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COMMENTS

WRONGFUL LIFE: SHOULD THE ACTION BE ALLOWED?

A woman undergoes a bilateral tubal ligation to prevent conception because she fears a hereditary impairment. The doctor improperly performs the operation and the woman becomes pregnant; subsequently a child is born with birth defects that will require extensive medical treatment. The parents of the child bring suit against the doctor to recover their expenses incurred because of the pregnancy, and to recover the costs associated with rearing the deformed child along with their general pain and suffering damages. In addition, the parents sue on behalf of the child alleging that he should never have been born; in other words, the child alleges that he has been injured by the fact of his birth and seeks compensation for having been born.

This paper examines the suit brought on behalf of the child, namely a wrongful life action. While not ignoring the problems of fitting wrongful life into the traditional tort framework of duty, causation, and damages, this analysis focuses primarily on the policy-oriented problems inherent in the action.¹ Two principal policy dilemmas will be addressed: identification

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1. To find tort liability on the part of a defendant, it must be established that the defendant owed the plaintiff a duty. It has been suggested in the wrongful life cases that the duty to the unborn child flows from the duty owed to the mother, a duty to properly inform. See Comment, "Wrongful Life": The Right Not to Be Born, 54 Tul. L. Rev. 480 (1980). In wrongful birth cases, the parents claim they would have avoided conception or terminated the pregnancy had they been properly informed of the risks involved; therefore, the duty was breached by the giving of misinformation. However, in wrongful life cases, the duty is to a nonexistent person. The plaintiff in the wrongful life action does not exist at the time of the breach.

There are cases that have established a duty owed to a nonexistent person. In *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1967), a doctor negligently transfused Rh positive blood into a woman who had Rh negative blood. Years later, a child was born with severe defects attributable to the transfusion of incompatible blood. The court stated that the doctor owed a duty to the child because it was foreseeable that a child would later be born with problems because of the transfusion. But see *Albala v. City of New York*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981), which held a child does not have an action for a pre-conception tort committed against his mother. In that case, the mother's uterus was perforated when she underwent an abortion; four years later, the child was born brain damaged. Although the court stated it was foreseeable that the mother would again conceive and the child could be affected adversely, the court

of the injury and assessment of the type and amount of damages to be awarded. The state of the law in Louisiana is noted, and it is suggested that Louisiana follow the majority rule and refuse to recognize a cause of action in wrongful life.

In the 1963 case of *Zepeda v. Zepeda*,² an extramarital child sued his father because he would be required to live with the stigma of illegitimacy. Although the court denied recovery, *Zepeda* was the origin of the tort action which came to be known as wrongful life in *Gleitman v. Cosgrove*.³ In *Gleitman*, brought four years after *Zepeda*, a child was born with birth defects attributable to German measles, a disease which the mother had been informed would have no effect on the child she was carrying. The court dismissed the wrongful life complaint. By 1980, only five state supreme courts⁴ had considered the wrongful life cause of action; all

denied that foreseeability is the only question in this type of case.

Even *Renslow* supports the idea of duty in only some cases. In genetic counseling suits, it reasonably can be said that the negligent party should foresee that if the testing is improperly performed and the parents rely on that information, the child born could have the defects from the hereditary impairment that should have been detected. The foreseeability is not as clear in failed sterilization cases. In those situations, the doctor can reasonably foresee that if the procedure is negligently performed, the woman could become pregnant. Absent any indication or suspicion of hereditary impairments or problems manifested in the woman's other children, however, the doctor can not be expected to foresee the birth of a deformed child.

Other duty problems exist. If in a wrongful life case the doctor does owe a duty to the not yet existing person based on the parents' need for accurate information, when does this duty end? Suppose a man and woman undergo genetic counseling and incorrectly are told that they are not carriers of a certain impairment. The woman becomes pregnant. Later it is learned that the tests were improperly performed, and the parents discover the error. Does the counselor's duty now end because the parents have received the proper information and an abortion is available?

Even if duty can be established in wrongful life cases, causation is still a problem. The negligent party is being sued for causing the birth through either a failure to prevent conception or a failure to properly inform the parents so that conception could be avoided or the pregnancy could be terminated. The defendant is not being sued over the birth defect. He did not cause the impairments from which the child suffers; nature did. It should be noted, however, that in some of the wrongful life cases the defendant is the cause of the deformity. For example, in *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983), the doctor prescribed Dilantin to the mother to control her epilepsy; the medicine caused birth defects in two children. Plaintiffs could have brought this case under a typical malpractice theory, alleging that the doctor caused the defects and seeking recovery therefore, and the problems discussed in this article could have been avoided.

Although this cursory discussion poses many interesting questions, a thorough examination of the issues raised is beyond the scope of this article.

2. 41 Ill. App. 2d 240, 190 N.E.2d 849 (Ill. App. 2d Cir. 1963), cert. denied, 379 U.S. 945, 85 S. Ct. 444 (1964).

3. 49 N.J. 22, 227 A.2d 689 (1967).

4. Numerous appellate court decisions were rendered during this time period; this comment analyzes only state supreme court decisions. No United States Supreme Court decision has addressed this issue.

disallowed it.⁵ Since then, that figure has almost tripled with only three state supreme courts allowing the action, all of which limited recovery.⁶

5. The five state supreme courts which faced wrongful life claims were: the New Jersey Supreme Court in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), overruled in part by *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), overruled by *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984), in which the New Jersey court recognized the wrongful life action, see *infra* note 5 (child born with Down's Syndrome after doctors did not tell the mother of the availability of amniocentesis); the New York Court of Appeals in *Stewart v. Long Island College Hosp.*, 30 N.Y.2d 895, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (mother gave birth to deformed child after she was told by doctors, who suspected the child was deformed, that abortion was not necessary), and later in *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (two cases: child born with Down's Syndrome to 37 year old mother who was never advised of the increased pregnancy risks because of her age nor of the amniocentesis procedure, and a child born with kidney disease after parents were advised that the same disease, which caused the death of their first child, was not hereditary); the Wisconsin Supreme Court in *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (no wrongful birth or wrongful life allowed for illegitimate child after mother consented to sexual relations on the promise of marriage from an already married man), and again in *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (child born with Rubella Syndrome after doctor misdiagnosed German measles in first month of mother's pregnancy); the Delaware Supreme Court in *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975) (healthy child born after doctor performed a bilateral tubal ligation); and the Alabama Supreme Court in *Elliot v. Brown*, 361 So. 2d 546 (Ala. 1978) (child born with serious deformities after vasectomy procedure on father).

6. The following state supreme courts have refused to recognize the action: the Idaho Supreme Court in *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984) (child born with severe congenital defects after doctor misdiagnosed rubella); the Texas Supreme Court in *Nelson v. Krusen*, 678 S.W. 2d 918 (Tex. 1984) (child born with Duchenne muscular dystrophy after mother was told she was not a genetic carrier of the disease); the North Carolina Supreme Court in *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 107 S. Ct. 131 (1986) (child born with Down's Syndrome after doctor failed to advise of availability of amniocentesis); the Kansas Supreme Court in *Bruggeman v. Bruggeman*, 239 Kan. 245, 718 P.2d 635 (1986) (child born with same congenital anomalies as sister after parents were told that impairments were not genetically transmitted); the New Hampshire Supreme Court in *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (N.H. 1986) (child born deformed after doctor failed to test and advise mother of rubella and its possible effects); and the Minnesota Supreme Court in *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (upheld as constitutional the state's statutory ban on wrongful birth and wrongful life actions).

The following courts have also denied the action, but in a less clear manner: the Pennsylvania Supreme Court in *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981) (lower court judgment affirmed by an equally divided court where the child was born with a crippling nerve disease after both vasectomy and abortion failed); the Massachusetts Supreme Judicial Court in *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) (court denied claims of "DES" daughters, classifying it as a wrongful life action); the Wyoming Supreme Court in *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982) (doctor performed 18 tubal ligations which resulted in 11 healthy children, four abortions and three women still pregnant at the time of suit; court held that under the circumstances, wrongful life actions would not be maintained); and the West Virginia Supreme Court

In Louisiana, the supreme court has not addressed the issue, and only one appellate court decision has been rendered on the subject of wrongful life.⁷

At the outset, it is necessary to distinguish wrongful life from two closely related causes of action, wrongful pregnancy and wrongful birth. Wrongful pregnancy, sometimes termed wrongful conception, is an action brought by the parents of a generally healthy, but unwanted child whose birth resulted from failed sterilization procedures, improperly administered contraceptive measures, or late pregnancy diagnosis which prevented abortion.⁸ Wrongful birth actions typically involve deformed children.⁹ Also brought by the parents, the wrongful birth claims usually arise from inadequate genetic counseling or failed sterilization procedures where parents claim they would have avoided conception or terminated the pregnancy had they been properly advised of the risks to the potential child.¹⁰

An action for wrongful life, though based generally on the same fact patterns as wrongful birth, differs in that the suit is brought on behalf

of Appeals in *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985) (court stated wrongful life would not be recognized unless it was statutorily allowed; two cases: one healthy child born after a failed tubal ligation, and one deformed child born after doctor failed to perform amniocentesis).

The following three supreme courts have allowed wrongful life actions: the California Supreme Court in *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (child born deaf after parents were told their first child did not suffer from the same hereditary deafness); the Washington Supreme Court in *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983) (two children born deformed after doctor prescribed Dilantin to mother to control her epilepsy); and the New Jersey Supreme Court in *Procanik by Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984) (child born with Rubella Syndrome after doctor failed to diagnose German measles of mother). It appears that the Illinois Supreme Court favors the wrongful life action. See *Goldberg v. Ruskin*, 113 Ill. 2d 482, 499 N.E. 2d 406 (1986) (the court stated that no general damages are available in wrongful life actions, but did not address the issue of special damages; however, the court cited *Simieniec v. Lutheran Gen. Hosp.*, 134 Ill. App. 3d 823, 480 N.E. 2d 1227 (1985), appeal allowed 108 Ill. 2d 589 (1985) which allowed the wrongful life action but limited recovery to special damages).

7. *Doe v. Cronan*, 487 So. 2d 461 (La. App. 5th Cir. 1986) (the court summarily dismissed action brought by child for illegitimate birth stating the authority for such actions must come from the legislature or the Louisiana Supreme Court).

8. See, e.g., *Yasar v. Cohen*, 483 So. 2d 1099 (La. App. 4th Cir. 1986).

9. Some wrongful birth cases are brought by parents of healthy children, but often the normal child rearing expenses are denied. For a discussion of whether to allow damages for healthy children, see *Miller v. Johnson*, 231 Va. 177, 343 S.E.2d 301 (1986) (although characterized in that opinion as wrongful pregnancy damages).

10. The state of wrongful birth claims and the damages recoverable in that action varies widely from state to state. Some cases have disallowed the action completely; see, e.g., *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). Of those courts allowing the wrongful birth action, the types of damages awarded has also varied. Compare, e.g., *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) and *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979). See generally, *University of Arizona Health Services Center v. Superior Court*, 136 Ariz. 579, 667 P.2d 1294 (1983).

of the child. Confusion often arises as to the nature of a wrongful life claim. The child is not suing for his birth defects, but for his existence. The deformed child pleads not that the negligence of the defendant, usually a doctor, caused his birth defects, but rather that the defendant's negligence caused his birth. The child's claim is that he never should have been born, in other words, that he would be better off dead.¹¹

Identifying the Injury

The courts have developed a recurring theme in their denial of wrongful life actions: that no injury has been suffered on the part of the claimant by his birth. This idea has been addressed in a number of ways, but is often couched in the rather nebulous concept of "preciousness of life."¹² As was stated in the case of *Coleman v. Garrison*,¹³ the first decision to consider the wrongful life action:

The preciousness of human life should not be held to vary with the circumstances surrounding birth. To make such a determination, would, indeed, raise the unfortunate prospect of ruling, as a matter of law, that under certain circumstances a child would not be worth the trouble and expense necessary to bring him into the world.¹⁴

The courts are unwilling to determine that life is an injury even when plagued by severe deformities because such a finding would carry an implicit denial of life as "precious."¹⁵

The basic problem with terming the life as a wrongful injury suffered at the hands of the defendant is that the negligent party did not cause the birth defects with which these children must live. The child never had a chance at a normal life; the choice was unfortunately between impaired life or no life, not between impaired life and nonimpaired life.¹⁶ Theoretically, the court cannot look to the defect to determine the "injury," but must look to the fact of the life itself. Considering life as the injury leads the courts to the unwanted task of determining

11. See, e.g., *Smith v. Cote*, 513 A.2d 341 (N.H. 1986).

12. See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. 1974), *aff'd*, 349 A.2d 8 (1975), *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315, 322 (1984), and *Bruggeman v. Bruggeman v. Schimke*, 239 Kan. 245, 718 P.2d 635 (1986).

13. 327 A.2d 757 (Del. 1974).

14. *Id.* at 761.

15. But see *Turpin v. Sortini*, 31 Cal. 3d 220, 233, 643 P.2d 954, 962, 182 Cal. Rptr. 337, 344-45 (1982), where the court stated, "[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life."

16. *Procanik v. Procanik v. Cillo*, 97 N.J. 339, 353, 478 A.2d 755, 763 (1984).

whether it would have been better never to have been born, "a mystery more properly left to the philosophers and theologians."¹⁷

A more pragmatic approach to the issue of injury, which includes the preciousness of life reasoning, has been to suggest that there is no right not to be born. In *Bruggeman by Bruggeman v. Schimke*,¹⁸ a wrongful life action was brought on behalf of a second-born child suffering from genetic deformities alleging that his parents were improperly advised that their first child's defects were not the result of chromosomal or biochemical imbalances. The Kansas Supreme Court stated: "It has long been a fundamental principle of our law that human life is precious. . . . A legal right not to be born—to be dead, rather than to be alive with deformities—is a theory completely contradictory to our law."¹⁹ The laws of this country protect life; there is no protection of "non-life." Therefore, as explained in the failed vasectomy case of *Elliot v. Brown*,²⁰ the wrongful life claimant is not standing on a constitutionally guaranteed right, and absent any interest in protecting nonexistence, the child lacks a legally recognizable injury.

A variation of the idea that there is no right not to be born is the idea that there is no right to be born "as a whole, functional human being."²¹ As pointed out in *Procanik by Procanik v. Cillo*,²² a case which allowed the wrongful life action, "the infant plaintiff never had a chance of being born as a normal, healthy child. Tragically, his only choice was a life burdened with handicaps or no life at all."²³ Under such reasoning, the child has not been denied a right by being born with birth defects any more than he has been denied a right by being born.

An interesting argument used to counter the idea that there is no right to be born without handicaps has been to analogize the wrongful life action to the concept of a right to die. Finding a right to die allows terminally ill patients to choose whether to undergo procedures or treatment that might prolong life. The California Supreme Court in *Turpin v. Sortini*²⁴ used the right to die concept to rebut the idea that all life

17. *Becker v. Schwartz*, 46 N.Y. 2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

18. 239 Kan. 245, 718 P.2d 635 (1986).

19. 718 P.2d at 642.

20. 361 So. 2d 546 (Ala. 1978) (in this case, the vasectomy was not a cause of the birth defect; the procedure was sought because of a fear of the effects of pregnancy upon the mother).

21. *Park v. Chessin*, 60 A.D.2d 80, 88, 400 N.Y.S. 2d 110, 114 (1977), modified by *Becker v. Schwartz*, 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (1978).

22. 97 N.J. 339, 478 A.2d 755 (1984).

23. *Id.* at 353, 478 A.2d at 763.

24. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

is preferable to nonlife; the implicit suggestion is that life itself can be an injury.²⁵

A comparison between wrongful life and right to die reasoning was recently made in *Smith v. Cote*.²⁶ However, in *Smith v. Cote*, a case in which the doctor negligently failed to diagnose the mother's German measles, the court distinguished the reasoning in wrongful life claims from right to die cases. In a right to die case, consideration is given to the person's autonomy²⁷ in deciding whether to prolong life through what often can be very painful, costly measures;²⁸ the issue is the person's right to choose life or death rather than a determination of that life as wrongful. In wrongful life cases, the determination is whether the child's life is one not worth living, whether the child would be better off never having existed. "Simply put, the judiciary has an important role to play in protecting the privacy rights of the dying. It has no business declaring that among the living are people who never should have been born."²⁹

Criteria for defining injury

In addition to the courts' unwillingness to declare as a matter of law that a life is not worth living is the problem of determining the criteria that would warrant the conclusion that a child's defect is so serious that he would be better off dead. This problem is perhaps most evident in *Turpin*, a decision that recognized an action for wrongful life.³⁰ In that case, the wrongful life claimant had been born deaf; no other physical infirmities existed. The court determined that "[i]n this case, in which plaintiff's only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all."³¹ Although the case was reversed and remanded for trial, no indication was given by the court as to what would constitute a finding of "wrongful" life.

25. *Id.* at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345.

26. 513 A.2d 341 (N.H. 1986).

27. See, e.g., La. R.S. 40:1299.58.1.A(1) (Supp. 1987) which states: "All persons have the fundamental right to control the decisions relating to their own medical care, including the decisions to have life-sustaining procedures withheld or withdrawn in instances where such persons are diagnosed as having a terminal or irreversible condition."

28. See, e.g., La. R.S. 40:1299.58.1.A(7) (Supp. 1987) which states: "The artificial prolongation of life . . . may . . . secure only a precarious and burdensome existence while providing nothing medically necessary or beneficial to the person." See also, La. R.S. 40:1299.58.2(4) and (8) (Supp. 1987).

29. 513 A.2d at 353.

30. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1987).

31. *Id.* at 234, 643 P.2d at 962, 182 Cal. Rptr. at 345.

As the court in the case of *Elliot v. Brown*³² queried, "What criteria would be used to determine the degree of deformity necessary to state a claim for relief?"³³ Must multiple defects exist, or just serious physical defects, or are severe mental deficiencies enough? The courts would not be asking a jury to determine negligence or damages or criminal culpability, but rather the determination of whether someone ever should have existed.

Practical considerations arise here. The child for whom the action has been brought cannot be asked whether he would rather be dead; he is too young or too uncomprehending to understand the question. The parents have decided for the child that the quality of his life warrants a wrongful life action. Whether or not the child prevails in his action, the court record always exists to remind the child that at least his parents, if not a jury, determined that he would have been better off had he never been born.

There is also the broader consideration of people who now live with the same or similar afflictions as the children involved in a wrongful life action. Disabled people must not only live with their handicaps, but must also face the "discrimination stemming not only from simple prejudice, but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.'"³⁴ The growing awareness of disabled people as productive members of society and the legislation passed to aid handicapped persons³⁵ should not be undermined by a judicial determination that entire groups of people have "wrongful" lives.

32. 381 So. 2d 546 (Ala. 1978).

33. *Id.* at 548.

34. *School Bd. of Nassau County, Florida v. Arline*, 107 S. Ct. 1123 (1987). The Supreme Court held that a teacher who had tuberculosis was protected under a statute aiding the handicapped.

35. See, e.g., 20 U.S.C. 1132-1 (1980) (making higher education facilities accessible to handicapped persons); 20 U.S.C. 1403 (1983) (setting up of the National Advisory Committee on Handicapped Children to be filled by the handicapped and parents of such children to review education for handicapped children); 23 U.S.C. 402(b)(1)(E) (1984) (providing for reasonable and safe access for movement across curbs by handicapped persons); 29 U.S.C. 792 (1984) (providing for the Architectural and Transportation Barriers Compliance Board which includes five handicapped persons to examine, among other things, alternative approaches for building and transportation barriers to the handicapped).

See, e.g., in Louisiana, La. R.S. 40:1299.113 (1981) which establishes "a comprehensive program designed to provide for the coordinated treatment, habilitation, and rehabilitation of persons suffering from congenital or acquired spinal cord dysfunctions."

Monetary awards

In a wrongful life action, the plaintiff child theoretically could collect damages for special expenses, such as medical treatment and special training or schooling, and for general pain and suffering.³⁶ It should be noted that some states allow the parents in a wrongful birth action to recover special expenses incurred on behalf of the child;³⁷ in such states, only the general pain and suffering damages will be at issue in a wrongful life action since the parents will have already recovered special expenses.³⁸ When the parent's wrongful birth claim has prescribed, however, the special damages are at issue.³⁹

Special damages

The courts that have allowed the wrongful life action have limited recovery to special damages. Justification for the award of special damages rests in the rationale that, but for the defendant's negligence, the child would never have incurred these expenses since the child would never have been born.⁴⁰ Although this is true, the child is not suing the defendant under the theory of wrongful life because of the defects, but rather because he is alive and suffering. The negligent party did not cause the birth defects; the wrongful life claim does not allege that the defendant did. The only allegation is that the defendant's acts wrongfully allowed the child to be born. The birth defects in these cases do not arise from actions of the defendant, but from nature.⁴¹ Although the courts admit the lack of a human hand in the defect, these courts are still willing to impose special damages under the theory of wrongful life.⁴²

Ironically, the *Turpin* case points out that tort damages are compensatory in nature, that they are designed "not to punish a negligent defendant but to restore an injured person as nearly as possible to the position he or she would have been in had the wrong not been done."⁴³ In these cases, had the wrong not been done, the child never would

36. See, e.g., 31 Cal. 3d at 224, 233-34, 643 P.2d at 956, 962, 182 Cal. Rptr. at 339, 345.

37. See supra note 10.

38. See, e.g., *Smith v. Cote*, 513 A.2d 341, 354 (N.H. 1986).

39. See, e.g., *Procanik by Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984).

40. See, e.g., *Turpin v. Sortini*, 31 Cal. 3d at 231, 643 P.2d at 961, 182 Cal. Rptr. at 344, and *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 482-83, 656 P.2d 483, 497 (1983).

41. See generally supra note 1.

42. See generally *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

43. *Id.* at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344.

have been born. Thus, under the minority view, there is no reason not to grant the child normal expenses of day-to-day life. But for the defendant's negligence, the child would never have had to go to school or purchase any of the necessities of life. However, the courts are not willing to do this; in fact, even in wrongful birth cases, claimants are often denied these normal daily expenses.⁴⁴

In allowing only extraordinary medical expenses, the court in *Procanik*⁴⁵ stated that its decision was not based on the premise that nonlife was better than impaired life but was "predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction."⁴⁶ Although this is a very noble goal, the court should not choose which damages they want to allow and then deny those which logically flow from their reasoning. To do so is to choose a result and then to ignore the reasoning used in reaching that result.

Incalculability of general damages

An often cited reason for denying wrongful life, even assuming a recognized injury exists, is that general damages "are certainly beyond computation."⁴⁷ The courts are unwilling to place a monetary value on life itself. In traditional personal injury cases, a jury is asked to determine the difference between life with the impairment and life without the impairment. In a wrongful life case, the determination is not of an impairment, but the calculation of life versus nonlife. The negligent party is not being asked to answer for the impairment, but to compensate for the life itself. The defendant is not paying for the pain of a physical injury or even for the wrongful death of a person, but for the pain and suffering of being alive.

It is interesting to note that of the three decisions which have allowed the wrongful life action, all have denied the award of general damages for the same reasons given by those courts denying the action. There is no rational way to measure life against nonlife; and even if a measure could be divined, the damages are too speculative.⁴⁸

44. See generally *supra* note 10.

45. 97 N.J. 339, 478 A.2d 755 (1984).

46. *Id.* at 353, 478 A.2d at 763.

47. See, e.g., *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 482, 656 P.2d 483, 496 (1983).

48. *Turpin v. Sortini*, 31 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 482, 656 P.2d 483, 496-97 (1983); *Procanik by Procanik v. Cillo*, 97 N.J. 339, 353-54, 478 A.2d 755, 763 (1984).

Other Damage Considerations

The heavy financial burden imposed on the defendant in these cases is obvious. Admittedly, the defendant has been negligent and his negligence has placed serious economic hardships on the family affected. However, by allowing all of the possible damages to be recovered, especially general damages of the parents and child and normal day-to-day expenses, the recovery will be excessive in comparison to the act. The harshness of the remedy does more than encourage diligence among those in the profession; it discourages the actual practice of that profession because of high litigation and insurance costs,⁴⁹ and increases the costs of the industry itself.⁵⁰

Another issue, rarely addressed, is mitigation of damages. In several cases, the woman had the opportunity of undergoing an abortion and chose not to or placing the child for adoption.⁵¹ Should the negligent party then be held accountable in actions for wrongful pregnancy, wrongful birth, or wrongful life when the birth could have been prevented or the child placed with people who would not have found the life wrongful? Clearly, this is a very sensitive issue. The courts probably would not want to hold that a mother has the duty to abort, especially given the fact that for many people abortion is not a viable alternative due to religious or moral beliefs. Forcing someone to place their child for adoption is equally difficult.⁵²

This raises another question. Could a child after reaching majority bring a wrongful life action against his parents because he was brought into the world instead of being aborted? Although this may sound farfetched, the California legislature, in response to an appellate court decision in that state that allowed the wrongful life action, passed a statute relieving parents of any liability in these cases.⁵³

Louisiana

As of this writing, the Louisiana Supreme Court has not addressed the wrongful life action. The sole appellate decision, *Doe v. Cronan*,⁵⁴

49. P. Danzon, *Medical Malpractice* 85 (1985). But see also for an earlier study, G. Burghart, *Medical Malpractice and the Supply of Surgeons in The Economics of Medical Malpractice* 103-23 (1978).

50. P. Danzon, *Medical Malpractice* 2-4 and 131-32 (1985).

51. See, e.g., *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

52. See, e.g., *University of Arizona v. Superior Court*, 136 Ariz. 579, 586 n.5, 667 P.2d 1294, 1301 n.5 (1983) (discussed in the wrongful birth context).

53. Cal. Civ. Code § 43.6 (West 1982) which states in part: "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born."

54. 487 So. 2d 461 (La. App. 5th Cir. 1986).

involved a factual situation similar to *Zepeda*, the illegitimate status case. The court summarily dismissed the case, finding no cognizable cause of action for being born illegitimate.⁵⁵ It is submitted that when the courts are confronted with a more typical wrongful life action, they should follow the majority rule and deny the cause of action.

In addition to the concerns discussed above, further policies of this state warrant nonrecognition of wrongful life. Louisiana always has had a strong policy of protecting the family, as is obvious through an examination of its successions law⁵⁶ and family law.⁵⁷ Implicit in these provisions is the recognition of the importance of the family unit. To allow parents to declare that their child's life is not one worth living could easily strain the parent-child relationship and leave the child to later ponder his own self-worth. Also relevant is Civil Code article 227, which states: "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children." At the least, the collection of damages for the normal day to day expenses of rearing a child under wrongful birth and wrongful life actions would be in contavention of this article. The obligation to support children is on their parents, not upon a negligent party who caused their birth.

Conclusion

In conclusion, it is submitted that policy reasons dictate that wrongful life should not be allowed. The claim questions the belief of the preciousness of life itself; it finds life to be an injury. Wrongful life claims pose serious problems as to what criteria define a "worthless" life. It allows parents to declare that their child's life is not worth living, straining the family unit and leaving the child to speculate later on the value of his existence. Additionally, a judicial determination of a life as "wrongful" because of an accompanying handicap makes serious inroads into the progress made toward changing society's attitudes toward the disabled. Wrongful life cases necessarily entail speculative damages impose disproportionately high costs upon defendants. It poses difficult

55. *Id.* at 462.

56. See, e.g., La. Civ. Code art. 1495 dealing with forced heirs which states: "[T]he heirs are called forced heirs, because the donor cannot deprive them of the portion of his estate reserved for them by law, except in cases where he has just cause to disinherit them." See also, La. Const. art. XII, § 5 which states in part, "No law shall abolish forced heirship."

57. See, e.g., La. Civ. Code art. 146 which declares that joint custody of children is favored. See also, *Brooks v. Brooks*, 469 So. 2d 398, 400 (La. App. 3d Cir. 1985) which states: "The primary purpose of La. C. C. art. 146 is to promote the children's best interest by allowing the physical care and custody of the children to be shared by the parents so that the children have frequent, continuing contact with both parents."

abortion and adoption questions. The traditional tort framework issues should not be addressed; the claim should be denied for policy reasons before those issues are even considered.

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