither

55. Christensen v. Thornby, 255 N.W. 620, 622 (Minn. 1934); Ball v. Mudge, 391 P.2d 201, 204 (Wash. 1964). This rule was followed in Texas in Hays v. Hall, 477 S.W.2d 402, 406 (Tex. Civ. App.—Eastland 1972), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1973). The rationale of the pre-1967 rule was affirmed in Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974), although the court of civil appeals did recognize that a child may not always be a benefit. *Id.* at 128.

56. Christensen v. Thornby, 255 N.W. 620, 622 (Minn. 1934); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974); Hays v. Hall, 477 S.W.2d 402, 406 (Tex. Civ. App.—Eastland 1972), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1973); Ball v. Mudge, 391 P.2d 201, 204 (Wash. 1964).

57. 255 N.W. 620, 622 (Minn. 1934).

58. *Id.* at 622.

59. *Id.* at 622.

60. Ball v. Mudge, 391 P.2d 201, 203 (Wash. 1964).

61. 59 Cal. Rptr. 463, 476-77 (Ct. App. 1967).

62. *Id.* at 477. The court reasoned that even where the mother survives without injury some loss is sustained. The amount of this loss is the result of spreading her familial duties over a larger group. *Id.* at 476.

63. *Id.* at 475. Unquestionably, the circumstances of the particular case before them influenced the court. Mr. and Mrs. Custodio were the parents of nine children prior to the sterilization operation.

64. Jackson v. Anderson, 230 So. 2d 503 (Fla. Ct. App. 1970); Troppi v. Scarf, 187 N.W.2d 511, 517-18 (Mich. Ct. App. 1971); Betancourt v. Gaylor, 344 A.2d 336, 340 (N.J. Super. Ct. 1975). *Contra*, Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974) (recovery denied on grounds that such damages are too speculative); Terrell v.

the *Christensen* nor the *Custodio* approach, however, has received universal acceptance.[65]

The parents of children born with birth defects have also had difficulty recovering damages. The precedent denying recovery was established in *Gleitman v. Cosgrove*,[66] where the New Jersey Supreme Court noted its sympathy for the plight of the parents, but held that the right of the child to live was greater than their right to avoid emotional and financial injury.[67]

Subsequent cases by the parents of deformed children illustrate that the law is moving in the direction of allowing some recovery, although at least one case has followed the rationale of *Gleitman* in denying recovery.[68] The cases that have allowed recovery have awarded damages equal to the economic burden caused by the child's defects.[69] The reasoning behind this limited award of damages was outlined in *Jacobs v. Theimer*,[70] where the Texas Supreme Court catalogued the objections to suits for life itself and held that an objection to the measurability of damages in such cases was understandable.[71] The economic burden resulting from the physical defects of the child, however, was held to be within the usual methods of proof. Thus, the court in *Jacobs* correctly distinguished suits for wrongful birth from suits seeking damages for injuries casually related to life, noting that the

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Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974) (recovery denied on public policy grounds); Rieck v. Medical Protective Co., 219 N.W.2d 242, 245 (Wis. 1974) (recovery denied on public policy grounds).

65. *Cause of action stated:* Custodio v. Bauer, 59 Cal. Rptr. 463, 476 (Ct. App. 1967); Jackson v. Anderson, 230 So. 2d 503 (Fla. Ct. App. 1970); Troppi v. Scarf, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971); Betancourt v. Gaylor, 344 A.2d 336, 340 (N.J. 1967). *Action denied*: Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D.W. Va. 1967); Christensen v. Thornby, 255 N.W. 620, 622 (Minn. 1934); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974); Rieck v. Medical Protective Co., 219 N.W.2d 242, 244 (Wis. 1974). In Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974) an attempt to compromise was made. Rather than allow recovery for the entire cost of raising the child, the court only approved recovery for the mother's pain and suffering, the cost of the operation, the loss of consortium to the husband, and medical expenses. *Id.* at 761-62.

66. 227 A.2d 689 (N.J. 1967).

67. *Id.* at 693.

68. Doerr v. Villate, 220 N.E.2d 767, 768 (Ill. Ct. App. 1966) (recovery allowed for medical expenses and other special care); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (Sup. Ct. App. Div. 1970) (parent's cause of action denied); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (expenses necessary for the treatment of the impairment awarded); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 377 (Wis. 1975) (compensatioin allowed for hospital, medical, and supportive expenses caused by the deformity).

69. Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 376 (Wis. 1975). The court in *Dumer* distinguished the previous denial of a cause of action for the entire costs of raising an unwanted normal child on the basis of the damages sought. *See* Rieck v. Medical Protective Co., 219 N.W.2d 242, 244 (Wash. 1974).

70. 519 S.W.2d 846 (Tex. 1975).

71. *Id.* at 849.

latter actions may be handled by a traditional negligence approach.[72] The recognition of this distinction, however, has not removed all obstacles to recovery in actions by parents.

Both groups of parents have been hindered by two doctrines: the "benefits" rule and the rule governing mitigation of damages. Under the "benefits" rule, the defendant who simultaneously injures and confers a benefit to the same interest of the plaintiff is entitled to have the benefit considered in mitigation of damages.[73] The benefits rule has resulted in a complex balancing of interests approach that has been praised for giving the trier of fact the flexibility to evaluate each set of circumstances individually.[74] In regard to its application barring recovery as a matter of law, however, the benefits rule has been questioned.[75] Nevertheless, the fact that the parents of a child receive some benefit has been considered in the litigation of claims by parents.[76]

The question of mitigating damages has arisen in the context of the parents' action for damages caused by the birth of a child. The defendants have attempted to require that the plaintiffs relinquish the benefit received by allowing the child to be adopted.[77] The courts have refrained from attempting to enforce such a requirement, but have considered the ramifications of allowing a plaintiff to retain that which he claims has damaged him when it has also benefited him.[78]

The questions of mitigation of damage and the benefits rule have been absent in actions by children for their own injuries. The prior born children have asked for monetary compensation for the reduction of their share of love, affection, and future financial support caused by the birth of their sibling.[79] These claims have been uniformly denied,[80] on the theory that

72. *Id.* at 849.

73. In Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974), the court recognized that a child is not always a profitable event when considered from the economic point of view alone, but noted that the intangible value of a child's smile cannot be measured. *See generally* RESTATEMENT OF TORTS § 920 (1939).

74. Troppi v. Scarf, 187 N.W.2d 511, 518-19 (Mich. Ct. App. 1971).

75. *Id.* at 517.

76. *See, e.g.*, Custodio v. Bauer, 59 Cal. Rptr. 463, 476 (Ct. App. 1967); Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967); Rieck v. Medical Protective Co., 219 N.W.2d 242, 244 (Wash. 1974).

77. Troppi v. Scarf, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971) (reasonable measures to mitigate damages are required and best interest of child must be considered); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 378 (Wis. 1975) (dissenting opinion); Rieck v. Medical Protective Co., 219 N.W.2d 242, 245 (Wash. 1974) (retention of child implies a parental benefit received that is relevant to issue of public policy).

78. Troppi v. Scarf, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971); Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967); Ziemba v. Sternberg, 357 N.Y.S.2d 265, 270-71 (Sup. Ct. App. Div. 1974) (dissenting opinion); Rieck v. Medical Protective Co., 219 N.W.2d 242, 245 (Wash. 1974).

79. Coleman v. Garrison, 327 A.2d 757, 760 (Del. Super. Ct. 1974) (reduction in amount of care and support); Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App.

while children may expect future care, affection, and pecuniary support, they have no vested right to it.[81] The parents may disinherit the children, or offer them for adoption, in which case the child may be deprived of any right in the parent's estate.[82] Moreover, the courts have found no correlation between the wrongful act of the defendant and the damages claimed by the infants.[83]

Actions by deformed children have also been poorly received. These children normally seek monetary compensation for their birth defects and permanently impaired capacity to enjoy life.[84] The courts denying recovery have been impressed by the logical inconsistency of the infant's position,[85] and by the public policy favoring the preservation of life.[86] The inconsistency lies in the nature of damages as compensation. The court in *Gleitman* stated that it "cannot weigh the value of life with impairments against the nonexistence of life itself,"[87] so that by alleging that he should have been aborted, the plaintiff renders it impossible for the court to make the comparison required by the compensatory remedy.[88] In *Stewart v. Long Island College Hospital*,[89] the New York Superior Court referred to the compensation of individuals for wrongs against them as the basic rationale of the law of torts.[90] Since the ultimate wrong is the causation of death, it would be antithetical to tort principles to require a defendant to respond in damages for failing to consign the plaintiff to oblivion.[91]

Illegitimate children have confronted problems similar to those of deformed children in their claims for damages. Illegitimate children have

1974) (diminution of love, affection, and pecuniary interests); Cox v. Stretton, 352 N.Y.S.2d 834, 837 (Sup. Ct. 1974) (reduction in care, affection, training, and financial support).

80. Coleman v. Garrison, 327 A.2d 757, 760-61 (Del. Super. Ct. 1974); Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App. 1974); Cox v. Stretton, 352 N.Y.S.2d 834, 840-41 (Sup. Ct. 1974).

81. Cox v. Stretton, 352 N.Y.S.2d 834, 840 (Sup. Ct. 1974).

82. *Id.* at 840.

83. *Id.* at 840.

84. Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 238 (10th Cir. 1973) (retardation, deformity, pain, and suffering); Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975) (birth defects); Gleitman v. Cosgrove, 227 A.2d 689, 690 (N.J. 1967) (birth defects); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (Sup. Ct. App. Div. 1970) (birth defects); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 374 (Wis. 1975) (retardation and impaired ability to enjoy life).

85. Smith v. United States, 392 F. Supp. 654, 656 (N.D. Ohio 1975) (applying Texas law); Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967); Stewart v. Long Island College Hosp., 296 N.Y.S.2d 41, 46 (Sup. Ct. 1968), *aff'd*, 332 N.Y.S.2d 640 (1972); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 375-76 (Wis. 1975).

86. Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967).

87. *Id.* at 692.

88. *Id.* at 692.

89. 296 N.Y.S.2d 41 (Sup. Ct. 1968), *aff'd*, 313 N.Y.S.2d 502 (Sup. Ct. App. Div. 1972), *aff'd*, 332 N.Y.S.2d 640 (1972).

90. *Id.* at 46.

91. *Id.* at 46.

sought to recover for the mental pain, humiliation, and embarrassment incident to being stigmatized a bastard, in addition to damages for the deprivation of property rights and a normal home life.[92] Without exception, recovery for these damages has been denied.[93] The reasoning for denial was expressed in *Pinkney v. Pinkney*[94] as the common understanding that "no one has an inalienable right to be born under one set of circumstances rather than another or to one pair of parents rather than another."[95] In one case the court found that the putative father had committed a tortious act, but still denied recovery in view of the possible social ramifications.[96]

The question of damages has been a crucial consideration in allowing or denying recovery, but a trend is discernible when the various cases are distinguished according to the party bringing the action. Where the plaintiffs are the parents, the courts have been permitting recovery for provable medical expenses associated with the birth and maintenance of the deformed child, however, the entire cost of raising a normal child is viewed as too speculative.[97] Where the children bring the action, the impossibility of measuring damages has been an insurmountable difficulty.[98] Even if it were possible to prove damages in all cases, however, the defendant still may prevail if he can raise a defense to the action.

AVOIDANCE OF LIABILITY

Defendants have employed various defenses to avoid liability, depending on the particular factual situation. An obvious defense, but one subject to many objections, is lack of precedent. The defense that the claim is novel, however, has not been an effective one.[99] Our judicial system has never

92. Pinkney v. Pinkney, 198 So. 2d 52, 53 (Fla. Ct. App. 1967) (stigma of bastardy); Zepeda v. Zepeda, 190 N.E.2d 849, 851 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964) (deprivation of plaintiff's right to be a legitimate child, to have a normal home, to have a legal father, to inherit from father and paternal ancestors, and for being stigmatized a bastard); Williams v. State, 276 N.Y.S.2d 885, 886 (1966) (deprivation of property rights, normal childhood, proper parental support, and for stigma of illegitimacy); Slawek v. Stroh, 215 N.W.2d 9, 21 (Wis. 1974) (mental pain, anguish, and humiliation).

93. Pinkney v. Pinkney, 198 So. 2d 52, 54 (Fla. Ct. App. 1967); Zepeda v. Zepeda, 190 N.E.2d 849, 858 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964); Williams v. State, 276 N.Y.S.2d 885, 886 (1966); Slawek v. Stroh, 215 N.W.2d 9, 22 (Wis. 1974).

94. 198 So. 2d 52 (Fla. Ct. App. 1967).

95. *Id.* at 54.

96. Zepeda v. Zepeda, 190 N.E.2d 849, 857-58 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964).

97. Coleman v. Garrison, 327 A.2d 757, 761-62 (Del. Super. Ct. 1974); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975).

98. Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 376 (Wis. 1975).

99. Williams v. State, 276 N.Y.S.2d 885, 886-87 (1966).

allowed a lack of precedent to defeat recovery when the elements of a tort are present.[100]

The most important defense to the wrongful birth actions has been the proposition that to allow recovery for life itself violates the public policy favoring life. This defense was first raised in actions seeking damages for the birth of a normal child,[101] and has since been used repeatedly to bar recovery in a variety of cases.[102] This defense has exhibited a remarkable tenacity in the face of recent judicial questioning of its validity.[103] The ramifications of the public policy defense were extensively developed in *Rieck v. Medical Protective Co.*,[104] where the court noted that even when the chain of causation is complete, recovery may be denied on one of six public policy reasons.[105]

Finally, the courts themselves have provided the defense of immeasurable damages. As previously indicated, this defense has been an effective bar to recovery.[106] In some cases, however, the courts have deferred this problem to the legislature because of the possible social effects of allowing recovery.[107]

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100. *Id.* at 886. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 3-4 (4th ed. 1971) (discussing lack of precedent).

101. Christensen v. Thornby, 255 N.W. 620, 621 (Minn. 1934).

102. Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974); Rieck v. Medical Protective Co., 219 N.W.2d 242, 244 (Wis. 1974). *Contra,* Custodio v. Bauer, 59 Cal. Rptr. 463, 477 (Ct. App. 1967); Jackson v. Anderson, 230 So. 2d 503 (Fla. Ct. App. 1970); Troppi v. Scarf, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971).

103. Custodio v. Bauer, 59 Cal. Rptr. 463 (Ct. App. 1967). This was the first case in which the public policy favoring family planning was given equal consideration with the policy favoring life. *Id.* at 477. After *Custodio*, revelations by demographers concerning population growth rates and diminishing agricultural productivity have reinforced the need for effective population control. *See, e.g.*, R. HEILBRONER, AN INQUIRY INTO THE HUMAN PROSPECT 31 (1974); D. MEADOWS, LIMITS TO GROWTH 29 (1972); R. PENNYCUICK, PEOPLE, POLLUTION, AND PAYMENT 10 (1973).

104. 219 N.W.2d 242 (Wis. 1974).

105. *Id.* at 244. The public policy reasons given by the court were: (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; (3) allowance of recovery would place an unreasonable burden on the defendant; (4) in retrospect it appears highly unlikely that the negligence should have brought about the harm; (5) allowance of recovery would be too likely to open the way for fraudulent claims; (6) allowance of recovery would be too likely to enter a field that has no logical boundaries. *Id.* at 244.

106. *See, e.g.*, Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975); Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967); Rieck v. Medical Protective Co., 219 N.W.2d 242, 244 (Wis. 1974).

107. Slawek v. Stroh, 215 N.W.2d 9, 22 (Wis. 1974).

Another possible defense is the statute of limitations. This defense has not been raised in any action by the children, but was unsuccessfully urged in an action for the failure of a sterilization operation in Doerr v. Villate, 220 N.E.2d 767 (Ill. Ct. App. 1966). In that case, the wife of the unsuccessfully sterilized patient sued for the expense of raising the deformed child born to her as a result of the failure of the operation. The

One defense not raised by the defendants in cases involving suits for damages after an unsuccessful vasectomy is recanalization, although several cases have mentioned this possibility.[108] In a vasectomy, the surgeon severs and ligates the vas deferens. These tubes may spontaneously and naturally reconnect despite the fact that the operation was skillfully and correctly performed. The incidence of this reconnection, called recanalization, has been estimated at between zero and six percent.[109] This factor may afford the defendant some factual basis for avoiding liability on grounds of causation.

CONCLUSION

In the area of recovery for wrongful birth, confusion is rampant. This state of affairs is a result of the failure to distinguish factually the various actions which involve *elements* of the recovery for wrongful birth, but which are not wrongful birth suits in the strict sense. Two particular classes of suits contain elements of the wrongful birth suit, but should be distinguished from the true wrongful birth actions by the courts: suits for prenatal injuries, and suits by parents to recover the costs of raising a normal child born as the result of negligent, ineffective sterilization. In the latter category, the courts have relied on the reasoning of the wrongful birth suits, thus blurring the distinctions between them.[110] The former class of cases are distinguishable on the point of causation.

A prenatal injury case is not a suit for wrongful birth because the plaintiff, although an infant, is not seeking damages for birth itself. Instead, the plaintiff seeks damages for an injury which is attributable to a cause other than mere birth; the cause of action for prenatal injuries is incidentally related to birth. The damages sought are not for birth itself but for an injury inflicted on the plaintiff prior to birth, the extent of which became known only after birth. Furthermore, unless evidence can be found indicating the presence of deformities prior to the accident, the measure of damages is certain. The child as he exists can be compared with the normal child he would have been. Thus, the complex problems of benefit and detriment are

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defendant pleaded the two year statute of limitations in tort; however, the court held that the plaintiff's claim was based on the breach of an oral contract, therefore the court applied the four year statute of limitations for contracts. *Id.* at 770.

108. Coleman v. Garrison, 327 A.2d 757, 762 (Del. Super. Ct. 1974) (possibility of recanalization prevents application of res ipsa loquitur); Ball v. Mudge, 391 P.2d 201, 204 (Wash. 1964) (possibility of recanalization termed a rarity).

109. Hackett & Waterhouse, *Vasectomy Reviewed*, 116 AM. J. OBSTET. & GYNEC. 438, 446 (1973). The failure of a vasectomy to produce sterility is, according to these authors, most commonly due to recanalization. *Id.* at 446. Another possible defense for the doctor in this area is the occurrence of a congenital duplication of the vas deferens. *Id.* at 446.

110. Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967); *see* Rieck v. Medical Protective Co., 219 N.W.2d 242, 244 (Wash. 1974).

absent in the prenatal injury case, and the court need not measure the void of nonexistence.

Similarly, the action by the parents seeking damages for the birth of a normal child subsequent to an unsuccessful sterilization can be distinguished from the true action for wrongful birth. To the extent that the plaintiff is seeking damages attributable to the birth of a child, his suit is within the ambit of the wrongful birth action.[111] This resemblance, however, should not blind the courts to the true nature of the action. The parents sought a particular surgical procedure to accomplish a desired result. Where an operation performed for a designated purpose fails to achieve that purpose, liability is properly placed upon the physician who failed to meet reasonable medical standards, and this liability should include all foreseeable results. The courts have been hesitant to impose this liability because of the speculative nature of recovery for future costs of raising a child.[112] This objection is strengthened by the interplay of the benefits rule and the rule concerning the mitigation of damages characteristic in such cases.[113]

The solution to this enigma must begin with a clear understanding of what a true wrongful birth action is. A true wrongful birth action is a suit brought by a child to recover from a defendant whose conduct was a contributing cause to his conception and birth.[114] It is an action seeking damages for birth itself, not a distinct injury caused prior to birth. Under this definition, the only suits that should be included in the term "wrongful birth" are those by the illegitimate children[115] and those by the children who claim that they should have been aborted.[116]

By adopting the strict approach outlined above, the courts may separate the actions that involve damages for torts causally related to the birth of a child from the actions where damages are sought for the existence of life itself.[117] Thus, actions by the parents seeking damages for the cost of

111. Custodio v. Bauer, 59 Cal. Rptr. 463, 476 n.11 (Ct. App. 1967).

112. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974).

113. *See* Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967); Betancourt v. Gaylor, 344 A.2d 336, 339 (N.J. Super. Ct. 1975).

114. Custodio v. Bauer, 59 Cal. Rptr. 463, 476 n.11 (Ct. App. 1967). *See also* Annot., 22 A.L.R.3d 1441 (1968).

115. Pinkney v. Pinkney, 198 So. 2d 52 (Fla. Ct. App. 1967); Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. Ct. App. 1963), *cert. denied*, 379 U.S. 945 (1964); Williams v. State, 276 N.Y.S.2d 885 (1966); Slawek v. Stroh, 215 N.W.2d 9 (Wis. 1974).

116. Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967); Stewart v. Long Island College Hosp., 332 N.Y.S.2d 640 (1972); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975). The actions by the prior born children are not true wrongful birth actions since the children do not seek damages for their own birth. Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Ct. App. 1974); Cox v. Stretton, 352 N.Y.S.2d 834, 840 (Sup. Ct. 1974).

117. Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975).

raising a normal child may be more properly termed an action for "wrongful pregnancy," since the pregnancy was the proximate result of the negligence, and the birth a remote result. No special name is required, however, since the basic principles of tort law should be applied. The court may award damages for provable expenses, and deny recovery as to future costs on the theory that they are too speculative.[118] This compromise is fair to the plaintiff-parents who have been injured and to the defendant who should compensate the plaintiff for the foreseeable results of his negligence without being forced to pay speculative damages.

A somewhat different problem is posed by the birth of a deformed child where a sterilization operation was sought to prevent such an occurrence. The special costs incident to such a child are not speculative, but are measurable. The problems of benefit and detriment are still present, since under the prevailing view of public policy, at least some benefits accrue to the parents of a retarded child, however intangible and ephemeral they may be. Whether these joys outweigh the measurable costs is a question about which reasonable men may differ and should be left to the jury. A balancing approach considering all relevant factors surrounding the birth would seem to be appropriate.[119] The solution to this dilemma will not be complete, however, without an examination of the policy considerations involved in a suit for wrongful birth.

When the first wrongful birth suits were initiated, the question of a conflict in public policy did not arise.[120] In recent years, however, family planning, population control, and the mother's right of privacy have achieved the status of recognized public policy.[121] The preservation of life is also an accepted policy, and the conflict is obvious.

The result of this variance in the two public policies is a judicial dilemma. The courts cannot be expected to reflect the common customs and mores of a

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118. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974). The theory was applied here with logical and equitable results. The physician was held accountable for the pain, suffering, and discomfort of the mother, the cost of the operation, the loss of consortium, and medical expenses resulting from the operation. The doctor was not required to pay for the entire cost of raising the child because it would involve undue speculative and ethically questionable assessments involving the benefits accruing to a parent from having a child, the detriments from the fact that it was unplanned, and the question of the duty to mitigate damages. *Id.* at 761.

119. *See* Troppi v. Scarf, 187 N.W.2d 511, 518-19 (Mich. Ct. App. 1971) (discussing balancing test as applied to normal child); Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975) (implicitly utilizing a balancing test).

120. *See* George, *The Evolving Law of Abortion*, in ABORTION, SOCIETY, AND THE LAW, 3, 7 (D. Walbert and J. Butler eds. 1973).

121. Coleman, *Family Planning, Population Control, and the Law*, in LEGAL MEDICINE ANNUAL 401, 410-14 (C. Wecht, ed. 1973). For a compilation of the laws of each state relating to family planning, see HEW, FAMILY PLANNING, CONTRACEPTION, AND VOLUNTARY STERILIZATION: AN ANALYSIS OF LAWS AND POLICIES IN THE UNITED STATES, EACH STATE AND JURISDICTION 134 (1971).

society which is itself undecided. Until this conflict is resolved, the law involving the various rights of the unborn will remain contradictory and in constant flux. It seems clear, however, that unless a consensus arises favoring the right to recover for birth itself, these claims should continue to be denied because of the impossibility of measuring damages, the logical inconsistency of the suit, and lack of causation. In the words of Professor Ploscowe:

> There are some wrongs which must be suffered and the law cannot provide a remedy for them. To attempt to do so may do more damage than if the law leaves them alone.[122]

122. Ploscowe, *An Action for Wrongful Life*, 38 N.Y.U.L. REV. 1078, 1080 (1963).