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Wrongful Life: Legal and Medical Aspects*

BY CONSTANCE FRISBY FAIN**

INTRODUCTION

Innovative causes of action in tort law evolve when conflicts develop between the established case law and the necessity of reacting to emerging problems. One such action, "wrongful life," has been met with a great deal of disapproval. Although sometimes applied to other types of claims,¹ "wrongful life" is defined most commonly as an action "brought by the child's

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¹ Several types of wrongful life claims have been filed. One involved a suit by an illegitimate child against his father for wrongfully causing the child's conception. See *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964). A second involved a suit by an illegitimate child against the legal guardian of his incompetent mother for negligently allowing a sexual assault which resulted in the child's birth. See *Williams v. State*, 223 N.E.2d 343 (N.Y. 1966) (discussed *infra* at notes 31-34 and accompanying text). A third type involved a medical malpractice action where a physician was sued for either failing to inform or incorrectly informing parents of the possibility that their child would be born with mental or physical birth defects, removing the parents' opportunity to avoid conception or consider an abortion. See *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967) (discussed *infra* at notes 35-38 and accompanying text); *Park v. Chessin*, 387 N.Y.S.2d 204 (N.Y. App. Div. 1976), *modified and aff'd*, 400 N.Y.S.2d 110 (N.Y. 1977) (discussed *infra* at notes 49-55 and accompanying text). A fourth type involved a child born with Tay-Sachs disease suing medical testing laboratories and a physician even though they had informed the parents of the possibility that the child might be born with birth defects. See *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980) (discussed *infra* at notes 79-90 and accompanying text). Although the *Curlender* court allowed the child to recover against the medical testing laboratory, it recognized the apprehension expressed by other courts that, if wrongful life actions were recognized, nothing would prevent actions by children against their parents for allowing them to be born. The court, however, found this fear groundless. The court felt that, if parents made a conscious decision to proceed with a pregnancy after being informed by a health care provider that the child would be born handicapped, the parents would be answerable not in a wrongful life action, but for the pain, suffering, and misery experienced by the child and no sound public policy should protect the parents from liability. *Id.* at 488. For three basic categories of wrongful life suits, see *infra* Section I.

parents or by a guardian ad litem on the child's behalf . . . based upon the same negligence as the parents' cause of action for 'wrongful birth.'² "Wrongful birth" actions, however, constitute the breach of duty by a physician or other health care provider to advise parents of the probability that their child will be born genetically impaired.³ Although many courts recognize the tort of wrongful birth,⁴ most courts refuse to accept wrongful life actions.⁵

² Note, *Wrongful Life: New Cause of Action Recognized Based Upon Medical Malpractice Theory*, 62 NEB. L. REV. 175, 175-76 n.2 (1983) [hereinafter Note, *Medical Malpractice Theory*].

For various definitions and other information regarding wrongful life actions, see DeVries & Rifkin, *Wrongful Life, Wrongful Birth, and Wrongful Pregnancy: Judicial Divergence in the Birth-Related Torts*, 20 FORUM 207 (1985); Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131 (1979); Reilly, *A 'Wrongful Life'*, 1982 RESIDENT & STAFF PHYSICIAN 71; Saltz, *Better Off Never Born*, 72 A.B.A. J., Apr. 1, 1986, at 46; Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63 (1984); Stoutamire, *The Effect of Legalized Abortion on Wrongful Life Actions*, 9 FLA. ST. U.L. REV. 137 (1981); Note, *Wrongful Life*, 19 J. FAM. L. 363 (1980-81); Note, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. CAL. L. REV. 477 (1982) [hereinafter Note, *A Preference*]; Note, *A Reassessment of "Wrongful Life" and "Wrongful Birth"*, 1980 WIS. L. REV. 782; Comment, *"Wrongful Life": Should The Cause of Action be Recognized?*, 70 KY. L.J. 163 (1981-82); Comment, *Wrongful Birth and Wrongful Life: Questions of Public Policy*, 28 LOY. L. REV. 77 (1982); Comment, *Wrongful Life: A Misconceived Tort*, 4 SPECIALTY L. DIG: HEALTH CARE 5 (1982) [hereinafter Comment, *A Misconceived Tort*]; Comment, *Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas*, 16 ST. MARY'S L.J. 639 (1985) [hereinafter Comment, *The Child's Cause of Action*]; Comment, *Torts—Wrongful Life—Infant's Right to Sue for Negligent Genetic Counseling*, 48 TENN. L. REV. 493 (1981); Comment, *Wrongful Life: The Right Not to be Born*, 54 TUL. L. REV. 480 (1980) [hereinafter Comment, *Wrongful Life*].

³ Note, *Medical Practice Theory*, *supra* note 2, at 175-76 n.2.

⁴ Many courts recognize wrongful birth actions and generally permit parents to recover, during the child's minority, extraordinary costs of treatment and additional medical or educational expenses attributable to the birth defect. *See, e.g.*, *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981); *Phillips v. United States*, 575 F. Supp. 1309 (D.S.C. 1983); *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984); *Blake v. Cruz*, 698 P.2d 315 (Idaho 1984); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Harbeson v. Parke-Davis*, 656 P.2d 483 (Wash. 1983) (also compensated parents for mental anguish) (discussed *infra* at notes 101-119 and accompanying text). *See generally* *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) (discussed *infra* at notes 91-100 and accompanying text); *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981); *Becker v. Schwartz*, 386 N.E.2d 807 (N.J. 1978) (discussed *infra* at notes 56-61 and accompanying text); *Jacob v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wash. 1975) (discussed *infra* at notes 43-44 and accompanying text).

⁵ *See, e.g.*, *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978) (discussed *infra* at notes 62-63 and accompanying text); *Moore v. Lucas*, 405 So. 2d 1022 (Fla. Dist. Ct. App.

In recent years, birth-related legal claims, such as wrongful life actions, have increased, a fact which can be attributed partially to the accessibility of medical facts to patients, and partially to prenatal and genetic testing. Amniocentesis, ultrasonography, and related procedures used to detect fetal development problems during the first three months of pregnancy have become commonplace. Therefore, if prenatal tests reveal that a woman is carrying a defective fetus, she can make a decision to terminate the pregnancy based on her constitutional right of privacy.⁶

This Article examines the wrongful life issue in terms of the scope of the problem, its historical development, and an overview of this tort's medical aspects.

I. PROBLEM STATEMENT

To clearly understand the wrongful life issue, one must distinguish wrongful life from other labels that may be used synonymously. Over the years, a great deal of confusion has existed regarding the use of the term "wrongful life," with that label being given to a variety of factual situations.⁷ This confusion has prompted one writer to recommend that the term be replaced by the term "genetic malpractice."⁸

Three basic classes of wrongful life actions have emerged. First, the "stigmatized life" suit, "alleg[es] a stigmatized life status—illegitimacy—as the result of the father's failure to marry

1981); *Eisbrenner v. Stanley*, 308 N.W.2d 209 (Mich. App. 1981); *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981) (affirmed on equally divided rate) (discussed *infra* at notes 73-78 and accompanying text); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (discussed *infra* at notes 146-166 and accompanying text); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985) (discussed *infra* at notes 167-175 and accompanying text); 233 N.W.2d 372; *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

⁶ See *Roe v. Wade*, 410 U.S. 113 (1973). The United States Supreme Court declared that a fetus, regardless of the gestational age, is not a legal person under the fourteenth amendment. Consequently, a woman and her physician held exclusive discretion to determine whether to continue pregnancy during the first trimester. The court, thereby, extended a woman's right to privacy to include her right to an abortion.

⁷ For various types of factual situations upon which wrongful life claims are based, see *supra* note 1.

⁸ See Note, *Medical Malpractice Theory*, *supra* note 2 (quoting Note, *A Preference*, *supra* note 2, at 491).

the mother before or after the child was born.”⁹ A second category, the “unwanted life” suit, occurs when “a healthy but unwanted child is born, due to a failure of contraception or sterilization.”¹⁰ A third category, the “diminished life” suit, is one in which “the child is born with a genetic defect which could have been diagnosed by the physician, but was not, leading the parents to an uninformed decision to carry the pregnancy full term.”¹¹ The “diminished life” suit, which raises some intriguing questions regarding medical technology, is the primary category for wrongful life actions. At the heart of wrongful life litigation lie advances in medical knowledge which enhance the physician’s ability to detect problems with fetal development through techniques such as amniocentesis and ultrasonography. Advances in prenatal and genetic testing have even led to the creation of the new specialty of genetic counseling.¹²

Wrongful life and wrongful birth causes of action arise out of the same negligent conduct. In each, the plaintiffs allege that the health care provider failed to inform (or incorrectly informed) the mother of the risk of her child being born with defects, and this constituted negligence which interfered with the mother’s opportunity to make decisions regarding procreation. The plaintiffs do not allege that the defendants caused the birth defects. Children’s wrongful life actions are unique because the child alleges that his or her life is wrong; that being born is an injury and that the mother would have aborted had she been aware the child could be defective.¹³ This distinguishes children’s claims from those of their parents and all other negligence actions. Comparatively, the injury in the mother’s wrongful birth action is the deprivation of her right to make an informed

⁹ See Furrow, *The Causes of “Wrongful Life” Suits: Ruminations on The Diffusion of Medical Technologies*, 1982 L. MED. & HEALTH CARE 11, 11. See also Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963).

¹⁰ Furrow, *supra* note 9, at 11. See also Troppi v. Scarf, 187 N.W.2d 511 (Mich. 1971).

¹¹ See Furrow, *supra* note 9, at 11. See also Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).

¹² Furrow, *supra* note 9, at 11. For information regarding genetic counseling, amniocentesis, ultrasound, and recent advances in genetic testing, see notes 195-270 *infra* and accompanying text.

¹³ See *infra* notes 232-240 and accompanying text.

decision regarding conception or abortion.¹⁴ Because the father's claim is derivative from the mother's, his damages are financial arising from his obligation to support the child.¹⁵

A successful action for wrongful life requires proof of each of the elements of negligence, *i.e.*, duty, breach of duty, causation and damages.¹⁶ The level of requisite proof of each element varies, however, with the biggest obstacle for the plaintiff being proof of damages.

To prove the element of duty, the plaintiff argues that the existence of the physician-patient relationship creates a duty on the part of the physician to the parents and child. Thus, the child seeks compensation due to that special relationship and the physician's subsequent obligation to warn of possible hereditary or congenital disorders. The foreseeability component of duty extends to the unborn child. Generally, courts have not had problems finding the duty element present.¹⁷

To establish breach of duty, the plaintiff must show that the medical care provider deviated from the applicable standard of care. Failure to test for a defect in fetal development only constitutes a breach when genetic counseling and prenatal testing are indicated by a patient's situation. Evidence of increased risk of conceiving or giving birth to a child who has a congenital or hereditary disorder includes the advanced age of the mother, certain racial backgrounds, exposure to particular drugs, and a family history of offspring or relatives who have suffered from genetic or birth defects.¹⁸ Furthermore, a breach may occur

¹⁴ See *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); 386 N.E.2d 807; Comment, *Wrongful Life*, *supra* note 2.

¹⁵ See Comment, *A Misconceived Tort*, *supra* note 2, at 9 n.6 (citing H. CLARK, *LAW OF DOMESTIC RELATIONS* § 6.3 (1968)).

¹⁶ See Note, *Medical Malpractice Theory*, *supra* note 2, at 183-95. See generally W. PROSSER & W. KEETON, *PROSSER & KEETON ON TORTS* § 130, at 164-65 (5th ed. 1984) [hereinafter PROSSER].

¹⁷ See *Curlender v. Bio Science Laboratories*, 165 Cal. Rptr. 477, 479 (Cal. Ct. App. 1980); *Harbeson v. Park-Davis, Inc.*, 656 P.2d 483, 486-87 (Wash. 1983); Schmidt, *Wrongful Life*, 250 J. A.M.A. 2209, 2209 (1983). For information regarding duty of care generally, see PROSSER, *supra* note 16, §§ 28-36, at 160-234.

¹⁸ See Note, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 WM. & MARY L. REV. 125, 139-40 (1978).

through a failure to diagnose or misdiagnosis of a hereditary defect in a couple's other children.¹⁹

Next, the plaintiff must show that the defendant's breach of duty was the cause in fact and proximate cause of the plaintiff's damages.²⁰ This requires proof that the failure to test, failure to warn, or misdiagnosis caused the parents either to forego an abortion or to conceive, resulting in the birth of an impaired child.²¹ Some early cases held that the causation element required that the physician cause the child's injury, but courts that recognize the wrongful life tort find that the failure to warn or test caused the birth of a child with defects who otherwise would not have been born or conceived.²²

Finally, the plaintiff must prove damages, the most controversial of the four elements in wrongful life actions. For most courts, determining damages in a wrongful life suit is difficult because courts must attempt to return the injured person as closely as feasible to the position he or she was in before the tort occurred, but they feel that comparing the value of an impaired life with nonexistence is an issue only for philosophers and theologians.²³ Recovery has been denied on this basis because public policy considerations mandate, as a matter of law, that an impaired existence is always preferable to nonexistence.²⁴ If general compensatory damages were allowed, the amount would be highly uncertain because its determination would be hampered by an inability to understand nonexistence.²⁵ For this reason, courts that have allowed recovery have restricted damages to special compensatory amounts, such as extraordinary expenses for specialized equipment, teaching, and training.²⁶

¹⁹ See *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982). For information regarding breach of duty, see generally PROSSER, *supra* note 16, §§ 37-40, at 235-262.

²⁰ 165 Cal. Rptr. at 486-87; 386 N.E.2d at 811.

²¹ *Gleitman v. Cosgrove*, 227 A.2d 689, 691-92 (N.J. 1967).

²² See *Schmidt*, *supra* note 17, at 2210. See 165 Cal. Rptr. at 488-89; 227 A.2d at 692. For information regarding cause in fact and proximate cause, see PROSSER, *supra* note 16, §§ 41-45, at 263-321.

²³ PROSSER, *supra* note 16, § 55, at 371.

²⁴ 227 A.2d at 692.

²⁵ *Schmidt*, *supra* note 17, at 2210. See also 227 A.2d 689; 386 N.E.2d 807; 643 P.2d 954; *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Harbeson v. Park-Davis, Inc.*, 656 P.2d 483 (Wash. 1983).

²⁶ Three state supreme courts have awarded special compensatory damages in

II. A CASE LAW SURVEY

A rather complex liability problem has been created for physicians, especially obstetricians, pediatricians, and family practitioners, due to the advent of prenatal diagnosis of defective fetal development and the rapid increase of clinics that specialize in genetic counseling. Questions one may consider with respect to wrongful life include: whether physicians have a duty to identify and warn parents who may give birth to an impaired child, what the extent of that duty is, and for what damages can physicians be held liable when they have breached a duty to warn. Some answers are suggested by the key judicial opinions which follow. Because most courts have rejected wrongful life claims,²⁷ those opinions that recognize wrongful life are emphasized.

The term "wrongful life" was not used in a court opinion until 1963. *Zepeda v. Zepeda*²⁸ involved a child who sued his father to recover damages because the child was born out of wedlock.²⁹ An Illinois appellate court denied recovery, holding illegitimacy an unactionable injury. The court understood that recognition of the plaintiff's claim would create a new tort of wrongful life. Fearing that the legal implications of such an action would be extensive and that the impact on society would be great even if the new tort were restricted to illegitimate claimants, the court preferred that the legislature declare the state's policy.³⁰

wrongful life actions. See 643 P.2d at 955 (California) (denied recovery for general damages but allowed for specialized teaching, training, and hearing equipment); 656 P.2d at 493 (Washington) (allowed recovery for emotion injury); 478 A.2d at 764 (New Jersey) (allowed recovery for extraordinary medical expenses necessitated by child's handicap).

²⁷ See *supra* note 5 and accompanying text.

²⁸ 190 N.E.2d 849 (Ill. App. Ct. 1963).

²⁹ *Id.* at 851.

³⁰ *Id.* at 858. The court was more concerned with the nature of the wrongful life action and the related suits which could be initiated than with suits by illegitimate claimants. The court feared that persons born into the world under many adverse conditions such as being born a certain race, with a hereditary defect, into a large and poor family, or to parents with odious reputations would be encouraged to seek damages. *Id.*

In 1966, the New York Court of Appeals followed *Zepeda*, in *Williams v. State*,³¹ by holding that the infant plaintiff, who was born out of wedlock, had no right to recover from the state of New York for negligent failure to prevent a sexual assault on his mother which resulted in the plaintiff's birth. At the time of the assault, the plaintiff's mother was confined in a state mental institution. The court recognized the state's neglect but could not find any "wrong" to a child born out of wedlock caused by an institution permitting the mother to be violated.³² Observing that "[b]eing born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court,"³³ the court, citing *Zepeda*, held that the law provides no compensation for being born illegitimate.³⁴

Gleitman v. Cosgrove,³⁵ a significant case decided by the New Jersey Supreme Court in 1967, involved a malpractice action brought by a child and his parents against physicians for negligently failing to inform the mother of the possibility that her child would be born with birth defects. Consequently, the mother failed to procure an abortion and the child was born with serious defects. The court barred recovery on two grounds: the impossibility of computing damages and public policy considerations. With respect to damages, the court stated that because compensatory damages are measured by comparing the plaintiff's condition if the defendant had not been negligent with the plaintiff's condition after the negligence, a wrongful life action requires comparison of an impaired existence with nonexistence, a comparison logically impossible to determine. Additionally, the court held that public policy considerations prohibit any decision denying the value of life.³⁶

Three justices dissented, however, with one commenting that the majority had failed to provide redress for a wrong which

³¹ 223 N.E.2d 343 (N.Y. 1966).

³² *Id.*

³³ *Id.* at 344.

³⁴ *Id.*

³⁵ 227 A.2d 689 (N.J. 1967). *Gleitman's* holding was subsequently overruled by *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984).

³⁶ 227 A.2d at 692-93.

involved serious consequential injuries.³⁷ Thus, nothing would deter this type of professional misconduct, a situation neither “just nor compatible with expanding principles of liability in the field of torts.”³⁸

In 1968, in *Stewart v. Long Island College Hospital*,³⁹ a New York lower court set aside a \$100,000 wrongful life verdict favoring the infant plaintiff.⁴⁰ The infant was born with congenital disabilities because the mother contracted German measles early in her pregnancy. The plaintiff alleged that her condition was caused by one of the defendant hospital’s staff physicians negligently assuring the mother that she did not need a therapeutic abortion and by the hospital’s failure to make a “reasonable disclosure” that two of four physicians on its committee believed she should have an abortion.⁴¹ The court, referring to *Zepeda*, *Williams*, and *Gleitman*, stated that “there is no remedy for having been born under a handicap, whether physical or psychological, when the alternative to being born in a handicapped condition is not to have been born at all.”⁴²

In 1975, in *Dumer v. St. Michael’s Hospital*,⁴³ the Wisconsin court affirmed a judgment favoring the defendants, physician and hospital, in an action brought by parents on behalf of their child who was born with rubella syndrome. The parents also had sued to recover damages they sustained due to the physician’s failure to diagnose accurately the mother’s illness and to inquire about pregnancy. The court agreed with *Gleitman*, holding that, because there are no recognized legal standards by which the alleged damages could be measured, no cause of action could be recognized.⁴⁴

³⁷ *Id.* at 703-04 (Jacobs, J., dissenting).

³⁸ *Id.* See also *Ekalo v. Constructive Serv. Corp. of Am.*, 215 A.2d 1 (N.J. 1965); *Falzone v. Busch*, 214 A.2d 12 (N.J. 1965); *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960).

³⁹ 296 N.Y.S.2d 41 (N.Y. Sup. Ct. 1968), *modified and aff’d*, 313 N.Y.S.2d 502 (N.Y. App. Div. 1970), *aff’d*, 332 N.Y.S.2d 640 (N.Y. 1972).

⁴⁰ *Id.* at 48.

⁴¹ *Id.* at 43. A therapeutic abortion has been defined as “the termination of a pregnancy that was a serious threat to the health or life of the mother.” See *Dumer v. St. Michael’s Hosp.*, 233 N.W.2d 372, 375 (Wis. 1975).

⁴² 296 N.Y.S.2d at 46.

⁴³ 233 N.W.2d 372 (Wis. 1975).

⁴⁴ *Id.* at 376.

In 1976, in *Stills v. Gratton*,⁴⁵ a lower California court considered a malpractice action by an infant and his mother. The infant claimed damages as a result of an illegitimate birth following a negligently performed abortion.⁴⁶ The court favored the mother's right to recover all damages to which she was entitled under ordinary tort principles.⁴⁷ The court, however, based in part on *Zepeda* and *Williams*, denied recognition of the infant's action based on the court's inability to measure damages.⁴⁸

In 1977, in *Park v. Chessin*,⁴⁹ an intermediate New York appellate court considered a wrongful life action brought by a child's parents on behalf of their infant child to recover for "so-called wrongful life and on their own behalf for medical expenses, emotional distress and loss of services."⁵⁰ *Park* became the first case to hold that an infant plaintiff had stated a cause of action for wrongful life.⁵¹ The parents had consulted with the defendants, before having a second child, to learn the likelihood that future children would be born with polycystic kidney disease, a fatal hereditary condition. A previous child had been born and had died five hours later from this disease, and the plaintiffs had informed the defendants of this fact. In response to the plaintiffs' inquiry, the defendants informed the parents that the chances of conceiving a second child with the same disorder were "practically nil,"⁵² because the disease was not hereditary.⁵³ The second child, however, was born with the same kidney disease and lived for only two and a half years.⁵⁴ The court, recognizing the causes of action of both the parents and the child, held that the law must keep up with advances in technology, social change, and economics. Parents have the right

⁴⁵ 127 Cal. Rptr. 652 (Cal. Ct. App. 1976). This was the only California case prior to *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980), to consider the viability of the wrongful life cause of action.

⁴⁶ 127 Cal. Rptr. at 653-54.

⁴⁷ *Id.* at 656.

⁴⁸ *Id.* at 657-59.

⁴⁹ 400 N.Y.S.2d 110 (N.Y. App. Div. 1977).

⁵⁰ *Id.* at 111.

⁵¹ *Id.* at 114.

⁵² *Id.* at 111.

⁵³ *Id.*

⁵⁴ *Id.*

not to have a child by exercising their right to an abortion. The court further declared that "[t]he breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole, functional human being."⁵⁵

Park was modified in 1978 by the New York court as a companion case to *Becker v. Schwartz*.⁵⁶ In both cases, infants born with congenital defects and their parents initiated wrongful life actions against physicians. In *Becker*, the mother had been under the care of obstetrics and gynecology specialists, and, despite the mother's age (thirty-seven), the physicians neither warned of the possibility of birth defects nor informed the parents of the availability of the amniocentesis test.⁵⁷ The court held in each case that the infants were barred from recovery because their complaints failed in two ways to state legally cognizable causes of action. One flaw was lack of legally cognizable injuries because of the absence of "precedent for recognition at the Appellate Division of 'the fundamental right of a child to be born as a whole functional human being'. . . ."⁵⁸ A second flaw was that damages recoverable on behalf of the infants were not ascertainable. Because the remedy available to injured parties in negligence is intended to restore them to their former position, *i.e.*, to make them whole, the law is not equipped to compare life in an impaired state with nonexistence.⁵⁹

Although the *Becker* court dismissed the infants' wrongful life actions, it upheld the parents' claim in each case that the physicians were negligent by failing to accurately inform the parents of the risks involved in pregnancy (which resulted in the Parks' decision to conceive and the Beckers' decision not to procure an abortion). *Becker* held that the parents' complaints stated legally cognizable causes of action for pecuniary damages suffered through giving birth to infants with congenital disorders, but for policy reasons rejected recovery for emotional harm resulting from the birth of infants with impaired health.⁶⁰ In

⁵⁵ *Id.* at 114 (emphasis added).

⁵⁶ 386 N.E.2d 807 (N.Y. 1978).

⁵⁷ *Id.* at 807-08.

⁵⁸ *Id.* at 812 (quoting *Park v. Chessin*, 400 N.Y.S.2d 110, 114 (N.Y. App. Div. 1977)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 813.

summary, the New York court decided to modify *Becker* by dismissing the parents' complaint except for damages from the cost of long-term institutional care of their child. The court also modified *Park* by dismissing the parents' complaint except for damages covering money expended for medical treatment and care of the infant until her death.⁶¹

In 1978, in *Elliott v. Brown*,⁶² the Alabama court followed the lead of the New York and New Jersey courts and rejected the wrongful life cause of action. In *Elliott*, an action was brought on behalf of an infant against a physician for negligently performing a vasectomy on the infant's father. Because of the failed vasectomy, the infant was conceived and then born with serious congenital defects. The court held that the infant had no cause of action for wrongful life in absence of an allegation that the physician's alleged preconception negligence caused the defects. Furthermore, the court held that a person does not have a legal right not to be born.⁶³

In 1978, in *Gildner v. Thomas Jefferson University Hospital*,⁶⁴ a Pennsylvania federal district court relied on *Gleitman* and refused to allow an infant suffering from Tay-Sachs disease to recover for wrongful life. Each parent was a carrier of the Tay-Sachs disease, but this was unknown because an amniocentesis test was performed negligently. Although the court denied the infant's wrongful life claim, it allowed the parents to recover. Because proper testing combined with an abortion is the only way to prevent the birth of a child with Tay-Sachs disease, the court believed the public interest demanded proper performance and interpretation of genetic testing.⁶⁵

In 1979, in *Berman v. Allan*,⁶⁶ the New Jersey court partially retreated from *Gleitman*. *Berman* relied substantially on the

⁶¹ *Id.* at 814.

⁶² 361 So. 2d 546 (Ala. 1978).

⁶³ *Id.* at 547-48.

⁶⁴ 451 F. Supp. 692 (E.D. Pa. 1978).

⁶⁵ *Id.* at 694-96.

⁶⁶ 404 A.2d 8 (N.J. 1979). The child was born with Down's syndrome, a genetic defect commonly referred to as mongolism. The physician had not suggested an amniocentesis test be given the mother, who was in her late thirties, an age that involves a substantial risk of defective birth. Furthermore, no information was given the mother about the risks of the child being born with this disease. *Id.* at 10.

United States Supreme Court decision in *Roe v. Wade*,⁶⁷ holding that women possess the constitutionally protected right, without state intervention, to procure an abortion during the first trimester of pregnancy.⁶⁸ Some courts deem this abortion case relevant in defining the scope of wrongful life actions.⁶⁹ In *Berman*, the court's partial retreat benefitted the parents by permitting recovery for their mental and emotional suffering. Lifetime support for the child, however, was denied.

The court denied the child's right to recover due to the difficulty of measuring damages and other public policy considerations. Because even a severely handicapped child will experience such emotions as love, happiness, and pleasure, which were deemed more valuable than the pain and suffering she may endure, the court believed that life with or without a major handicap is better than no life at all. Therefore, the court concluded that the child had not suffered legally cognizable damages by being born.⁷⁰ Justice Handler, concurring in part and dissenting in part, stated that the majority opinion overruled in part the *Gleitman* decision by recognizing the parents' right to recover for mental and emotional suffering; a right this court denied in 1967.⁷¹ Furthermore, Justice Handler stated that impaired parenthood or parental capacity also should be included as an element of the parents' damages; the child should be compensated for breach of a duty of reasonable care by the mother's physician owed directly to the child during gestation.⁷²

In 1979, in *Speck v. Finegold*,⁷³ a lower Pennsylvania court issued an exhaustive opinion in a malpractice action brought by parents and their child. The child's wrongful life action was based on being born with the serious crippling disease, neurofibromatosis, of which his siblings also suffered.⁷⁴ The child's

⁶⁷ 410 U.S. 113 (1973).

⁶⁸ *Id.* at 164.

⁶⁹ *See, e.g.*, 165 Cal. Rptr. at 483; 478 A.2d at 759.

⁷⁰ *See* 404 A.2d at 11-13.

⁷¹ *Id.* at 15.

⁷² *Id.*

⁷³ 408 A.2d 496 (Pa. Super. Ct. 1979), *aff'd*, 439 A.2d 110 (Pa. 1981). *See also* *Suing for Being Born*, NEWSWEEK, Mar. 8, 1982, at 53. *See generally* BEHRMAN'S NEONATAL-PERINATAL MEDICINE: DISEASES OF THE FETUS AND INFANT (A. Fanaroff & R. Martin 3d ed. 1983) [hereinafter BEHRMAN'S] at 980-81, 987, 1051.

⁷⁴ 408 A.2d at 499.

birth resulted from a negligently performed vasectomy on the child's father and an unsuccessful abortion attempt by the physician on the mother.⁷⁵ Although the defendant's negligent treatment of the mother and father was the proximate cause of the child's birth with defects, the court denied the action, holding that the child had failed to state a cause of action cognizable at law.⁷⁶

The court noted two serious weaknesses in the child's wrongful life claim. First, at that time there were no precedents in appellate decisions holding that "a child has a fundamental right to be born as a whole, functional human being."⁷⁷ The court thought it a mystery whether it is better not to be born than to be born with serious mental defects, believing it a subject better left to philosophers and theologians. Second, because remedies in negligence are designed to restore plaintiffs to the positions they occupied before the defendant's negligence, the problem is the improbability of placing the child in a state of nonexistence. This requires a calculation of damages based on a comparison between the child's impaired life and nonexistence.⁷⁸

The 1980 landmark case, *Curlender v. Bio-Science Laboratories*,⁷⁹ established the validity of wrongful-life suits in California. This case stimulated a great deal of controversy which decreased significantly when the case was modified by the California court's decision in *Turpin v. Sortini*.⁸⁰ *Curlender* involved an issue of first impression in California: "What remedy, if any, is available in this state to a severely impaired child—genetically defective—born as the result of defendants' negligence in conducting certain genetic tests . . . which, if properly done, would have disclosed the high probability that the actual, catastrophic result would occur."⁸¹ The complaint alleged that the infant plaintiff was born with Tay-Sachs disease following "incorrect and inaccurate" information given by defendant laboratories to

⁷⁵ *Id.* at 500.

⁷⁶ *Id.* at 508.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).

⁸⁰ 643 P.2d 954 (Cal. 1982) (overruling in part *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477).

⁸¹ 165 Cal. Rptr. at 479-80.

the plaintiff's parents concerning their status as carriers after certain tests had been administered.⁸² Because the date of the infant's birth was not alleged in the complaint, it is unclear whether the parents relied upon the inaccurate test results and went ahead to conceive the child or whether they relied upon the results and failed to undergo an amniocentesis test and consider termination of the pregnancy.⁸³

In analyzing the case, the *Curlender* court reviewed the opinions previously discussed and other opinions involving the historical development of the wrongful life cause of action. The court's holding was based on a survey of other courts' wrongful birth damage awards designed to benefit the parents and on the erosion of the argument concerning the impossibility of computing wrongful life damages. The issues in controversy were the right not to be born and the entitlement to damages for a less than normal life. The court's decision to allow a wrongful life claim had several bases. First, the court cited *Roe v. Wade*⁸⁴ as being very important in defining the bounds of wrongful life actions.⁸⁵ Second, the court recognized that medical laboratories owe a duty to parents and unborn children to use ordinary care in administering genetic testing.⁸⁶ Third, the court believed that recognition of the plaintiff's cause of action was consistent with applicable principles of case and statutory law in California.⁸⁷ Fourth, because defendants ordinarily are liable for all consequences of the damage inflicted, the court held the defendant responsible for the pain and suffering the plaintiff would endure during her limited life span and for special pecuniary loss due to the plaintiff's impaired state.⁸⁸ Finally, the court decided punitive damages pursuant to state statutory law were appropriate.⁸⁹ Thus, the court felt that neither legal nor public policy

⁸² *Id.* at 480.

⁸³ *Id.*

⁸⁴ 410 U.S. 113.

⁸⁵ 165 Cal. Rptr. at 483.

⁸⁶ *Id.* 488.

⁸⁷ *Id.* 489.

⁸⁸ *Id.* 489-90.

⁸⁹ *Id.* at 490. The court stated that CAL. CIV. CODE § 3294 (West Supp. 1986) "allows . . . damages 'where the defendant has been guilty of oppression, fraud, or malice, express or implied'; they are given 'for the sake of example and by way of punishing the defendant.'" *Id.*

reasons existed for exempting a defendant, sued for wrongful life, from liability for punitive damages.⁹⁰

Turpin v. Sortini,⁹¹ a 1982 California case, was the first state supreme court opinion to recognize an infant's wrongful life action based on medical or professional malpractice.⁹² The question before the court was "whether a child born with an hereditary affliction may maintain a tort action against a medical care provider who—before the child's conception—negligently failed to advise the child's parents of the possibility of the hereditary condition, depriving them of the opportunity to choose not to conceive the child."⁹³ The plaintiff alleged that the infant's pediatrician had advised her parents to take their first child, Hope, to be tested for a possible hearing problem. Subsequently, the pediatrician was incorrectly informed that Hope's hearing was within normal limits. A second examination by other specialists revealed that Hope was totally deaf. Believing Hope's hearing was normal, the parents conceived the plaintiff, Joy. The plaintiff alleged that the parents would not have conceived her had they known of Hope's hereditary deafness. When Joy was born she suffered from the same hearing defect as her sister, Hope.⁹⁴ The only cause of action before the court was brought on Joy's behalf seeking:

(1) general damages for being "deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness" and (2) special damages for the "extraordinary expenses for specialized teaching, training and hearing equipment" which she will incur during her lifetime as a result of her hearing impairment.⁹⁵

The *Turpin* court found the plaintiff's injury was legally cognizable, believing that the state's public policy did not, as a matter of law, establish that life with defects is preferable to

⁹⁰ *Id.*

⁹¹ 643 P.2d 954.

⁹² *Id.* at 966. See Saltz, *supra* note 2, at 47.

⁹³ 643 P.2d at 955.

⁹⁴ *Id.* at 956.

⁹⁵ *Id.* The parents also brought actions seeking special damages for the support and medical care of the child until the age of majority and special damages for emotional distress sustained by caring for and raising a handicapped child. *Id.*

nonexistence under all circumstances. Furthermore, negligent diagnosis of a hereditary ailment deprives parents of information needed to help them decide if it is best for a child to be born handicapped or not to be born at all.⁹⁶

The *Turpin* court rejected the *Curlender* analysis by limiting the plaintiff's wrongful life recovery to special damages. The court rejected recovery of general damages for two reasons. First, the court could not determine whether the child had suffered an injury by being born deaf, rather than not being born at all. Second, even if an injury was perceived, the court believed it impossible to assess general damages in a fair, unspeculative manner.⁹⁷ The court, however, did allow the infant to recover special damages for the extraordinary expenses necessary to treat the hereditary defect.⁹⁸ The court stated that monetary compensation would not adequately compensate the child for losing the opportunity not to be born; but because special damages to cover specialized training, teaching, and hearing equipment needed during plaintiff's lifetime are readily ascertainable and are commonly awarded in professional malpractice cases, this type of award was considered just.⁹⁹ Thus, *Turpin* eliminated an infant's right, as permitted in *Curlender*, to recover general damages for physical and mental pain and suffering.¹⁰⁰

Harbeson v. Parke-Davis, Inc.,¹⁰¹ a 1983 Washington case, was the second state supreme court case to recognize a cause of action for wrongful life. *Harbeson* involved two infant plaintiffs who were diagnosed as suffering from "fetal hydantoin syn-

⁹⁶ *Id.* at 962-63. See also *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981); 404 A.2d at 14; *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975).

⁹⁷ 643 P.2d at 963.

⁹⁸ *Id.* at 965-66.

⁹⁹ *Id.* at 964-65.

¹⁰⁰ Although the *Curlender* court recognized a child's right to recover damages for wrongful life, the damages were subject to certain limitations due to the nature of the cause of action. The court said the infant plaintiff's right to damages must be based on her mental and physical condition at birth and her anticipated condition during the predicted life span of only four years as alleged in the complaint. Damages also included special pecuniary loss resulting from the impaired condition of the plaintiff. Punitive damages, as requested in the complaint, were also justified. 165 Cal. Rptr. at 489-90.

¹⁰¹ 656 P.2d 483 (Wash. 1983).

drome."¹⁰² After suffering a grand mal seizure, Ms. Harbeson, the infants' mother, was instructed by physicians to take Dilantin, an anticonvulsant drug. Ms. Harbeson was pregnant while taking the medication, but the child she carried was born healthy. After moving, Ms. Harbeson's treatment for epilepsy was continued. During the next eight months, the Harbesons informed three physicians that they were considering having more children and requested information on the risks of taking Dilantin during pregnancy. Although each physician informed them that the drug could cause cleft palate¹⁰³ and temporary hirsutism,¹⁰⁴ no literature searches were conducted nor were consultations with other sources for specific information regarding the relationship between Dilantin and birth defects pursued. Relying on the physicians' assurances, Ms. Harbeson twice became pregnant and gave birth. She continued to take Dilantin throughout both pregnancies. The Harbesons would not have conceived other children had they been informed of the potential birth defects associated with the use of Dilantin during pregnancy.¹⁰⁵

With respect to the wrongful life issue, the Washington court held that an action could be maintained for the children to recover the extraordinary expenses to be incurred during their lifetime due to their birth defects.¹⁰⁶ The court agreed with *Turpin*¹⁰⁷ that it would be unusual and unreasonable to allow the parents and not the child to recover for the child's own medical bills. Of course, the two children's recoveries were limited to the medical costs incurred during their majority if the parents recovered such costs for the children's minority in a wrongful birth action.¹⁰⁸

¹⁰² *Id.* at 486. This condition is characterized by "mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal bridge, and other physical and developmental defects." *Id.*

¹⁰³ A cleft palate is "a congenital fissure in the median line of the palate, often associated with harelip." *STEDMAN'S MEDICAL DICTIONARY* 910 (2d ed. 1972).

¹⁰⁴ Hirsutism is the "presence of excessive bodily and facial hair; especially in women." *Id.* at 579.

¹⁰⁵ 656 P.2d at 486.

¹⁰⁶ *Id.* at 495.

¹⁰⁷ 643 P.2d 954.

¹⁰⁸ 656 P.2d at 495. The court added that the necessity for medical care and other

The *Harbeson* court based its holding on the four traditional elements of a negligence claim: duty, breach of duty, causation, and injury. One potential problem with duty is that while health care providers are liable only to persons foreseeably endangered by their conduct, the alleged negligence always occurs before the child is born and often before conception.¹⁰⁹ Because the parents in *Harbeson* informed the defendants of their plans to have more children, future children were foreseeably endangered by the defendants' unreasonable failure to determine the danger of prescribing Dilantin to control the mother's seizures.¹¹⁰ The court believed the mother's physicians owed a duty to the unconceived children, holding that "a duty may extend to persons not yet conceived at the time of a negligent act or omission . . . limited . . . by the element of foreseeability."¹¹¹ Breach of duty is the failure to comply with the appropriate standard of care applicable in medical malpractice cases.¹¹²

The court next addressed causation stating that the issue in a wrongful life action is whether "[b]ut for the physician's negligence, the parents would have avoided conception, or aborted the pregnancy, and the child would not have existed."¹¹³ If this test is satisfied, the defendant's action is deemed the cause in fact of the plaintiff's injury. Proximate cause is the second component of causation. The court was not convinced by a proximate cause argument advanced in some early cases¹¹⁴ which

special expenses do not "miraculously" cease upon the child's attaining of majority. Often, these expenses fall on the child's parents or the state. Rather than permitting this, the court preferred to recognize the wrongful life action. Thus, the onus of those expenses should be placed on the party whose negligence proximately caused the child's birth, which resulted in the continuous necessity for special training and medical care.
Id.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 496.

¹¹¹ *Id.* at 495. See also *Hunsley v. Giard*, 553 P.2d 1096 (Wash. 1976).

¹¹² 656 P.2d at 496. Generally, "professional persons . . . , and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability." PROSSER, *supra* note 16, § 32, at 185. Specifically, a "doctor must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing; and a doctor will be liable if harm results because he does not have them." *Id.* at 187.

¹¹³ 656 P.2d at 497 (citing Comment, *Wrongful Life*, *supra* note 2 at 491).

¹¹⁴ *Id.* (citing 227 A.2d 689).

alleged that the child's defect was not caused by the physician's negligence but by the physician's failure to reveal the presence of the defect. The *Harbeson* court rejected this argument and instead emphasized the closeness of the causal connection between the physicians' negligence, the children's births, their affliction with fetal hydantoin syndrome, and the resulting unusual costs related to their defects.¹¹⁵

The final element in a wrongful life cause of action, injury, has engendered the most controversy.¹¹⁶ The *Harbeson* court agreed with the court in *Berman*¹¹⁷ that mortals, whether judges or jurors, cannot compare the value of an impaired life with nonexistence, but did not find this difficulty sufficient to prohibit a wrongful life cause of action. Although general damages cannot be calculated with the "reasonable certainty" required under Washington law,¹¹⁸ damages for extraordinary expenses, such as medical care and special training, can be computed. Finally, the court disagreed with the *Berman* court's belief that requiring a negligent defendant to compensate a child for the costs of health care is "a disavowal of the sanctity of human life."¹¹⁹

New Jersey became the third state to recognize a cause of action for wrongful life when, in 1984, the New Jersey court decided *Procanik v. Cillo*.¹²⁰ *Procanik* involved a minor who sought compensation from physicians because he was born with congenital defects and would suffer a damaged or diminished childhood. The minor's parents sought compensatory damages to cover mental anguish and extraordinary medical costs related to the congenital defects. The minor alleged that the defendant physicians had breached a duty to him by failing to discover that his mother had contracted German measles during the initial trimester of gestation.¹²¹ Consequently, the minor was born with

¹¹⁵ *Id.*

¹¹⁶ *See, e.g.*, 404 A.2d 8; 227 A.2d at 692.

¹¹⁷ 404 A.2d 8.

¹¹⁸ 656 P.2d at 496 (quoting *Dyal v. Fire Companies Adj. Bur., Inc.*, 161 P.2d 321, 324 (Wash. 1945)).

¹¹⁹ 656 P.2d at 497.

¹²⁰ 478 A.2d 755 (N.J. 1984).

¹²¹ *Id.* at 757.

congenital rubella syndrome.¹²² On the theory that his parents negligently were divested of their option of terminating the pregnancy, the minor sought both general damages for pain and suffering and for his parents' impaired ability to cope with his condition and special damages attributable to the extraordinary costs for health-related care.¹²³

Procanik represents the New Jersey court's reconsideration of a minor's right to recover general and special damages which it had denied in *Gleitman*¹²⁴ and *Berman*.¹²⁵ The *Procanik* court found that the defendant physicians owed a duty to the minor plaintiff when treating the mother. The court assumed that the physicians breached that duty, thus depriving the minor's parents of the option of terminating the pregnancy.¹²⁶ Although the New Jersey court had recognized a breach of duty, policy considerations previously had caused it to reject the wrongful life action. This prior rejection had been based mainly on the plaintiffs' assertions that the children should not have been born, not that the children should have been born unimpaired.¹²⁷ Previously, in *Gleitman* and *Berman*, this court felt that the minor had not suffered any damage cognizable at law by being born and that life, even though burdened, is better than nonexistence.¹²⁸

The *Procanik* court pointed out that dissenting judges in *Gleitman* and *Berman* had urged recognition of wrongful life claims because they felt a wrong had been committed.¹²⁹ In *Gleitman*, Justice Jacobs stated that a reasonable measure of compensation to relieve the plaintiff's financial burdens could be afforded.¹³⁰ Although finding the plaintiff's emotional distress claim could not be computed, Justice Jacobs felt the medical and maintenance costs were capable of measurement.¹³¹ The

¹²² The child suffered from multiple congenital defects comprised of eye lesions, heart disorder, and hearing problems. *Id.* at 758.

¹²³ *Id.* at 757.

¹²⁴ See *supra* text accompanying notes 35-38.

¹²⁵ See *supra* text accompanying notes 66-70.

¹²⁶ 478 A.2d at 760.

¹²⁷ See, e.g., 404 A.2d 8; 227 A.2d 689.

¹²⁸ See *supra* text accompanying notes 35-38 and 66-70.

¹²⁹ 478 A.2d at 761.

¹³⁰ 227 A.2d at 703-06 (Jacobs, J., dissenting).

¹³¹ *Id.*

court recognized that similarly, in *Berman*, Justice Handler supported recognition of the minor's claim for damages based on the implication "that damages would be appropriate if they were measurable by acceptable standards".¹³² Therefore, "if the measure of damages were the only concern,"¹³³ courts could develop a remedy to compensate minor plaintiffs for their injuries even if recovery was only partial.¹³⁴

The *Procanik* court recognized that the injured child, as well as the parents, feels the financial impact of extraordinary medical care. Furthermore, the financial burden may affect the injured child's siblings by reducing the money available for food, clothing, and college education for the other children.¹³⁵ Thus, recovery by either the parents or the child of damages for extraordinary medical expenses "is consistent with the principle that the doctor's negligence affects the entire family."¹³⁶

The *Procanik* court felt that the rationality of allowing parents to recover extraordinary medical care expenses incurred by an impaired child outweighed the unfair result of denying the child's right to recover those damages. The child's right to recover for his injuries should not depend on the parent's right to sue, which in *Procanik*, was barred by the statute of limitations. The minor plaintiff need not forego medical treatment for her condition, because the expenses are reasonably certain, easily computed, and of a type determined by judges and juries on a daily basis.¹³⁷ Thus, the court held "a child or his parents may

¹³² 478 A.2d at 761 (citing *Berman v. Allan*, 80 N.J. 421); 404 A.2d at 15-21 (Handler, J., concurring in part and dissenting in part).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 762.

¹³⁶ *Id.* (citing 227 A.2d at 704 (Jacobs, J., dissenting)):

And while logical objection may be advanced to the child's standing and injury, logic is not the determinative factor and should not be permitted to obscure that he has to bear the frightful weight of his abnormality throughout life, and that such compensation as is received from the defendants . . . should be dedicated primarily to [the child's] care and the lessening of his difficulties. Indeed, if this were suitably provided for in the ultimate judgment, the technical presence or absence of the child as an additional party plaintiff would have little significance.

Id. (quoting 227 A.2d at 704 (Jacobs, J., dissenting)).

¹³⁷ *Id.*

recover special damages for extraordinary medical expenses incurred during infancy, and . . . the infant may recover those expenses during his majority."¹³⁸

The court explained that its decision to allow recovery for extraordinary medical expenses was based on the needs of the living in bearing the burden of their condition, not on a belief that nonexistence is preferable to an impaired life. The court rejected the minor's claim for general damages for pain and suffering because the minor plaintiff "never had a chance of being born as a normal, healthy child."¹³⁹ His only option was nonexistence or a handicapped life. Although the proximate cause of the minor's birth was the defendant physician's negligence, the minor's congenital rubella syndrome was not engendered by the physician's negligence. In brief, there is no rational way to compare pain and suffering with nothingness because of the capricious and illogical nature of the claim.¹⁴⁰

The *Procanik* court continued its assessment of wrongful life by maintaining that logic, equity, foreseeability, and prevention of prospective tortious conduct are inherent in tort law's function of remunerating claimants who have been damaged or impaired. Thus, "it is too speculative to permit an infant plaintiff to recover for emotional distress . . . that plaintiff claims he would be better off if he had not been born. Such a claim would stir the passions of jurors about the nature and value of life, the fear of nonexistence, and about abortion."¹⁴¹

Regarding the minor's claim for diminished childhood, the court encountered additional difficulty and found such an assessment even more debatable. An impaired childhood claim requires evidence that the physician's failure to act reasonably divested the parents of information regarding the state of the fetus, which in turn eliminates their abortion option. The parents' resulting failure to anticipate the birth of an impaired infant engenders mental distress. Consequently, the plaintiff alleged that a diminished childhood would be experienced due to

¹³⁸ *Id.*

¹³⁹ *Id.* at 763.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

the lessened ability of the parents to love, show concern, and tend to the infant's needs.¹⁴²

The court refused to recognize the plaintiff child's claim for impaired childhood for several reasons. First, the parents would have used the information regarding the fetus' condition to terminate the pregnancy instead of to prepare for the birth of an impaired child. Second, the child's and the parents' harms may not be easily separated. Finally, the court indicated that "the award of extraordinary medical costs to the child or the parents when combined with the right of the parents to assert a claim for their own emotional distress, comes closer to filling the dual objectives of the tort system: the compensation of injured persons and the deterrence of future wrongful conduct."¹⁴³

Hence, the New Jersey court's decision in *Procanik* to award special damages only to the plaintiff child to cover expenses for extraordinary medical care was consistent with the California court in *Turpin v. Sortini*¹⁴⁴ and the Washington court in *Harbeson v. Parke-Davis*.¹⁴⁵

In accordance with the majority of courts, the Texas court, in the 1984 decision of *Nelson v. Krusen*,¹⁴⁶ refused to recognize the controversial cause of action for wrongful life. *Nelson* involved an action by parents on behalf of their child for medical care costs, pain, and suffering. The plaintiff/parents previously had given birth to a child afflicted with Duchenne Muscular Dystrophy; so after discovering that Ms. Nelson was pregnant, they consulted the defendant, Dr. Krusen, to determine if Ms. Nelson was a genetic carrier of the disease.¹⁴⁷ Dr. Krusen conducted tests and an examination of Ms. Nelson on three separate occasions with all results found normal.¹⁴⁸ Based on a consul-

¹⁴² *Id.* at 763-64.

¹⁴³ *Id.* at 764.

¹⁴⁴ See *supra* text accompanying notes 98-99.

¹⁴⁵ See *supra* text accompanying notes 106-108.

¹⁴⁶ 678 S.W.2d 918 (Tex. 1984). See also Comment, *The Child's Cause of Action*, *supra* note 2.

¹⁴⁷ See 678 S.W.2d at 919-20, 924.

¹⁴⁸ An examination revealed pregnancy, normal muscle test and flexes, normal laboratory test of Creatine Phosphokinase ("Enzyme present in skeletal and cardiac muscle and the brain"), and normal electromyogram ("A graphic record of the con-

tation with Dr. Krusen, the parents decided not to have the pregnancy terminated, the minor plaintiff was born, and a subsequent examination by a pediatric neurology specialist revealed that the child suffered from Duchenne Muscular Dystrophy.

The complaint alleged that Dr. Krusen was negligent in advising Ms. Nelson of her risk of having a child afflicted with Duchenne Muscular Dystrophy by assuring her that she was "no more likely than any other woman to have a child afflicted by the disease."¹⁴⁹ The parents asserted that Dr. Krusen's advice caused their decision not to procure an abortion. In the alternative, the plaintiffs alleged that defendant Baylor University Medical Center negligently conducted or reported the tests, resulting in Dr. Krusen receiving inaccurate results, causing plaintiffs to receive erroneous advice.¹⁵⁰

The Texas court rejected the minor's wrongful life cause of action noting two general, but fundamental, reasons why the majority of states have declined to embrace the tort.¹⁵¹ First, courts have been reluctant to allow wrongful life plaintiffs to collect compensation because they are alive. At the crux of this disposition is the "high value which the law and mankind has [sic] placed on human life, rather than its absence."¹⁵² Second, because in awarding compensation, the court is required to balance any exceptional benefits inuring to the plaintiff from the negligence,¹⁵³ a wrongful life cause of action entails weighing

traction of a muscle as a result of electrical stimulation"). See *Nelson v. Krusen*, 635 S.W.2d 582, 583 (Tex. Ct. App. 1982); *TABER'S CYCLOPEDIA MEDICAL DICTIONARY*, at 396, 527 (C.L. Thomas ed. 1985) [hereinafter *MEDICAL DICTIONARY*].

¹⁴⁹ 678 S.W.2d at 919.

¹⁵⁰ *Id.* The gravamen of the minor plaintiff's complaint was that he never would have been born if his parents had been informed of the possibility he would be born with Duchenne Muscular Dystrophy, not that Dr. Krusen caused the defect. Thus, the breach of duty by the physician was the proximate cause of the child's birth and his having to live in an impaired condition. See *id.* at 924.

¹⁵¹ See *id.* at 924-25. See also *supra* text accompanying notes 28-145.

¹⁵² 678 S.W.2d at 924 (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 812).

¹⁵³ 678 S.W.2d at 924 (citing *RESTATEMENT (SECOND) OF TORTS* § 920 (1979)). See also *Hickman v. Myers*, 632 S.W.2d 869, 870 (Tex. Ct. App. 1982) *reh'g denied*, 1982 (citing *RESTATEMENT (SECOND) OF TORTS* § 920 (1979)):

When 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

existence versus nonexistence, "a calculation that cannot rationally be made."¹⁵⁴ As stated in *Gleitman*, "ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether this is so."¹⁵⁵

In justifying its objection to the wrongful life claim, the Texas court considered the opinions in *Turpin*,¹⁵⁶ *Harbeson*,¹⁵⁷ and *Procanik*,¹⁵⁸ in which the children were allowed to recover special damages. The Texas court did not believe that the problem was addressed so summarily.¹⁵⁹ The court emphasized that claimants may only be restored to their conditions prior to the tortfeasor's unreasonable conduct that caused the harm, a rule which mandates contrasting the child's status with an impaired life versus no life at all.¹⁶⁰

Clearly, the Texas court did not agree that damages can be restricted in the manner endeavored by the California, Washington, and New Jersey courts. The court noted the statement in *Strohmaier v. Associates in Obstetrics and Gynecology*¹⁶¹ that "[t]he special damages that are claimed cannot be considered in a vacuum separate from the reality that, but for the alleged negligence, plaintiff would not exist."¹⁶²

The *Nelson* court concluded that its rationale not to recognize wrongful life actions in Texas was not premised on the complexities inherent in calculating damages, because it is well established in Texas that inaccurate or ambiguous damage estimations do not operate as a barrier to compensation.¹⁶³ Rather,

is considered in mitigation of damages, to the extent that this is equitable.

Hickman involved parents' medical malpractice suit seeking damages for the cost of raising an unplanned child whose birth resulted from the alleged negligent performance of a tubal ligation on the mother.

¹⁵⁴ 678 S.W.2d at 924 (citing *Dumer v. St. Michael's Hosp.*, 233 N.W.2d at 376).

¹⁵⁵ *Id.* (citing *Gleitman v. Cosgrove*, 227 A.2d at 711 (Weintraub, C.J., concurring and dissenting)).

¹⁵⁶ 643 P.2d 954. See *supra* text accompanying notes 91-100.

¹⁵⁷ 656 P.2d 483. See *supra* text accompanying notes 101-119.

¹⁵⁸ 478 A.2d 755. See *supra* text accompanying notes 120-143.

¹⁵⁹ 678 S.W.2d at 924-25.

¹⁶⁰ *Id.* at 925.

¹⁶¹ 332 N.W.2d 432 (Mich. Ct. App. 1982).

¹⁶² 678 S.W.2d at 925 (quoting 332 N.W.2d at 435).

¹⁶³ *Id.* (citing *Hindman v. Texas Lime Co.*, 305 S.W.2d 947, 953 (Tex. 1947); *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1099 (Tex. 1938)).

the court noted, wrongful life cases present the issue of whether there has even been any damage sustained at all.¹⁶⁴ Moreover, the court stated that such a determination is "a mystery more properly to be left to the philosophers and the theologians."¹⁶⁵ Texas, like many other states, based its rejection of wrongful life actions on the difficulty of resolving the damage issue, the benefits rule, and public policy arguments emphasizing the sanctity of human life.¹⁶⁶

The West Virginia court held in a 1985 consolidated opinion, in *James G. v. Caserta*,¹⁶⁷ that a wrongful life cause of action does not exist in West Virginia in the absence of a statute giving rise to such a claim.¹⁶⁸ One case involved parents who brought a claim for wrongful pregnancy due to an alleged negligently performed tubal ligation, which resulted in the conception and birth of a healthy child.¹⁶⁹ The second case involved parents and their child who sought to recover damages for wrongful birth and wrongful life, respectively. They claimed that their physician negligently failed to perform an amniocentesis test on the wife which would have revealed that the child would be born with a birth defect.¹⁷⁰

The issue of the existence of a wrongful life cause of action was one of first impression in West Virginia.¹⁷¹ The court did not feel the wrongful life claim could withstand a rational tort theory analysis despite the factual relationship to the parents' wrongful birth claim.¹⁷² In the wrongful birth claim, "liability

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 812).

¹⁶⁶ *Id.* at 924-25.

¹⁶⁷ 332 S.E.2d 872 (W.Va. 1985).

¹⁶⁸ *Id.* at 881.

¹⁶⁹ *Id.* at 874.

¹⁷⁰ *Id.*

¹⁷¹ The court noted that the wrongful life and wrongful birth actions had evolved as a result of the increased ability of medical science to determine the possibility of genetic defects which can cause substantial birth defects. With the increased knowledge in this field of genetic counseling means that there is the concomitant recognition that the ordinary standard of care may require appropriate tests and counseling with parents who are more likely to bear children with birth defects.

Id. at 879.

¹⁷² *Id.* at 880 n.17.

rests on the physician's failure to initially diagnose the birth defect."¹⁷³ According to the court, "this duty to inform does not extend to the unborn child, as it is the parents' decision to risk conception or to terminate the pregnancy."¹⁷⁴ Thus, the child's wrongful life claim was rejected because the physician owed no legal duty to the unborn child, but only to the parents. Consequently, the court declined to address the damage issue.¹⁷⁵

In 1985, the North Carolina court reversed a lower court opinion and refused to allow a child born with Down's Syndrome to be compensated under the wrongful life theory. *Azzolino v. Dingfelder*¹⁷⁶ involved a doctor and nurse who were allegedly negligent in failing to advise the child's parents about the possibility of performing an amniocentesis test and of genetic counseling.¹⁷⁷ The court disagreed with the court of appeals opinion that no life may be preferable to life burdened with extreme weakening disorders.¹⁷⁸ Although the court appreciated the interest and consideration demonstrated by the courts who have recognized wrongful life actions, it felt compelled to reject such actions as not being judiciable in North Carolina.¹⁷⁹

The court based its holding on several reasons. First, following *Becker*,¹⁸⁰ the court agreed that the issue of existence versus nonexistence is an enigma to be resolved by those who are versed in the nature of God and religious truth, because the law lacks the capability to settle the matter considering the importance of human life in society.¹⁸¹ Second, the court feared the implications of embracing the wrongful life theory would be "staggering,"¹⁸² especially in view of related concerns such as paying a claim

¹⁷³ *Id.* at 881.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The court did recognize that many courts rejected wrongful life actions due to the difficulty of computing damages.

¹⁷⁶ 337 S.E.2d 528 (N.C. 1985).

¹⁷⁷ *Id.* at 530.

¹⁷⁸ *Id.* at 531 (citing *Azzolino v. Dingfelder*, 322 S.E.2d 567, 576 (N.C. Ct. App. 1984)).

¹⁷⁹ *Id.* at 532-33.

¹⁸⁰ *Becker v. Schwartz*, 386 N.E.2d 807 ("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 left to the philosophers and the theologians."). *Id.* at 812.

¹⁸¹ 337 S.E.2d at 533 (citing *Becker*, 386 N.E.2d at 812).

¹⁸² *Id.* at 533 (citing *Becker*, 386 N.E.2d at 821).

“for a less than perfect birth.”¹⁸³ Third, the court held that the law is not prepared to make a comparative estimate between an impaired existence and no life, believing an appropriate formula to compute the claimant’s harm best left to the legislature.¹⁸⁴

In 1986, in *Smith v. Cote*,¹⁸⁵ the New Hampshire court refused to acknowledge “a right not to be born,”¹⁸⁶ disallowing compensation to the claimant “from one who has done him no harm.”¹⁸⁷ Suit was initiated by the mother on behalf of the child and in her own behalf seeking remuneration from defendant physicians due to the physicians’ negligence in not testing initially for and detecting, in a timely manner, that the mother had rubella. Furthermore, the mother was not provided with information about the chances of congenital disorders in a fetus exposed to rubella; therefore, she was unable to make an informed decision as to the procurement of a eugenic abortion. The mother did not discover that she had been exposed to rubella, as indicated by the rubella titre test, until she was in the second trimester of gestation. It was contended that had she been aware of the dangers associated with exposure to rubella during pregnancy, she would have exercised her right to an abortion. The child was born with congenital rubella syndrome.¹⁸⁸

Some interesting reasons were given by the court in *Smith* for declining recognition of this wrongful life action. First, the child did not suffer an injury by being born, which is an essential element of the negligence cause of action.¹⁸⁹ Second, public policy does not support such a claim, because the right to life is constitutionally protected under New Hampshire law,¹⁹⁰ and the state should not make decisions as to whether someone’s existence is of value. Additionally, the right to die doctrine

¹⁸³ *Id.* (citing *Becker*, 386 N.E.2d at 812).

¹⁸⁴ *Id.*

¹⁸⁵ 513 A.2d 341 (N.H. 1986).

¹⁸⁶ *Id.* at 355.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 342-43. The child suffered “bilateral cataracts, multiple congenital heart defects, motor retardation, . . . significant hearing impairment . . . [and] [s]he is legally blind. . . .” *Id.* at 342.

¹⁸⁹ *Id.* at 352.

¹⁹⁰ *Id.* (citing N.H. CONST. pt. I, arts. 1, 2).

espoused in *In re Quinlan*¹⁹¹ does not affect the issue of whether the child's existence establishes harm within the context of tort law.¹⁹² Third, public policy is against acknowledgment of the child's claim that an impaired life is an injury because of the detrimental effect on the interests of the handicapped in our society. Current changes in views reflect the public's respect and appreciation for the abilities, worth, competence and contributions of the handicapped.¹⁹³ Fourth, it is difficult for the courts to evaluate and decide quality of life questions, because the issue of harm in a wrongful life action is based on a subjective view of the importance and worth of one's existence.¹⁹⁴

As this historical development of the wrongful life case law illustrates, the overwhelming majority of the courts have rejected the wrongful life theory. Does this treatment of the issue create an atmosphere where injustice could easily thrive? Moreover, do these decisions merely delay the inevitable in an area so important in today's society?

III. MEDICAL ASPECTS

Having identified the problem and considered the legal development of the wrongful life tort nationally, this section addresses the medical aspects of the issue. Here, genetic testing and counseling, the medical standard of care, the response of physicians to wrongful life suits, and related matters are emphasized.

A. Genetic Testing and Counseling

Genetics has been defined as "[t]he study of heredity and its variation,"¹⁹⁵ and a geneticist as "one who specializes in genetics."¹⁹⁶ Genetic counseling involves "the application of what is known about human genetics in providing advice to those who are concerned about the possibility of their offspring being

¹⁹¹ *Id.* (citing 355 A.2d 647 (N.J. 1976)).

¹⁹² *Id.* at 353.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 352-53.

¹⁹⁵ See MEDICAL DICTIONARY, *supra* note 148, at 672.

¹⁹⁶ *Id.*

free of hereditary abnormality.”¹⁹⁷ The number of genetically impaired children born is more significant than most people believe. As one author stated:

Because most genetic diseases and birth defects are individually rare, their cumulative prevalence is not appreciated, even by physicians. Over 3,000 genetic diseases have been catalogued. Approximately 5 percent of all newborn infants suffer from a major or minor malformation, and 60 percent of these are grossly deforming or life threatening. Approximately 200,000 deaths per year occur from two common hemoglobin diseases (sickle cell anemia¹⁹⁸ and thalassemia¹⁹⁹) and there are an estimated 100 million carriers in the world for these disorders. The most common genetic disorder among Caucasians is cystic fibrosis,²⁰⁰ with about 2,000 cases per year in the United States. Approximately 5 percent of all Americans are carriers. Among children admitted to pediatric wards of hospitals, 25 to 30 percent have an underlying genetic disease, chromosomal disorder, or birth defect. More than half of all babies born with Down's Syndrome have associated defects, malformation of the heart, respiratory, gastrointestinal, musculoskeletal, or nervous system.²⁰¹

“Until about [the late 1960s], methods of detecting and predicting human genetic disorders was very inexact.”²⁰² The

¹⁹⁷ *Id.*

¹⁹⁸ Sickle cell anemia is “a hereditary chronic form of anemia in which abnormal sickle or crescent-shaped erythrocytes are present. Due to the presence of abnormal type of hemoglobin, hemoglobin S, in red blood cells the frequency of the gene that causes this disease is high in Mediterranean and African populations.” *MEDICAL DICTIONARY*, *supra* note 148, at 1559.

¹⁹⁹ See *infra* note 227 for a definition of “thalassemia.”

²⁰⁰ Cystic fibrosis is “a disease of infants, children, adolescents, and young adults involving the exocrine glands, especially those secreting mucus, and resulting in pancreatic disease, abnormally high sweat electrolyte levels, and, in some cases, cirrhosis of the liver.” *MEDICAL DICTIONARY*, *supra* note 148, at C-139.

²⁰¹ Shaw, *supra* note 2, at 75-76 (citations omitted).

²⁰² See Grundtisch, *Legal Liability in Genetic Counseling and Testing*, 21 A.F. L. REV. 462, 462 (1979). Although asserting in 1979 that it was medically impossible to discover most genetic defects in utero, Grundtisch indicated that “amniocentesis and ultrasonography are the most refined techniques used to detect or predict human genetic disorders.” *Id.* at 462 n.1. He added that “[a]mniocentesis provides diagnosis of virtually all known chromosomal abnormalities, certain unborn errors of metabolism and a majority of ‘open’ neural tube defects.” *Id.* (citing Golbus, *Prenatal Genetic Diagnosis in 3000 Amniocenteses*, 300 NEW ENG. J. MED. 157-63 (1979)).

capacity to accurately predict birth malformations and other hereditary diseases, however, has improved drastically in recent years as technology has progressed.²⁰³ Genetic counseling likewise has increased in scope and has been accompanied by augmentation in diagnostic testing and more informed determinations about whether couples should conceive or continue pregnancies.²⁰⁴

In addition to a physician or other health care provider informing prospective parents of the probability of their offspring being born with genetic diseases, genetic counseling

is a multi-step process in which the genetic counselor attempts to help the couple to: 1. [c]omprehend the medical facts, including the diagnosis, probable course of the disorder, and the available management; 2. appreciate the way heredity contributes to the disorder, and the risk of recurrence in specified relatives; 3. understand the alternatives for dealing with the risk of recurrence; 4. choose the course of action which seems to them appropriate in view of their risk, their family goals, and their ethical and religious standards, and to act in accordance with that decision; and 5. to make the best possible adjustment to the disorder in an affected family member and/or risk of recurrence of that disorder.²⁰⁵

Acceptable and sufficient genetic counseling involves the fulfillment of the five steps outlined above, which requires the counselor to use a reasonable degree of skill and care. Only then can it be maintained that the couple made an educated decision regarding the initiation of or the endurance of a pregnancy. Those genetic advisers who fall short of such reasonable skill and care in fulfilling their responsibility to their advisees may

²⁰³ During the past decade, advances in the antenatal diagnosis of genetic disorders have proceeded at a revolutionary pace. For instance, amniocentesis and karyotype analysis of fetal cells have made the detection of Down's syndrome (trisomy 21) and a host of other chromosomal abnormalities almost routine. In 1979, 28.7% of all pregnant women in New York age thirty-five or older underwent prenatal cytogenetic studies. See Hook, *Use of Prenatal Cytogenetic Diagnosis in New York State*, 305 NEW ENG. J. MED. 1410 (1981); Reilly, *supra* note 2, at 71.

²⁰⁴ See Grundtisch, *supra* note 202, at 462.

²⁰⁵ Note, *Genetic Counseling and Medical Malpractice: Recognizing a Cause of Action for Wrongful Life*, 8 T. MARSHALL L. REV. 154, 156 (1983) (quoting Capron, *Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 621 (1979)).

be sued and ultimately held liable to their advisees for negligent conduct.²⁰⁶

Historically, the event that brought couples to the genetic counselor was the birth of a child burdened with a genetically transmitted disease. Only recently have more couples sought advice to pinpoint the odds of their parenting such a child. Genetic advisers are being sought out in greater numbers partly because the new prenatal diagnosis technology has armed them with a greater ability to read the genetic crystal balls of those concerned couples.²⁰⁷

Amniocentesis, fetoscopy, and ultrasound head the list as the most widely recognized prenatal examinations.²⁰⁸ Amniocentesis involves a small quantity of amniotic fluid extracted from the uterus of the mother-to-be. A hypodermic needle directed by ultrasound removes the fluid which contains cells discarded by the fetus. Biochemical and chromosomal defects capable of retarding, seriously harming, or otherwise threatening the survival of a fetus can be detected through examination of the amniotic fluid cells.²⁰⁹ Genetic diseases are determined by examining the amniotic fluid and developing it in a culture medium. If the testing indicates a fetus affected with a hereditary ailment, abortion becomes an option.²¹⁰ Approximately sixty genetic disorders could be accurately detected through amniocentesis, and, of course, that number is increasing rapidly with new technology.²¹¹

²⁰⁶ See Note, *supra* note 205, at 156-57; See also Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1504 (1978) (author argues tort liability should be imposed on negligent physicians to reduce the incidence of genetic defects, but that only claims by parents should be sustained) [hereinafter Note, *Father and Mother Know Best*].

²⁰⁷ See Note, *supra* note 205, at 157 (citing Note, *Father and Mother Know Best, supra* note 206, at 1492). See also Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 720 (1982).

²⁰⁸ See Note, *supra* note 205, at 157. For more information on fetoscopy and ultrasound, see Note, *Father and Mother Know Best, supra* note 206.

²⁰⁹ See Altman, *Birth-Defect Suits Worry Doctors*, N.Y. Times, Jan. 30, 1979, (Science Times), at C2. See also Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 95, 97 (1974); Note, *supra* note 205, at 157. See generally BEHRMAN'S, *supra* note 73, at 1028-33.

²¹⁰ See Friedman, *supra* note 209, at 95, 98-99; Note, *supra* note 205, at 157.

²¹¹ See Altman, *supra* note 209, at C2. See generally BEHRMAN'S, *supra* note 73, at 1028-33.

The National Genetics Foundation reported in 1979 that known genetic diseases exceeded 2,000.²¹² A more recent source indicates that scientists "are focusing on discovering which genes cause each of the nearly 4,000 hereditary disorders."²¹³ It is not surprising that, as of 1979, one-third of patients admitted to pediatric medical centers suffered from some type of genetic disorder.²¹⁴

Medical geneticists utilize an assortment of tools to estimate the chances that a given couple will parent a child marked by a particular disorder. First, the geneticist reviews old medical records and takes comprehensive medical histories of both parents and their blood relatives. Finally, a battery of tests is completed and counseling based on the total picture follows. The gains made in early pregnancy testing are of particular importance in recent years. Hereditary conditions detected in the early months of gestation allow abortions to be performed without danger, if that is the alternative chosen.²¹⁵ Other tests performed simultaneously with amniocentesis can alert the geneticist to many chromosomal abnormalities such as Down's syndrome.²¹⁶

The success of such procedures as amniocentesis has made many women feel more secure that their children will not be born with genetic disorders. Many physicians publicly express concern that the reported successes of amniocentesis have created a false sense of safety about the procedure itself. There have been isolated instances of needle damage to the fetus, miscar-

²¹² Altman, *supra* note 209, at C2. See generally BEHRMAN's, *supra* note 73, at 1013-34.

²¹³ Shaffer, *Advances in Genetics Improve Diagnosis of Inherited Disease*, WALL ST. J., Nov. 4, 1983, § 2 (Technology), at 37. See generally BEHRMAN's, *supra* note 73, at 1013-34.

²¹⁴ See Altman, *supra* note 209, at C2. See generally BEHRMAN's, *supra* note 73, at 1013-34.

²¹⁵ Altman, *supra* note 209, at C2. See generally BEHRMAN's, *supra* note 73, at 1033.

²¹⁶ Down's syndrome is the "preferred term for mongolism, a variety of congenital moderate-to-severe mental retardation. Marked by sloping forehead, small ear canals, presence of epicanthal folds causing an Oriental appearance of eyes, gray or very light yellow spots at periphery of iris (Brushfield's spots), short broad hand with a single palmar crease (simian crease), a flat nose or absent bridge, low-set ears, and generally dwarfed physique." MEDICAL DICTIONARY, *supra* note 148, at 490. See also Altman, *supra* note 209, at C2. See generally BEHRMAN's, *supra* note 73, at 1028-33.

riages, and bleeding. Rulings like *Becker*²¹⁷ may jeopardize the careers of physicians due to current doubt over the suggested age for amniocentesis testing and the attendant danger of the procedure.²¹⁸

Medical practitioners possessing the capability and proficiency necessary to handle problems involving genetically transmitted diseases in humans are unfortunately scarce.²¹⁹

[O]nly a handful of our clinicians have the ability to completely deal with human genetic-related matters. Prospective parents commonly ask for details of the clinical manifestations or the complications of a disease state, and the ability to deal with these questions with confidence and competence is usually beyond the scope of those who have no special knowledge or who have acquired what they know from reading textbooks and periodicals.²²⁰

To gather and analyze data properly, the practitioner must possess special, superior skills for such an intensely dangerous practice. Nongeneticists have not yet developed expertise or capability in this area, and to assume otherwise would be disastrous. Not only must the genetic adviser possess a high degree of understanding gained through experience and study, but a continuing cognizance of modern techniques and technology is imperative.²²¹

There are some conditions and circumstances that are appropriate for referring a couple to a medical geneticist. They include:

²¹⁷ 386 N.E.2d 807 (N.Y. 1978). See *supra* notes 56-61 and accompanying text for a discussion of *Becker*.

²¹⁸ See Altman, *supra* note 209, at C2. It states:

One of the most publicized of these defects is Down's Syndrome [sic]. The risk of bearing a Down's Syndrome [sic] child rises sharply at about age 40. The risk under age 30 is one in 1,500, according to the United States Public Health Service, rising to one in 280 between the ages of 35 and 39 and to one in 130 between 40 and 44. Beyond the age of 45, the Federal statistics put the risk at one in 65.

Id. A more recent source reveals that "at the age of 30, a woman's chances of giving birth to a Down's syndrome child are about one in 885; at 35, they increase to one in 365; and at 40, they're about one in 109." Rapp, *Who Should Consider Amniocentesis?*, MS., Apr. 1984, at 98. See generally BEHRMAN'S, *supra* note 73, at 1028-33.

²¹⁹ See Grundtisch, *supra* note 202, at 470-71.

²²⁰ *Id.*

²²¹ *Id.* at 471.

1. Known or presumed congenital abnormalities.
 - a. Congenital malformations of any type.
 - b. Ambiguous genitalia, hemaphroditism.
 - c. Mental retardation (cause unknown).
 - d. Fetal or parental exposure to environmental agents (drugs, irradiation, infections, and maternal factors).
2. Acknowledged familiar disorders.
3. Known inherited disorders.
4. Metabolic, biochemical disorders (screening).
5. Known or suspected chromosome abnormalities.
6. Multiple miscarriages, still births.
7. Infertility.
8. Premarital counseling.
9. Consanguinity, incest.
10. Prenatal diagnosis.²²²
 - a. Either parent a known "balanced carrier" for a chromosome abnormality.
 - b. Previous child with any kind of chromosome abnormality.
 - c. Mother 35 or older.
 - d. Inordinate parental concern or anxiety.
 - e. Both parents carriers for a specifically diagnosable metabolic or structural autosomal recessive disorder.
 - f. Either parents affected with a specifically diagnosable metabolic or structural dominant disorder.
 - g. Mother a known or presumed carrier for a serious x-linked recessive disorder.
 - h. Either parent having a first- or second-degree relative with a neural tube defect (e.g., spine bifida, anencephaly).²²³

²²² Although all diseases are not discoverable through prenatal diagnosis, it can detect disorders such as:

dominant gene conditions that a parent has, like one very serious high cholesterol predisposition to heart disease; recessive gene conditions in which parents are carriers but never manifest the problem themselves, such as Cooley's anemia found in Mediterranean peoples, Tay-Sachs among Ashkeazi Jews, and sickle-cell anemia—in people of African descent; neural tube defects such as anencephaly (a missing portion of the brain) and spina bifida (caused by a prenatal lesion in the neural tube); [and] chromosomal anomalies in which the "wrong number" of chromosomes cause conditions like Turner's and Klinefelter's syndromes, and, most commonly, Down's syndrome.

See Rapp, *supra* note 218. See generally BEHRMAN's, *supra* note 73, at 1028-33.

²²³ Grundtisch, *supra* note 202, at 471-72 (citing V. RICCARDI, *THE GENETIC APPROACH TO HUMAN DISEASE* 6 (1977)).

Although discovery of hereditary disorders has been expanded considerably in recent years, actual medical care and treatment of such disorders have not enjoyed similar success, and the hope for immediate advances is not as optimistic. The growth of diagnostic testing is so rapid that systematic examination of *every* mother-to-be for the presence of the most prevalent genetic disorders seems quite practical in the near future. Most of these tests provide accurate data when performed on the fetus, the minor, or the adult of either sex. The possibilities seem endless, and the day may arrive when even the probability of a child contracting a disease sometime later in life is a projectable factor.²²⁴

“In one prenatal test, copies of defective genes are helping doctors to detect thalassemia without drawing a blood sample from the unborn child, which kills about 5% of the babies tested.”²²⁵ As early as the eighth week of gestation, another encouraging test, chorionic villi biopsy, detects certain genetic defects in fetuses. Today’s most widely utilized test, the amniocentesis, generally is performed in the sixteenth week. The earlier test, however, brings hope for safer and less emotionally draining abortions.²²⁶

In the new eighth-week test “a thin plastic tube is put into the uterus through the vagina. The tube sucks out a few of the fingerlike tissues that holds the fetus to the womb. . . . Genes in the tissue can be analyzed in a few hours, as opposed to the weeks required for the same analysis of the fluid sample in amniocentesis.”²²⁷ “Because the sample is obtained through the mouth of the womb, the biopsy may also be less risky than amniocentesis to the mother and child.”²²⁸ Because it is nonin-

²²⁴ See Shaffer, *supra* note 213, at 37. See generally BEHRMAN’S, *supra* note 73, at 1028-33.

²²⁵ Shaffer, *supra* note 213, at 27. Thalassemia is “[a] group of hereditary anemias . . . produced by either a defective productive rate of the alpha or beta hemoglobin polypeptide chain or a decreased synthesis of the beta chain.” MEDICAL DICTIONARY, *supra* note 148, at 1716. See also BEHRMAN’S, *supra* note 73, at 732-33.

²²⁶ See Shaffer, *supra* note 213, at 37. See generally BEHRMAN’S, *supra* note 73, at 1033.

²²⁷ Shaffer, *supra* note 213, at 37.

²²⁸ *Id.* Primarily for the purpose of determining fetal sex, physicians in China, Europe, and the Soviet Union have been working with the biopsy procedure for years.

vasive and provides an opportunity for selective abortion prior to the time when the mother has experienced fetal motion and abdomen expansion, many predict that chorionic villi biopsy will gradually supersede amniocentesis as the preferred method of diagnosing genetic abnormalities within the next few years.²²⁹

Exactly how much risk chorionic villi biopsy presents to both mother and child is uncertain. While the preliminary success has been most encouraging, the next two or three years of research and practice will tell a more complete story. The prospect of informing parents of a defect at a point at which alternatives are really alternatives inspires many physicians and others in the medical community.²³⁰ Once the chorionic villi biopsy's safety and effectiveness have been certified to the satisfaction of the medical community, it is then arguable that every prospective mother can be screened or at least be given that option, because there is no augmented danger to the mother or her un-born child.²³¹

Using chorionic biopsy, scientists in France are able to diagnose sickle cell anemia about two months subsequent to conception. Biopsy patients in the United States have been accepted on a trial basis for testing chorionic biopsy procedures by Chicago's Michael Reese Medical Center, Philadelphia's Thomas Jefferson Medical Center, and Yale Medical School. *Id.* See also Shaw, *supra* note 2, at 76-77 (discussion of advantages of chorionic villi biopsy).

Chorionic biopsy involves the chorion "[a]n extraembryonic membrane that, in early development, forms the outer wall of the blastocyst. It is formed from the trophoblast and its inner lining of mesoderm. From it develop chorionic villi which establish an intimate connection with the endometrium, giving rise to the placenta." MEDICAL DICTIONARY, *supra* note 148, at 324. See generally BEHRMAN's, *supra* note 73, at 1028-33.

²²⁹ See Shaw, *supra* note 2, at 76. See generally Cowart, *First-Trimester Prenatal Diagnostic Method Becoming Available in U.S.*, 250 J. A.M.A. 1249 (1983); Kazy, Rozovsky & Bakharev, *Chorion Biopsy in Early Pregnancy: A Method of Early Prenatal Diagnosis for Inherited Disorders*, 2 PRENATAL DIAG. 39 (1982).

²³⁰ See Shaffer, *supra* note 213, at 37. See generally BEHRMAN's, *supra* note 73, at 1033.

²³¹ See Shaw, *supra* note 2, at 77. Another recent advance in medical genetics being explored widely and applied in selected cases for prenatal diagnosis is restriction fragment length polymorphisms. *Id.* at 77-78. See generally Botstein, White, Skolnick & Davis, *Construction of a Genetic Linkage Map in Man Using Restriction Fragment Length Polymorphisms*, 32 AM. J. HUM. GENET. 314 (1980) (description of new basis for constructing genetic linkage map of human genome using restrictive fragment length polymorphisms); Skolnick & White, *Strategies for Detecting and Characterizing Restriction Fragment Length Polymorphisms (RFLPS)*, 32 CYTOGENETIC CELL GENET. 58 (1982).

The proliferation of wrongful life suits would seem to indicate that genetic diseases, chromosome related malformations, congenital defects, and others like them could be reduced greatly by prenatal diagnosis, genetic counseling, and selective abortions.

B. *The Medical Standard of Care*

Progress in the genetics discipline and its tools of amniocentesis²³² and ultrasonography²³³ have enabled physicians to accurately predict fetal defects. As parents begin to rely more and more on genetic information, it seems likely, if not inevitable, that diagnostic errors will pave the way for additional tort litigation.²³⁴ As litigation increases, it seems that innovative and different theories of recovery will likely also appear.²³⁵

Using new diagnostic techniques is a must for all physicians to satisfy their professional duty to their patients. They are "bound to keep abreast of the times."²³⁶ To define the standard as the duty to keep "abreast of the times" is simply too vague, especially considering the tremendous growth of medical knowledge in the last twenty years.²³⁷ In reality, the actual relationship between a physician and his standard of practice is considerably more sophisticated and difficult to pin down.

For physicians, the recognized standard (called the locality rule) has been "the standard of professional competence and care customary in [the same or] similar communities among

²³² For an explanation of the amniocentesis procedure, see *supra* text accompanying note 209-11.

²³³ Ultrasonography is the "[u]se of ultrasound to produce an image or photograph of an organ or tissue. Ultrasonic echoes are recorded as they strike tissues of different densities." MEDICAL DICTIONARY, *supra* note 148, at 1799.

²³⁴ According to statistics gathered between 1973 and 1980 by the St. Paul Companies, the nation's largest medical malpractice insurer, failure to properly diagnose was alleged in 25% of the medical malpractice cases filed. Statistics for suits between July and October of 1976 gathered by the Department of Health, Education and Welfare show that 25% of all claims filed and 50% of claims filed against internists and general practitioners involved diagnostic errors. For nonsurgical cases, claims involving insufficient testing were the highest in number. See Furrow, *supra* note 9, at 12.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

physicians engaged in [their] field of practice."²³⁸ An increasing number of courts have ruled that there is a minimum national standard, especially where the physician defendant is a specialist.²³⁹ Thus, a higher standard of care may be imposed on the specialist.²⁴⁰

Concerning physicians' standard of care, one writer has suggested a physician may be classified as: the out-of-touch practitioner; the reluctant practitioner; the faithful follower; and the innovative physician.²⁴¹ The *out-of-touch practitioners* have not espoused, for a myriad of reasons, the prevailing trends concerning the standard of care or of diagnostic testing. For instance, a physician is not liable for a fallacious assessment of a patient's condition due to a miscalculation in judgment caused by the physician's failure to embrace the prevailing trend of diagnostic testing.²⁴² When pertinent data is not obtained by utilizing typical tests, however, the physician more likely will be held negligent.²⁴³ One court has stated:

If a physician, as an aid to diagnosis, *i.e.*, his judgment, does not avail himself of the scientific means and facilities open to him for the collection of the best factual data upon which to arrive at his diagnosis, the result is not an error of judgment but negligence in failing to secure an adequate factual basis upon which to support his diagnosis or judgment.²⁴⁴

Proverbial malpractice is found where the physician neglects to acknowledge an ever-changing standard of medical practice. If adequate evidence is offered and deviation from a standard of care is shown, victory for the plaintiff is probable. Physicians who neglect to at least mention the possibility of an amniocen-

²³⁸ *Health v. Swift Wings, Inc.*, 252 S.E.2d 526, 529 (N.C. Ct. App. 1979) (citing *Dickens v. Everhart*, 199 S.E.2d 440, 443 (N.C. 1973)).

²³⁹ See W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 196 (7th ed. 1982). See also *Murphy v. Little*, 145 S.E.2d 760 (Ga. Ct. App. 1965) (negligence in placing cast on fractured arm); *Roberts v. Tardif*, 417 A.2d 444 (Me. 1980) (negligence in delivery of baby); *Wentling v. Jenny*, 293 N.W.2d 76 (Neb. 1980) (negligence in failing to timely diagnose and treat breast cancer).

²⁴⁰ See 252 S.E.2d at 529 (1979).

²⁴¹ See *Furrow*, *supra* note 9, at 12-14.

²⁴² See *id.* at 13, 47 n.23 (citing *Peterson v. Hunt*, 84 P.2d 999 (Wash. 1938)).

²⁴³ See *id.* at 13.

²⁴⁴ *Id.* (quoting *Clark v. United States*, 402 F.2d 950, 953 (4th Cir. 1968)).

tesis to a thirty-five-and-over mother-to-be had better check their malpractice premium receipts if impaired children result from their omissions.²⁴⁵

The *reluctant practitioners* represent the physicians who are unwilling to embrace the relevant medical standard. For instance, this practitioner does not employ or advise the application of fetal monitors during childbirth even though this monitoring is customary in the profession. This departure from established procedures, pursuant to conventional professional negligence principles, can lead to legal responsibility unless the jury is convinced that fetal monitoring is not a standard procedure within the medical profession.²⁴⁶

Medical practitioners in this posture contest conformance with conventional practice by asserting that their refusal to employ such measures as fetal monitoring or amniocentesis testing is reasonable. They argue that "as a statistical matter [these tests] cause greater harm to all patients even though such measures would actually have been helpful (a fact not predictable by the defendant) in the particular case before the jury."²⁴⁷

Reluctant practitioners also might help their cases by introducing data to illustrate that the prudence of using such a technique is not absolute when considered against the frequency and resulting expense of Caesarean sections. These physicians might assert application of the "best judgment" rule, in support of their actions or inactions, contending, "a physician should use his or her own best judgment when the commonplace medical practice is dangerous."²⁴⁸ This standard seems to present an insurmountable obstacle for the defendant physician and suggests that failure to conform his or her conduct to the applicable standard of care is difficult to explain and virtually impossible to defend.²⁴⁹

The *faithful followers* are the practitioners who, with the spiritual conviction of saints, embrace every medical procedure

²⁴⁵ See *id.* See also Phillips v. United States, 575 F. Supp. 1309 (D.S.C. 1983); Berman v. Allan, 404 A.2d 8 (N.J. 1979).

²⁴⁶ See Furrow, *supra* note 9, at 13.

²⁴⁷ *Id.* at 47 n.26.

²⁴⁸ *Id.* at 13.

²⁴⁹ *Id.*

that exemplifies the prevailing current or direction of the medical profession. Generally, these practitioners adhere to acceptable practice and are logical in their convictions that others have laid the research groundwork necessary to support and certify the current medical procedure. Such a trusting adherence to new technology may get faithful followers in trouble in certain situations. The mainstream procedure possibly may have been adopted too quickly by the profession. Also, recent scientific investigation may result in the introduction of improvements not snagged by the mainstream practice. Finally, especially with respect to discovery of the nature of a patient's illness, mainstream procedures may result in such heavy dependence by practitioners on current technology that they abandon other more conventional and effective diagnostic checks and balances.²⁵⁰ For example, faulty laboratory tests may go undetected as in *Curlender v. Bio Science Laboratories*.²⁵¹

The fourth classification includes the *innovative physicians* who have been so labeled because they are delighted by new diagnostic tools that have not yet been adopted by the mainstream. If the procedure has garnered insignificant support in medical periodicals and in medical circles and, provided it does not function accurately or predictably, these physicians may find themselves liable for malpractice. Such physicians may not even be protected through complete disclosure of the experimental nature of the procedure to their patients because for social policy reasons, complete disclosure is not a shield to legal responsibility for such innovation.²⁵²

The proliferation of medical research, technology, and data have helped to create wrongful life actions. The need for every doctor to be cognizant of new medical procedures, publication materials on current technology, and the effect on the prevailing standard of professional care are brought ever so close to home via these suits.²⁵³

²⁵⁰ *Id.*

²⁵¹ 165 Cal. Rptr. 477 (Cal. Ct. App. 1980). See *supra* notes 79-90 and accompanying text for a discussion of *Curlender*.

²⁵² See Furrow, *supra* note 9, at 14.

²⁵³ See *id.*

Physicians should be aware of the cause of birth defects because in some cases the defects are under the control of physicians. This control imposes a duty to protect the fetus when possible.²⁵⁴ Some of the causes of birth defects are environmental teratogens²⁵⁵ and embryotoxins,²⁵⁶ which include maternal infections such as: rubella (German measles); syphilis, herpes, gonorrhea and autoimmune deficiency syndrome (AIDS); other maternal illnesses such as thyroid disease, ovarian and adrenal gland tumors, hypertension, fever, diabetes and vaginal bleeding; environmental chemicals; occupational hazards; and some prescription drugs.²⁵⁷

C. Response of Physicians to Wrongful Life Suits

Only a limited number of claimants have experienced success in wrongful life litigation against physicians and other health maintenance providers and centers.²⁵⁸ Nonetheless, many doctors are very concerned, due to court awards to children with congenital disorders. The fact that many courts have permitted monetary compensation for wrongful birth to parents of impaired infants²⁵⁹ also increases physicians' anxiety. Geneticists and consumer organizations praised the *Becker* decision of the New York court which held doctors legally obligated to claimants for lifetime protection, supervision, and attentiveness to the needs of their children born with hereditary or birth disorders.²⁶⁰ Obviously, the decision was not well received in the medical community, with obstetricians particularly troubled.²⁶¹

Proponents of consumer rights viewed the New York court's ruling as an avenue for patients to become involved in the

²⁵⁴ See Shaw, *supra* note 2, at 66.

²⁵⁵ *Id.* at 67. Teratogen "is an agent that causes birth defects. Many substances that produce genetic mutations (mutagens) and cancer (carcinogens) are also teratogenic." *Id.* at 67 n.18.

²⁵⁶ *Id.* Embryotoxin "interferes with embryonic development and sometimes causes death (spontaneous abortion and stillbirth). It can also lead to premature births and low birthweight infants." *Id.* at 67 n.19.

²⁵⁷ See *id.* at 67-73 (additional information regarding causes of birth defects).

²⁵⁸ See *supra* notes 91, 101, 120 and accompanying text.

²⁵⁹ See *supra* note 4 for courts that have recognized wrongful birth actions.

²⁶⁰ 386 N.E.2d 807; *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978).

²⁶¹ See Altman, *supra* note 209, at C1. See generally BEHRMAN's, *supra* note 73, at 1033.

resolution of issues that have a lasting effect on themselves and their families. Some specialists projected the decision would cause a decrease in births of impaired children. Many practitioners asserted, however, that the decision would simply increase the number of diagnostic tests ordered for mothers-to-be and aggravate already spiraling malpractice insurance premiums, boost medical expenses, and actually result in the increase in abortions of healthy embryos and fetuses.²⁶²

Obstetricians feel that public discussion of amniocentesis testing has tended to deemphasize the test's risks. There is danger that the needle used can harm the fetus or cause miscarriages or bleeding. Physicians feel they have been placed in a precarious situation because of uncertainty over the age at which amniocentesis is recommended and the hazards involved.²⁶³

An obstetrician compared the situation generated by the court compensating parents of impaired children to the controversy involving D.E.S.,²⁶⁴ a medication designed to decrease miscarriages. Recently, it has been determined that D.E.S. has a carcinogenic effect on certain females born to mothers who took the medication. This obstetrician believed that the medical community viewed the *Becker* decision as the flame leading to doctors "getting burned again," provided some technique now considered safe is ultimately determined to have unanticipated complications.²⁶⁵

Practitioners also wonder how far to go in counseling couples. It has been suggested that some obstetricians are attempting to insulate themselves by telling every mother-to-be that she has a two percent risk of giving birth to an impaired child. Critics of plaintiff malpractice recoveries predictably assert that holding

²⁶² Altman, *supra* note 209, at C1. See generally BEHRMAN's, *supra* note 73, at 1028-33.

²⁶³ Altman, *supra* note 209, at C2. See generally BEHRMAN's, *supra* note 73, at 1028-33.

²⁶⁴ D.E.S. is a synthetic estrogen drug called diethylstilbestrol which was used to prevent miscarriages. See, e.g., *Sindell v. Abbott Laboratories*, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980) (market share liability imposed against all D.E.S. manufacturers except those demonstrating they could not have made the product causing injury).

²⁶⁵ See Altman, *supra* note 209, at C2. See generally BEHRMAN's, *supra* note 73, at 1028-33.

doctors liable for all defects unacceptably increases professional negligence insurance costs.²⁶⁶

In his dissenting opinion in *Becker*,²⁶⁷ Judge Wachtler acknowledged the physician's dilemma, projecting that other costs are inevitable, which may be even more difficult to measure. Some doctors may even be inclined to propose abortion in their attempt to practice "defensive medicine." Certainly, a physician faced with liability and malpractice premiums of such proportions might so advise parents rather than take the chance of compensating a claimant for lifetime care. In Judge Wachtler's view, such abortion decisions involve human costs as well. What price tag can one attach to the unnecessary abortion of a healthy child? Even if it is the threat of pecuniary liability that motivates, what price the human life?²⁶⁸

CONCLUSION

The wrongful life issue has posed difficult questions for courts and has imposed additional duties on physicians and other health care providers. Malfeasance and nonfeasance, such as misdiagnosis of a previous child, laboratory errors, misdiagnosis of pregnancy, failure to identify high risk parents, failure to take a family history, failure to perform diagnostic tests, failure to provide genetic counseling,²⁶⁹ and failure to inform the parents of the availability of amniocentesis testing have resulted in wrongful life actions. Although a number of lawsuits have alleged one or more of these negligent acts, most courts have refused to recognize children's wrongful life claims that they should never have been born.

Courts have given several reasons for their refusal to recognize wrongful life actions, and the same arguments appear repeatedly. First, courts have said the plaintiffs deny their own standing to sue by asserting they should never have been born. Second, damages are not calculable because of the impossibility

²⁶⁶ Altman, *supra* note 209, at C1.

²⁶⁷ See 386 N.E.2d at 816 (Wachtler, J., dissenting in part).

²⁶⁸ *Id.* at 818-19.

²⁶⁹ See Shaw, *To be or Not to be? That is the Question*, 36 AM. J. HUM. GENET. 1, 6 (1984).

of comparing nonexistence with an impaired existence. Third, the plaintiffs have not suffered a legally cognizable injury because life, even if severely defective, is more precious than nonexistence. Fourth, the mother's physician owes no duty to the fetus. Fifth, the judiciary is unable to evaluate metaphysical, theological, or philosophical issues. Sixth, there is no legal right not to be born. Seventh, the physician's wrongful act did not cause the defect. Eighth, the court recognizes that the sanctity of life outweighs the quality of life. Ninth, there is no fundamental right to be born as a whole, functional human being. Tenth, the social impact of recognition of wrongful life actions could be staggering because it would open the floodgates to all kinds of frivolous claims by persons who are dissatisfied with life. Eleventh, recognition of these actions against health care providers would lead to wrongful life actions against parents. Twelfth, recognition of wrongful life claims is against public policy and is a matter to be resolved by the legislature.

Although the preceding arguments have been made to justify the denial of wrongful life actions, some courts have recognized the action, a trend this Author believes to be in the right direction. Recovery, however, has been limited to special damages for extraordinary expenses, such as medical care and special training. These courts feel that the child has suffered a legally cognizable injury. General damages, however, were not awarded because pain and suffering and emotional distress are not readily calculable versus nonexistence, being beyond the capacity of human imagination.

This Author is not convinced that such comparisons cannot be made. Comparisons of existence and nonexistence occur frequently in situations in which patients would expire unless they receive medical life support and in cases in which a vegetative patient's life might be prolonged, but life support treatment is withheld or discontinued.²⁷⁰ In the case involving a vegetative, comatose patient or a terminally-ill person, prolonging the individual's life is presumed more harmful than allowing the per-

²⁷⁰ See, e.g., *In the Matter of Quinlan*, 355 A.2d 647 (N.J. 1976) (life support system permitted to be terminated when individual's right to privacy overcame state's interest in preserving life, due to increased degree of bodily invasion accompanied by dimness of prognosis).

son to die and that the latter is in the patient's best interests. The decision to cease prolonging a person's life appears based on a comparison between the harm of existence in an impaired state and the harm of nonexistence.²⁷¹ If this inference is correct it should not be impossible for the courts to compare and place a value on existence and nonexistence in a wrongful life case. Thus, a major reason for failure to recognize wrongful life actions should not focus on the issue of existence versus nonexistence, but perhaps whether being alive is something for which one should be compensated. Medical, educational, rehabilitation, and other costs associated with a physically impaired child cannot overshadow the joys of life. The joys of life are emotional in nature; but joy, however great, cannot speak to the plaintiff child's financial condition.

²⁷¹ See Jones & Perry, *Can Claims for 'Wrongful life' be Justified?*, 9 J. MED. ETHICS 162, 164 (1983).

