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WRONGFUL LIFE: A MODERN CLAIM WHICH CONFORMS TO THE TRADITIONAL TORT FRAMEWORK

From the time that man first developed a code of law, the destruction of another human's life has been considered the preeminent legal and moral wrong. Paradoxically, recent tort cases, notably those concerned with medical malpractice, have raised the legal question whether one can be liable for wrongfully allowing an infant to be born, or phrased differently, whether there is a recognizable tort action for "wrongful life."

The term "wrongful life" denotes a claim by or on behalf of an infant that a defendant's negligence has wrongfully led to the infant's existence.¹ Claims for wrongful life may be of several kinds. One such claim may be brought by an illegitimate child either against his father for his wrongful conduct in causing the plaintiff's conception or, if the mother is incompetent, against the mother's legal guardian for negligently permitting the access by the father which resulted in conception.² Another type of wrongful life claim is a malpractice action against a doctor for negligently allowing a legitimate child to be born with serious physical or mental defects.³ In the latter situation, the typical allegation is that the physician, contrary to standard medical conduct, failed to inform the parents of the possibility that the child may be afflicted with birth defects.⁴ Had the parents been informed properly of the risk of fetal deformity, the claim continues, they would have chosen to abort the fetus; thus, but for the doctor's negligence, the child would not have been born and thereby forced to suffer an abnormal existence.⁵

Courts generally have disfavored suits which allege that the plaintiff's very existence is wrongful. Several factors have contributed to

1. See Note, *Wrongful Birth and Emotional Distress Damages: A Suggested Approach*, 38 U. Prrt. L. Rev. 550, 552-53 (1977) [hereinafter cited as *Wrongful Birth*]; 41 ALB. L. REV. 162 (1977).

2. See, e.g., *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1964); *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (1965) (guardian ad litem of illegitimate child brings suit against state for allowing an incompetent resident of state mental institution to be assaulted sexually resulting in illegitimate birth).

3. See, e.g., *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), modified and aff'd, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

4. For an example of a typical malpractice wrongful life claim, see *Karlsons v. Guerinot*, 57 App. Div. 2d 73, 994 N.Y.S.2d 933 (1977).

5. *Id.*

this unfavorable response.⁶ Because the harm to be vindicated is the birth itself, rather than the plaintiff's impaired condition, the courts frequently have denied recovery on the grounds that the damages are immeasurable.⁷ In addition, courts have stated in malpractice cases that, because the physician was not the cause of either the infant's conception or his defect, he cannot be held liable to the child because the necessary element of proximate cause is absent. Other reasons for rejecting wrongful life claims include the lack of precedent, the fear of increased and potentially fraudulent litigation, the desire to prevent the expansion of medical malpractice liability, and a public policy discouraging abortions.

Although this Note will discuss the wrongful life claims of illegitimate children, it will focus on the more controversial medical malpractice claims. Contrary to the "strict" definition of "wrongful life," which includes only those suits brought by or on behalf of the infant, the term "wrongful life" will be used to describe any claim for damages, whether brought on behalf of the child or his parents, which requires a comparison of the value of life in a disabled condition with the value of nonexistence.⁸ By examining the claims made

6. To date, no appellate court has sustained recovery for damages to an infant born under adverse circumstances when the only alternative for the child was not to be born at all. In *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), *modified and aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), however, the Supreme Court of New York did hold that an action for wrongful life existed. See notes 48-61 *infra* & accompanying text.

7. See notes 9-38 *infra* & accompanying text.

8. Most modern courts and authors use this more flexible definition and include parental claims under the rubric "wrongful life." A distinction, however, should be made between "wrongful life" and "wrongful birth" claims. Wrongful life claims generally are brought by or on behalf of the infant to recover for life in an impaired condition. The assertion is that the plaintiff's birth is the cause of his injury—that his very life is wrongful—and that nonexistence is preferable to his being alive. Because the qualitative difference in value between life with deformities and nonexistence is abstract, the damages sought are extremely difficult to measure. In contrast, "wrongful birth" is generally a separate cause of action stated by parents suing to recover for an unwanted pregnancy. Such claims usually are brought after the failure of a sterilization operation, see, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Jackson v. Anderson*, 230 So. 2d 503 (Fla. App. 1970), or negligent filling of a birth control prescription, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971). The damages sought in wrongful birth cases usually are the medical expenses and cost of rearing the child, economic damages capable of relatively precise measurement. The difference in ability to measure damages, combined with easier proof of proximate cause, may explain why wrongful birth claims have met with greater success than wrongful life actions. See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. 1974); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

An interesting wrongful birth claim also has been made, albeit unsuccessfully, against physicians by the siblings of children born after an unsuccessful vasectomy. In two separate

in the leading wrongful life cases, this Note will demonstrate that wrongful life conforms to tort law's traditional elements of duty, breach, proximate cause, and damages. After examining and refuting the various public policy reasons urged against the judicial acceptance of wrongful life claims, this Note will recommend that wrongful life should be given recognition as a tort.

GENERAL REJECTION OF THE WRONGFUL LIFE CLAIM

Malpractice Cases

Gleitman v. Cosgrove,⁹ decided by the New Jersey Supreme Court in 1967, illustrates well the unfavorable reception generally given wrongful life claims by courts and the reasons underlying this disfavor. Sandra Gleitman, upon discovering that she was two months pregnant, informed her obstetricians that she had contracted rubella during her first month of pregnancy. The doctors failed to warn Mrs. Gleitman of the possibility that, as a result of its exposure to the mother's rubella, the child could suffer birth defects.¹⁰ The child, Jeffrey, was born with serious sight, hearing, and speech defects. Jeffrey and his parents sued the obstetricians for their negligent failure to inform Mrs. Gleitman of the enhanced possibility of birth defects, thereby depriving the Gleitmans of the opportunity to choose whether to procure an abortion. The Supreme Court of New Jersey affirmed the Superior Court's dismissal of the complaints of

cases, the complaints alleged that the physicians' negligence in performing the operations resulted in a child's birth and thus injured the prior-born children by reducing their share of parental love, affection, care, training, and financial support. *Aronoff v. Snider*, 292 So. 2d 418 (Fla. App. 1974); *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974).

9. 49 N.J. 22, 227 A.2d 689 (1967).

10. The testimony accepted by the court was that the obstetricians assured Mrs. Gleitman that the rubella would have no effect on the child. *Id.* at ____, 227 A.2d at 691.

Rubella virus infects 1 out of every 1000 pregnant women during nonepidemic years but about 20 out of every 1000 in an epidemic. Pregnant women who contract rubella carry a 25% risk of delivering a baby with congenital rubella. Since the fetal death rate is 10 to 15%, the risk of fetal mortality or morbidity becomes about 40% for a pregnancy complicated by rubella.

The frequency of congenital malformation is highest when rubella develops early in pregnancy: the malformation rate is 10 to 50% when maternal rubella occurs in the first month; 14 to 25% in the second month; and 6 to 17% in the third month. Cataracts, deafness, and heart disease are the most common syndrome of infant abnormalities resulting from maternal rubella. This syndrome was first described in 1941. Since the early 1960's, numerous other congenital defects have been associated with pregnant women who contract rubella. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, 1010-11 (13th ed. 1977) [hereinafter cited as MERCK].

both the child and the parents.¹¹

Although it acknowledged the child's "legal right to begin life with a sound mind and body,"¹² the court argued that the damages sought by the plaintiffs were immeasurable, and acknowledged a public policy against honoring wrongful life claims. The majority emphasized that the defendants' conduct was not the cause of the infant's impaired condition; once the mother contracted rubella, no available medical treatment could have reduced the likelihood of birth defects.¹³ Summarizing the child's claim, the court stated:

The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all. In the language of tort law he says: but for the negligence of defendants, he would not have been born to suffer with an impaired body. In other words, he claims that the conduct of defendants prevented his mother from obtaining an abortion which would have terminated his existence, and that his very life is "wrongful".¹⁴

Even if the conduct complained of were true, the court's argument continued, no damage remedy recognized by the law was available to compensate the plaintiffs. To compute compensatory damages, the normal measure of damages in tort cases, the plaintiff's condition in the absence of the defendants' negligence must be compared with his impaired condition resulting from the defendants' negligence. Such a determination was impossible in the present case, the court claimed, because no logical comparison could be made between a life with defects and the "utter void of nonexistence;"¹⁵ consequently, the court refused to entertain the infant's complaint.¹⁶

Mrs. Gleitman's claim for emotional injury and Mr. Gleitman's claim for the expenses of raising Jeffrey also were held to be non-compensable. The court found that damages could not be awarded

11. *Gleitman v. Cosgrove*, 49 N.J. 22, —, 227 A.2d 689, 694 (1967).

12. *Id.* at —, 227 A.2d at 692 (citing *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960)). *Smith* established the right of an infant to sue for prenatal torts in New Jersey.

13. 49 N.J. 22, —, 227 A.2d 689, 692 (1967).

14. *Id.* See also *id.* at —, 227 A.2d at 711 (Weintraub, C.J., concurring and dissenting).

15. *Id.* (citing *Tedeschi, On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513, 529 (1966)); accord, *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), modified, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

16. 49 N.J. at —, 227 A.2d at 692.

when the relevant comparison was between the cost of parenthood of a defective child and nonparenthood.¹⁷ Moreover, New Jersey's public policy recognizes an inalienable right to life, and the court stated that it could not determine "what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause of action. . . . A child need not be perfect to have a worthwhile life."¹⁸ Finally, the majority stated that the right of a child to live is greater than the parents' right to be free from emotional and financial injury.¹⁹

Gleitman has been cited in virtually every wrongful life case since 1967. Following the reasoning popularized in that case, most of the courts that have denied recovery to both the infant and the parents inevitably have based their decisions on an inability to place comparative values on life with deformities and nonexistence, thus making the determination of compensatory damages impossible.²⁰ Other courts, while noting the immeasurability of the plaintiff's loss, also have denied recovery because of the lack of proximate cause. In *Smith v. United States*,²¹ a physician's negligent failure to properly diagnose and treat rubella in a pregnant woman allegedly led to the wrongful birth of an infant with substantial birth defects. The Federal District Court for the Northern District of Ohio held that the defendant's negligence was not the proximate cause of the plaintiff's abnormalities; even if the doctor had diagnosed the virus correctly, there was no treatment that could have prevented the abnormalities or lessened the likelihood of their occurrence.²²

Other reasons for denying a wrongful life claim were discussed in

17. *Id.* at ___, 227 A.2d at 693.

18. *Id.*

19. *Id.*

20. See *Karlsons v. Guerinot*, 57 App. Div. 2d 73, ___, 394 N.Y.S.2d 933, 938 (1977) (denial of claim for wrongful life made by parents of mongoloid child against physicians for failing to advise mother of possibility of birth defects when they had knowledge of mother's advanced age, thyroid condition, and previous delivery of deformed child); *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (denial of wrongful life claim); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (no recovery for physician's failure to inform mother of risk of birth defects resulting from maternal rubella).

21. 392 F. Supp. 654 (N.D. Ohio 1975).

22. *Id.* at 655.

Howard v. Lecher.²³ A child suffering from Tay-Sachs disease was born to the plaintiffs;²⁴ the infant died within two years. The parents sued their obstetrician-gynecologist alleging that he negligently had failed to follow the accepted medical practice of taking genealogical histories and conducting routine medical tests to determine whether the parents were carriers of Tay-Sachs or whether the fetus was afflicted with this incurable disease.²⁵ The Supreme Court of New York, Appellate Division, denied recovery for the parents' claim for emotional distress resulting from the physician's negligence.²⁶ New York law permits recovery for emotional injury only if it results from direct injury to the plaintiff; the injury alleged to have caused the parents' emotional distress was suffered by the child, not by the parents. The court noted further that the limits of medical malpractice liability would be extended dangerously if the parents' claim for emotional distress were accepted.²⁷ Moreover, acknowledgment of such claims would lead to increased litigation with an enhanced likelihood of fraudulent claims.²⁸ Finally, the court agreed with the opinion in *Gleitman* that damages in wrongful life cases were not ascertainable; a monetary recovery could not be based upon such speculative damages.²⁹

23. 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976).

24. Tay-Sachs is a genetic disease characterized by early onset, progressive retardation in development, blindness, dementia, paralysis, and death by age three or four. Persons like the plaintiffs in *Howard*, descendants of Eastern European Jews, are the primary carriers of this dreaded disease. See MERCK, *supra* note 10, at 1109.

25. 53 App. Div. 2d at —, 386 N.Y.S.2d at 461.

Tay-Sachs disease can be diagnosed with precision, both pre and postnatally, and carriers of the condition can be detected accurately. "[E]very pregnant [Eastern European] Jewish woman should be apprised of the risk of Tay-Sachs disease by her physician early in the pregnancy. She and her husband should then have the opportunity to be tested if they so desire." MERCK, *supra* note 10, at 1235.

26. 53 App. Div. 2d at —, 386 N.Y.S.2d at 461-62.

27. *Id.* at —, 386 N.Y.S.2d at 462. The majority stated that such an extension of malpractice liability was unwarranted and would require an exhaustive search of parents' genealogies for the physician to counsel parents on the wisdom of having a baby. *Id.* But a sufficient genealogical background could be garnered simply by having the physician ask a few questions as a part of taking the mother's routine medical history. Contrary to the opinion expressed in *Howard*, a physician should have the duty to counsel parents on having children, if information concerning possible congenital disease is readily accessible.

28. *Id.*

29. *Id.* The court emphasized that the plaintiffs' damages could be measured only by comparing their alleged emotional injuries from rearing a child with a fatal disease with "the denial to them of the intangible, unmeasurable and complex human benefits of motherhood and fatherhood." *Id.* Although there may be parental benefits in raising a child with slight

Pervading the opinions denying recovery for wrongful life is an overriding judicial concern for the right to life. In cases decided prior to the landmark 1973 Supreme Court decision of *Roe v. Wade*,³⁰ courts justified their denial of recovery either by adverting to the public policy against abortion or by citing an existing statute that made abortions a criminal offense.³¹ After *Roe*, acknowledging that women have the right to choose to have abortions,³² courts resorted to vague declarations of the sanctity of life and the "obvious" preference of existence, no matter how wretched, over the "utter void of nonexistence."³³

This nearly unanimous refusal by the courts to allow recovery for wrongful life has led to the incongruous result that, although recognizing in dicta that the defendant has acted negligently and that his conduct has injured the plaintiff, these same courts have held that the inability to measure damages and a nebulous public policy favoring life prohibit any recovery.³⁴ This conflict has not gone uncriticized. The dissenting opinion in *Howard v. Lecher*³⁵ argued that, if the plaintiffs could show the essential tort elements of duty, negli-

defects, it is difficult to imagine any real benefit or joy in being the parent of an infant with severe physical and mental handicaps doomed to die before its fourth birthday.

30. 410 U.S. 113 (1973).

31. See *Gleitman v. Cosgrove*, 49 N.J. 22, —, 227 A.2d 689, 692 (1967); *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

32. See notes 127-31 *infra* & accompanying text.

33. *Gleitman v. Cosgrove*, 49 N.J. 22, —, 227 A.2d 689, 692 (1967).

In *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972), the court expressed its belief in the sanctity of life in legalistic terms:

[T]here 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. To put it another way, a plaintiff has no remedy against a defendant whose offense is that he failed to consign the plaintiff to oblivion. Such a cause of action is alien to our system of jurisprudence.

The rationale of our law of torts is to compensate individuals who have suffered a diminution of their faculties, temporarily or permanently, as a result of a defendant's carelessness. The gravity of a defendant's wrong is measured by the extent to which his conduct has put the plaintiff in a handicapped position. The ultimate wrong that can be committed is to cause another person's death. It would be the antithesis of these principles to require the defendant hospital to respond in damages to the infant plaintiff because it did not prevent the infant's birth.

Id. at —, 296 N.Y.S.2d at 46.

34. See, e.g., *Gleitman v. Cosgrove*, 49 N.J. 22, —, 227 A.2d 689, 692 (1967).

35. 53 App. Div. 2d 420, —, 386 N.Y.S.2d 460, 463 (1967) (Margett, J., dissenting).

gence, proximate cause, and damages, recovery should not be precluded merely to limit physicians' liability or because damages could not be measured precisely.³⁶ Likewise, in *Gleitman v. Cosgrove*,³⁷ Justice Jacobs criticized the majority opinion for allowing a serious wrong to go unredressed. Justice Jacobs' dissent accused the court of inflexibility, calling the decision incompatible with expanding principles of tort liability. The absolute preclusion of damages provided no deterrent to professional irresponsibility, reasoned Justice Jacobs, and the burden of complex damage estimations should not result in the total denial of recovery.³⁸

In summary, courts generally have refused to extend medical malpractice liability to cover claims for wrongful life. Although physicians have failed to conform to accepted medical standards, the legal system has shielded the medical profession from liability by holding wrongful life claimants to rigid standards of damage measurement and proof. This practice completely denies compensation to severely injured, innocent children and overlooks a public policy interest in promoting professional responsibility.

Actions Brought by Illegitimate Children

Several actions for wrongful life also have been filed by illegitimate children. The principal case is *Zepeda v. Zepeda*,³⁹ in which the plaintiff was the infant son of the defendant. The complaint alleged that the defendant, who was already married, induced the plaintiff's mother to have sexual relations with him by promising to marry her. The plaintiff contended that the defendant injured him by causing his birth as an adulterine bastard. The plaintiff sought damages for deprivation of his rights to be a legitimate child, to have a normal home, to have a legal father, and to inherit from his father and paternal ancestors; and for being stigmatized as a bastard.⁴⁰ The Illinois Court of Appeals affirmed that, although the commission of a tort was alleged, the claim must be dismissed to

36. *Id.* at ____, 386 N.Y.S.2d at 468-69.

37. 49 N.J. 22, ____, 227 A.2d 689, 703 (1967) (Jacobs, J., dissenting).

38. *Id.* at ____, 227 A.2d at 703 (Jacobs, J., dissenting). The dissent further stressed that medical expenses claimed by the parents were readily ascertainable and that emotional distress from having a defective child was no more difficult to measure than "pain and suffering," a standard element of tort damages. *Id.*

39. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

40. *Id.* at 246, 190 N.E.2d at 851.

avoid the generation of an uncontrollable amount of new litigation.⁴¹ Specifically, the court stated that, because lawmaking in this area would have such sweeping social and legal effects, the policy of the state should be proclaimed by the legislature. Recognizing the complaint as one for wrongful life, the court feared that allowing such a claim would encourage lawsuits protesting every possible disadvantage at birth.⁴² Thus, the conflict between the need to compensate the victims of wrongful conduct and the public interest in limiting litigation and preventing fraudulent claims is present not only in malpractice suits but also in wrongful life suits brought by illegitimate children.

Similar claims by other illegitimate children consistently have failed in the courts.⁴³ Such denials of recovery are not beyond criticism,⁴⁴ but the merits of wrongful life claims by illegitimates have been weakened in recent years by the repeal and revision of statutes that historically have given inferior legal rights to illegitimate children.⁴⁵ The United States Supreme Court has further eroded the basis of such claims by ruling that some state laws which treat illegitimate children differently from legitimate children violate the equal protection clause of the fourteenth amendment of the United States Constitution.⁴⁶ Because health rarely is an issue in a wrongful

41. *Id.* at 262, 190 N.E.2d at 859.

42. *Id.* at 260, 190 N.E.2d at 857-58. The court stated that "the quintessence of [plaintiff's] complaint is that he was born and that he is." *Id.* at 258, 190 N.E.2d at 857.

43. See *Pinkney v. Pinkney*, 198 So. 2d 52 (Fla. App. 1967); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974). See also *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (healthy illegitimate child had no cause of action for wrongful life against physicians who negligently performed abortion resulting in child's birth); *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (no cause of action by illegitimate child for wrongful life against State for negligently failing to protect mother while a patient in state mental institution from being sexually assaulted, which resulted in conception and birth of child).

44. As in some malpractice cases, see notes 108-37 *infra* & accompanying text, the courts can be criticized for acknowledging the commission of a tort in cases involving illegitimate children but denying recovery for reasons of public policy and difficulty of damage measurement.

45. See, e.g., VA. CODE §§ 64.1-5.1 to 64.1-5.2 (Cum. Supp. 1978) (repealing VA. CODE §§ 64.1-5 to 64.1-6 to allow illegitimate children to inherit from their fathers because of older statute's dubious constitutionality). See also ARIZ. REV. STAT. ANN. § 14-2611 (1976); N.C. GEN. STAT. § 29-19 (Repl. Vol. 1976); note 46 *infra*.

46. See *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimate children entitled to prove paternity for intestate succession); *Gomez v. Perez*, 409 U.S. 535 (1973) (illegitimate children entitled to same support from father as legitimate children); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimate children entitled to be beneficiaries under a wrongful death statute for the death of their mother).

life case brought by an illegitimate child, his case lacks the tremendous psychological impact of mental and physical defects that may work to the advantage of the plaintiff in a malpractice action for wrongful life. Therefore, although the stigma of illegitimacy may persist, courts are unlikely to decide that an illegitimate child who possesses both good health and full legal rights would have preferred nonexistence.

UPHOLDING THE WRONGFUL LIFE CLAIM

Although the judicial response to wrongful life claims has been overwhelmingly negative, one commentator recently recognized a trend toward permitting wrongful life actions brought by parents to recover the financial costs resulting from a physician's negligence in allowing an impaired child to be born.⁴⁷ This trend gives the parents an opportunity to prove the defendant's negligence and focuses on traditional, readily ascertainable tort damages, thereby preventing a court from denying an otherwise warranted recovery on the grounds that damages are speculative or immeasurable. Allowing the parents to recover the financial costs resulting from wrongful life is indeed a step toward recognition of the tort, but this remedy provides only a nominal rectification of the wrongful life claim. If this remedy alone is granted, the core of the claim, the infant's assertion that nonexistence is preferable to his defective state of life, is not adjudicated.

The case of *Park v. Chessin*⁴⁸ marks the only legal recognition of a cause of action for wrongful life brought on behalf of an infant. The Parks had given birth to a baby who survived for only five hours before dying from polycystic kidney disease,⁴⁹ "a fatal hereditary disease of such nature that there exists a substantial probability

47. Note, *Torts—An Action for Wrongful Life Brought on Behalf of the Wrongfully Conceived Infant*, 13 WAKE FOREST L. REV. 712, 718 (1977) [hereinafter cited as *Wrongful Life On Behalf of Wrongfully Conceived Infant*]; see, e.g., *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975). The author of the Note includes several "wrongful birth" cases in the "wrongful life" category. The two actions are related, but the bases for the claims are totally different. See note 8 *supra*.

48. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

49. Polycystic kidney disease is an inherited kidney disorder characterized by many bilateral cysts which cause a gradual deterioration of renal function. The form of the disease in infants usually leads to early death from uremia, an accumulation in the blood of constituents normally eliminated in the urine, thereby producing a severe toxic condition. See MERCK, *supra* note 10, at 700.

that any future baby of the same parents will be born with it.”⁵⁰ Following the death of the child, the Parks asked the defendant-obstetricians if the disease posed any risk to a child born to them in the future. The defendants, contrary to acknowledged medical fact, advised the plaintiffs that the chances of having another baby with polycystic kidney disease were “practically nil” and that the disease was not hereditary.⁵¹ Relying on the defendants’ erroneous advice, Mrs. Park became pregnant and had a daughter afflicted with polycystic kidney disease from which the child died two and one half years later.⁵²

The Parks sued the defendants for medical malpractice and sought damages for wrongful life in the name of the infant. Basing their action on the defendants’ negligent failure to “warn, advise [and] inform”⁵³ the plaintiffs of the risks attending any future pregnancy, the Parks asserted that their reliance on the defendants’ medical expertise and superior knowledge was clearly foreseeable and that, had the plaintiffs been given accurate medical advice, they would have decided not to have another baby. The Appellate Division of the Supreme Court of New York affirmed the Queens County Trial Court’s holding that a cause of action for wrongful life on behalf of the child existed against the physicians for their failure to correctly inform the child’s parents of the chances of birth defects.⁵⁴ The court declared that “decisional law must keep pace with expanding technological, economic, and social change.”⁵⁵ Citing New York’s abolition of a statutory ban on abortion, the opinion declared that potential parents have the right, within certain limits, not to have a child: “This right extends to instances in which it can be determined with reasonable medical certainty that the child would be born deformed. The breach of this right may be said to be tortious to the fundamental right of a child to be born as a whole functional human being.”⁵⁶

50. 60 App. Div. 2d at ____, 400 N.Y.S.2d at 111.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at ____, 400 N.Y.S.2d at 111-12. As to the parents’ personal claims against the physicians for medical malpractice, the court held that they could recover their direct medical expenses and the husband’s loss of the wife’s services, but no recovery could be allowed for Mrs. Park’s mental anguish or emotional distress or loss of services. *Id.* at ____, 400 N.Y.S.2d at 114; see text accompanying note 26 *supra*.

55. 60 App. Div. 2d at ____, 400 N.Y.S.2d at 114.

56. *Id.*

The *Park* case presents the strongest factual circumstances yet litigated to support an action for the tort of wrongful life. As the court acknowledged, the Parks made a specific request for medical information concerning the possibility of having another baby afflicted with polycystic kidney disease and received incorrect advice upon which they relied to their detriment; the defendants' wrongful conduct was active, not merely an instance of omission.⁵⁷ Furthermore, the infant's illness was readily foreseeable in light of the affliction of the Parks' previous child. Finally, the extremely limited prognosis for those afflicted with the polycystic disease may have affected the court's decision. At birth, the Park infant was destined to die within four years and actually died within two and one half years. Many other wrongful life cases have involved children who, though suffering from severe deformities, reasonably were expected to live much longer than the Parks' daughter. Weighing the benefits of life against the value of nonexistence, the court might have given little value to the child's existence because of the short time she had to "enjoy it."⁵⁸

Importantly, the *Park* case involved pre-conception negligence, not the usual post-conception negligence present in wrongful life actions. The Parks sought advice to decide whether to prevent conception; they did not allege any negligence on the part of defendants in preventing an informed decision to abort. Therefore, the controversial possibility of abortion need not have been an issue. Yet the majority looked to the liberalization of abortion laws to find a qualified right not to have a child.⁵⁹ The court should have based its

57. In *Park* the court distinguished *Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976). In *Howard* the parents based their claim on what defendants should have done, notwithstanding parental failure to request genetic counselling. 60 App. Div. 2d at ____, 400 N.Y.S.2d at 112-13.

58. Conversely, it could be argued that since the Park child lived such a short life, she suffered less than those infants afflicted with defects for many years; therefore, even less reason existed to uphold her claim for wrongful life. Based upon the courts' usual inclination to value life at any cost, it is unlikely that a court would adhere to such reasoning.

59. This irony was pointed out in a vigorous dissent by Justice Titone. As the dissent recognized, the majority wrongly based its decision on a changing policy toward abortion; although the *Park* case dealt with the right not to conceive a child, it ignored the United States Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See note 60 *infra* & accompanying text. Justice Titone made the simplistic assertion that "no right to recover damages for having been conceived and born rather than never to have conceived or born was known at common law." 60 App. Div. 2d at ____, 400 N.Y.S.2d at 116 (Titone, J., dissenting).

decision directly and less controversially on the right of a married couple to use contraceptives.⁶⁰

*Park v. Chessin*⁶¹ represents a drastic departure from the traditional judicial attitude toward wrongful life claims. For the first time, an appellate court upheld a cause of action for wrongful life brought on behalf of the infant. The *Park* decision, though apparently based on a public policy that only indirectly applied to the facts of the case, may alter the future course of wrongful life cases by offering plaintiffs a favorable precedent. Nevertheless, a serious problem remains: *Park* provides no guidance concerning the proper measure of wrongful life damages.

ANALYSIS OF THE WRONGFUL LIFE CLAIM

Some generalizations can be made about the wrongful life claim based on medical malpractice. The claim always involves a child suffering from birth defects, whether physical deformity, mental imperfection, or terminal illness. The complaint does not assert that the defects were caused by the defendant's negligent conduct. Instead, the plaintiff concedes that the defects were caused by parental disease or condition and that the effect of this condition was irreversible; the defendant could not have done anything to prevent the occurrence of the disease. The claim is that the physician either negligently advised the parents that a certain illness or trait would not cause birth defects or that he negligently failed to advise the parents of the possibility of birth defects. Finally, the assertion is made that had the parents known of the possibility of birth defects, they would have chosen either contraception or abortion to prevent the child's birth.

The wrongful life claim is brought typically by or on behalf of the child and asserts that nonexistence would be preferable to life in an impaired state. In essence, the cause of action states that if the defendant had not been negligent, the plaintiff would not have been

60. *Griswold v. Connecticut*, 381 U.S. 479 (1963) (right of married couples to use contraceptive devices is part of the constitutional right of privacy).

A recent author asserted that the court in *Park* could have supported its decision with an anti-abortion stance. By holding a physician to a standard of care that requires investigation and warning before conception, abortions are not encouraged but are prevented. *Wrongful Life on Behalf of Wrongfully Conceived Infant*, *supra* note 47, at 721.

61. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), *modified and aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

born and made to suffer; because the plaintiff was born with congenital defects, the defendant is liable to the child for damages.⁶² Associated damage claims brought by the parent often include pain and suffering, emotional distress accompanying the birth and care of a defective child,⁶³ the medical and hospital costs, and the general costs of raising and caring for a defective child.⁶⁴

The Tort Framework

The extreme youth of the plaintiff and the timing of the defendant's conduct in a wrongful life action present no substantial obstacles to bringing the action. In virtually all American jurisdictions a child may bring a tort action to recover damages for negligently inflicted prenatal injuries, if that child is born alive.⁶⁵ Courts have had difficulty, however, in determining whether a claim for wrongful life conforms to the theories underlying tort recovery for negligence generally. An examination of the previously identified general characteristics of wrongful life reveals that these claims satisfy the traditional tort elements of duty, breach, proximate cause, misfeasance, nonfeasance, and damages.

Duty

Unless a duty exists, there can be neither a breach nor liability; a duty is a legally recognized obligation to conform to a specific standard of conduct toward another.⁶⁶ A physician is under a duty to provide his patients with professional medical care.⁶⁷

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a

62. A specific example of a child's wrongful life claim can be found in *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). The infant alleged that, as a result of the defendants' negligence, she was "not aborted" and "was allowed to be born to a wrongful life; that she was born disabled, retarded and crippled; and that her ability to enjoy life had been permanently impaired." *Id.* at ___, 233 N.W.2d at 374.

63. See, e.g., *Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976).

64. See, e.g., *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (recovery of expenses reasonably necessary for care and treatment of physically impaired child).

65. Annot., 40 A.L.R.3d 1222, 1228-30 (1971).

Viability of the fetus at the time of the infliction of the injury is no longer a requirement for maintaining prenatal injury actions and recovering damages. See also *W. PROSSER, LAW OF TORTS* 337 (4th ed. 1971).

66. See *PROSSER, supra* note 65, at 324.

67. *Park v. Chessin*, 60 App. Div. 2d 80, ___, 400 N.Y.S.2d 110, 113 (1977); *Karlsons v. Gueriot*, 57 App. Div. 2d 73, ___, 394 N.Y.S.2d 933, 936 (1977).

profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.⁶⁸

In wrongful life claims, this standard requires physicians to be aware of current, normative medical information and to use such knowledge in their practice. Thus, if physicians in certain communities normally would know that a particular parental disease or condition would increase the likelihood of birth defects, a physician in a similar community should be held to possess that knowledge.

For wrongful life to be recognized as a tort, the doctor must have a duty to impart his knowledge concerning the possibility of birth defects to the aggrieved party. This duty should be based upon the requirement of informed consent in medical treatment,⁶⁹ which imposes upon physicians a duty to disclose any facts "which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. . . ."⁷⁰ Thus, if a physician knows or should know of a condition that increases the likelihood of fetal defects, he is under a duty to disclose that information to the parents to permit them to choose intelligently whether to conceive a child or, in other instances, whether to abort a possibly impaired fetus.⁷¹ Because the

68. RESTATEMENT (SECOND) OF TORTS § 229A (1965). See also Annot., 37 A.L.R.3d 420 (1971).

69. See *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

70. *Id.* at ____, 317 P.2d at 181. This duty is limited generally to those disclosures which a reasonable physician would make under the same or similar circumstances. See *Natanson v. Kline*, 186 Kan. 393, ____, 350 P.2d 1093, 1106 (1960).

The rationale that underlies the doctrine of informed consent is a combination of a patient's right to be informed reasonably of all possibilities, including risks and alternatives, which may affect his agreement to a proposed treatment and a physician's duty to inform his patient in a medically sound fashion. See Annot., 69 A.L.R.3d 1250 (1976) for a survey of cases dealing with informed consent in treatment during pregnancy and childbirth. See also *Wale v. Barnes*, 261 So. 2d 201 (Fla. App. 1972); *Charley v. Cameron*, 215 Kan. 750, 528 P.2d 1205 (1974); *Roberts v. Young*, 369 Mich. 133, 119 N.W.2d 627 (1962); *Young v. Group Health Coop.*, 85 Wash. 2d 332, 534 P.2d 1349 (1975); *Holt v. Nelson*, 11 Wash. App. 230, 523 P.2d 211 (1974).

71. See *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (physician has duty to make reasonable disclosure of diagnosis of maternal disease and subsequent risks of pregnancy). But see *Gleitman v. Cosgrove*, 49 N.J. 22, ____, 227 A.2d 689, 692 (1967) (informed consent does not include duty on part of doctor to inform mother of possibility of birth defects resulting from rubella so that patient could have an abortion).

Even in *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), modified, 35 App. Div. 2d 53, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972), a case denying a cause of action for wrongful life, the New York

mother is the physician's patient, the doctor clearly has a duty to inform the woman of the risk of bearing the child, whether the danger involves mother or infant.⁷² More problematic, however, is whether the doctor's duty to inform the parents of the possible dangers inures to the child after birth.

The best approach to resolve this question is to focus on the physician's duty to the child rather than on his duty to the parents. If a physician has knowledge or should have knowledge either prior to conception or during pregnancy that there is a possibility that a mother will give birth to a child afflicted with congenital defects, the doctor has a duty to disclose this danger to the mother. In this situation, the child clearly is a foreseeable victim of damages ensuing from the physician's negligent failure to inform the mother of the dangers of having the child.⁷³ Thus, the duty owed by the doctor to the child, as well as any subsequent liability, derives from the physician's duty to the mother.⁷⁴

Alternatively, the physician arguably has a direct duty to the child. If a pregnancy is treated, the fetus is as much a patient of the attending physician as its mother. The doctor is under a duty to preserve the health of both mother and child and to help the parents select the appropriate medical procedure. Although a physician's disclosure of possible or probable birth defects does not force the parents to prevent conception or birth, the information makes them aware of the risk and gives them an opportunity to decide whether life is best for the child. Without such information, there is no reason for the parents to prevent the child's birth, and he may be condemned to an unhealthy, painful existence. The physician owes a duty to the child as well as to the parents; he must afford the child, vicariously through its parents, an opportunity to be relieved of an impaired life.⁷⁵ Once the doctor has given the parents sound

Supreme Court recognized a physician's obligation to disclose to his patient serious or statistically frequent risks of a proposed procedure. The court denied recovery for wrongful life, however, because of the inability to measure damages and the failure to show proximate cause. *Id.* at ___, 296 N.Y.S.2d at 43-44.

72. This duty is particularly acute in cases like *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), *modified and aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), where the parents specifically requested such information.

73. See *Tedeschi*, *supra* note 15, at 523-24.

74. Cf. *Shack v. Holland*, 89 Misc. 2d 78, ___, 389 N.Y.S.2d 988, 993 (1976) (liability of physician for lack of informed consent of the mother inures to infant who suffered injury during delivery procedure that was not explained adequately to mother).

75. In *Note*, *Torts—Wrongful Life—No Cause of Action for Failure to Inform of Possible*

medical information concerning potential birth defects, he has met his duty to both parent and child. If the physician fails to give the parents reasonably obtainable information concerning the risks of congenital defects, a conditional prospective liability⁷⁶ to the fetus is created and inures to the benefit of the child in the form of a claim for wrongful life upon birth in a defective condition.

Breach

"Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right."⁷⁷ Therefore, before liability for negligence can be imposed on the defendant, plaintiff must show that the defendant not only owed a duty to the plaintiff but that there was a breach of that duty.⁷⁸ In a wrongful life case, the plaintiff's argument is that the physician breached his duty of care by failing to inform, or by inaccurately informing, the parents of the possibility of birth defects, thereby preventing an informed decision whether to have the child.⁷⁹

The Restatement (Second) of Torts is directly applicable to the question of breach in a wrongful life claim:

- (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

Birth Defects, 13 WAYNE L. REV. 750 (1967) [hereinafter cited as *No Cause of Action*], an analysis of *Gleitman*, the author refused to recognize this duty to the child:

However, what duty, aside from preservation of the fetal health, did the defendant-doctors in the principal case owe? The plaintiffs would say, a duty to give the parents the opportunity to terminate the fetal life. But the conclusion follows that this is not a duty owing to the unborn, for the rights are solely in the parents to demand the exercise of the duty since they are the ones who can react to the information and thereby profit from it.

Id. at 756. This statement, though logical, defines the physician's duty too narrowly. Although the communication must be made to the parents and they, not the fetus, must make the decision, it is ultimately the fetus that suffers most from the physician's negligent failure to inform. Simply because the fetus is incapable of deciding between life and nonexistence, the physician should not be relieved of his duty to the fetus to inform its parents of possible birth defects.

76. The concept "conditional prospective liability to one not yet in being" was used first by Justice Holmes in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884).

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

78. See text accompanying note 66 for a definition of "duty."

79. See, e.g., *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

- (a) to the other, or
- (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
 - (a) in ascertaining the accuracy of the information, or
 - (b) in the manner in which it is communicated.⁸⁰

This section of the Restatement appears to apply to every type of negligent action alleged in wrongful life claims to date, whether it be the doctor's failure to diagnose a maternal disease, his failure to inform the patient of the risk of birth defects, or his failure to inform the patient correctly of the probability of birth defects.⁸¹

The appropriate standard for determining if a physician has breached his duty of care owed to a patient is whether he failed to exercise the degree of skill and care of the average qualified practitioner in the same or similar community.⁸² Referring specifically to the tort of wrongful life, the physician breaches his duty of care owed to both the parents and the child if he fails to inform the parents of the possibility of birth defects and this information nor-

80. RESTATEMENT (SECOND) OF TORTS § 311 (1965). Comment (b) to § 311 states:

The rule stated in this section finds particular applicability where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine.

This comment stresses the rule's applicability both to those cases in which the physician negligently fails to diagnose, a maternal disease, *see, e.g.*, *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio, 1975) (rubella), and cases in which the diagnosis is correct but advice as to its consequences is not. *See, e.g.*, *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

81. In *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975), a case involving a child born with defects caused by its mother's rubella in the first trimester, the court held that a physician had a duty to make reasonable disclosure of a diagnosis and risk of proposed treatment and that the doctor in that case did not comply with this degree of care in failing to diagnose rubella and to inform the parents of the risks attending childbirth.

In the more complicated case of *Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976), the alleged breach was the doctor's failure to administer tests to determine whether the parents were carriers of deadly Tay-Sachs disease. Comment (d) to RESTATEMENT (SECOND) OF TORTS § 311 (1965), states that negligence may consist of a failure to make proper inspection or inquiry (for example, taking medically sanctioned tests to determine the patient's condition).

82. *See Brune v. Belinkoff*, 354 Mass. 102, 235 N.E.2d 793 (1968); Annot., 37 A.L.R.3d 420 (1971).

mally would be ascertained and communicated according to standard medical procedure. Thus, the doctor is not required to know of and communicate every possible chance of congenital defects; if a physician fails to perform a test that would have revealed a defect or mistakenly prognosticates that a disease will have no effect on a fetus, he has breached no duty if he properly exercised his medical judgment and did not depart from accepted medical practice.⁸³ A breach of duty on the part of a physician can be proven either by expert medical testimony which shows that the applicable standard of care was not followed or can be inferred by common knowledge from proven facts.⁸⁴

Although the physician's negligence in wrongful life cases occurs before birth and even prior to conception in some instances, he still has breached a duty to the child, a foreseeable victim,⁸⁵ as well as to its parents, if his conduct falls below standard medical practice.⁸⁶ If a physician misdiagnoses a parent's condition or fails to administer and transmit the results of a standard procedure to the parent, a conditional prospective liability to the fetus is created. Upon the birth of the child in a defective condition, this liability inures to the benefit of the child as a claim for wrongful life.⁸⁷

A breach of duty can be determined only in light of subsequent events; at the time of the act, one cannot know whether the actor has breached a duty. Moreover, for liability to be imposed, the

83. See, e.g., *Johnson v. Yeshiva Univ.*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977).

84. *Larrabee v. United States*, 254 F. Supp. 613, 616 (S.D. Cal. 1966).

85. See text accompanying notes 77-84 *supra*.

86. One court stated that a child has the right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, —, 367 N.E.2d 1250, 1255 (1977). The case is significant because it allowed an infant to maintain an action against a hospital and a physician for injuries sustained as a result of a negligent transfusion of RH negative blood into its RH positive mother, even though the transfusion occurred several years prior to the infant's conception. *Id.* at —, 367 N.E.2d at 1255-56.

87. In *Shack v. Holland*, 89 Misc. 2d 78, 389 N.Y.S.2d 988, 993 (1976), the court held that a conditional prospective liability to a fetus was created when the unborn child's mother was not informed fully of the dangers and alternatives of a delivery procedure, and such liability attached upon the birth of the child and inured to his benefit in the form of a claim for lack of informed consent. The child was maimed permanently during the delivery procedure.

Application of this same theory of conditional prospective liability to the child also is correct in a wrongful life claim. The child in a wrongful life case is a foreseeable victim and lacks the ability to give informed consent under the same rationale as the infant injured in delivery.

conduct must result in damage.⁸⁸ Consequently, a determination whether the defendant breached a duty owed to the plaintiff can be made only after the damage caused by the act becomes evident, at the time of or after the child's birth.

Proximate Cause

Tort law dictates that, although the breach of a duty may be linked causally to the harm suffered by the plaintiff, liability is not imposed unless the breach is a proximate cause of the harm.⁸⁹ The essential question is whether the defendant should be legally responsible for the plaintiff's injuries, or whether the law will "extend the responsibility for the conduct to the consequences which have in fact occurred?"⁹⁰

The doctrine of foreseeability plays a prominent role in determining proximate cause. In the landmark case of *Palsgraf v. Long Island Railroad Co.*,⁹¹ Justice Cardozo's opinion for the majority stated that negligence was a matter of relation between the parties based upon the foreseeability of harm to the person actually injured.⁹² American courts generally have accepted the *Palsgraf* position.⁹³ Thus, the wrongdoer should be liable only for harm done to a foreseeable victim of his conduct.

In wrongful life cases, the issue of foreseeability of injury to the deformed or unhealthy child merges with the doctrine of "conditional prospective liability," discussed previously. The child's claim is not that the defendant caused the defects but that the breach of duty led proximately to the infant's birth—the maturing of the harm—and, therefore, the child is forced to live a life of deformity or chronic illness that could have been avoided but for the defendant's negligence. A physician should foresee that if he gives a favorable prognosis concerning a patient's childbearing abilities, or if he does not warn of possible infirmities in a baby, his patient probably will decide to have a child. Consequently, it is foreseeable that any negligence on the part of the physician in failing to warn the parents of potential defects could have an adverse effect on the

88. See PROSSER, *supra* note 65, at 143.

89. *Id.* at 244.

90. *Id.*

91. 248 N.Y. 339, 162 N.E. 99 (1928).

92. *Id.* at 244, 162 N.E. at 101.

93. See PROSSER, *supra* note 65, at 258.

child. Until birth, injury from the negligent act or omission remains a possibility; therefore, the liability merely is conditional. At the birth of an abnormal child, however, the physician's conditional prospective liability becomes actual liability because the injury that could have been prevented but for the physician's negligence actually has occurred.⁹⁴

A basic argument expounded by defendants in wrongful life cases is that the maternal illness or genetic condition, not the physician's failure to warn of potential birth defects, was the proximate cause of the child's injury.⁹⁵ The rationale is that an intervening cause has broken the chain of causation between the defendant's negligence and the plaintiff's injury. This argument fails on two grounds. First, "an intervening cause is one which comes into active operation in producing the result, after the negligence of the defendant."⁹⁶ If the physician fails to warn the parents of the dangers of having a child after a maternal illness has occurred, the illness cannot be considered an intervening cause; the doctor's negligence occurred after the illness. Second, even in cases in which the negligence precedes the alleged intervening cause, such as a failure to warn of likely defects prior to conception, if the intervening cause is foreseeable, the defendant does not escape liability.⁹⁷ Therefore, if a physician, employing the normal standard of skill and care required in his profession, would have detected a genetic defect in the parents prior to conception that could possibly lead to birth defects in a child, the effect of this genetic malformation is a foreseeable consequence. A doctor who negligently fails to warn of the possible danger to any future child conceived by these patients should not be relieved of liability to either the parents or the child.⁹⁸

94. See Note, *Prenatal Injuries—North Carolina Approaches the Crossroads*, 1 WAKE FOREST INTRA. L. REV. 72, 81 (1965).

Whether the negligent advice comes before or after conception should not alter significantly the plaintiff's proof of proximate cause. The timing of the negligence is insignificant because "those persons ought to be 'foreseeable' who could be injured by an act for as long as that act is likely to cause injury." Tedeschi, *supra* note 15, at 522.

95. See *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Gleitman v. Cosgrove*, 49 N.J. 22, —, 227 A.2d 689, 691-92 (1967).

96. See PROSSER, *supra* note 65, at 271.

97. See *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

98. Two "wrongful birth" cases strongly support this argument. In *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), the plaintiff-parents sought recovery for medical expenses and physical and emotional injuries resulting from the birth of a baby after the defendants had negligently performed a sterilization operation on the mother. The defendants

In conclusion, although a physician's negligent failure to warn of possible birth defects is not the sole cause of suffering by a subsequently born deformed child, it is a proximate cause of the child's injuries if the parents can prove that they would have chosen not to have the child had they known of the risk. The infant suffers directly and immensely from the breach. Moreover, the defendant's negligence is the proximate cause of the parents' medical expenses in having to raise a deformed child. More troublesome, however, is the causal connection between the defendant's conduct and the parents' emotional distress. Most courts refuse to acknowledge a direct relationship between the two,⁹⁹ but one commentator has argued recently that recovery for the parents' emotional anguish in wrongful life cases could be allowed without straining the theory underlying the doctrine of proximate cause.¹⁰⁰

contended that any injury or damage suffered by the plaintiffs was not the proximate result of any breach of their duty but the result of an intervening cause, sexual intercourse between the plaintiffs. The California appellate court stressed that, upon showing that the defendants breached a duty, their negligence need not be the sole cause of injury in order for the plaintiffs to recover but must be only a proximate cause of the injury. "The general test of whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation is the foreseeability of that act. . . . It is difficult to conceive how the very act the consequences of which the operation was to forestall, can be considered unforeseeable." *Id.* at ___, 59 Cal. Rptr. at 472 (citation omitted).

In *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971), the possibility that a woman might become pregnant due to a pharmacist's failure to fill properly a prescription for birth control pills was foreseeable; the court could not say that this failure was not the proximate cause of the birth of the child. *Id.* at ___, 187 N.W.2d at 513.

99. See, e.g., *Howard v. Lecher*, 53 App. Div. 2d 420, ___, 386 N.Y.S.2d 460, 461-62 (1976); notes 23-38 *supra* & accompanying text.

100. See *Wrongful Birth*, *supra* note 1. After reviewing the court's decision in *Howard* denying recovery to the parents for their emotional distress, resulting from the defendant's failure to discover the risks to their child of being born with Tay-Sachs disease, the author argued that the parents' emotional injury was within the zone of foreseeable injury:

The parents' own emotional distress injuries suffered as a consequence of a physician's negligent failure to diagnose a fatal genetic disease embody a different concept than the witnessing of an accident involving their child, especially when the means of preventing the Tay-Sachs fetus from being born would have been exercised by the parents, had they been made aware of the disease's presence. The parents of a child born with genetic deformities that could have been diagnosed are much more victims of the alleged negligence than they are bystanders; breach of a physician's duty to diagnose, if shown, affects them as parties injured by the breach itself, and not merely as witnesses.

Id. at 555; accord, *No Cause of Action*, *supra* note 75, at 756.

Misfeasance—Nonfeasance

The wrongful life claim often is based upon the physician's negligent failure to inform the parents of possible birth defects. Occasionally, the allegation is made that the doctor failed to diagnose a maternal disease or administer a medical test which would have indicated whether birth defects were probable. Thus, the negligence alleged in wrongful life cases frequently is omission or passive inaction.

Traditionally, the courts have given widespread protection to victims of active misconduct, or misfeasance, but have been reluctant to recognize liability for a failure to act, or nonfeasance.¹⁰¹ In recent years, however, public policy has led courts to impose liability upon a limited group of relations involving a duty of affirmative action.¹⁰² Thus, as Prosser states, liability for misfeasance "extends to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct, or perhaps even beyond," but for liability to be imposed for nonfeasance, "it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act."¹⁰³ The relationship between physician and patient justifies such a duty. Social policy demands that a physician act affirmatively to preserve his patients' health and well-being.

Whether based upon an act or an omission, the claim for wrongful life should be upheld. Many courts have held a physician liable in tort for a breach of a duty undertaken when he begins to treat a patient and then neglects or abandons him.¹⁰⁴ The failure to diagnose a readily detectable disease, to administer a standard medical test, or to inform a pregnant woman of the risks of congenital defects

101. See PROSSER, *supra* note 65, at 338-39. Liability for nonfeasance originally was restricted to persons involved in "public callings"—those people who undertook a duty to give service to the public, for example, innkeepers and common carriers. *Id.*

102. *Id.* at 339.

103. *Id.* RESTATEMENT (SECOND) OF TORTS § 284 (1965) states:

Negligent conduct may be either:

(a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or

(b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

104. See PROSSER, *supra* note 65, at 340 (citing *Thaggard v. Vafes*, 218 Ala. 609, 119 So. 647 (1928); *Braun v. Riel*, 40 S.W.2d 621 (Mo. 1931); *Mehigan v. Sheehan*, 94 N.H. 274, 51 A.2d 632 (1947); *Cochran v. Laton*, 78 N.H. 562, 103 A. 658 (1918)).

can all be considered forms of neglect. Furthermore, what appears to be an omission actually may be affirmative misconduct. If a physician fails to administer a prenatal test to determine congenital defects that is mandated by standard professional conduct, he is not failing merely to act to protect the mother and the potential child, but actively is practicing medicine carelessly and harming his patients.¹⁰⁵ Consequently, whether a doctor's negligence is characterized as misfeasance or nonfeasance, should have no effect on liability in wrongful life cases.

Damages

For a claim of negligence to be complete, the plaintiff must prove that he suffered actual injury as a result of the defendant's conduct.¹⁰⁶ Tort damages generally are compensatory in nature. The courts seek to measure the loss or detriment suffered by the plaintiff and to compare the victim's present position with his position prior to the tortfeasor's harmful conduct or the plaintiff's present position had the defendant's conduct not occurred.¹⁰⁷ Proof of damages is the primary obstacle to a successful wrongful life claim, for most wrongful life claims have been dismissed because the courts have deemed damages in such cases to be immeasurable.¹⁰⁸

In wrongful life cases, the infant and its parents assert that damages result from allowing the infant to live and seek to compare the child's defective life with the alternative of nonexistence. Most courts and authors claim that such a comparison is impossible because no values can be placed on life with defects and "the utter void of nonexistence."¹⁰⁹ Therefore, it is argued, because damages cannot be ascertained, the cause of action must fail.¹¹⁰

105. As Prosser states:

The question appears to be essentially one of whether the defendant has gone so far in what he has actually done, and has got himself into such a relation with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from failing to confer a benefit upon him.

PROSSER, *supra* note 65, at 340.

106. *Id.* at 143.

107. See C. McCORMICK, DAMAGES 560-62 (1st ed. 1971).

108. See notes 11-20 *supra* & accompanying text. See also *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

109. *Gleitman v. Cosgrove*, 49 N.J. 22, —, 227 A.2d 689, 692 (1967).

110. The rationale quoted most often for this theory is that of *Tedeschi*, *supra* note 15, at 529: "[N]o comparison is possible since were it not for the act of birth the infant would not

Basing the denial of recovery upon the inability to determine damages has been widely criticized.¹¹¹ A doctrine widely recognized by the courts in granting remedies is that damages need not be proved with mathematical certainty; difficulty in assessing damages will not prevent recovery by the injured party.¹¹² As the United States Supreme Court has stated: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."¹¹³ Thus, if the plaintiff in a wrongful life case can show that the defendant negligently injured him, the uncertain amount of such damage should not bar the plaintiff's recovery. As many have argued, the measurement of wrongful life damages is no more speculative than the common practice of placing a monetary value upon pain and suffering.¹¹⁴

In wrongful life actions brought by the parents alone, damages sought include the parents' pain and suffering in having a defective child,¹¹⁵ and emotional trauma.¹¹⁶ The problem with the parents'

exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage."

111. See *Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460, 463-71 (1976) (Margett, J., dissenting); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970) [hereinafter cited as "*Wrongful Life*" [A Suggested Analysis]].

112. See *Whitehorse v. Briggs*, 555 F.2d 283, 287 (10th Cir. 1977); *Kinty v. UMW*, 544 F.2d 706, 725 (4th Cir. 1976); *L.C.L. Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 421 F. Supp. 1090, 1102 (N.D. Tex. 1976).

113. *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 562 (1931). The Court continued:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

Id. at 563; accord, *Compania Pelineon De Navegacion v. Texas Petroleum Co.*, 540 F.2d 53, 56 (2d Cir. 1976); cf. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1214 (1970) ("[I]t is hard to defend a requirement that attempts to cope with the necessity for speculation by denying recovery altogether rather than by resorting to reasonable approximation.").

114. See *Wrongful Birth*, *supra* note 1, at 559; "*Wrongful Life*" [A Suggested Analysis], *supra* note 111, at 66.

It is conceivable that the phrasing of the child's wrongful life claim in *Park v. Chess* 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), modified and *aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), as one for "pain and suffering" could have affected the court's favorable decision. By claiming damages for pain and suffering, the plaintiff expressed her damages in a traditionally accepted tort form, which gave an air of legitimacy to her claim.

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

116. *Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976).

claim is that if the action is based on the premise that the parents would have prevented conception or obtained an abortion had they been informed of possible defects, then all expenses and injuries during the child's life logically would be included as damages. The plaintiffs would have the defendant physician totally support their child while they raise it. Such a result would be extremely harsh. Although some courts and commentators have attempted to mitigate the parents' recovery by reducing the damages to the extent that the parents have received a benefit from the birth, this practice increases the speculative nature of the damages and may result in a complete denial of recovery.¹¹⁷

If it is shown in a wrongful life case that damages do exist, the difficulty in measuring those damages should not preclude recovery by the plaintiff. The problem is finding a system to measure the damages as reasonably as possible without resorting to sheer guesswork. One recent critic suggested the assignment of relative values to life itself, life with defects, and nonexistence.¹¹⁸ Using a flexible, case-by-case approach which would consider the severity of each child's defects, the author argues that establishing these values gen-

117. The "benefits rule" of the RESTATEMENT OF TORTS § 920 (1939) reads: "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable."

The rule has been applied primarily in wrongful birth cases (distinguished from wrongful life cases in note 8 *supra*). In earlier cases, courts commonly held that the benefit of life, under any conditions, outweighed any injury suffered as a result of being born. Recently, however, the judiciary has recognized that benefits will differ from case to case because of varying circumstances, for example, present severity of the child's illness and the prognosis. Thus, the benefits rule should not be applied automatically to expunge damages; the trier of fact must evaluate the benefit according to all the circumstances of each case. *See, e.g., Troppi v. Scarf*, 31 Mich. App. 240, ___, 187 N.W.2d 511, 517-19 (1971).

118. "Wrongful Life" [A Suggested Analysis], *supra* note 111, at 64-66. The author based this scheme on the treatment by the court in *Gleitman* of life, defective life, and nonexistence. Briefly, the Note gave the following values: life = a plus value (+), life with defects = a plus-minus value (±), nonexistence = a minus value (-). The assumption made in this analysis, and that made by the court in *Gleitman*, is that life is preferable, that life with defects has both drawbacks and rewards, and that nonexistence is always the least desirable state.

The more severe the defects, however, the less clear it becomes that a defective life has greater value than nonexistence. Thus, in extreme cases, the values should shift in the following manner: life without defects = a plus value (+), nonexistence = (0), life with defects = a minus value (-). According to this analysis, in certain situations, it would be preferable not to exist rather than to suffer from severe mental and physical defects. In such cases, the court should provide for a recovery that would restore the injured plaintiff to the value accorded to nonexistence, the preferred alternative state (the level at which nonexistence is no longer preferable to existence).

erates a less speculative compensatory figure for wrongful life.¹¹⁹ Although this system provides some general direction for measuring damages, it offers no practical guidance for assessing the reasonable monetary award that would compensate a plaintiff for its birth in an impaired state as opposed to not being born.

Proven wrongful injury to another should not go unredressed, no matter how difficult damage measurement may be. Denial of recovery in such instances deprives the plaintiff of his legal rights and offers no deterrent to repetition of the tortfeasor's negligence. Instead of becoming mired in the difficult question of whether nonexistence outweighs existence, if the courts find that the defendant has harmed the plaintiff, they should compensate the victim for the loss arising from his defects as compared to life without the defects.¹²⁰ Factors such as the number and type of defects should be considered. Although the defendant's negligence caused the birth and not the defect, the defendant, aware of the certain or probable handicap, should have given the parents the opportunity to decide whether to prevent the birth.¹²¹ Although the child claims that his very life is wrongful, in reality the child's complaint is that he is forced to live in a handicapped condition.

When courts analyze the parents' claims, the same reasoning can be applied to limit recovery to those damages resulting directly from the handicap.¹²² Because the core of the parents' complaint concerns

119. "Wrongful Life" [A Suggested Analysis], *supra* note 111, at 66.

120. Because life with defects and a normal, healthy life are both common variables to which man can give relative values, there is no reason why a court could not use the standard compensatory formula of comparison and proceed to award damages for such standard tort damages as medical expenses, lost earning capacity, and pain and suffering.

121. See Tedeschi, *supra* note 15, at 538.

122. This limitation was employed in *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975). The defendant failed to diagnose the mother's rubella during pregnancy and warn her of the risks to the potential child. After the child was born with defects, the court allowed the mother's suit for wrongful life but held that recovery would be limited to the expenses reasonably necessary for the special care and treatment of the child due to its physical impairment. *Id.* at 850; *accord*, *Shack v. Holland*, 89 Misc. 2d 78, 389 N.Y.S.2d 988 (1976) (parents' damages limited to those occasioned by their child's deformity—medical, hospital, and supportive expenses); *cf.* *Coleman v. Garrison*, 327 A.2d 757 (Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975), in which the court refused to recognize damages for "wrongful life" because of life's precious nature; but to prevent immunity of the medical profession for improper treatment of patients seeking to avoid pregnancy, the court would recognize a cause of action for "wrongful pregnancy." The scope of the injury was limited, however, to the actual expenses and difficulties attending an unexpected pregnancy; recoverable damages included pain and suffering, cost of unsuccessful treatment, loss of comfort and consortium, and medical expenses resulting from the injury.

their child's deformity, recoverable damages should be limited to pain and suffering, emotional trauma, and medical and other expenses evolving directly from the handicap. This limitation provides a relatively easy measurement of damages and places a ceiling on the defendant's liability, which allows him to escape paying the ordinary expenses accompanying the life of every child.¹²³

PUBLIC POLICY

If a court finds that a wrongful life claim satisfies the traditional tort elements of duty, breach, proximate cause, and negligence, recovery still may be refused on the basis of public policy. Courts have based such denials on a public policy opposing abortion,¹²⁴ the expansion of medical malpractice liability,¹²⁵ and an influx of fraudulent claims.¹²⁶

Abortion

Early wrongful life cases, such as *Gleitman v. Cosgrove*¹²⁷ and *Stewart v. Long Island College Hospital*,¹²⁸ based denials of recovery on "the right to life" and a public policy discouraging abortion.¹²⁹ This rationale, although valid when those decisions were reached, is no longer viable.

123. One commentator has argued that another alternative to the difficult measurement of compensatory damages in wrongful life suits is to rely on punishment and deterrence by imposing punitive damages on the defendant. 49 *Iowa L. Rev.* 1005, 1011-17 (1964). Although the deterrent function of tort law is important, punitive damages are assessed traditionally only if the defendant's act is characterized as malicious, evil, willful, or wanton. See PROSSER, *supra* note 65, at 10. "Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as gross." *Id.* Thus, punitive damages would not be applicable in most, if not all, wrongful life cases. The imposition of liability for compensatory damages alone should suffice to deter negligent conduct.

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

125. See, e.g., *Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976).

126. *Id.*

127. 49 N.J. 22, 227 A.2d 689 (1967).

128. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

129. It is important to distinguish between a therapeutic abortion—one necessary to preserve the life of the mother—and an eugenic abortion—one performed to preserve the integrity, well-being, and physical perfection of the human race. Thus, a wrongful life claim would be based on the premise that had the parents been warned properly about possible birth defects, they would have procured an eugenic abortion. The early cases were decided at a time when eugenic abortions, and in some states even therapeutic abortions, were illegal. Therefore, the courts did have a valid public policy reason to refuse the wrongful life claim at that time. See notes 130-33 *infra* & accompanying text.

In 1973, the Supreme Court held in *Roe v. Wade* that the due process clause of the fourteenth amendment, which protects the individual's right of privacy from state intrusion, includes a woman's qualified right to terminate her pregnancy.¹³⁰ During the first three months of pregnancy, the decision to abort is strictly between the patient and her physician.¹³¹ According to the decision, only in the third trimester of pregnancy can the state, "in promoting its interest in the potentiality of human life," regulate or proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."¹³² This important decision erased the illegality of abortion and declared that a woman's fundamental right of privacy could not be infringed by preventing her from having an abortion in the first trimester. Therefore, the *Roe* decision removed the policy reason of discouraging abortion as a barrier to recovery upon a wrongful life claim.¹³³

Expanding Malpractice Liability

Some courts have held that allowing recovery from wrongful life would be an unwarranted expansion of malpractice liability.¹³⁴ To examine this rationale, the form of the action must be distinguished from the standard of conduct. The nature of the claim is different from other claims for prenatal injury because wrongful life is based on the physician's negligent advice rather than his negligent action. In the typical prenatal injury case, the doctor is alleged to have harmed what would have been a normal existence for the child,

130. 410 U.S. 113, 153 (1973).

131. *Id.* at 163-64. The only difference between the first and second trimesters is that during the latter the state, to protect the mother's health, may regulate the abortion procedure in terms of qualifications and licensing of persons performing the procedure and the facilities to be used. Abortions during the second trimester generally cannot be deemed illegal. *See id.* at 164-66.

132. *Id.* at 164-65.

133. If a particular wrongful life claim relied on the premise that had the parents been informed properly of potential defects they would not have conceived the child, as in *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), a public policy supporting a right to life could not block the claim. The Supreme Court has recognized a constitutionally protected right to use contraceptives and choose whether to bear children. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Furthermore, if a state advocates family planning to the extent that it provides funds for contraceptives as part of its welfare program, public policy cannot be said to disfavor contraception. *Troppi v. Scarf*, 31 Mich. App. 240, —, 187 N.W.2d 511, 517 (1971).

134. *See, e.g., Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976).

whereas the wrongful life claim alleges that the physician harmed the child by failing to allow it the opportunity not to exist.

Although these differences unquestionably exist, both types of claims focus upon defects that could have been avoided had the doctor acted prudently. In both instances, the doctor's act or omission contributed to the existence of the defect, whether directly or indirectly. The physician's required standard of conduct has not been expanded; nor is the physician in a wrongful life claim held to a higher degree of care. Courts traditionally have recognized new tort claims if a person wrongfully injures another. If a physician has injured a child and its parents in a new way through negligent medical conduct, the expansion of liability is justified; a refusal to allow such a claim is an unwarranted shield for careless medical conduct.¹³⁵

Fraudulent Claims

Although frequently expressed by courts in wrongful life cases, the fear of encouraging fraudulent claims by allowing a new cause of action has little merit. It would be virtually impossible for an infant to feign blindness, deafness, mental retardation, or other disease symptoms. Physicians could determine the extent of the injury and whether it coincided with the claim. Alternatively, a competent court or jury should be able to detect false testimony as to a doctor's failure to notify the parents of potential birth defects. Perhaps the greatest potential for fraud lies in claims by the parents for emotional distress. Such damages, however, are commonly sought in modern courts; therefore, trial judges should be thoroughly familiar with these claims and be aware of any deceit. As the court in *Park v. Chessin*¹³⁶ stated: "[T]he Judiciary can intelligently sift the wheat from the chaff and . . . it has the ability to succinctly deal with any attempted fraudulent scheme or claim and make short shrift thereof."¹³⁷

135. The trial court in *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), rejected previous denials of wrongful life claims based on this policy: "What statute or theory of law grants preferential treatment of immunity to the medical profession? . . . This court believes that the medical profession is not 'unreasonably burdened' if held liable in damages for the injuries caused to those who depend upon it for their very lives." *Id.* at ____, 387 N.Y.S.2d at 211.

136. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976).

137. *Id.* at ____, 387 N.Y.S.2d at 211. Any type of claim is subject to fraudulent presenta-

CONCLUSION

The tort of wrongful life, although generally not accepted by American courts, fits into tort law's traditional framework of duty, breach, proximate cause, and damages. The physician owes a duty to provide an unborn infant with sound medical care; this includes an obligation to inform the child's parents of likely or possible birth defects. If the physician fails to apprise the parents of the risk of fetal abnormalities, he has breached his duty. If the child is born with defects and the parents can show that they legally would have prevented the child's birth had they been informed of the chance of deformity, the doctor's negligence should be considered a proximate cause of the infant's injury, making the medical practitioner liable in damages to the child and its parents. In determining whether damages exist, factors such as the number and severity of defects, as well as the degree of professional irresponsibility involved, are important. Although compensatory damages may be difficult to ascertain in wrongful life cases, if they are shown to exist, recovery should not be denied totally. A practical approach, both in terms of measurement and limitation, is to award traditional tort damages stemming solely from the defects suffered by the child rather than balancing existence with nonexistence.

Various public policy arguments traditionally employed to defeat the wrongful life claim have been eroded by modern judicial decisions and changing social values. Each case must be considered on its merits, with the underlying theme being that if a child is to live a life with defects, it must be the result of an informed choice by the parents, not because a physician's failure to supply reasonable medical advice gave them no alternative. The doctor's duty to preserve fetal health must include doing what is medically best for the child; by failing to allow the parents to weigh the reasonable alternatives for their child, the physician fails in that duty and decides the infant's destiny. Therefore, he ultimately should be responsible for resulting injury to the child in the form of a defective life.

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tion. One common and proper function of courts is to separate false from bona fide claims. Courts should not deny access and recovery for many legitimate claims simply to avoid having to determine that certain other claims are fraudulent.