University of Baltimore Law Review

Volume 22
Issue 2 *Spring 1993*

Article 3

1993

Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?

Alan J. Belsky
University of Baltimore School of Law

INJURY AS A MATTER OF LAW: IS THIS THE ANSWER TO THE WRONGFUL LIFE DILEMMA?

Alan J. Belsky†

I. INTRODUCTION 186
II. WRONGFUL LIFE AND WRONGFUL BIRTH: AN OVERVIEW OF THESE DISTINCT BUT RELATED TORT ACTIONS 189
A. *Wrongful Life and Wrongful Birth Before Roe v. Wade* 191
B. *A Coming of Age for Wrongful Life: Judicial Qualification of the Damages Recoverable* 196
III. WRONGFUL LIFE AND THE TRADITIONAL TORT FRAMEWORK 205
A. *Establishment of a Duty to Parent and Unborn Child* 205
1. Prenatal Tort: The Independent Legal Status of the Unborn 205
2. The Viability Standard 208
3. Disregard for the Viability Standard: Conception and Beyond 209
a. Previability Tort 210
b. Preconception Tort 211
B. *Breach of Duty: The Evolution of Genetics and the Standard of Care for Genetic Counselors* 215
1. Genetic Counseling and the Role of the Counselor 217
2. The Undefined Standard of Care for Genetic Counselors 218
C. *Proof of Causation* 220
D. *Birth as an Injury: The Metaphysical Conundrum* 222
1. Right-to-Die: An Appropriate Analogy 223
2. Measuring Wrongful Life Damages in Economic Terms 234

---

† B.A., 1987, University of Baltimore; J.D. *cum laude* 1991, University of Baltimore School of Law; Associate, Rochlin, Settleman & Dobres, P.A., Baltimore, Maryland. I wish to thank my wife Stacey, and my parents, Donna and Calvin, for the encouragement to complete this Article, and those who have listened to my views on this subject and who have expressed their views to me.

3. The Benefit Doctrine of Restatement (Second) of Torts § 920 237
E. Public Policy Considerations: The Fifth Element of the Tort Framework 239
1. Parental Liability 240
2. Sanctity of Life 243
3. Defensive Medicine 245
4. Judicial Deference to Legislative Pronouncement 246
IV. STRICT LIABILITY FOR DEFECTIVE GENETIC COUNSELING 248
A. Strict Products Liability as a Model 248
B. Erroneous Genetic Counseling as a Defective Treatment 251
C. Policy Considerations for Imposing Strict Liability 253
1. Difficulty in Proving Negligence 253
2. Incentive to Act Prudently: An Economic Perspective to Genetic Counseling 254
3. Genetic Counselor as Best Accident Avoider 256
4. Genetic Counselor as Best Risk Allocator 256
5. The Obligation of the Genetic Counselor as a Market Participant 257
D. Judicial Rationales for Not Imposing Strict Liability on Medical Providers 258
V. CONCLUSION 266

I. INTRODUCTION

It is every parent's worst fear that their child will be born with a debilitating birth defect. Equally tragic is the harsh reality confronting the child who must cope with the physical, emotional, and economic burdens precipitated by her handicap.[1] Advances in medical genetics have brought about greater scientific understanding of birth-related disorders, and concomitant improvements in the ability of medical providers to diagnose and treat many congenital anomalies during the early stages of fetal gestation. Diseases such as Down's syndrome[2] and Tay-Sachs,[3] which until recently were difficult to

1. Use of the feminine pronoun in this Article encompasses both genders.
2. For a medical description of Down's syndrome, see *infra* note 31.
3. For a medical description of Tay-Sachs disease, see *infra* note 52.

diagnose in utero, are now capable of detection soon after and even before a child is conceived.[4]

Advances in prenatal diagnoses and treatments have heightened expectations that certain genetic conditions will be averted either by allowing parents the opportunity to avoid the pregnancy or by correcting the condition in utero. Unfortunately, diagnosable genetic conditions sometimes remain undiagnosed because of negligent medical care, thus resulting in the birth of a handicapped child and the initiation of lawsuits against obstetricians, gynecologists, and genetic counselors.[5] One cause of action which is more frequently visiting those rendering medical care for the unborn, and which has generated sharp legal, philosophical, and ethical debate among jurists, is the tort action for wrongful life.

In theory, the wrongful life action provides the framework upon which a child may recover both pecuniary (special) and nonpecuniary (general) damages after convincing the trier of fact that she would have been better off not having been born than to live life with severe disability.[6] Courts, however, have been reluctant to embrace the wrongful life action which, they contend, is premised solely on the metaphysical assumption that nonexistence is preferable to life with disability. For this reason courts have uniformly rejected wrongful life claims for general damages, and all but a few have rejected claims for special damages.[7]

---

4. Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (en banc). Many chromosomal disorders are detectable through genetic screening of potential parents before a child is conceived. *See, e.g.*, Naccash v. Burger, 290 S.E.2d 825, 827 (Va. 1982) (Tay-Sachs disease). For a description of genetic counseling and some of the various diagnostic procedures utilized in the counseling process, see *infra* Part III.B.
5. The term "genetic counselor" encompasses a wide variety of medical providers involved in evaluating and disseminating information and advice to potential parents regarding the risk of giving birth to a handicapped child. *See infra* notes 187-88 and accompanying text.
6. Preventable disease is not the focus of the wrongful life action. If the disease is curable, then the nonexistence comparison is not required. *See, e.g.*, Empire Casualty Co. v. St. Paul Fire & Marine Ins. Co., 764 P.2d 1191, 1195 (Colo. 1989) (en banc).
7. The following jurisdictions recognize the wrongful life action, although in every instance recovery has been limited to pecuniary damages: Turpin v. Sortini, 643 P.2d 954 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (en banc). *See also infra* Part II.B.

   Many more intermediate appellate courts have recognized the wrongful life action, although in every instance they have been overruled by their state's court of last resort. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980) (allowing general and special damages), *modified*, Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (allowing only special damages); Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384 (Colo. App.

This Article examines the wrongful life action with a critical view toward those courts that have refused to compensate children who must live and suffer as a consequence of negligent medical care. Part One reviews a small sampling of the many appellate decisions on wrongful life and related actions. Part Two analyzes the wrongful life action against the five elements of the traditional tort framework: duty, breach, causation, injury/damage and public policy.[8] Part Three proposes a strict liability approach as a means of avoiding the life versus nonlife dilemma presented by the wrongful life action. Finally, Part Four concludes that the choice confronting the parent, the child, and the courts, all of whom must decide that a particular life is not worth living, is a difficult one. Yet the plight of the handicapped child and the need to deter negligent medical care necessitate reconsideration of the issue by the vast majority of courts which have refused to award any damages for wrongful life.[9]

1985) (refusing to reach issue of damages recoverable), *overruled*, Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988); Siemieniec v. Lutheran Gen. Hosp., 480 N.E.2d 1227 (Ill. Ct. App. 1985) (allowing special damages), *rev'd in part*, 512 N.E.2d 1191 (Ill. 1987); Cowe v. Forum Group, Inc., 541 N.E.2d 962 (Ind. Ct. App. 1989) (allowing general and special damages), *rev'd in part*, 575 N.E.2d 630 (Ind. 1991); Park v. Chessin, 400 N.Y.S.2d 110 (N.Y. App. Div. 1977) (allowing general and special damages), *modified sub nom.* Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978); Azzolino v. Dingfelder, 322 S.E.2d 567 (N.C. Ct. App. 1984) (allowing general and special damages), *rev'd in part*, 337 S.E.2d 528 (N.C. 1985).

8. Public policy is treated in this Article as a separate tort element. *See infra* Part III.E.

9. The following courts refuse to recognize the wrongful life action in any form: Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Walker v. Mart, 790 P.2d 735 (Ariz. 1990) (en banc); Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988) (en banc); Donnelly v. Candlewood Obstetric-Gynecological Assocs., No. 30-20-96 (Conn. App. Ct. June 8, 1992); Garrison v. Medical Ctr. of Del., Inc., 571 A.2d 786 (Del. 1989) (en banc); Haymon v. Wilkerson, 535 A.2d 880 (D.C. 1987); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990); Blake v. Cruz, 698 P.2d 315 (Idaho 1984); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987); Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991); Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990); Strohmaier v. Associates in Obstetrics & Gynecology, P.C., 332 N.W.2d 432 (Mich. Ct. App. 1982); Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986) (en banc) (construing MINN. STAT § 145.424 (1984)); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988) (en banc), *cert. denied*, 488 U.S. 893 (1989); Smith v. Cote, 513 A.2d 341 (N.H. 1986); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986); Flanagan v. Williams, 623 N.E.2d 185 (Ohio Ct. App. 1993); Speck v. Finegold, 439 A.2d 110 (Pa. 1981) (plurality decision); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

II. WRONGFUL LIFE AND WRONGFUL BIRTH: AN OVERVIEW OF THESE DISTINCT BUT RELATED TORT ACTIONS

An action for "wrongful life" is brought on behalf of a handicapped child against a medical provider for depriving her parents of medical information necessary for them to make an informed decision not to conceive or to terminate a pregnancy. The child does not accuse the medical provider of causing the birth defect with which she is born; the defect is attributable to a genetic condition of one or both of her parents or to an independent teratogenic source[10] and cannot be prevented without preventing the child's life.

Wrongful life, like other negligence actions, seeks to compensate the victim by comparing the condition the victim would have occupied had the defendant not acted negligently (the otherwise condition)[11]

---

10. *See, e.g.,* Empire Casualty Co. v. St. Paul Fire & Marine Ins. Co., 764 P.2d 1191, 1195 (Colo. 1988) (en banc). A significant cause of fetal malformation is exposure to various drugs, viruses, chemicals and radiation, which, although not genetic in origin, necessitates careful genetic evaluation. Exposure may result from maternal drug or alcohol abuse, ingestion of drugs for therapeutic purposes, or workplace exposure to certain substances. NELSON: TEXTBOOK OF PEDIATRICS 479 (Richard E. Behrman et al. eds., 12th ed. 1983).

    Certain drugs are known for their teratogenic effects. Thalidomide, widely prescribed to pregnant women in Europe in the 1950s and 1960s to control "morning sickness," diethylstilbestrol (DES), used to prevent spontaneous abortions, and the anticonvulsant drug Dilantin™ (phenytoin) to control grand mal seizures in epileptics, are teratogens known to cause profound fetal malformations. *Id.* at 324-26. Other suspected teratogens include agent orange, dioxin, phenopolybicarbons (PCBs) and benzine. For a more complete description of those substances known or thought to be teratogenic, see generally KENNETH L. GORVEZ & SANDRA G. MARCHESE, GENETIC COUNSELING FOR CLINICIANS 250-68 (1986); Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEG. MED. 63, 66-73 (1984); Harold Kalter & Josef Warkany, *Congenital Malformations: Etiological Factors and Their Role in Prevention*, 308 NEW ENG. J. MED. 424 (1983).

    It is important for the purpose of the wrongful life analysis to distinguish those cases where the child's mother could have discontinued ingestion of the teratogen so as to avoid injuring the fetus, from those cases where the mother, for medical reasons, had no option but to continue her ingestion to the physical detriment of the fetus. In the former cases, the mother very well could have discontinued her treatment to ensure the health of her fetus and could have given birth to a healthy child. Maternal drug abuse cases therefore do not raise issues of wrongful life because a healthy life is attainable. *See supra* note 6. In the latter cases, however, the child's claim against the product manufacturer is one for wrongful life because the only way to avoid the child's defect would have been to avoid her birth altogether. *See* Payton v. Abbott Labs., 437 N.E.2d 171, 181-82 (Mass. 1982); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (en banc).

11. The "but for" condition of the impaired infant is sometimes described in this Article as her "otherwise condition." This phraseology is borrowed from E. Haavi Morreim, *The Concept of Harm Reconsidered: A Different Look at Wrongful Life*, 7 LAW & PHIL. 3, 10 (1988).

and the condition in which the plaintiff finds herself after the tort. If the victim is worse off after the tort than before, she has been harmed and damages should be awarded. This comparison is particularly difficult in wrongful life cases because the otherwise condition the child claims she prefers is no life at all rather than life with handicap. The trier of fact is therefore asked to assess damages against the tortfeasor for eliminating the child's chance of having no life at all. This necessarily requires an assessment of the value and benefit of nonexistence which mortals know nothing about.[12] Wrongful life plaintiffs typically sue for the extraordinary expenses occasioned by their handicaps, and for the pain and suffering and emotional distress brought about by their impaired existence.

Parents of the handicapped child usually bring their own claim for "wrongful birth." The child's life is injurious to them, they allege, because they must live with and care for a child who will not live a normal, healthy life. Unlike the wrongful life action, an action for wrongful birth does not require a comparison between the child's life with a handicap and nonexistence. Rather the focus is on the otherwise condition of the parents who claim to prefer life without that particular child or, in some cases, eternal childlessness to parenthood with a handicapped child.[13] Parents bringing wrongful birth claims usually seek lost wages, child rearing expenses, pain and suffering and emotional distress damages and reimbursement for the extraordinary expenses occasioned by the child's handicap.[14]

---

12. Gleitman v. Cosgrove, 227 A.2d 689, 692-93 (N.J. 1967), *overruled in part by*, Berman v. Allan, 404 A.2d 8 (N.J. 1979), discussed *infra* at notes 16-28 and accompanying text.
13. In some cases state-of-the-art technologies make it possible for parents to claim they were deprived of the opportunity to substitute a healthy fetus for a handicapped one. *See* Philip G. Peters, *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV. 487, 518 (1989) (artificial fertilization techniques may allow prospective parents to replace genetically defective gametes with normal ones).
14. The similarity and indiscriminate use of the terminology associated with the various birth-related tort actions require clarification for the purpose of this Article. Actions for wrongful life and wrongful birth are distinguishable from tort actions for wrongful pregnancy and wrongful conception. The facts of a particular case, and not the terminology employed by the courts in their decisions, dictate the classification.

    Wrongful pregnancy actions involve a medical provider's failure to diagnose an unplanned pregnancy, which prevents the mother from aborting. The child is born healthy. *See, e.g.*, Phillips v. United States, 575 F. Supp. 1309, 1316 (D.S.C. 1983). Wrongful conception actions involve failed sterilization or contraception procedures that result in the birth of an unwanted but healthy child. The two actions are very similar to one another. *See* Jones v. Malinowski, 473 A.2d 429 (Md. 1984); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990); Girdley v. Coats, 825 S.W.2d 295 (Mo. 1992) (en banc). Parents bringing wrongful

Wrongful life and wrongful birth actions are relatively recent in origin, having surfaced less than thirty years ago.[15] From the time these actions were first brought in American courts, judicial decisions have followed a clear course paralleling the progression of the constitutional right to practice birth control and to procure abortions. The following cases illustrate the natural progression of the wrongful life and wrongful birth actions and are representative of the various approaches taken by those courts which have either allowed or disallowed the claims of both parent and child.

A. Wrongful Life and Wrongful Birth Before Roe v. Wade

The first appellate decision addressing a wrongful life claim by a handicapped child was the 1967 New Jersey Supreme Court decision

---

pregnancy or wrongful conception actions normally sue for the cost of raising the child to its age of majority, the cost of the unsuccessful medical procedure, lost wages and consortium during the pregnancy, and compensatory damages for pain and suffering. Courts are divided on whether and to what extent parents may recover child rearing costs. *Compare* Lovelace Med. Ctr. v. Mendez, 805 P.2d 603 (N.M. 1991) (allowing full child rearing expenses without offset of the intangible noneconomic benefits to the parents from the child's life) *and* Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990) (same) *with* Jones v. Malinowski, 473 A.2d at 429 (allowing child rearing expenses offset by the intangible value to the parents from the child's life) *and* Burke v. Rivo, 551 N.E.2d 1 (same) *with* O'Toole v. Greenberg, 477 N.E.2d 445 (N.Y. 1985) (disallowing child rearing expenses altogether) *and* Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982) (same). This Article elaborates no further on the wrongful conception and wrongful pregnancy actions. For further discussion of those actions, see generally Jennifer Mee, Note, *Wrongful Conception: The Emergence of a Full Recovery Rule*, 70 WASH. U. L.Q. 887 (1992); *Cause of Action Against Physician for Wrongful Conception or Wrongful Pregnancy, in* 3 SHEPARD'S CAUSES OF ACTION 83 (1987 & Supp. 1993).

15. Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967), *overruled in part by* Berman v. Allan, 404 A.2d 8 (N.J. 1979). Some jurists cite the case of Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964) as the first reported wrongful life case. *Zepeda* was a case brought by a healthy child who claimed injury for being born into a life of illegitimacy. Such status-type harm is not the basis of a true wrongful life action since the child, although injured by her impaired status, is otherwise physically healthy at birth. *See* Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477, 486 (Cal. Ct. App. 1980); *see also* Foy v. Greenblott, 190 Cal. Rptr. 84, 94 (Cal. Ct. App. 1983) (finding paramount difference between illegitimate and severely handicapped children alleging wrongful life); Stills v. Gratton, 127 Cal. Rptr. 652, 656 (Cal. Ct. App. 1976) (wrongful life action barred where child is born out of wedlock and is otherwise healthy); Cowe v. Forum Group, Inc., 575 N.E.2d 630, 635 (Ind. 1991) (child had no cause of action against nursing home for negligence that resulted in his birth to retarded mother incapable of providing care and support); Williams v. State, 223 N.E.2d 343, 344 (N.Y. 1966) (child had no cause of action against state for negligence resulting in child's birth to a retarded mother within the care of the state).

in *Gleitman v. Cosgrove*.[16] Sandra Gleitman contracted rubella early in her pregnancy. Her physicians advised her that the infection would not affect her unborn child;[17] however her son, Jeffrey, was subsequently born with severe auditory and sight impairments as a result of his mother's rubella infection. Jeffrey and his parents sued the physicians for failing to render correct advice regarding the likelihood that Jeffrey would be born with his defects. Had proper advice been given, Jeffrey's mother alleged she would have procured an abortion to avoid his birth.

The New Jersey Supreme Court denied the Gleitmans' claims for wrongful life and wrongful birth because both claims failed to allege essential elements of negligence. The majority opinion explained that the claims for relief asserted in *Gleitman* were much different than claims for prenatal tort, where but for the negligence of the medical provider, the child would have been born healthy.[18] In wrongful life and wrongful birth actions, the court explained, the medical provider does not proximately cause the genetic anomaly but only causes the birth of a child with a preexisting condition.[19]

In addressing Jeffrey's claim for wrongful life, the court noted the logical impossibility of comparing Jeffrey's condition before the physicians' negligence—nonexistence, with his present condition—life with handicap,[20] and concluded that life, no matter how impaired, "does not give rise to damages cognizable at law."[21] The court also noted the difficulty of evaluating the harm suffered by Mr. and Mrs. Gleitman, especially in light of the intangible benefits of parenting even a handicapped child such as Jeffrey.[22]

The court also pointed to the "countervailing public policy supporting the preciousness of human life" as an additional reason

---

16. 227 A.2d 689 (N.J. 1967), *overruled in part*, Berman v. Allan, 404 A.2d 8 (N.J. 1979) (recognizing parents' wrongful birth claim for general damages).
17. *Id.* at 690-91.
18. *Id.* at 691 (citing Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966)). *See infra* Part III.A. for further discussion of prenatal and preconception tort actions.
19. *Gleitman*, 227 A.2d at 692.
20. The court pointed to Jeffrey's lack of standing to sue as one reason for denying his wrongful life action. "'[N]o comparison is possible since were it not for the act of birth the infant would not 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 damages.'" *Id.* at 692 (quoting Guido Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513, 529 (1966)); *see also* Turpin v. Sortini, 643 P.2d 954, 961 (Cal. 1982) (en banc) (distinguishing ordinary prenatal injury cases from plaintiff's wrongful life claim).
21. *Gleitman*, 227 A.2d at 692. The court believed that if Jeffrey could have been asked in utero whether he would prefer nonlife over his life with impairment, he would have chosen life. *Id.* at 693.
22. *Id.* at 693.

for disallowing the wrongful life and wrongful birth actions.[23] The United States Supreme Court had not yet decided *Roe v. Wade*,[24] and the court in *Gleitman* felt constrained by the strict limits that New Jersey statutes placed on abortion.[25] The court concluded that "the right to life is inalienable in our society" and that a "child need not be perfect to have a worthwhile life."[26]

In a dissenting opinion, Justice Jacobs maintained that the law should allow reasonable compensation to both parents and child in order to alleviate the financial burdens arising from the child's impairments and to deter negligent treatment in the future.[27] The problem of ascertaining damages, he reasoned, had not prevented damage awards in other difficult contexts and should not preclude recognition of wrongful life or wrongful birth claims.[28]

For several years following *Gleitman*, and even after abortion rights were firmly entrenched in the law, courts remained loyal to the reasoning employed by the majority in *Gleitman*. Some progress was made toward the recognition of wrongful birth in 1977, when the Court of Appeals of New York decided two cases consolidated for appeal to that court.[29]

In *Becker v. Schwartz*,[30] Delores Becker, age thirty-seven, became pregnant and subsequently gave birth to a child afflicted with Down's syndrome.[31] The parents sued their medical providers for failing to

---

23. *Id.*
24. 410 U.S. 113 (1973).
25. *Gleitman*, 227 A.2d at 692-93; *see also id.* at 703 (Francis, J., concurring).
26. *Gleitman*, 227 A.2d at 693.
27. *Id.* at 703 (Jacobs, J., dissenting).
28. *Id.* at 704 (Jacobs, J., dissenting). Justice Jacobs minimized the difficulty of assessing damages: "Surely a judicial system engaged daily in evaluating such matters as pain and suffering, which admittedly have 'no known dimensions, mathematical or financial,' should be able to evaluate the harm which proximately resulted from the breach of duty." *Id.* (quoting Botta v. Brunner, 138 A.2d 713, 720 (N.J. 1958)).
29. *See* Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).
30. 400 N.Y.S.2d 119 (N.Y. App. Div. 1977), *modified*, 386 N.E.2d 807 (N.Y. 1978).
31. *Becker*, 386 N.E.2d at 808. Down's syndrome is caused by the presence of an extra chromosome number 21 (trisomy 21). *Id.* at 808 n.1. The clinical features of Down's syndrome include mongolism, mental retardation of varying severity, congenital heart disease, and abnormal limb growth. Phillips v. United States, 508 F. Supp. 537, 539 n.3 (D.S.C. 1980). Depending on the severity of the disease, an afflicted child may live a full and rewarding life. *See ABC News Special, The Perfect Baby* (ABC television broadcast, July 18, 1990) (available on LEXIS, NEXIS Library, ABCNEW file). Women at risk for giving birth to children with Down's syndrome are typically those who become pregnant in their late thirties, who have previously given birth to a child afflicted with that disease, or who have two or more close relatives with mongolism. Laurence E. Karp, *The Prenatal Diagnosis of Genetic Disease*, *in* BIOMEDICAL ETHICS

disclose the increased risk of giving birth to a retarded child because of Mrs. Becker's advanced age, and in failing to perform amniocentesis.[32] The Beckers alleged they would have terminated the pregnancy had they been advised of the risks involved.[33]

In the second case, *Park v. Chessin*,[34] the Parks sought the advice of obstetricians after giving birth to a child afflicted with polycystic kidney disease.[35] The defendants had advised the Parks that polycystic kidney disease was not a hereditary disorder, and that the chance of giving birth to a second child suffering from the same condition was "practically nil."[36] Lara Park was subsequently born suffering from polycystic kidney disease and died two and one-half years later.[37] The parents sued individually and on behalf of Lara, claiming general and special damages for Lara's birth.[38]

The Court of Appeals of New York, in the consolidated case styled *Becker v. Schwartz*, denied the infants' causes of action for wrongful life in both cases because they failed to allege cognizable injury and damage.[39] The court refused to recognize that being born, even with severe handicap, is an injury cognizable at law, and referred to the "very nearly uniform high value which the law and mankind has placed on human life" and the law's incompetence to resolve matters "more properly to be left to the philosophers and the theologians."[40] The court also pointed to the inadequacy of tort law to provide an accurate calculation of damages for being born when the child's otherwise condition is nonexistent.[41] This calculation, the

---

458, 460 (Thomas A. Mappes & Jane S. Zembaty eds., 1981). The "incidence of Down's syndrome in the offspring of women under thirty is about one in 1,500. This figure rises to one in 300 between thirty-five and thirty-nine; one in 100 between forty and forty-five; and one in forty between forty-five and forty-nine." *Id.* first trimester amniocentesis and chorionic villus sampling can detect this abnormality with near perfect accuracy. *See infra* notes 179-80 for further discussion of these diagnostic techniques.

32. *Becker*, 386 N.E.2d at 808-09.
33. *Id.* at 812.
34. 400 N.Y.S.2d 110 (N.Y. App. Div. 1977), *modified sub nom.* Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).
35. Polycystic kidney disease is a hereditary disorder that is marked by gross enlargement of the kidneys and progressive renal failure requiring dialysis and sometimes kidney transplantation. A positive history of the disease in a sibling is decisive in determining the risk of the disease in future offspring. NELSON, *supra* note 10, at 1356-57.
36. *Park*, 400 N.Y.S.2d at 111.
37. *Id.*
38. *Id.*
39. 386 N.E.2d 807, 814 (N.Y. 1978).
40. *Id.*
41. *Id.*

court concluded, required a choice better left for the state legislature.[42]

Although the court denied the infants' causes of action for wrongful life, it affirmed the parents' wrongful birth claims for special damages.[43] The court reasoned that an affirmative duty was owed to the infants' parents to provide the information necessary for them to decide in *Becker* whether to abort the fetus, and in *Park* whether to avoid conception.[44] The breach of such a duty resulted in measurable pecuniary loss to the parents in the form of the special, extraordinary costs associated with the care, education, and habilitation of the children.[45]

The parents' claims for emotional distress damages, however, were denied because the court was unwilling to recognize that the birth of a handicapped child necessarily results in emotional harm.[46] The court concluded that "notwithstanding the birth of a child afflicted with an abnormality, *and certainly dependant upon the extent of the affliction*, parents may yet experience a love that even an abnormality cannot fully dampen."[47] Citing the "benefit doctrine" of section 920 of the *Restatement (Second) of Torts*, which requires offset of damages by any benefit derived by the plaintiff from the defendant's conduct,[48] the court concluded that the benefits of parenting even a handicapped child may mitigate any award of pain and suffering damages.[49]

---

42. *Id.; see also infra* Part III.E.4. for a critical discussion of those courts that have deferred to their state legislatures to recognize wrongful life and wrongful birth actions.
43. *Becker*, 386 N.E.2d at 814.
44. *Id.* at 813.
45. *Id.* at 813-14.
46. *Id.* at 814.
47. *Id.* (emphasis added). Interestingly, the court qualified its denial of general damages and implicitly advocated a case-by-case analysis of the severity of the child's handicap in determining the right of parents to recover pain and suffering damages. *Id.* Unlike its prior decision in *Howard v. Lecher*, 366 N.E.2d 64, 66 (N.Y. 1977), the court in *Becker* was reluctant to hold that in every instance parents would not suffer emotional trauma as a result of the doctor's misfeasance. A similar "severity of injury" approach to the wrongful life action is discussed *infra* notes 243-54 and accompanying text.
48. The *Restatement (Second) of Torts* § 920 states the benefit doctrine as follows:
> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

RESTATEMENT (SECOND) OF TORTS § 920 (1979). For further discussion of the benefit doctrine and its use in calculating damages in wrongful life cases, see *infra* Part III.D.3.
49. *Becker*, 386 N.E.2d at 814.

B. A Coming of Age for Wrongful Life: Judicial Qualification of the Damages Recoverable

In *Curlender v. Bio-Science Laboratories,*[50] the California Court of Appeals was the first appellate court to award general and special damages to a child for her wrongful life.[51] Shauna Curlender was born with Tay-Sachs disease[52] after a medical testing laboratory negligently performed genetic tests on her parents.[53] If properly performed, the tests would have revealed that both of Shauna's parents were carriers of the Tay-Sachs gene, and were at an increased risk of conceiving a child afflicted with the disease.[54] Because of the incorrect test results, neither the Curlenders nor their medical providers had reason to suspect that Shauna would be born with Tay-Sachs.[55] The Curlenders conceived Shauna, who was born with the disease and lived for four years with intense pain and progressive loss of motor reaction.[56] The Curlenders, on behalf of Shauna, sued

---

50. 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).
51. See *supra* note 7 for additional intermediate appellate courts that have awarded general and special damages for wrongful life.
52. Tay-Sachs disease is a neurodegenerative disorder that first manifests mild symptoms. After four to six months of normal development, psychomotor deterioration begins to occur. NELSON, *supra* note 10, at 478. By the child's first year, her health is visibly and markedly failing:

> The infant, who may have crawled, sat unaided, or even pulled to a standing position, rapidly deteriorates both mentally and physically by about one year of age. The previously playful and happy infant no longer smiles, no longer reacts playfully, no longer recognizes or sees his parents and, in fact, rapidly loses all contact with his environment. Poor muscle tone soon leads to generalized paralysis; feeding difficulties secondary to ineffective deglutination progresses to inanition. The child . . . remains in this totally deteriorated mental and physical state until death occurs . . . , usually . . . by the age of three to five years.

Michael M. Kaback & Robert S. Zeigler, *The John F. Kennedy Institute Tay-Sachs Program: Practical and Ethical Issues in an Adult Genetic Screening Program, in* ETHICAL ISSUES IN HUMAN GENETICS 131, 131-32 (Bruce Hilton et al. eds., 1973); *see also* Goldberg v. Ruskin, 499 N.E.2d 406, 411 (Ill. 1986) (Clark, C.J., dissenting).

Blood tests and amniocentesis procedures are used to detect the carrier status of the parents and the fetus. In particular, "[i]t is recommended that all Jewish couples of Eastern European ancestry be advised that tests for the carrier state are available and that prevention of this fatal disease is possible." NELSON, *supra* note 10, at 479.

53. *Curlender*, 165 Cal. Rptr. at 480.
54. *Id.* at 480 n.4. There is a 25% chance that a child will be born with Tay-Sachs disease when both parents are carriers of the aleatory gene. NELSON, *supra* note 10, at 479.
55. *Curlender*, 165 Cal. Rptr. at 480.
56. *Id.* at 480-81.

various medical providers and the testing laboratory on a theory of wrongful life.[57]

The *Curlender* court discounted the metaphysical problems associated with the wrongful life action and concluded that it "need not be concerned with the fact that had the defendants not been negligent, the plaintiff might not have come into existence at all."[58] Instead, the court adopted an approach that looks prospectively at the child's life with impairment, rather than retrospectively into a world of unknowns:

> The reality of the "wrongful life" concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that [the] plaintiff, however impaired she may be, has come into existence as a living person with certain rights.[59]

Based on this reasoning, the majority in *Curlender* held a child "may recover damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition."[60]

The rationale employed by the *Curlender* court in permitting recovery of general damages for wrongful life was short-lived. Less than two years later, the California Supreme Court, sitting en banc, decided *Turpin v. Sortini*,[61] in which the court limited the damages recoverable in wrongful life actions to the extraordinary expenses occasioned by the child's handicapped life.[62]

Joy Turpin was born with hereditary deafness.[63] She and her parents alleged that the defendant audiologist was negligent in failing to discover the same disorder in her older sister, Hope.[64] Joy's parents alleged that a proper diagnosis of Hope's condition would have put them on notice of the risk of conceiving a second child with the same condition and would have resulted in their decision not to

---

57. *Id.* at 479.
58. *Id.* at 488.
59. *Id.* (emphasis in original)
60. *Id.* at 489.
61. 643 P.2d 954 (Cal. 1982) (en banc).
62. *Id.* at 965-66.
63. *Id.* at 956.
64. *Id.*

conceive Joy.[65] The court allowed the child's claim for special damages but refused to recognize her claim for general damages.[66]

On the issue of special damages, the *Turpin* majority challenged as unsound the notion that life, no matter how impaired, is always preferable to nonexistence, and questioned whether there was any "societal consensus" on that view.[67] The court acknowledged instead "the right of each individual to make his or her own determination as to the relative value of life and death."[68] Recognizing that an unborn child is never able to assert its own preference, the court adopted the substituted judgment approach advanced by several right-to-die cases, which permits a family member or other proxy decisionmaker to make a decision based on the patient's best interest.[69]

Noting the impropriety of awarding duplicative damages to both the parents and the child for the same special care required during the child's minority, the court nonetheless found it illogical to permit recovery by the parents instead of the child for the expenses associated with the child's own care.[70] To hold otherwise, the court concluded, would result in the child's dependance upon "the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care."[71]

The *Turpin* court took a contrary view of the child's right to recover general damages and aligned itself with the view originally

---

65. *Id.*
66. *Id.* at 965-66.
67. *Id.* at 962-63. The court focused on the relatively minor handicap of the child in predicting that a jury would not likely conclude that the child is worse off alive than not having been born at all:

> In this case, in which the 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. Other wrongful life cases, however, have involved children with much more serious, debilitating and painful conditions, and the academic literature refers to still other, extremely severe hereditary diseases. Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.

Id. (footnote omitted). See *infra* notes 243-54 and accompanying text for further discussion of the severity of injury approach to the wrongful life action.
68. *Turpin*, 643 P.2d at 962.
69. *Id.* (citing *In re* Quinlan, 355 A.2d 647, 662-64 (N.J. 1976) and Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417, 423-27 (Mass. 1977)). For a discussion of the substituted judgment approach in right-to-die and wrongful life cases, see *infra* Part III.D.1.
70. *Turpin*, 643 P.2d at 965.
71. *Id.*

expressed in *Gleitman v. Cosgrove*[72] that human experience does not make possible the life-nonexistence comparison necessitated by the wrongful life action.[73] The obstacle for the court not only involved the practical difficulties of computing damages, but also the inability to find any legally cognizable injury in being born.[74] The court cited the "benefit doctrine"[75] as a further reason for denying general damages, and concluded that although offset of general damages by the intangible benefits of life may be appropriate in wrongful life actions, neither "element[] of this harm-benefit equation" can be valued in a nonarbitrary way.[76]

One year later, in *Harbeson v. Parke-Davis, Inc.*,[77] the Supreme Court of Washington held per certified question that Washington recognizes causes of action for wrongful life[78] and wrongful birth.[79] In 1970, Jean Harbeson conceived her first child.[80] During the course of her pregnancy she was diagnosed by physicians as having epilepsy and was prescribed the drug Dilantin™ (phenytoin) to control her grand mal seizures.[81] Michael Harbeson was subsequently born healthy.[82] In 1972, Mrs. Harbeson sought further medical treatment for her seizures, and Dilantin was again prescribed.[83] Several months later, the Harbesons informed three physicians of their desire to conceive a second child, and inquired about the risks associated with the use of Dilantin during Mrs. Harbeson's pregnancy.[84] The doctors advised that Dilantin could cause cleft palate and hirsutism,[85] but failed to warn of the more profound birth defects associated with use of the drug during pregnancy.[86] In 1974 and 1975, the Harbesons

---

72. 227 A.2d 689 (N.J. 1967), *overruled in part by* Berman v. Allan, 404 A.2d 8 (N.J. 1979).
73. *Turpin*, 643 P.2d at 963 (citing *Gleitman*, 227 A.2d at 711) (Weintraub, C.J., dissenting in part).
74. *Id.* at 963-64.
75. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1979); *see also supra* note 48.
76. *Turpin*, 643 P.2d at 964 (citing RESTATEMENT (SECOND) OF TORTS § 920 (1979)).
77. 656 P.2d 483 (Wash. 1983) (en banc).
78. *Id.* at 497.
79. *Id.* at 493.
80. *Id.* at 486.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. Hirsutism is a condition characterized by excessive hair growth over various parts of the body not normally susceptible to such hair growth. The condition may be a normal characteristic in certain ethnic groups or it may develop as a result of a metabolic disorder. STEDMAN'S MEDICAL DICTIONARY 717 (25th ed. 1990).
86. *Harbeson*, 656 P.2d at 486; *see also infra* note 87.

gave birth to Elizabeth and Christine, both of whom were born with fetal hydantoin syndrome.[87]

The Harbesons brought wrongful birth and wrongful life claims against the physicians[88] and the pharmaceutical manufacturer for failing to warn of the risks associated with the use of Dilantin during pregnancy,[89] which deprived them of the opportunity to make an informed decision not to conceive either child.[90] In response to questions certified by the federal district court, the Supreme Court of Washington held that wrongful birth and wrongful life actions are "logical and necessary" and fit within the traditional tort framework for negligence actions.[91] The court certified that the parents could recover general and special damages,[92] and that the children could recover special damages to cover the costs associated with their handicaps.[93]

The court's primary focus in discussing the Harbesons' wrongful birth action was the duty owed to the parents by medical providers under the law of informed consent to disclose the information necessary for parents to prevent the birth of a handicapped child.[94]

---

87. *Harbeson*, 656 P.2d at 486. Fetal hydantoin syndrome is a nongenetic disease caused by teratogenic exposure to hydantoin. 2 SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE F-59 (1993). Abnormalities associated with fetal hydantoin syndrome include "mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects." *Harbeson*, 656 P.2d at 486.

88. Mrs. Harbeson was treated by physicians at the Madigan Army Medical Center, the medical care facility at the McChord Air Force Base where her husband was stationed. The Madigan physicians were agents of the United States Air Force, and suit was therefore brought against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2402, 2674-80 (1988). *Harbeson*, 656 P.2d at 486-87.

89. *Id.* at 483. The trial court found specifically that an "adequate literature search would have revealed the risks associated with Dilantin." *Id.* at 494.

90. *Id.* at 483.

91. *Id.*

92. *Id.* at 494.

93. *Id.* at 497.

94. *Id.* at 490-91. *Harbeson* is one of the only appellate decisions to treat actions for wrongful life and wrongful birth as actions for breach of informed consent rather than medical malpractice. *Id.* at 490. Other courts have held that informed consent applies only to cases involving affirmative and invasive treatment and not to genetic counseling. *See, e.g.*, Reed v. Campagnolo, 630 A.2d 1145 (Md. 1993); Pratt v. University of Minn. Affiliated Hosps., 414 N.W.2d 399 (Minn. 1987) (dictum); Karlsons v. Guerinot, 394 N.Y.S.2d 933 (N.Y. App. Div. 1977).

In *Reed v. Campagnolo*, the Court of Appeals of Maryland held per certified question that an action for wrongful birth is a valid claim by parents for medical malpractice but not for breach of informed consent. 630 A.2d at 1152-54. In refusing to recognize the parents' claim for breach of informed consent,

The court recognized both the existence of a duty owed by medical providers to potential parents to render accurate genetic counseling and the right of parents to benefit from state-of-the-art diagnostic procedures which can determine genetic abnormalities in the parents and their unborn child.[95] The court had little difficulty finding that the birth of a child is an actionable injury to the parents, but experienced greater difficulty determining the proper measure of damages to be awarded.[96] The court looked to the policy underlying existing state statutory provisions and found that the parents could recover for their emotional suffering and the extraordinary expenses arising from the children's birth.[97] Citing the "benefit doctrine" however, the court noted that the parents' recovery for emotional pain and suffering should be offset by the emotional benefits of parenthood.[98]

In addressing the children's wrongful life claims, the court held the children could recover the extraordinary expenses incurred during their adulthood.[99] The court recognized that the

---

the court noted that under Maryland law, a breach of informed consent occurs only upon nondisclosure of a risk associated with an affirmative medical treatment that reasonable people would deem material to their decision to undergo that treatment. *Id.* at 1152-53. However, in most cases alleging inadequate genetic counseling, the court noted, there is no affirmative treatment, nor should the counselor's conduct be judged simply by considering what reasonable people would want to know about the genetic fate of their child. *Id.* at 1153-54. The court reasoned that each situation involving genetic counseling is unique and requires professional evaluation of the genetic risks and the appropriateness of prenatal testing in light of those risks. *Id.* at 1154.

As discussed further Part IV, *infra* however, certain aspects of genetic counseling involve professional discretion, whereas certain mechanical aspects of genetic counseling, such as the interpretation of unambiguous test results, do not. In those situations involving failed, nondiscretionary genetic counseling, imposition of strict liability against the counselor may be appropriate.

95. *Harbeson*, 656 P.2d at 491. The court noted that "[r]ecognition of the duty will 'promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong.'" *Id.* (quoting Thomas D. Rogers, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713, 757 (1982)).

96. *Id.* at 492.

97. *Id.* at 492-94. The court found that WASH. REV. CODE § 4.24.010 (1982), which provides for parents' pecuniary and nonpecuniary recovery for loss sustained as the result of an injury to their child, did not apply because "a wrongful birth claim does not allege injury to the child as the cause of the parents' injury. . . ." *Harbeson*, 656 P.2d at 493. Nonetheless, the court found that the policy underlying § 4.24.010—to compensate parents for emotional injury—is promoted by recognizing claims for wrongful birth. *Id.*

98. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 920 (1979)); *see also supra* note 48.

99. *Harbeson*, 656 P.2d at 495.

> need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority. In many cases, the burden of those expenses will fall on the child's parents or the state. Rather than allowing this to occur by refusing to recognize the cause of action, we prefer to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training.[100]

The *Harbeson* court analyzed the infants' wrongful life action under the same tort framework it considered in analyzing the parents' wrongful birth action.[101] The court found a duty by medical providers to a child not yet born or conceived based upon the foreseeable harm that could come to the child if treatment is rendered negligently.[102] The court identified the breach of duty as either the "failure to impart material information" or the "negligent performance of a procedure to prevent the birth of a defective child."[103] The court held those special damages proximately caused by the defendant readily ascertainable,[104] and rejected the sanctity of life[105] and proximate cause[106] arguments advanced in other cases. The court, however, denied the infants' claim for general damages on the grounds that those damages could not be proved with reasonable certainty.[107]

In *Procanik v. Cillo*,[108] the Supreme Court of New Jersey revisited its previous wrongful life decision in *Gleitman v. Cosgrove*, and held for the first time that a child could recover special damages for the treatment and habilitation costs associated with his handicaps.[109]

---

100. *Id.* The court indicated that double recovery by both parents and child for the same extraordinary expenses would not be allowed. Thus, if the parents were awarded extraordinary damages pursuant to their wrongful birth action, the child could not recover the same damages in her wrongful life action for the period during which damages were awarded to the parents. *Id.*; *see also infra* note 121 (collecting cases where special damages have not been awarded to children for their care during adulthood because those same damages could be awarded as part of their parents' wrongful birth claims).
101. *Harbeson*, 656 P.2d at 495.
102. *Id.* at 495-96.
103. *Id.* at 488.
104. *Id.* at 496.
105. *Id.* at 496-97 (citing Berman v. Allan, 404 A.2d 8, 12-13 (N.J. 1979)).
106. *Id.* at 497 (citing Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967)).
107. *Id.* at 496.
108. 478 A.2d 755 (N.J. 1984).
109. *Id.* at 762. Two issues were presented to the New Jersey Supreme Court on appeal: First, whether Peter Procanik in his own right could recover general and special damages arising from his birth with defects. *Id.* at 758. Second, whether Peter's parents were entitled to recover general damages for their

Peter Procanik and his parents sued three physicians for failing to diagnose his mother as having rubella during her first trimester of pregnancy, a fact that would have resulted in the parents' decision to terminate the pregnancy.[110] Peter was born suffering from congenital rubella syndrome and multiple birth defects associated with the disorder.[111]

The majority opinion in *Procanik* relied on Justice Jacobs's dissenting opinion in *Gleitman v. Cosgrove*[112] and held the child entitled to those special damages which are "readily measurable."[113] The court, however, rejected the child's claim for general damages, noting that although "mathematical precision" is not required in calculating damages for personal injury, "some modicum of rationality" is necessary.[114] To recognize the right of a child to recover general damages for being born, the majority noted, would present insurmountable problems for jurors who would struggle to determine the value of life and the morality of abortion, and who may be unable to disassociate their finding of injury and damage from the value and quality of their own lives.[115] These difficulties, the court noted, would likely cause "wild swings" in general damage awards, and are "more than the justice system can digest."[116]

The majority in *Procanik* held, however, that the child could recover the special damages for the medical care and treatment

---

emotional distress and special damages for the care and treatment of Peter's handicaps. *Id.* The court relied upon N.J. REV. STAT. § 2A:14-2 to find the parents' wrongful birth claims independent of Peter's wrongful life action and thus barred by the state's two year statute of limitations. 478 A.2d at 764.

110. *Id.* at 758. The complaint alleged that the medical providers failed to properly interpret a blood test performed on Mrs. Procanik during the early stages of her pregnancy, which, if properly interpreted, would have indicated her infected condition. *Id.* The doctors, however, negligently interpreted the results as indicating Mrs. Procanik's *past* rubella infection rather than her ongoing infection with the disease. *Id.*

111. *Id.*

112. 227 A.2d 689, 703-06 (N.J. 1967) (Jacobs, J., dissenting). See *supra* notes 16-28 and accompanying text for a discussion of the *Gleitman* decision.

113. *Procanik*, 478 A.2d at 761 (quoting *Gleitman*, 227 A.2d at 704 (Jacobs, J., dissenting)).

114. *Id.* at 763.

115. *Id*; *see also* Bernadette Kennedy, Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 U.C.L.A. L. REV. 473, 489-91 (1983) (persons asked to make the life/nonlife comparison will look only to their own fears and preconceptions about what it would be like to live with a particular handicap).

116. *Procanik*, 227 A.2d at 763. *But see id.* at 766-70 (Handler, J., dissenting in part) (general damages for pain and suffering should be awarded to the child because she suffers a diminished childhood from her parents' inability to care for her).

occasioned by his handicaps.[117] Citing to the Supreme Court of California holding in *Turpin v. Sortini*,[118] Justice Pollock eloquently pronounced the majority's reasoning for allowing special damages:

> Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become a[n] instrument of injustice. Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the injustice of that result. The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the wholly "fortuitous circumstance of whether the parents are able to sue."[119]

Awarding special damages to the child, the court concluded, "will carry a sufficient sting to deter future acts of medical malpractice" and is an appropriate response "to the call of the living for help in bearing the burden of their affliction."[120]

The foregoing cases illustrate the various approaches taken by courts that have addressed wrongful life and wrongful birth claims. Courts in the vast majority of jurisdictions refuse to award any damages to the child for her handicapped life, although some of these same courts in the same cases have awarded parents general damages for the suffering they must endure because of the child's handicapped life. In recent years, a few courts have awarded the child special damages for the special care required after her majority, while many more have awarded the parents these same

---

117. *Id.* at 763. The Supreme Court of New Jersey addressed the issue of whether the child was entitled to special damages, even though such damages were not sought in his complaint. *Id.* at 761-62. The reason for the court's sua sponte consideration was the parents' inability to collect special damages because their claim was time-barred by the state's two year statute of limitations. *Id.* at 764. *See also supra* note 109.

118. 643 P.2d 954 (Cal. 1982).

119. *Procanik*, 478 A.2d at 762 (quoting Turpin v. Sortini, 643 P.2d 954, 965 (Cal. 1982)). The court also recognized that the economic impact of the child's need for extraordinary medical care is felt not only by the parents of that child, but also by the child's siblings who are deprived of the parents' financial support for education and other necessities. *Id.* at 762. Other courts have rejected wrongful birth claims initiated on behalf of siblings. *See, e.g.*, Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986). *See generally* PRENATAL INJURIES AND WRONGFUL LIFE § 57, at 1:191-92 (Law. Coop. 1993).

120. *Procanik*, 478 A.2d at 762.

damages as a matter of course in their claims for wrongful birth.[121] With this case law overview as a primer, Part Two of this Article undertakes a more detailed analysis of the wrongful life action against each of the five tort elements within the traditional tort framework.

III. WRONGFUL LIFE AND THE TRADITIONAL TORT FRAMEWORK

A. Establishment of a Duty to Parent and Unborn Child

The wrongful life action, like other tort claims for injuries inflicted prior to birth, raises difficult questions about the physician-patient relationship and, more specifically, to whom a duty of prudent medical treatment is owed. At first blush, it appears somewhat anomalous that a medical provider should owe the unborn a duty to disclose medical information when she cannot act upon the information. It is the parents and not the unborn who must make the ultimate decision whether or not to bring the child into the world, and it is the parents, particularly the mother, who maintains control over decisions concerning abortion.

In the context of wrongful life and wrongful birth actions, although it is the unborn's parents who seek prenatal treatment or genetic counseling, the ultimate concern throughout the treatment and decision-making processes is the well-being of the unborn.[122] For this reason, courts have found an independent duty running to the unborn to advise her parents of the risks that she will be born genetically impaired. This section examines more closely the independent duty owed to the unborn child to disseminate information regarding her genetic fate which, although impossible for the child to act upon, is crucial to the state of her existence.

1. Prenatal Tort: The Independent Legal Status of the Unborn

Prenatal tort is a common law action brought by or on behalf of a child or a deceased for injuries sustained at some point during

---

121. Some courts refuse to award special damages to children alleging wrongful life because their parents can recover those same damages for the duration of the children's lifetime as part of their wrongful birth claims. *See, e.g.*, Kush v. Lloyd, 616 So. 2d 415, 423-24 (Fla. 1992) (special damage award to parents must be placed in trust for child's benefit); Blake v. Cruz, 698 P.2d 315, 321 (Idaho 1984) (similar); Smith v. Cote, 513 A.2d 341, 354 (N.H. 1986); Phillips v. United States, 575 F. Supp. 1309, 1320 n.10 (D.S.C. 1983); James G. v. Caserta, 332 S.E.2d 872, 882 (W. Va. 1985).

122. Ann M. Rhodes, *Legal Aspects of Prenatal Diagnosis*, 31 CLINICAL OBSTETRICS & GYNECOLOGY 233, 234 (1988).

gestation. The defendant's conduct either causes the child to be born with defects or causes the child's death before or shortly after birth.[123]

The first American decision to address the right of a child to recover for prenatal injuries sustained in utero was the 1884 Massachusetts Supreme Court decision in *Dietrich v. Northampton*.[124] Writing for the majority, Justice Holmes dismissed a prenatal tort claim brought on behalf of a child who was injured during his fourth month of gestation.[125] The unborn's claim was barred, according to Justice Holmes, because the child "was a part of the mother at the time of the injury, [and] any damage to it which was not too remote to be recovered for at all was recoverable by her. . . ."[126] In dictum, Justice Holmes also questioned whether an unborn child "could be said to have become a person recognized by the law as capable of having *locus standi* in court, or being represented there by an administrator."[127]

Several years later in the Irish case of *Walker v. Great Northern Railway of Ireland*,[128] the court denied a claim for prenatal injuries sustained by an unborn which caused his premature birth and inevitable death.[129] Chief Justice O'Brien, writing for the majority, based his opinion on the lack of privity between the carrier responsible for the mother's transport and the child in the mother's womb.[130] The lack of such privity, the majority held, nullified any duty owed to

---

123. It is important to distinguish prenatal tort actions, rooted in the common law, from wrongful death and survival actions, which in most states are of statutory origin. Some courts refuse to apply their wrongful death and survival statutes to situations involving the death of an unborn fetus, and justify their refusal by defining narrowly the meaning of "person" as used in their state's wrongful death statute. *See* Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time For a New Framework*, 22 J. FAM. L. 677, 689 n.57 (1984); David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 Mo. L. REV. 639, 652 nn. 68-70 (1980). Wrongful death and survival cases remain instructive on the common-law rights of the unborn, however, because inherent in the analysis of the statutory right of recovery is the question of whether the child could have pursued a common-law action for prenatal injury had she survived her injury. Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 395 (D.C. App. 1984).

124. 138 Mass. 14 (1884), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967).

125. *Id.*

126. *Id.* at 17. Very few jurisdictions remain loyal to Justice Holmes's statement in *Dietrich* that an unborn child does not hold a status independent of its mother until it is born alive. *See, e.g.*, Blackman v. Langford, 795 S.W.2d 742 (Tex. 1990); *see also infra* note 147.

127. *Dietrich*, 138 Mass. at 16.

128. 28 L.R. Ir. 69 (Q.B. 1890).

129. *Id.*

130. *Id.* at 79.

the unborn.[131] In a concurring opinion, Associate Justice O'Brien opined that the more compelling reason for denying the child's claim was the impossibility of proving causation, and the danger of fictitious and unwieldy claims.[132]

Both *Dietrich* and *Walker* exemplify the rationales used by early courts to deny recovery for prenatal injuries because of the lack of duty owed to the unborn. Over the next several years, however, American tort law evidenced a slow but steady trend toward allowing recovery for injuries wrongfully committed against the unborn.

One of the first judicial pronouncements favoring recognition of actions for prenatal tort was Justice Boggs dissenting opinion in *Allaire v. St. Luke's Hospital.*[133] Justice Boggs departed from the opinion by Justice Holmes in *Dietrich*, which held that because a child held no separate existence apart from her mother, the defendant could owe the child no duty to act prudently.[134] Instead, Justice Boggs reasoned that a child achieves independent legal status once she is capable of physical existence separate from her mother, and any injury sustained by the child after viability was compensable.[135] To Justice Boggs, it was clear that

> at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother.[136]

It is upon this statement, and the heightened scientific understanding of the physical development of the fetus, that courts have relied in

---

131. *Id.* American courts no longer require privity of contract as a prerequisite for recovery in negligence. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

132. *Id.* at 81 (O'Brien, J., concurring). "[T]here are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us." *Id.*

133. 56 N.E. 638, 640 (Ill. 1900) (Boggs, J., dissenting). *Allaire* involved a claim by a child, born alive, who sustained severe injuries in utero after his mother fell from a chair in an elevator operated by the defendant hospital. *Id.* at 638. In a per curiam opinion, the majority followed the reasoning of Justice Holmes in *Dietrich* and held the child was owed no independent duty since it had no separate existence at the moment of injury. *Id.* at 640.

134. *See* Dietrich v. Northampton, 138 Mass. 14, 16 (1884), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967).

135. *Allaire*, 56 N.E. at 641-42.

136. *Id.* at 641.

developing the viability standard in prenatal tort actions.[137]

In the first reported decision to allow recovery for tortious prenatal conduct, *Kine v. Zuckerman*,[138] a Pennsylvania trial court avoided the issue of legal status of the fetus, and focused primarily on the causal connection between the defendant's conduct and the unborn child's subsequent injury.[139] The court rejected the defendant's argument that, since the negligence occurred at a time prior to the legal existence of the child, the defendant could not be held liable.[140] Instead, the court held that "[t]he time which elapses between the negligent act which puts harmful forces in motion and the receipt of the injury by the person injured is of no consequence, except as it may have an evidential value in a dispute as to cause and effect."[141] The *Kine* decision expressed a view of unborn rights which soon gained acceptance in appellate decisions from other jurisdictions.

2. The Viability Standard

Twenty-two years after *Kine*, the United States District Court for the District of Columbia decided *Bonbrest v. Kotz*,[142] a case cited by many jurists as the seminal case allowing recovery for prenatal injuries.[143] In recognizing the child's independent right to damages, viability played a pivotal role in the court's decision. Writing for a unanimous court, Justice McGuire noted the "anomalous doctrine . . . announced by Mr. Justice Holmes in . . . *Dietrich*,"[144] and reasoned that if the child is viable, it no longer is a part of the mother and should receive the same legal protections afforded any other living person:[145]

> As to a viable child being "part" of its mother—this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life—and while dependent for its continued development on

---

137. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 139-40 (D.D.C. 1946), discussed *infra* at notes 142-46 and accompanying text. *See also infra* note 147 (collecting cases applying the viability standard).
138. 4 Pa. D. & C. 227 (1924), *overruled by*, Berlin v. J.C. Penny Co., 16 A.2d 28 (Pa. 1940).
139. *Id.* at 230.
140. *Id.* at 231.
141. *Id.* at 230.
142. 65 F. Supp. 138 (D.D.C. 1946).
143. *See, e.g.*, Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1402, 1411.
144. *Bonbrest*, 65 F. Supp. at 139.
145. *Id.* at 140-42.

> sustenance derived from its peculiar relationship to its mother, it is not "part" of the mother in the sense of a constituent element—as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a nonviable foetus is not a part of its mother.[146]

The *Bonbrest* court's willingness to go beyond existing precedent to attach liability to the physician's acts, and its refusal to succumb to the difficulties of proof and the possibility of fraudulent claims, soon took hold in other jurisdictions. Many of the cases decided in the wake of *Bonbrest* adopted the viability standard for determining whether wrongful conduct was an actionable prenatal tort.[147]

3. Disregard for the Viability Standard: Conception and Beyond

A fundamental deficiency in the viability approach, however, is that the most debilitating effects of maternal disease and trauma during pregnancy attach at the very early stages of fetal develop-

---

146. *Id.* at 140 (citations omitted).

147. The following cases require that the child be viable at the time of injury as a prerequisite for recovery on the basis of prenatal tort, although not all require that the child be born alive: Estate of Baby Foy v. Morningstar Beach Resort, Inc., 635 F. Supp. 741 (D.V.I. 1986) (stillborn); Summerfield v. Superior Court, 698 P.2d 712 (Ariz. 1985) (born alive); Scott v. McPheeters, 92 P.2d 678 (Cal. Ct. App.) (born alive), *aff'd per curiam*, 93 P.2d 562 (Cal. 1939); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557 (Del. Super. Ct. 1956) (stillborn); Greater Southeast Community Hosp. v. Williams, 482 A.2d 394 (D.C. App. 1984) (born alive); Britt v. Sears, 277 N.E.2d 20 (Ind. Ct. App. 1971) (stillborn); Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983) (stillborn); Hale v. Manion, 368 P.2d 1 (Kan. 1962) (stillborn); Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970) (stillborn); Milton v. Cary Med. Ctr., 538 A.2d 252 (Me. 1988) (stillborn); Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949) (stillborn); Rainey v. Horn, 72 So. 2d 434 (Miss. 1954) (stillborn); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983) (en banc) (stillborn); White v. Yup, 458 P.2d 617 (Nev. 1969) (stillborn); Salazar v. St. Vincent Hosp., 619 P.2d 826 (N.M. Ct. App. 1980) (stillborn); DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987) (stillborn); Hopkins v. McBane, 427 N.W.2d 85 (N.D. 1988) (stillborn); Werling v. Sandy, 476 N.E.2d 1053 (Ohio 1985) (stillborn); Libbee v. Permanente Clinic, 518 P.2d 636 (Or. 1974) (stillborn); Presley v. Newport Hosp., 365 A.2d 748 (R.I. 1976) (stillborn); Hall v. Murphy, 113 S.E.2d 790 (S.C. 1960) (born alive); Farley v. Mount Marty Hosp. Ass'n, 387 N.W.2d 42 (S.D. 1986) (stillborn); Shousha v. Matthews Drivurself Serv. Inc., 358 S.W.2d 471 (Tenn. 1962) (born alive); Vaillancourt v. Medical Ctr. Hosp., Inc., 425 A.2d 92 (Vt. 1980) (stillborn); Moen v. Hanson, 537 P.2d 266 (Wash. 1975) (stillborn); Baldwin v. Butcher, 184 S.E.2d 428 (W. Va. 1971) (stillborn); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107 (Wis. 1967) (stillborn).

ment—well before the fetus is viable.[148] Today, a number of jurisdictions have abandoned the viability test for determining whether a duty was owed at the time the tortious conduct was committed.[149]

a. Previability Tort

As the number of claims brought for prenatal injuries increased, a minority of courts began to look beyond the viability requirement

---

148. The shortcomings of the viability standard are appropriately described by Judge Haynsworth in his dissenting opinion in Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964) (interpreting South Carolina law):

> Treatment of viability at the time of injury as significant is a relic of a relatively modern misunderstanding. When Mr. Justice Holmes wrote for the Supreme Judicial Court of Massachusetts in 1884, he advanced as one reason for not allowing recovery for prenatal injuries the notion that, until birth, the child was part of its mother. That notion was inconsistent with what common law precedents there were and with medical facts as they are known today. Its expression, however, led those taking the first hesitant steps away from Dietrich to say with understandable restraint that a viable child, at least, was not part of its mother. Since we now know that a child is no more a part of its mother before viability than after, this relic of an invalid notion does not deserve preservation. Our steps away from Dietrich need no longer be hesitant.

Id. at 79 (Haynsworth, C.J., dissenting) (citations omitted).

149. The following jurisdictions do not require that the child be viable at the time of injury in order to bring an action for prenatal tort, although the vast majority requires that the child be born alive: Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (interpreting Missouri law); Brown v. Green, 767 F. Supp. 273 (D.D.C. 1991); Wolfe v. Isbell, 280 So. 2d 758 (Ala. 1973); Simon v. Mullin, 380 A.2d 1353 (Conn. Super. Ct. 1977); Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560 (Fla. Dist. Ct. App. 1976); Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727 (Ga. 1956); Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977); Walker v. Rinck, 604 N.E.2d 591 (Ind. 1992); Group Health Ass'n v. Blumenthal, 453 A.2d 1198 (Md. 1983); Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967); Womack v. Buchhorn, 187 N.W.2d 218 (Mich. 1971); Bennett v. Hymers, 147 A.2d 108 (N.H. 1958); Smith v. Brennan, 157 A.2d 497 (N.J. 1960); Kelly v. Gregory, 125 N.Y.S.2d 696 (N.Y. App. Div. 1953); Grover v. Eli Lilly & Co., 591 N.E.2d 696 (Ohio 1992); Graham v. Keuchel, 847 P.2d 342 (Okla. 1993); Sinkler v. Kneale, 164 A.2d 93 (Pa. 1960) (dictum); Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966); Yandell v. Delgado, 471 S.W.2d 569 (Tex. 1971); Kalafut v. Gruver, 389 S.E.2d 681 (Va. 1990).

Only one reported appellate decision has recognized a cause of action for the death of a nonviable fetus. *See* Porter v. Lassiter, 87 S.E.2d 100 (Ga. App. 1955). Most courts have rejected this approach. *See, e.g.*, Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993); Rapp v. Hiemenz, 246 N.E.2d 77 (Ill. App. 1969); Toth v. Goree, 237 N.W.2d 297 (Mich. App. 1975); Rambo v. Lawson, 799 S.W.2d 62 (Mo. 1990) (en banc); Wallace v. Wallace, 421 A.2d 134 (N.H. 1980); Egan v. Smith, 622 N.E.2d 1191 (Ohio App. 1993); Coveleski v. Bubnis, 634 A.2d 608 (Pa. 1993); Miccolis v. AMICA Mut. Ins. Co., 587 A.2d 67 (R.I. 1991).

and deemed actionable any wrongful conduct causing injury to the unborn at any point after conception. In *Kelly v. Gregory*,[150] for example, a New York intermediate appellate court held that upon the establishment of a causal connection between the defendant's conduct and the injury to the unborn, an action may be brought for injuries sustained at any point after the child's conception.[151] Today, a number of courts have abandoned the viability standard and allow recovery for injuries sustained by the unborn child during any stage of fetal development.[152]

b. Preconception Tort

Actions for preconception tort afford recovery for injuries caused by acts or omissions occurring prior to a child's conception.[153] Relatively few preconception tort cases have been decided by appellate courts, and those cases take different approaches and reach different conclusions on the legitimacy of the action.

The first preconception tort action was decided in 1973 by the United States Court of Appeals for the Tenth Circuit in *Jorgensen v. Meade Johnson Laboratories, Inc.*[154] That case involved claims brought on behalf of twins born severely retarded, allegedly as the result of their mother's ingestion of birth control pills prior to

---

150. 125 N.Y.S.2d 696 (N.Y. App. Div. 1953).

151. *Id.* at 698. *Kelly* involved an action by a minor child for injuries sustained during the third month of gestation as a result of an automobile collision. *Id.* at 697. The court held that a nonviable fetus was capable of sustaining physical injury notwithstanding his inability to live outside the mother's womb. *Id.* at 697-98.

152. *See supra* note 149.

153. *See* Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978). The term "preconception tort" is somewhat of a misnomer in the legal sense because, as a general rule, a tort is not complete until injury is suffered from the defendant's act or omission. Although it is true that the unborn's mother may be exposed to the defendant's negligent conduct, oftentimes the negligence does not cause her direct injury. *See generally* Charles L. Moore, Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 Sw. L.J. 414 (1974). The tort, as it applies to the unconceived child, is not complete until that child is conceived and adversely affected. *See* Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1259 (Ill. 1977) (Dooley, J., concurring). Without the child's conception, therefore, the defendant's conduct is nothing more than "negligence in the air." *See id.* at 1254 (quoting FREDERICK POLLOCK, TORTS 361 (14th ed. 1939)); *see also* Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851 (Mo. 1993).

Defendants in preconception cases often challenge preconception tort claims by arguing that no duty is owed to someone not in existence at the time of the wrongful conduct. This argument ignores the conditional prospective nature of the duty owed to potential life. *See infra* note 166 and accompanying text.

154. 483 F.2d 237 (10th Cir. 1973).

plaintiffs' conception.[155] The infants brought negligence, strict liability, and warranty actions against Meade Johnson, alleging that the pharmaceutical it manufactured caused an alteration of their mother's chromosomal structure, which, in turn, caused their mongoloid condition.[156] In allowing the preconception tort action to proceed to trial, the Tenth Circuit concluded that Oklahoma law recognized actions for prenatal injuries grounded on theories of strict liability, negligence, and breach of warranty—any of which might support the plaintiffs' claim. Although the case involved a defective pharmaceutical and thus could have been decided on strict products liability grounds, *Jorgensen* provided the necessary groundwork for a later decision based solely on negligence.[157]

In *Renslow v. Mennonite Hospital*,[158] a sharply divided Supreme Court of Illinois permitted recovery by a child for neurologic and hematologic injuries sustained as the result of negligent blood transfusions administered to her mother more than seven years prior to the child's conception.[159] The *Renslow* majority, in recognizing preconception tort as a valid cause of action, acknowledged the logical progression of American tort law to provide recompense to those injured during the very early stages of gestation.[160] The court could envision no reason why a child may recover for injury sustained prior to viability, but not for harms put in motion prior to the child's existence which manifest their ill effects only upon contact with the embryo at conception.[161]

---

155. *Id.* at 238.
156. *Id.*
157. Several courts and commentators argue that *Jorgensen* is of minimal significance in the development of preconception tort law because the action was governed by strict products liability law. *See, e.g.*, Albala v. City of New York, 429 N.E.2d 786, 788 n.* (N.Y. 1981); Comment, *Preconception Injuries: Viable Extension of Prenatal Injury Law or Inconceivable Tort?*, 12 VAL. U. L. REV. 143, 168 (1977). A careful reading of the court's brief holding, however, reveals that the case was not decided solely on the basis of strict products liability. *See Jorgensen*, 483 F.2d at 241; *see also* discussion *infra* notes 173-75 and accompanying text.
158. 367 N.E.2d 1250 (Ill. 1977).
159. *Id.* at 1255-56. In 1965, Emma Renslow was transfused with incompatible Rh-positive blood that caused her own blood to sensitize. *Id.* at 1251. This condition went unnoticed for several years until the results of a routine blood test indicated her condition. *Id.* At the time her condition was detected, Emma was pregnant with her daughter Leah Ann, but at no time did treating physicians advise Emma of her condition or its possible consequences on the health of her expected child. *Id.* Leah Ann was born severely handicapped. *Id.*
160. Although the Supreme Court of Illinois had not ruled on the legitimacy of the viability standard prior to *Renslow*, that case inherently presented the issue. *Id.* at 1253-54.
161. *Id.* at 1255.

The concept of foreseeability played a significant role in the *Renslow* decision. Justice Moran, writing for the majority in *Renslow*, found it both logical and justified to extend a physician's duty to those persons who are the foreseeable beneficiaries of her treatment or advice, whether or not they are in being at the time the treatment or advice is rendered.[162] The majority declined to follow the existing line of cases which had imposed preconception tort liability on the basis of causation,[163] noting that "in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world."[164] Thus, Justice Moran concluded that "any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which 'set society on edge and fill the courts with endless litigation.'"[165]

The *Renslow* majority recognized that harmful conduct and the resulting injury need not occur simultaneously—that a tortfeasor may set harmful forces in motion at a time when the inevitable victim does not exist, and remain conditionally and prospectively liable to those whose situation in time and place make them the unfortunate beneficiaries of the harm.[166] It is this concept of conditional prospective liability that is basic to the wrongful life action, which charges that a genetic counselor is negligent in failing to disclose genetic risks at a time when the victim is either unborn or unconceived. Although the advice when disseminated is only potentially injurious, it is not harmful and therefore tortious until the child is conceived and born alive.

The rationale of the majority opinion in *Renslow* has been questioned by several courts that have refused to recognize the preconception tort action. In *Albala v. City of New York*,[167] Jeffrey

---

162. *Id.*

163. *See, e.g.*, Jorgensen v. Meade Johnson Labs., Inc., 483 F.2d 237 (10th Cir. 1973).

164. *Renslow*, 367 N.E.2d at 1254.

165. *Id.* (quoting William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1953)).

166. *Id.* at 1255. *Accord* Walker v. Rinck, 604 N.E.2d 591 (Ind. 1992) (holding physician and laboratory liable for failing to diagnose and treat mother's Rh blood disorder prior to conception of twins who were born with severe birth defects as a result); Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851 (Mo. 1993) (similar); Graham v. Keuchel, 847 P.2d 342 (Okla. 1993) (similar); *see also* Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (applying Missouri law) (physician who negligently performed Caesarean section on mother prior to plaintiff's conception liable for injuries sustained by child born prematurely as a result); Monusko v. Postle, 437 N.W.2d 367 (Mich. Ct. App. 1989) (physician breached duty to unconceived child by failing to immunize her mother against rubella where physician was aware of mother's intention to conceive a child).

167. 429 N.E.2d 786 (N.Y. 1981).

Albala brought suit against Bellevue Hospital alleging that a negligently performed abortion procedure on his mother seven years prior to his birth caused him to sustain severe brain damage upon his conception.[168] In affirming the dismissal of the complaint, the majority held that to recognize a right of action for preconception tort "would require the extension of traditional tort concepts beyond manageable bounds . . . ."[169] The court reasoned that the duty owed to the unconceived must not be based solely on foreseeability; otherwise the class of potential plaintiffs would grow at a staggering and unmanageable rate.[170] The court also noted the consequence of recognizing preconception tort on the medical community, the members of which would be tempted to practice defensive medicine to avoid potential malpractice, and on "society as a whole[, which] would bear the cost of our placing physicians in a direct conflict between their moral duty to patients and the proposed legal duty to those hypothetical future generations outside the immediate zone of danger."[171]

In a footnote, the majority acknowledged the handful of cases in other jurisdictions which had recognized preconception tort, but noted that two of the three cases were "based largely on a misplaced reliance upon precedent in prenatal injury cases . . . ."[172] In discussing the third case, *Jorgensen v. Meade Johnson Laboratories, Inc.*,[173] however, the court noted that foreseeability played no part in that decision because it was a products liability action based on strict liability, where "the necessity of establishing manageable bounds for

---

168. *Id.* at 787.
169. *Id.*
170. The notion that liability must stop somewhere has served to defeat preconception tort claims in several other cases decided subsequent to *Albala*. *See* Hegyes v. Unjian Enters., Inc., 286 Cal. Rptr. 85, 90 (Cal. Ct. App. 1991) (driver of automobile who caused collision not liable for premature birth of child not conceived when accident occurred); McAuley v. Wills, 303 S.E.2d 258, 260 (Ga. 1983) (similar); McNulty v. McDowell, 613 N.E.2d 904, 906-07 (Mass. 1993) (ob-gyn owed no duty to unconceived child to vaccinate her mother against rubella where purpose of medical consultation was to prevent mother's pregnancy); Carr v. Wittingen, 451 N.W.2d 584, 585-86 (Mich. App. 1990) (physician who negligently performed laparotomy on mother prior to child's conception not liable for death of unborn child after mother's uterus ruptured during pregnancy); Enright v. Eli Lilly & Co., 570 N.E.2d 198 (N.Y. 1991) (pharmaceutical manufacturer not liable for injuries sustained by granddaughter of woman who ingested diethylstilbestrol (DES) during her pregnancy); Grover v. Eli Lilly & Co., 591 N.E.2d 696, 700-01 (Ohio 1992) (same).
171. *Albala*, 429 N.E.2d at 788-89.
172. *Id.* at 788 n.* (citing Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) and Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977)).
173. 483 F.2d 237 (10th Cir. 1973).

liability is conspicuously absent."[174] Cases premised on strict products liability, the court concluded, do not necessitate a circumscribed view of foreseeability because a manufacturer's liability automatically extends to the entire class of persons affected by the product regardless of foreseeability or due care.[175]

The foregoing cases evidence the progression of American tort law which, today, fully embraces the concept of duty owed to the unborn. This expanded notion of duty is important in wrongful life cases because the medical provider's independent duty now extends to the unborn or unconceived child to disseminate accurate information to those who have control over her genetic fate.[176] Although the unborn child cannot act on the information, the quality of her life is so inextricably dependent on this information that a breach of care by a medical provider is a breach of her obligation to the unborn or unconceived child.

B. Breach of Duty: The Evolution of Genetics and the Standard of Care for Genetic Counselors

The study of inheritance and human genetics has developed at an incessant pace since Gregor Mendel discovered that hereditary traits are passed on to offspring in hereditary units known as "genes."[177] Almost 100 years later, in 1953, James Watson and

---

174. *Albala*, 429 N.E.2d at 788 n.*. It is not at all clear from the holding in *Jorgensen* that the case was decided on the basis of strict products liability. In fact, the Tenth Circuit, in concluding that Oklahoma law provided the foundation upon which an action for preconception tort could be based, focused on concepts of duty, causation, and proximate cause, and noted that "principles of strict liability in tort, negligence and warranty have been primarily recognized by court decision, even though substantially new bases of recovery were afforded." *Jorgensen*, 483 F.2d at 241. The court, however, never actually stated the theory upon which it relied in reaching its decision.

175. *Albala*, 429 N.E.2d at 788 n.*. The insignificance of foreseeability in strict liability does not justify the conclusion reached in *Albala* that "the necessity of manageable bounds for liability is conspicuously absent." *Id.* To the contrary, if the true concern is establishing manageable bounds for liability, negligence rather than strict liability better deters ultimate recovery. Plaintiffs alleging negligence, particularly in defective product cases, have the difficult burden of proving fault. Strict tort liability, at least in theory, however, relieves the plaintiff of this burden, and requires only that she prove the product was defective when it left the manufacturer's control. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A (1965); DAVID FISHER & WILLIAM POWERS, JR., PRODUCTS LIABILITY 50-51 (1988). *But see infra* note 317 and accompanying text (culpability remains an element of strict products liability).

176. *But see* James G. v. Caserta, 332 S.E.2d 872, 880-81 (W. Va. 1985) (holding that no duty is owed to unborn infant suing for wrongful life).

177. Gregor Mendel, *Experiments in Plant Hybridization*, *in* CLASSIC PAPERS IN GENETICS 1 (J. Peters ed., 1959).

Francis Crick discovered the double helix structure of DNA (deoxyribonucleic acid),[178] and a new science, molecular biology, introduced new techniques such as amniocentesis,[179] chorionic villus sampling,[180] and alpha-fetoprotein analysis[181] for identifying various congenital anomalies in unborn children.

Genetic testing and evaluation affords parents the opportunity to make a timely and informed choice whether or not to conceive

---

178. James Watson & Francis Crick, *Genetical Implications of the Structure of Deoxyribonucleic Acid*, 171 NATURE 964 (1953).

179. Amniocentesis is the most commonly utilized invasive prenatal procedure, and is used extensively to detect numerous genetic abnormalities through DNA analysis. A long surgical needle is inserted into the woman's amniotic sack where a small amount of fluid is removed. The procedure is medically indicated where the mother is of advanced maternal age (over 35), where there is a known familial translocation, or where there is a prior birth of a child with trisomy 21. John W. Littlefield et al., *Prenatal Genetic Diagnosis: Status & Problems*, *in* ETHICAL ISSUES IN HUMAN GENETICS, *supra* note 52, at 43. "At a maternal age of 35 years the risk of a chromosome abnormality is 1 per 200 live births and increases to 1 per 65 live births by age 40 years." ROBERT W. KISTNER, GYNECOLOGY 658-59 (4th ed. 1986). *But cf.* M.M. Adams et al., *Down's Syndrome: Recent Trends in the United States*, 246 JAMA 758 (1981) (reporting that the incidence of Down's syndrome among women over age 45 is less than 35 per 1000 live births).

180. Chorionic villus sampling (CVS) is a relatively new technology for diagnosing various chromosomal abnormalities during fetal gestation. ROVINSKY & GUTTMACHER'S MEDICAL, SURGICAL & GYNECOLOGIC COMPLICATIONS OF PREGNANCY 310 (Carol-Lynn Brown ed., 1985) [hereinafter ROVINSKY & GUTTMACHER]. A small catheter is inserted through the vagina and cervix to extract a small sample of chorionic tissue from the fetal placenta for chromosomal and biochemical analyses. *Id.* The procedure can be used as early as nine weeks into pregnancy and, in most instances, is preferable to amniocentesis, which cannot be performed before the sixteenth week and requires two-to-three weeks additional time to culture the fetal cells. *Id.* CVS is not appropriate in all circumstances; amniocentesis is still required for the detection of certain genetic disorders such as neural tube defects. *Id.* at 306. Where CVS is feasible, however, the patient is afforded the opportunity to make prompt decisions about first trimester abortion, and physicians are afforded the opportunity to initiate fetal therapy at a very early stage of the child's prenatal development. Frank A. Chervenak et al., *Advances in the Diagnosis of Fetal Defects*, 315 NEW ENG. J. MED. 305, 306 (1986).

181. Alpha-fetoprotein (AFP) can be measured in maternal serum (through a blood test on the mother) or in the amniotic fluid (through amniocentesis). Maternal serum AFP analysis is a screening test elevated levels of AFP which may be associated with open neural tube defects. Conversly, low levels AFP may be associated with trisomies such as Down's syndrome. KENNETH L. GARVER & SANDRA G. MARCHESE, GENETIC COUNSELING FOR CLINICIANS 73 (1986); *see also infra* note 246 (offering a medical description of neural tube defects). Amniocentesis can then be performed to confirm or rule out these anomalies. GARVER, *supra* at 73. Timing is critical to accurate test results. JACK A. PRITCHARD ET AL., WILLIAMS OBSTETRICS 277 (17th ed. 1985). AFP analysis should be performed between 16 and 20 weeks of gestation. *Id.*

or to proceed with a pregnancy. When the genetic counselor, testing laboratory, or other medical provider fails accurately to disseminate genetic information to prospective parents, litigation in the form of wrongful life and wrongful birth actions sometimes ensues. This section examines the roles, duties, and obligations of the genetic counselor as an information provider and advice giver.

1. Genetic Counseling and the Role of the Counselor

Clinical genetics or "genetic counseling" is a relatively new specialty, the availability and benefit of which has only recently been recognized by physicians, patients, and insurers in the prevention of hereditary and congenital birth defects.[182] Genetic counseling involves the dissemination of information and advice by trained medical providers to potential parents regarding "the occurrence and risk of recurrence of certain genetic disorders."[183] Genetic counseling typically involves the taking of a detailed medical history which may include a review of family pedigree, medical records, a physical examination, and either the performance of, or instruction to undergo, diagnostic procedures and laboratory analyses, all of which will determine with reasonable certainty the risks of passing genetic disease onto future offspring.[184]

Proper genetic counseling requires not only that the information be fully disclosed, but also that it be conveyed in such a manner as to maximize the parents' understanding of the diagnosis, thus allowing them to make rational and informed decisions about the pregnancy. The genetic counselor hopes that the information derived from her evaluation can be conveyed accurately to the patient, and that the patient will fully understand the risks associated with the pregnancy. It is not unusual, however, for the patient to become confused or feel overwhelmed by the complexity of the information.[185] Even the way a counselor portrays the disease may have a profound impact on the parents' ultimate decision to proceed with or to terminate a pregnancy.[186]

---

182. Reed E. Pyeritz et al., *The Economics of Clinical Genetics Services I: Preview*, 41 AM. J. HUM. GENET. 549, 551 (1987). Clinical genetics began in the 1940s. *Id.* Since that time a few centers, such as the Medical Genetics Clinic at Johns Hopkins Hospital in Baltimore, have been established. *Id.* However, the specialty as a whole has not had time to establish itself in mainstream medicine. *Id.* This is probably due to the fact that physicians, patients, and insurers are not yet fully aware of the genetic services available. *Id.*

183. ROVINSKY & GUTTMACHER, *supra* note 180, at 307.

184. *Id.* at 307-08.

185. LORI B. ANDREWS, MEDICAL GENETICS: A NEW FRONTIER 108-110 (1987).

186. Daniel Callahan, *The Meaning and Significance of Genetic Disease: Philosophical Perspectives*, *in* ETHICAL ISSUES IN HUMAN GENETICS, *supra* note 52, at 83, 91; ANDREWS, *supra* note 185, at 109.

The qualifications of the professionals who render genetic counseling vary considerably. Some physicians or Ph.Ds. specialize in genetics, while others incorporate genetic counseling into their obstetric or gynecologic practices.[187] Other nonphysicians have special training in genetic counseling and consult patients pursuant to the recommendation of the patient's family physician.[188]

2. The Undefined Standard of Care for Genetic Counselors

The extent of the genetic counselor's duty, and the standard of care against which the counselor is to be judged, are not fully defined, primarily because of the recent emergence of the field of genetic counseling as a separate medical specialty, the diversity of medical providers offering genetic counseling, and the rapid technological advancement that shapes diagnostic abilities.[189] As the field of genetic counseling is further refined by science and litigation, questions are surfacing as to the techniques and manner in which genetic information is conveyed to patients. The problem is particularly acute in those circumstances where information known by the counselor is not properly conveyed to the patient, and thus, does not take on the significance it should in the parents' procreative decision-making process.

A breach of duty by the genetic counselor in its simplest form occurs when the counselor fails to utilize diagnostic procedures,[190] fails to take a family history[191] or inquire into the parents' ethnicity,[192]

---

187. Obstetricians may have a legal duty to refer at-risk patients to genetic counselors. Keith S. Fineberg & J. Douglas Peters, *Genetic Counseling and Screening: Standards of Care, Customary Practice, and Legal Liability*, *in* PERSONAL INJURY DESKBOOK—1985 173, 175 (Barry Denkensohn & Gordon Ohlsson eds., 1985); *see also infra* note 194 and accompanying text.

188. Ricki Lewis, *Better Babies*, HEALTH, Mar. 1987, at 23-24.

189. Further growth of genetic counseling as a separate medical discipline will inevitably give rise to a standard of care for the field. At present, however, it is difficult to find unanimous opinion among experts on the proper standard of care for genetic counseling. *See, e.g.*, Alexander M. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 622-25 (1979) (because of the wide variety of medical providers involved in genetic counseling, one professional standard cannot govern without the creation of a new medical discipline). Some commentators suggest that a national standard of care applies to genetic counseling. *E.g.*, Roger Dworkin, *The New Genetics*, *in* BIOLAW 89 (James F. Childress et al. eds., 1986).

190. Failure to offer amniocentesis is one of the most prevalent omissions giving rise to wrongful life and wrongful birth suits. *See, e.g.*, Berman v. Allan, 404 A.2d 8, 10 (N.J. 1979); Becker v. Schwartz, 386 N.E.2d 807, 808 (N.Y. 1978).

191. *See* Turpin v. Sortini, 643 P.2d 954, 955 (Cal. 1982); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 693 (Ill. 1987); Schroeder v. Perkel, 432 A.2d

or fails properly to interpret or disseminate genetic information.[193] Likewise, the provider may be negligent in failing to refer patients to specialists in genetics,[194] or in selecting an incompetent laboratory to administer a diagnostic procedure.[195] In these circumstances—which account for the vast majority of wrongful life and wrongful birth cases—the breach is easy to identify and, thus, liability would appear clear. In some circumstances, however, a breach of duty by a genetic counselor is not so easy to identify because at first blush the patient appears to have exercised an independent and informed procreative choice. Closer scrutiny, however, may reveal subtle deviations in the counseling approach which may have caused the parents to make a decision they otherwise would not have made had they been counseled differently.[196] In these cases, it will be more difficult to prove a

---

834, 835 (N.J. 1981); Park v. Chessin, 440 N.Y.S.2d 110, (N.Y. App. Div. 1977), *modified sub nom.* Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).

192. Certain genetic traits are more common in particular racial and ethnic groups. Sickle-cell anemia is most prevalent in Blacks, Tay-Sachs disease in eastern European Jews, cystic fibrosis in northern European Caucasians, and the various forms of thalassemia in Italians, Greeks, and other persons of Mediterranean ancestry. NELSON, *supra* note 10, at 284.

193. *See* ANDREWS, *supra* note 185, at 105-06.

194. Fineberg & Peters, *supra* note 187, at 173, 174. The following indications warrant referral to a genetic counselor:

—a genetic or congenital anomaly in a family member;
—family history of an inherited disorder;
—abnormal somatic or behavioral development in a child;
—mental retardation of unknown etiology in a child;
—pregnancy in a woman older than age 35;
—specific ethnic background suggestive of a high rate of genetic abnormality;
—drug use or long-term exposure to possible teratogens or mutagen;
—three or more spontaneous abortions, early infant deaths, or both; and
—infertility.

Id. at 174 (citing Council on Scientific Affairs of the American Medical Association, *Genetic Counseling and Prevention of Birth Defects*, 248 JAMA 221 (1982)).

195. Commentators are split on the question of whether a genetic counselor should be accountable for laboratory errors. *Compare* Aubrey Milunsky, *Prenatal Diagnosis and the Law*, *in* GENETICS AND THE LAW II 61, 65 (Aubrey Milunsky & George Annas eds., 1980) (genetic counselors should be held accountable for negligently selecting a laboratory) *with* Phillip Reilly, *Genetic Counseling and the Law*, 12 HOUS. L. REV. 640, 656 (1975) (genetic counselors should not be liable for tests negligently performed by an independent laboratory).

196. There are two genetic counseling approaches. One involves "directive" counseling, where advice or recommendations are made on the basis of test data in combination with the patient's perceived ability to act responsibly and cope with the decision she makes. The counselor practicing directive genetic counseling may choose not to disclose certain information or she may suggest what she considers the "most appropriate" course of action for the patient under

breach of duty, particularly since the standard of care for genetic counseling is presently undefined.[197]

C. *Proof of Causation*

As with any other negligence action, the wrongful life plaintiff must prove the defendant's negligence was the cause in fact and legal cause of her injury. Seldom has the lack of causation played a decisive role in appellate decisions denying wrongful life.[198] One reason is because the defendant usually challenges the action by motion for summary judgement or motion to dismiss, in which case the court must assume every allegation in the plaintiff's complaint is true. The plaintiff will usually plead the required allegations in her complaint. Whether she can actually prove causation along with the other elements of the action, however, depends on her success on the merits.

---

the circumstances. The counselor may well justify nondisclosure of certain diagnoses on the assumption that the parents, upon receipt of such information, may decide "unreasonably" to abort the fetus. Alexander M. Capron, *Informed Decisionmaking in Genetic Counseling: A Dissent to the "Wrongful Life" Debate*, 48 IND. L.J. 581, 588-94 (1973). Directive counseling is most frequently recommended when the patient is perceived not to understand the genetic information she receives, or when she chooses to forego medically indicated diagnostic procedures. Maxine A. Sonnenberg, Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. CAL. L. REV. 477, 498-99 (1982).

Other counselors practice "nondirective" counseling, where the counselor disseminates information on the risks of particular diagnostic procedures, the meaning of test results, the likelihood of disease manifestation, and the procreative alternatives; but the counselor renders no specific recommendation on the "most appropriate" course of action for the patient. The nondirective counseling approach appears the more preferable method for both the counselor and the patient since it leaves the ultimate decision concerning reproductive choice to the parents untainted by the counselor's own moral, ethical, and religious convictions. ROVINSKY & GUTTMACHER, *supra* note 180, at 308. Nondirective counseling also serves to reduce the counselor's exposure to malpractice liability because the patient has made a knowing and voluntary choice, assuming the information is communicated properly. A counselor who takes a purely nondirective approach must remain uninvolved in the parents' decision to terminate a pregnancy based on minimally significant conditions such as a cleft lip or even because of the undesirable sex of the child. The counselor must also remain uninvolved when the medical indications of the disease at issue are severe, yet the parents decide nonetheless to proceed with the pregnancy. It is not difficult to envision where a genetic counselor's personal interests and values may affect the counseling approach she employs. *See* Capron, *supra*, at 589-91.

197. *See supra* note 189 and accompanying text.

198. *But see* Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988) (en banc), *cert. denied*, 488 U.S. 893 (1988) (rejecting wrongful life claim on basis that impaired child cannot prove causation).

Causation in fact requires that the defendant's conduct be inextricably linked to the plaintiff's harm in such a way as to permit a trier of fact to conclude that, but for the defendant's conduct, the plaintiff would not have been injured. Thus, the child alleging wrongful life must prove she would not have been born but for the medical provider's failure to inform her parents of the genetic risks associated with her birth.

Legal causation is often defined by the defendant's ability to foresee the adverse effects of her act or omission.[199] Thus, the extent of foreseeability will vary depending upon the status of the parties and their relationship with one another. Cases addressing the duty owed to unborn children establish that the unborn child, although not in existence or a person under the law, is a foreseeable beneficiary of the defendant's wrongful conduct. Likewise, where a woman of childbearing age seeks genetic counseling, it is reasonable for the genetic counselor to recognize the information she imparts will inevitably affect potential life. For these reasons, a genetic counselor who negligently withholds or discloses erroneous genetic information proximately causes the resulting child's handicapped condition since dissemination of accurate information would have allowed the parents to avoid the birth. Although the provider does not cause the impairment in the literal sense, she causes the *birth* of a child with impairment and, thus, unilaterally transforms that impairment into absolute reality for both parent and child.[200]

The vitality of the wrongful life action hinges on the freedom to make procreative decisions about conception and abortion. Without such freedom the parents cannot claim they were deprived of the "right" to avoid the birth of their child, and the wrongful life plaintiff will be unable to sustain her burden of proving factual causation. American jurisprudence embraces the parents' fundamen-

---

199. Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co., 1 All E.R. 404 (P.C. 1961); *see also* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (the zone of danger defines the zone of duty).

200. *E.g.*, Reed v. Campagnolo, 630 A.2d 1145 (Md. 1993) (wrongful birth case). Under Restatement (Second) of Torts § 431 (1965), an actor's negligent conduct is a legal cause if it is "a substantial factor" and if no rule of law relieves the actor from liability because of the manner in which the negligence resulted in harm. Even though the physical forces producing [the child's] birth defects were already in operation at the time of the alleged negligence of the physicians, under the chain of causation alleged by the [plaintiffs] the physicians could have prevented the harm to the parents. Those allegations, if proved, would present sufficient evidence from which the trier of fact could find that the alleged negligence of the physicians was a substantial factor in the legal harm to the parents.

Id. at 1152.

tal right to practice birth control and the woman's right to procure an abortion, although the latter right is not absolute at all phases of the pregnancy.[201] As long as procreative decision-making remains constitutionally protected, genetic counselors have a duty to inform their patients of these options as part of the counseling process. A breach of this duty can be said to proximately cause the birth of a handicapped child.

The parents' personal decision whether or not to exercise the rights afforded them under the law is also an issue of causation in the wrongful life action. The child must prove that, if properly informed, her parents would have acted upon the information disclosed by the genetic counselor and avoided the child's birth. The religious and moral convictions of the child's parents may be such that the child cannot prove her parents would have avoided her birth if given the chance.[202] Thus, the medical provider's failure to properly disseminate genetic information is not the proximate cause of the child's impaired existence since her parents would not have heeded the information if given the opportunity.[203]

D. Birth as an Injury: The Metaphysical Conundrum

The related issues of injury and damage in the wrongful life action have proved the major stumbling blocks for courts asked to decide whether the child has been harmed by being born.[204] It is by now understood that the typical tort law approach for determining injury and damage is more problematic in wrongful life cases because the otherwise condition preferred by the plaintiff is nonexistence. This section examines the rationales underlying the refusal to award general and special damages to children alleging wrongful life, and analyzes the philosophical debate inherent in the concept that life

---

201. Although the continued vitality of the trimester approach of *Roe v. Wade* has been challenged as unsound, *see* Webster v. Reproductive Health Servs., 492 U.S. 490, 529-31 (1989) (O'Connor, J., concurring), abortion remains part of the woman's right to privacy, at least for the immediate future. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

202. For a general discussion of the various religious views on contraception and abortion, see James F. Childress, *Religious and Philosophical Perspectives on Contraception and Abortion*, *in* BIOLAW, *supra* note 189, at 69-71.

203. The inability of the wrongful life plaintiff to prove that her parents would have procured an abortion because of their moral or religious convictions will rarely serve to defeat a wrongful life claim, particularly since the parents are usually the ones who initiate the action on behalf of their child.

204. Injury and damages are treated herein as separate elements of the wrongful life action. *See infra* Part III.D.2. Other commentators refute the distinction between these related tort concepts. *See, e.g.*, Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505, 517, 525-35 (1991).

with impairment is a cognizable injury when the child's otherwise condition is nonexistence.

Reported wrongful life cases evidence a uniform unwillingness as a matter of law to permit recovery of general damages by a child born into a life with handicap—a life which could have been avoided but for the negligence of medical providers.[205] Even the few courts that have awarded special damages for wrongful life have denied (rather inconsistently) the child's claim for general damages because of the absence of injury.[206]

Courts have justified their refusal to award general damages on various grounds, ranging from the purported inability to prove any damage in being born,[207] to the danger that the sanctity of life will somehow be disavowed if courts were to allow such a right of recovery.[208] Although the reasoning of those courts is well-intentioned, their approach in refusing to recognize an impaired life as an injury is inconsistent with existing legal doctrine.

1. Right-to-Die: An Appropriate Analogy

Right-to-die cases evidence some concession by courts that life may not always be preferable to nonexistence, and are also instructive on the concept of substituted decision-making which is essential to the wrongful life action.[209] Particularly instructive are those right-to-die cases involving requests to discontinue or withhold artificial life support made on behalf of incompetent patients who have never

---

205. *See supra* notes 7 and 9.

206. If, as this Article posits, separate inquiries into injury and damages are required, it appears that injury must exist whenever any damages are awarded. *See* David H. Pace, *Treatment of Injury in Wrongful Life Claims*, 20 COLUM. J.L. & SOC. PROBS. 145, 155-58 (1986), *reprinted in* PERSONAL INJURY REVIEW—1987 552, 563-66 (Barry Denkensohn & Agnes A. Fliss eds., 1987); *see also infra* note 259 and accompanying text.

207. *See* Lininger v. Eisenbaum, 764 P.2d 1202, 1210-11 (Colo. 1988) (en banc); Smith v. Cote, 513 A.2d 341, 352 (N.H. 1986); Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978); Azzolino v. Dingfelder, 337 S.E.2d 528, 532-33 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986); Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984).

208. *See* Blake v. Cruz, 698 P.2d 315, 322 (Idaho 1984); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 702 (Ill. 1987); Bruggeman v. Schimke, 718 P.2d 635, 642 (Kan. 1986); Smith v. Cote, 513 A.2d 341, 352-53 (N.H. 1986); Berman v. Allan, 404 A.2d 8, 12-13 (N.J. 1979). *But see* Turpin v. Sortini, 643 P.2d 954, 961-62 (Cal. 1982) (en banc) (suggesting that in cases of severe hereditary disease, never having been born may be preferable to being born).

209. A detailed discussion of the right-to-die controversy is beyond the scope of this Article. For a further discussion of the many issues surrounding the right-to-die, see generally ALAN MEISEL, THE RIGHT TO DIE (1989); Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375 (1988).

been capable of expressing a preference for a particular course of treatment and who have never experienced healthy life.

The substituted judgement doctrine is a judicially created legal fiction that affords an otherwise incompetent patient, through a proxy, the same rights as a competent patient to refuse extraordinary medical treatment that would merely prolong the patient's dying. Accordingly, courts and legislatures have developed various prognosis-based approaches for determining when it is appropriate to permit the removal and withholding of artificial life support. Those conditions which would justify the removal of life support have been invariably described to include a patient who is terminally ill, irreversibly comatose, or who is in a persistent vegetative state. According to this doctrine, consideration must be given to what the patient, if competent, would have decided regarding her treatment.

In *In re Quinlan*,[210] the Supreme Court of New Jersey held that the individual's right to privacy overrides the state's interest in preserving life in certain circumstances, so that the parents could make the life or death decision for a child incompetent to do so on her own.[211] According to the holding in *Quinlan*, when reliable proof indicates that the patient has no chance of returning to a cognitive, sapient existence, a proxy, who, in *Quinlan*, was the patient's father, can choose to have treatment terminated.[212] The court recognized that "the focal point of decision should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence to which Karen seems to be doomed."[213]

The *Quinlan* court espoused what has come to be known as the "substituted judgment doctrine," which preserves the incompetent's rights by permitting a guardian or family member "to render their best judgement . . . as to whether she would exercise it in these circumstances."[214] In pronouncing this standard, the court incorporated the expected preference of the incompetent patient:

> We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, she could effectively decide upon discontinuance

---

210. 355 A.2d 647 (N.J. 1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).
211. *Id.* at 663-64.
212. *Id.* at 664.
213. *Id.* at 669.
214. *Id.* at 664.

> of life-support apparatus, even if it meant the prospect of natural death.[215]

The court continued by announcing that an incompetent patient has the same privacy rights as one who is fully competent, and in order to preserve those rights, a proxy can exercise the incompetent's rights for her:

> If a putative decision by Karen to permit this non-cognitive, vegetative existence to terminate by natural forces is regarded as a valuable incident of her right to privacy, as we believe it to be, then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice. The only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment, subject to the qualifications hereinafter stated, as to whether she would exercise it in these circumstances. If their conclusion is in the affirmative this decision should be accepted by a society, the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them.[216]

The substituted judgment approach as expressed in *Quinlan* embraces both the anticipated, subjective preference of the patient, and the objective, societal view of what is in the patient's best interest. The fact that Karen Quinlan was at one time competent and had previously intimated her desire not to be kept alive artificially made it easier for the court and her family to anticipate her preference. Nonetheless, Karen's best interest remained an important factor in the court's decision to permit removal of her life support.

The significance of *Quinlan*'s substituted judgement approach to the wrongful life action lies in the inherent notion that action upon the patient's unexpressed but probable desire to forego life sustaining treatment is, in essence, promoting a patient's right to choose, even when the patient can not do so expressly. Equally significant is the concept that life can be of such a minimal quality that a court may conclude that one might prefer death or nonexistence to life.

A few state courts have addressed the substituted judgment doctrine in situations where parents seek to withhold life-saving treatment from their seriously ill newborn.[217] These cases are partic-

---

215. *Id.* at 663.
216. *Id.* at 664.
217. *See, e.g.*, Newmark v. Williams, 588 A.2d 1108 (Del. 1991) (upholding parents' decision on religious grounds to forego treatment of child's terminal cancer); *In re* Guardianship of Barry, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984)

ularly instructive to the wrongful life analysis because the child has never experienced healthy life and knows her life only as it is.

In *In re Guardianship of Barry*,[218] the parents of a ten-month-old infant petitioned the court for authorization to remove the ventilator life support that had kept their son, Andrew, alive since birth.[219] Andrew was born afflicted with a severe and irreversible brain malformation that rendered his brain ninety percent dysfunctional.[220] Consequently, Andrew had no independent respiratory function and was placed on ventilator life support without which he would likely have died within a few hours.[221] Andrew's parents were advised by treating physicians as to his medical condition, and were counseled by clergy who concurred with the morality of their decision to have Andrew's life support removed.[222] Andrew's attending physicians and his court-appointed guardian ad litem also supported the parents' decision to terminate and withhold further life support.[223]

The Florida District Court of Appeals affirmed the order authorizing the termination of the ventilator life support and the withholding of further life-sustaining procedures.[224] The court allowed the parents to exercise their substituted judgment, supplemented by competent medical evidence, to remove the life support even in the absence of evidence of Andrew's preference.[225] The court acknowledged the limits of the substituted judgment doctrine, particularly where the patient never independently expressed her preference.[226] Yet the court found it "the right and obligation of the parents in

---

(granting parents' petition to remove terminally ill child from life support); *see also In re* L.H.R., 321 S.E.2d 716 (Ga. 1984) (applying a "best interests" analysis in authorizing parents to remove terminally ill child from life support). Several other courts have applied a substituted judgment or best interests analysis in allowing "Do Not Resuscitate" orders to be entered on a terminally ill child's medical records. *In re* C.A., 603 N.E.2d 1171 (Ill. App. Ct. 1992), *cert. denied*, 610 N.E.2d 1264 (Ill. 1993); Care & Protection of Beth, 587 N.E.2d 1377 (Mass. 1992); Custody of a Minor, 434 N.E.2d 601 (Mass. 1982). Some argue that the substituted judgement approach is inappropriate in circumstances involving never-competent patients because "it is naive to pretend that the right to self-determination serves as the basis for substituted decision making." *In re* Conroy, 486 A.2d 1209, 1231 (N.J. 1985) (surrogate decision-maker may direct the withdrawal or withholding of life-sustaining treatment for incompetent, terminally ill patient based upon that patient's "best interest").

218. 445 So. 2d 365 (Fla. Dist. Ct. App. 1984).
219. *Id.* at 367.
220. *Id.* at 368.
221. *Id.*
222. *Id.* at 371.
223. *Id.* at 367-68.
224. *Id.* at 371.
225. *Id.*
226. *Id.*

such an instance to exercise their responsibility and prerogative" to exercise the child's independent right to privacy and self-determination through their own substituted judgment.[227] The court embraced a quality of life approach to the issue of substituted judgment, finding such proxy decision-making substantiated by the terminal, incurable, and irreversible condition of the patient for whom the substituted judgment was being exercised.

There is considerable debate within the legal community whether the substituted judgment doctrine survives the Supreme Court decision in *Cruzan v. Director, Missouri Department of Health*.[228] Even assuming the approach is on shaky legal ground, right-to-die cases involving competent patients remain particularly instructive. A living patient who concludes that death is preferable to her life with disability has made a decision with no rational basis of knowledge to support it, since mortals know nothing more of death than what we conceptualize prior to its occurrence. Courts and legislatures nonetheless sanction the patient's decision to end life support.

Why then should it be any different if a living patient concludes that her life is no longer worth living than for a parent to conclude that their child would not want to be born into a life of suffering and thus would prefer nonexistence? It is illogical to say that because a living individual knows what she is giving up—life, she is thus competent to make the decision. The living patient is no more capable of concluding that death is preferable than is the handicapped child or her parents capable of deciding that nonlife is preferable to life with disability.

---

227. *Id.*

228. 497 U.S. 261 (1990). In *Cruzan*, the Court considered whether the United States Constitution affords an incompetent person in a persistent vegetative state the right, as exercised through a proxy decisionmaker, to be removed from artificial hydration and nutrition. The Court held that individuals have a Fourteenth Amendment due process right to be free from unwanted bodily intrusion, and that the States may enact legislation that requires clear and convincing proof of the patient's preference for termination or withholding of life-sustaining treatment before that right will be recognized. *Id.* at 278-85. Thus, the case could be viewed as implicitly rejecting the substituted judgment approach in right-to-die cases involving incompetent patients. *See generally* Susan R. Martyn & Henry J. Bourguignon, *Coming to Terms with Death: The* Cruzan *Case*, 42 HASTINGS L.J. 817 (1991).

The *Cruzan* decision is of little significance in the wrongful life analysis, however, since the Court in that case was concerned with ensuring that a proxy not involuntarily deprive an already living person of continued life, rather than with the right of a proxy to decide that a potential life should be avoided. Unlike right-to-die cases such as *Cruzan*, an infant asserting a claim for wrongful life is not asking that she be returned to the nonexistent "state" she claims to prefer; she only seeks damages as compensation for the handicapped life she is forced to live.

Tort actions other than wrongful life give rise to the same difficulties, yet courts addressing these cases have found it unnecessary to consider the metaphysical dilemma of life versus nonlife. Instead they appear most concerned with the end result—a prolonged life of suffering.

In *Estate of Leach v. Shapiro*,[229] Edna Marie Leach suffered a cardiopulmonary arrest during treatment for a respiratory condition at the defendant hospital.[230] Although successfully resuscitated, Mrs. Leach remained in a persistent vegetative state and was placed on life support to sustain her breathing and circulation.[231] Mrs. Leach remained on life support for several months, after which time doctors informed her husband that she would never regain consciousness and would require indefinite life support.[232]

Mrs. Leach's husband filed an action against the hospital for tortiously maintaining his wife on life support against her express will and requested damages for the pain and suffering his wife had endured during her wrongfully prolonged existence.[233] The court held that, "[t]o the extent that plaintiffs can prove that this conduct was wrongful and caused pain and suffering beyond that which she would have normally suffered from her condition, they state a claim for relief."[234]

The court in *Leach* indicated that, although the plaintiff could not recover for the pain and suffering she would have experienced during the period she would have survived without the treatment (essentially viewing this as a preexisting condition), she could recover for the pain she experienced during the time her life was wrongfully prolonged beyond the point when she would have died naturally from her infirmities.[235] In reaching its decision, the *Leach* court implicitly acknowledged that life itself can in some instances be injurious.[236]

---

229. 469 N.E.2d 1047 (Ohio Ct. App. 1984).
230. *Id.* at 1051.
231. *Id.*
232. *Id.* at 1054.
233. *Id.* at 1055.
234. *Id.* Although the posture of the case on appeal was the review of the probate court's granting of a motion to dismiss, the case is significant in that the appellate court reversed the probate court's ruling, thus refusing to find as a matter of law that the plaintiffs could not prove Mrs. Leach's extended life was an injury. *But see* Anderson v. Saint Francis-Saint George Hosp., 614 N.E.2d 841, 845 (Ohio Ct. App. 1992) (rejecting "wrongful living" cause of action for involuntary prolongation of life).
235. 469 N.E.2d at 1055.
236. *See also* Samuel Oddi, *The Tort of Interference With the Right to Die: The Wrongful Living Cause of Action*, 75 GEO. L.J. 625, 660-63 (1986) (advocating "wrongful living" cause of action for involuntary prolongation of life); Richard P. Dooling, Comment, *Damage Actions for Nonconsensual Life-Sustaining Medical Treatment*, 30 ST. LOUIS U. L.J. 895, 916-17 (1986) (similar).

Right-to-die cases illustrate the reality that not all life is preferable to nonexistence, and also establish the family's right to exercise discretion over treatment decisions, particularly where the subjective desires of the patient are unknown because of her incompetence. To a similar extent, the family in wrongful life cases has the right to decide for the child whether, on whole, her life is worth living. Of course the child might reach a different conclusion if she were "miraculously lucid for an interval."[237] The reality, however, is that it is impossible to know what the child would have preferred at the time of her injury. For this reason, courts must accept the family's decision as that of the child's.[238]

It escapes explanation why courts have ignored right-to-die cases when ruling on the cognizability of the child's wrongful life claim. Arguably, right-to-die cases have overcome the more difficult issue of whether death is preferable to a life with even the most debilitating illness.[239] Just as the state recognizes the right of a living person to avoid circumstances where the preservation of her life would serve only to demean or degrade her existence and humanity, the state should recognize the same right of the unborn, through her parents, to avoid birth into a life of suffering. The parents, and not the state, are in the best position to make decisions regarding the unborn's potential quality of life with or without her genetic anomalies.[240] Once that decision is made, it should be considered the decision of both parent and child.

Of course the notion that no one is in a better position than the parents to make decisions on behalf of their potential child is not without exception. There will be instances where the parents' decision will not be, at least when viewed objectively, in the best interest of the child, and their decision will sometimes be negligent or even reckless. Notwithstanding these inevitable failings, the parents generally are in the best position to decide for the unborn child

---

237. *In re* Quinlan, 355 A.2d 647, 663 (N.J. 1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

238. *See generally* Rhoden, *supra* note 209, at 420 (advocating presumption in favor of family's decision to remove incompetent from life support); TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 179-80 (3d ed. 1989) (similar).

239. Some commentators suggest that dying is a much more difficult concept for a person to accept than is never having been born at all. *See* Peters, *supra* note 13, at 541 ("[T]he instinct of self-preservation . . . may explain the conclusion that a miserable life is worth continuing, but not worth receiving."); Joel Feinberg, Comment, *Wrongful Conception and the Right Not to be Harmed*, 8 HARV. J.L. & PUB. POL'Y 57, 64-65 (1985) (similar).

240. States which have enacted legislation outlawing wrongful life actions essentially establish as a matter of law that life in all forms is preferable to nonexistence. *See infra* Part II.E.4.

whether or not her life will bring with it the joys and pleasures that make it worthwhile.

Some courts and commentators acknowledge that the parents' decision to avoid giving birth to an impaired child might be premised on their own selfish motives rather than the interests of the child.[241] The same issue has permeated right-to-die cases.[242] It would be unreasonable not to expect that potential parents will be introspective when deciding the fate of the "to be" child. They will look at their own lives, which, of course, will affect the future experiences of their child. They will ask themselves how it would feel, physically and emotionally, if they were afflicted with the child's infirmities. Potential parents may also view the birth of an impaired child as a threat to their own well-being. Although the interests of the parents must not predominate the decision to assert the child's wrongful life claim, it would be equally fallacious to expect that their decision will be wholly removed from their own interests and expectations of what that child's life will bring upon themselves and the family unit.

In some instances, depending upon the severity of the disease, life may be a fate worse than death. This concept of injury thus requires factfinders to draw a line between those injuries which are relatively mild and those which are so severe that on whole they can find with reasonable certainty that the child would have chosen nonlife over her life with infirmity had she been asked to decide.

The dividing line between those handicaps which would justify a conclusion that nonexistence is preferable to life is difficult to draw, although the task is not an insurmountable one for the jury to assume. The ends of the spectrum are easier to identify. At one end, where life is arguably not worth living, are diseases which are so physically devastating that an individual has little chance of living a cognizant, sapient existence.[243] Included in this category are diseases

---

241. Becker v. Schwartz, 386 N.E.2d 807, 815 (N.Y. 1978) (Fuchsberg, J., concurring); Kelly, *supra* note 204, at 546; Capron, *supra* note 196, at 603; Marten A. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 16 FAM. L.Q. 15, 32 (1980).

242. *See also* John A. Robertson, *Involuntary Euthanasia of Defective Newborns: § 242.22 A Legal Analysis*, 27 STAN. L. REV. 213, 215-17, 262-64 (1975).

243. This severity of injury approach has been advocated by numerous commentators in various ways. *See* Thomas K. Foutz, Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L. REV. 480, 497-98 (1980) (advocating test that would balance the benefits of the child's life against the severity of her infirmity to determine the extent (if any) of the child's injury); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58, 65 (1970) (similar); *see also* Michael D. Bayles, *Harm to the Unconceived*, 5 PHIL. & PUB. AFF. 292, 300-02 (1976) (proposing that an individual is harmed if she is deprived of a minimum quality of life); Morreim, *supra* note 11, at 25 (similar); Peters, *supra* note 13, at 502 ("If the long-run burdens of life, such as the pain associated with a congenital affliction, outweigh the benefits of life, then a person can rationally prefer not to exist at all.").

such as Tay-Sachs,[244] Lesch-Nyhan syndrome,[245] and certain neural tube defects,[246] where the afflicted child cannot interact with her environment or with other people, and will have a very short lifespan.[247] At the opposite end of the spectrum are less severe handicaps such as sickle-cell anemia[248] and hereditary blindness, deafness, and paralysis, where the child can be expected to experience many of life's joys and pleasures.[249]

---

244. *See supra* note 52 for a medical description of Tay-Sachs disease.
245. Lesch-Nyhan syndrome is a genetic disorder detectable prenatally using amniocentesis. Those afflicted with the disease lack motor control and demonstrate dramatic self-destructive behavior including self-mutilation of the extremities and lips which can be prevented only by physically restraining the patient. William L. Nyhan, *Clinical Features of the Lesch-Nyhan Syndrome*, 130 ARCHIVES OF INTERN. MED. 186, 186-89 (1972).
246. Neural tube defects (NTDs) involve fetal malformations of the central nervous system. There are many different forms of NTDs, varying widely in their degree of severity. Spina bifida cystica (meningomyelocele) is one of the more well-known neural tube defects. The disease involves the malformation of the spinal cord and the bones that envelope it, causing part of the spinal cord to develop outside of the back, leaving the fragile spinal nerves exposed. Other attributes of the disease include microencephaly (an abnormally small head), and hydrocephalus (an accumulation of spinal fluid in the infant's cranium), which if not properly drained, causes severe pain, severe brain damage, and inevitable paralysis and death. The condition, even if treated, usually renders the patient at least partially paralyzed and interferes with bowel and bladder control. Children afflicted with spina bifida require constant medical treatment and must rely on braces, crutches, and wheelchairs for mobility. Second-trimester alpha-fetoprotein (AFP) testing of amniotic fluid and maternal serum can positively diagnose NTDs. First-trimester diagnosis of NTDs is not currently possible. *See* NELSON, *supra* note 11, at 1560-63.
247. Peters, *supra* note 13, at 502-03.
248. Sickle-cell anemia is a genetic disorder that affects the red blood cells. Those afflicted with the disease have less than the normal number of red blood cells because the lack of normal amounts of hemoglobin in the cells make them more rigid (sickle shaped) and thus more apt to self-destruct. Sickle-cell disease is highly variable in severity. "The clinical manifestations include anemia, jaundice and 'sickle cell crisis' marked by impaction of sickle cells, vascular obstructions and painful infarcts in various tissues such as the bones, spleen and lungs." JAMES S. THOMPSON & MARGARET W. THOMPSON, GENETICS IN MEDICINE 100 (3d ed. 1980). About one in twelve Black Americans has the sickle-cell trait; the theoretical incidence of sickle-cell anemia among Black Americans is 1 in 575. Blood tests can identify carrier status of the parents and amniocentesis can identify the defect in the fetus. WILLIAMS, *supra* note 181, at 569.
249. Peters, *supra* note 13, at 503. Ironically, many of the cases that have allowed recovery of special damages for wrongful life have involved handicaps of relatively mild severity. *See* Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (hereditary deafness); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984) (Down's syndrome); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (en banc) (fetal hydantoin syndrome).

A substantial gray area joins these identifiable extremes, the interior of which encompasses more moderate handicaps such as Down's syndrome[250] and cystic fibrosis.[251] It will be difficult for juries to evaluate each disease in terms of the benefit-burden analysis, and concededly, different juries will come to different conclusions. Nonetheless, just as jurors are left with the discretion to award damages for alleged harms that are intangible and difficult to measure (such as emotional distress or "hedonic"[252] damages), they are capable of making an evaluation whether a given life, in light of all that is knowable about the plaintiff's existence, is preferable to nonexistence. The health of the child, the opinions of experts, and the demeanor of witnesses will all play a part in any decision the jury will reach.[253]

---

250. See *supra* note 31 for a medical description of Down's syndrome.

251. Cystic fibrosis is the most common genetic disorder in the United States and afflicts approximately 1 out of every 1,800 newborns. Schroeder v. Perkel, 432 A.2d 834, 837 (N.J. 1981). The disease causes lung infection and increased secretion of mucus, which makes it very difficult to breathe and slows down the digestion of food in the intestines. There is presently no cure for cystic fibrosis, although recent identification of the gene for the disease raises new hope for an effective treatment or cure. *See, e.g.*, Vincent A. Fulginiti & John E. Lewy, *Pediatrics*, 270 JAMA 246 (1993). Milder cases of the disease can be treated through special diet, medications to aid digestion, physiotherapy to break up the thick mucus, and respiration machines to aid breathing. NELSON, *supra* note 10, at 1086-99.

252. Hedonic damages compensate the victim for the loss of such things as the companionship of loved ones, the sound of music, the cool mist of an ocean breeze or the achievement of career success. Sherrod v. Berry, 629 F. Supp. 159, 163 (N.D. Ill. 1985), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988). Courts in recent years have expressed an increasing willingness to allow hedonic damages as part of plaintiff's claim for noneconomic compensation, either as a component of pain and suffering damages or as a separate form of damage. *See* Molzof v. United States, 112 S. Ct. 711, 718 (1992); *see also* Eyoma v. Falco, 589 A.2d 653, 658 (N.J. Super. Ct. App. Div. 1991) (hedonic damages may be awarded as part of total disability damages caused by a tortious injury). *See generally* Erin A. O'Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away With Murder?*, 78 GEO. L.J. 1687 (1990). Arguably, the jury's task in a wrongful life case is much easier than in a case involving a claim for hedonic damages, since one who would not have been born would not lose any of life's benefits. *See, e.g.*, Kelly, *supra* note 204, at 517.

253. Gleitman v. Cosgrove, 227 A.2d 689, 703 (N.J. 1967) (Jacobs, J., dissenting); *see supra* notes 27-28 and accompanying text. The severity of injury approach for awarding general damages serves as a deterrent to negligent medical care, and is not proposed simply as a means of compensating the victim. RESTATEMENT (SECOND) OF TORTS § 901 (1979); *see also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 187-91 (3d ed. 1986) (discussing the deterrent purpose and effect of tort law). Children born with severe handicaps will often lack the ability to experience pleasure, and thus will be unable to appreciate the general damages awarded. Instead, the award is justified under the deterrence rationale, which encourages tortfeasors to take optimum care by forcing them to recognize

Rather than deciding as a matter of law that life no matter how impaired is preferable to nonexistence, courts should afford the child and her parents the opportunity to prove that such is not always the case.

The deliberation required of the jury in reaching a conclusion that a particular life is not worth living is similar to that required of infant care committees in their decisions to discontinue life support for seriously ill newborns.[254] Each group is comprised of a fair cross section of the community, and each is required to weigh various factors when reaching a conclusion whether or not the child should live or die. Although the interdisciplinary nature of the infant care committee allows members to bring with them insights the average person may not possess, nothing prevents litigants from bringing the same insights and expertise into the courtroom to assist the trier of fact in reaching a decision as to the benefits and burdens of the

---

the cost of activity which creates unreasonable risk of injury. *Id.* at 186.

Particularly where the infant is severely handicapped, a court may deny general damages as wasteful, since the monetary award will not benefit the child, and will not deter unreasonable risk any more than will the award of pecuniary and nonpecuniary damages to the parents. Hence the dilemma: the award of general damages is particularly compelling where the child's genetic infirmities are severe; but yet courts are more reluctant to make such awards where the infirmities are so severe that the child could not benefit from the award. Children who are born afflicted with less severe disorders such as Down's syndrome may derive benefit and pleasure from nonpecuniary compensation, yet, if we must create a dividing line for the award of such damages using the severity of injury approach, the child's infirmity itself may militate against such an award.

The appropriate response is that the infant plaintiff not only benefits from the award, but so do potential victims of improper genetic medical care, who will benefit from the deterrent effect of the law by receiving more competent medical care. Thus, the deterrence rationale justifies general damage awards for the benefit of future life, and not merely as a means of compensating the immediate victim. *See infra* note 335 and accompanying text. It is more important that the tortfeasor pay damages than it is for the injured plaintiff to be compensated. *See id.*

254. Hospitals that receive federal funding are encouraged to establish infant review committees for the purpose of educating hospital personnel and families of disabled infants with life-threatening conditions, recommending institutional policies and guidelines concerning the withholding of medically indicated treatment from such infants, and offering counsel and review in cases involving disabled infants with life threatening conditions. 45 C.F.R. § 84.55(f)(1)(iii)(A) (1992). The federal regulation outlines a "Model Infant Care Review Committee" that must consist of at least seven interdisciplinary members, including a practicing physician, a practicing nurse, a hospital administrator, a representative of the legal profession, a representative of a disability group, a lay community member, and a member of the facility's medical staff. *Id.* § 84.55(f)(2). This group deliberates on the condition of the infant to determine whether or not an infant shall live or die. *Id.*

plaintiff's life. A properly educated and instructed jury is, arguably, as well equipped to make these decisions as are infant care committees.

Another criticism of the wrongful life action takes on a "grass is always greener" approach. The plaintiff, the critics argue, has never experienced a healthy life, and, when born, will have life experiences relative to her handicap. Accordingly, the child suffers nothing since all that she knows is her present condition with its concomitant pain and suffering.[255] The child cannot reach a decision that her life is not worth living without first experiencing what she now claims is her injury. In other words, the wrongful life plaintiff has nothing to lose from claiming her life is not worth living, since a verdict in her favor does not require that she return to the "state" of nonexistence she claims to prefer. Instead the child continues to live and reap the benefits of life, and at the same time benefit from the damages awarded for her suffering.

These arguments fail in several respects. First, the child, although never able to experience greater health, remains capable of judging her surroundings and the quality of others' lives, which may permit her to reach a rational decision that the quality of her own life is not worth the experience of being alive.[256] Conversely, the approach fails to incorporate into its assumption those children who are so impaired that they lack the cognitive ability to experience anything. In fact, it is the child's inability to experience life's pleasures that often gives rise to the child's claim of injury in the first place.

Courts today are willing to recognize that medical choices should lie with the patient rather than with the physicians or other medical providers. The right-to-die cases are indicative of a growing trend toward recognition that life is *not always preferable.* The philosophical difficulties noted by most, if not all, courts which have denied the wrongful life action appear to be less persuasive today then they were in 1967 when *Gleitman v. Cosgrove*[257] was decided. The inability of courts to say with absolute certainty that life no matter how impaired outweighs nonexistence does not justify the summary rejection of the child's wrongful life claim.

2. Measuring Wrongful Life Damages in Economic Terms

Recognizing birth as a cognizable injury does not resolve the question of whether the wrongful life plaintiff can prove in economic

---

255. *See* Robertson, *supra* note 242, at 254.

256. Capron, *supra* note 189, at 655.

257. 227 A.2d 689 (N.J. 1967), *overruled in part by*, Berman v. Allan, 404 A.2d 8 (N.J. 1969) (recognizing parents' wrongful birth claim for general damages); *see also supra* notes 16-28 and accompanying text for a discussion of the *Gleitman* decision.

terms the value of nonexistence against the value of life with impairment.[258] This Article, unlike many of the cases, treats the issue of damages as a question of whether the plaintiff can prove the *quantum* of her damage, not whether she can prove an *event* of injury by being born. Logically, the issue of damages as defined herein need not be addressed unless the issue of injury is resolved in the plaintiff's favor.[259]

It is a basic principle of modern tort law that a cause of action should not be denied when the only thing preventing recovery is the plaintiff's inability to prove damages with specificity.[260] Many courts have nonetheless refused to recognize the wrongful life action because the plaintiff cannot attribute a precise dollar amount to the value of nonexistence.[261] In fact, even those courts which have approved the wrongful life action to the extent of awarding special damages have refused to award general damages because, they contend, those damages are not as easily measurable. Again, these courts appear to concede the existence of injury yet, rather illogically, refuse to hold the provider accountable for the general damages caused by the same breach of care.[262]

Until now, this Article has focused on whether it is possible to say that one is harmed by being born, and has analyzed this question in the context of whether general damages can and should be awarded. The recommended answer to this question is by now apparent. Little

---

258. *See, e.g.*, *Gleitman*, 227 A.2d at 692.

259. Walker v. Mart, 790 P.2d 735, 740 (Ariz. 1990) (en banc) ("Principles of tort law require that the existence of injury be ascertained first; courts should allow the injury caused by defendants' negligence to define the damages recoverable, rather than allow impairment/damage the defendant did not cause to define the nature of the injury.").

260. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). The Court reasoned as follows:

> 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 for making any amend for his acts. . . . [I]t will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.

Id.

261. Some courts use this as the exclusive justification for rejecting the cause of action, while others consider this factor only after implicitly conceding that the plaintiff's birth is an injury to her. *See* Blake v. Cruz, 698 P.2d 315 (Idaho 1984).

262. Other courts that have considered the lack of measurable damage as the exclusive justification for refusing to award general or special damages for wrongful life also appear to concede the existence of injury. *E.g.*, Moores v. Lucas, 405 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 1981); *Blake*, 698 P.2d at 322; Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 376 (Wis. 1975).

has been said, however, about the necessity of awarding special damages, which include the extraordinary costs of maintaining the child's handicap and the nonextraordinary child rearing costs that would otherwise have been averted if the child had not been born.

Special damages are most critical to the child's continued existence and should be awarded as a matter of right once injury and the other elements of the wrongful life tort are proved.[263] These damages can be ascertained with certainty,[264] and are essential to alleviate the burden that would otherwise be imposed upon the child's parents and the state to support the child during her lifetime. A child is entitled to these damages, especially during adulthood, provided her parents have not received an award of special damages in their own right for the child's care during the same period.

An award of special damages is also important to the determination of the amount of general damages that should be awarded to the child. This Article posits (rather unremarkably) that the general damages awarded should be proportionate to the severity of the handicap. As in other negligence actions, special damages serve as an important guideline for valuing the general damages recoverable by the wrongful life plaintiff. There is a presumption that the greater the expense required to habilitate or rehabilitate the plaintiff, the greater the pain and suffering she will likely sustain. Logically, more severe handicaps will necessitate larger general damage awards, limited by any statutory damage cap in place at the state level.[265]

---

263. These damages should be awarded according to the strict liability approach advocated by this Article *infra* at Part IV.

264. *See generally* CAROLYN S. EDWARDS, U.S. DEPT. OF AGRICULTURE, USDA ESTIMATES OF THE COST OF RAISING A CHILD: A GUIDE TO THEIR USE AND INTERPRETATION (1981).

265. Many state legislatures have enacted statutory limits on the recovery of general and special damages. *See, e.g.*, ALA. CODE § 6-5-544(b), -547 (Supp. 1987) (limiting nonpecuniary damages to $400,000 and total damages recoverable in medical malpractice claims to $1,000,000); ALASKA STAT. § 09.17.101(a), (b) (1986) (limiting nonpecuniary damages to $500,000); CAL. CIV. CODE § 3333.2 (West 1992) (limiting nonpecuniary damages to $250,000); COLO. REV. STAT. § 13-21-102.5(1)-(3) (1993) (limiting nonpecuniary damages to $250,000 unless clear and convincing evidence justifies greater award which in no event can exceed $500,000); IDAHO CODE § 6-1603 (Supp. 1987) (limiting nonpecuniary damages to $400,000); IND. CODE ANN. § 16-9.5-5-2(a) (Burns Supp. 1986) (limiting damages recoverable for any injury or death to $750,000); KAN. STAT. ANN. § 60-3407(a) (1985) (limiting nonpecuniary damages to $250,000 and total damages recoverable to $1,000,000); LA. REV. STAT. ANN. § 40:1299.42 B(1) (West Supp. 1987) (limiting damages recoverable in medical malpractice claims, exclusive of future medical care and related pecuniary damages, to $500,000); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (Supp. 1994) (limiting nonpecuniary damages for personal injury to $500,000); MASS. GEN. LAWS ANN. ch. 231, § 60H (West 1986) (limiting nonpecuniary damages to $500,000

3. The Benefit Doctrine of Restatement (Second) of Torts § 920

When a tort victim benefits in some way from the defendant's conduct, the damages recoverable for the tort should be offset by the benefits conferred. This basic principle of mitigation is expressed in Section 920 of the *Restatement (Second) of Torts* and has been used by courts as a justification for refusing to award general and special damages for wrongful life, wrongful birth, wrongful pregnancy and wrongful conception. Again, it is not necessary to consider mitigation of damages until some damage is deemed to have been sustained.[266]

The *Restatement* explains that an offset is appropriate only when the benefit conferred by the tort is to the same interest that was harmed.[267] In other words, pecuniary harm should be offset by pecuniary benefit; nonpecuniary harm only by nonpecuniary benefit. Thus, for example, damages for pain and suffering resulting from a nonconsensual surgery should be offset by the future pain and suffering averted by the surgery.[268] Conversely, where a prominent

---

unless jury finds there is "substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances" justifying larger award); MO. REV. STAT. § 538.210 (1993) (limiting nonpecuniary damages to $350,000); NEB. REV. STAT. § 44-2825 (Supp. 1986) (limiting total damages recoverable in medical malpractice claims to $1,000,000); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1993) (limiting nonpecuniary damages to $875,000); N.M. STAT. ANN. § 41-5-6 (Michie 1987) (limiting total damages recoverable in medical malpractice claims to $500,000); OHIO REV. CODE ANN. § 2307.43 (Baldwin 1993) (limiting general damages in any medical claim not involving death to $200,000); S.D. CODIFIED LAWS ANN. § 21-3-11 (1986) (limiting total damages recoverable in medical malpractice claims to $1,000,000); TEX. REV. CIV. STAT. ANN. art. 4590i §§ 11.02-.03 (Vernon Supp. 1994) (limiting total damages to $500,000); UTAH CODE ANN. § 78-14-7.1 (Supp. 1986) (limiting nonpecuniary damages in medical malpractice claims to $250,000); VA. CODE ANN. § 8.01-581.15 (Michie 1984) (limiting total damages recoverable in medical malpractice claims to $1,000,000); W. VA. CODE § 55-7B-8 (1986) (limiting nonpecuniary damages to $1,000,000); WIS. STAT. ANN. § 893.55 (West 1986) (limiting nonpecuniary damages to $1,000,000).

Several courts, however, have deemed their state's statutory damage caps unconstitutional. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 158 (Ala. 1991) (interpreting ALA. CODE § 6-5-544(b) (1975)); Chamberlain v. State ex rel. Dep't of Transp., 624 So. 2d 874 (La. 1993) (interpreting LA. REV. STAT. ANN. § 13:5106(B)(1) (1991)); Morris v. Savoy, 576 N.E.2d 765, 768 (Ohio 1991) (interpreting OHIO REV. CODE ANN. § 2307.43 (Baldwin 1990)); Lucas v. United States, 757 S.W.2d 687, 687 (Tex. 1988) (interpreting TEX. REV. CIV. STAT. ANN. art. 4590i 2 § 11.02-.03 (Vernon Supp. 1986)).

266. *See supra* note 259 and accompanying text.

267. RESTATEMENT (SECOND) OF TORTS § 920 cmt. b (1979) ("Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefitted.").

268. *Id.* § 920 cmt. a, illus. 1.

attorney seeks nonpecuniary damages for the emotional pain and suffering caused by the defendant's libelous remarks, the defendant cannot assert in mitigation that the adverse publicity, for whatever reason, increased the plaintiff's volume of business.[269] The pecuniary interest enhanced by the tort—the increase in business—is dissimilar to the nonpecuniary harm to reputation suffered by the attorney.

When properly applied to wrongful life and wrongful birth cases, the benefit doctrine requires offset of general damages by the intangible value of life to the child and her parents. Similarly, the parents' emotional harm could conceivably be offset by the emotional harm they would have sustained had they chosen to abort the fetus,[270] or by the emotional joys and benefits derived from the child's existence. The parents' recovery of child-rearing and extraordinary expenses should be offset by the pecuniary benefits the parents will derive from the child's life.[271]

Many courts have based their refusal to award general and special damages in wrongful life and other birth-related tort actions on the *plaintiff's* inability to disprove that the value of her life exceeds the pain and suffering she endures as a result of the malpractice. Accordingly, courts refuse to award general damages because the joys and benefits of the handicapped life to both parent and child offset any damages resulting from that life. Some courts have violated the similar interests requirement of the benefit doctrine and have denied recovery of special damages after concluding that the intangible pleasures of handicapped existence offset the special

---

269. *Id.* § 920 cmt. b.

270. Surprisingly, this issue of mitigation has not been raised in any reported decision on wrongful birth. Numerous studies have been undertaken to determine the psychological effect of abortion on women at various stages post-abortion, ranging from several minutes after the abortion to greater than ten years after the date of the procedure. The conclusions reached by these studies are evenly balanced between those which document significant post-abortion emotional trauma and those which discount any emotional effect whatever, especially during the first trimester of the pregnancy. *Compare* Nancy Adler et al., *Psychological Responses After Abortion*, 248 SCIENCE 41, 43 (1990) ("[S]evere negative reactions after abortion are rare and can best be understood in the framework of coping with a normal life stress.") *with* H.R. REP. No. 392, 101st Cong., 1st Sess. 5 (1989) ("[T]he psychological effects of abortion are unclear. . . . [S]ome researchers have concluded that the psychological impact of abortion is very negative, whereas others say that they are usually more positive than carrying an unwanted child.") (referencing *Medical and Psychological Impact of Abortion: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations*, 101st Cong., 1st Sess. 68-71, 219-222 (1989) (testimony of C. Everett Koop, M.D., Surgeon General of the United States)).

271. Offset of pecuniary damage is not appropriate in most instances because neither the parents nor the child usually benefits economically from the child's birth.

damages occasioned by the malpractice.[272] Theoretically, only the economic benefits of the child's handicapped life should offset the special economic damages caused by the child's handicap.

The difficulty with the benefit doctrine as applied in wrongful life actions is that the plaintiff is saddled with the burden of proving that the benefits of nonexistence exceed the burdens of her life with handicap. The burden properly should be on the *defendant* to prove an offsetting benefit conferred by her tortious conduct.[273] Once the plaintiff has sustained the burden of proving an event of harm by being born, the defendant should bear the burden of proving the benefits derived from the child's existence outweigh the burdens caused by her disease.[274] Perhaps a presumption favoring nonexistence would equalize the burden of proof in wrongful life cases and increase the plaintiff's chance of recovery.

E. Public Policy Considerations: The Fifth Element of the Tort Framework

A continuing debate essential to modern jurisprudence involves the role public policy should play in the shaping of judicial decisions. On one side of the debate are those jurists who maintain that judicially declared public policy is a useful doctrine that helps the law embrace a more humanistic approach and "brings into the case an element extrinsic from the conduct of the parties—the exercise of community control quite apart from statute, judicial precedent or doctrine."[275] On the opposite side of the debate are those who assert that decisions based on public policy add a degree of uncertainty to the law that makes it more difficult for individuals to conform their behavior to the law.[276] If public policy is to shape the law, they

---

272. *E.g.*, Strohmaier v. Associates in Obstetrics & Gynecology, P.C., 332 N.W.2d 432, 435 (Mich. App. 1982). Several wrongful pregnancy and wrongful conception cases have misapplied the benefit doctrine by offsetting the parents' claim for pecuniary damages by the nonpecuniary benefits they derive from parenthood. *See* University of Ariz. v. Superior Court, 667 P.2d 1294 (Ariz. 1983); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); Jones v. Malinowski, 473 A.2d 429 (Md. 1984); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).

273. *See* Kelly, *supra* note 204, at 520 ("To deny recovery because the defendant cannot produce exculpatory evidence seems backwards.") (citing Melinda A. Roberts, *Distinguishing Wrongful From "Rightful" Life*, 6 J. CONTEMP. HEALTH L. & POL'Y 59, 69-70 (1990)).

274. *See* Roberts, *supra* note 273, at 67-70.

275. James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 323 (1971).

276. *See* Richardson v. Mellish, 130 Eng. Rep. 294, 303 (C.P. 1824) ("[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. . . ."); *see also* Egerton v. Earl Brownlow, 10

argue, legislative pronouncement should be the sole source of its influence.[277]

Negative public policy implications have been cited by many courts as a reason for denying claims for wrongful life and wrongful birth. This section examines the policy considerations upon which courts have based their refusal to recognize the wrongful life action, and concludes that none of the policy reasons cited by courts justifies the denial of a child's right to recover damages for her wrongful life.

1. Parental Liability

One implication of recognizing the wrongful life action is that a child may attempt to sue her parents for erroneous decisions to conceive or proceed with the pregnancy after being fully informed of the substantial risk that the child would be born with a birth defect. Concededly, a negligent decision by parents has the same effect on the child as does the medical provider's failure to disclose the information to the parents. If parents are to complain that they have been deprived of their freedom to make an informed choice on behalf of their potential child, what responsibilities do they have to the child to make a responsible choice? How much freedom should parents have in exercising their informed choice? Some of these issues were addressed as dictum by the California Supreme Court in *Curlender v. Bio-Science Laboratories*:

> If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude [wrongful life] liability insofar as defendants other than the parents were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.[278]

The staggering implications of parental liability for wrongful life condoned by the *Curlender* court prompted the California legislature

---

Eng. Rep. 359, 408-09 (H.L. 1853) (explaining that public policy may vary depending upon the education, habits, tastes, and dispositions of the person to whom the inquiry is addressed), *cited in* American Casualty Ins. Co.'s Case, 34 A. 778, 785 (Md. 1896).

277. Hopkins, *supra* note 275, at 331-32.

278. Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980).

to enact a law prohibiting parental suits in wrongful life cases.[279]

Permitting children to maintain actions against their parents for wrongful life is unsound. Such suits may chill the parents' constitutional right to make unencumbered procreative choices.[280] The number of aborted pregnancies may rise, not because of the parents' reasoned determination that the child would not want to live such a life, but out of fear that a contrary decision would be challenged by the child at some point after her birth.

Children seeking pecuniary damages for their special care with handicap have little to gain and much to lose in suing a parent, particularly if the family unit is intact. As one commentator has noted: "Parents are already legally obliged to support their children, and most do so to the limits of their ability whether the child is normal or not."[281] A different conclusion may be appropriate if the parent-child relationship no longer exists, since voluntary care is no longer a given and preservation of the family unit may not be a concern.[282]

Some jurists argue that there must be a limit to legal accountability of parents for so-called "irresponsible" choices.[283] Allowing children to sue parents for their decisions would render nugatory "the freedom of choice now extolled in genetic counseling."[284] The right to be free from interference in decisions on procreation, however, does not necessarily affirm the righteousness of a decision to bring a child into the world. In some cases it might be possible to

---

279. *See* CAL. CIV. CODE § 43.6 (West 1982).

280. *See* Walker v. Mart, 790 P.2d 735, 740 (Ariz. 1990) (en banc) (dictum). *See generally* Joan Waters, *Wrongful Life: The Implications of Suits in Wrongful Life Brought by Children Against Their Parents*, 31 DRAKE L. REV. 411 (1981) (a wrongful life claim brought by a child against her mother is irreconcilable with the mother's right to privacy).

281. Capron, *supra* note 196, at 602.

282. *Cf.* Smith v. Gross, 571 A.2d 1219, 1224 (Md. 1990) (Eldridge, J., dissenting) (the parent-child immunity rule should not be applied where the child is deceased, because there is no family discipline to impair or home tranquility to preserve).

283. *See* Sonnenberg, *supra* note 196, at 498 ("The essence of the [wrongful life] action is that parents should be able to make an *informed* decision whether a genetically defective child should be born, not that those parents should make the 'right decision.'").

284. Callahan, *supra* note 186, at 86. *But see* Shaw, *supra* note 10, at 102-04 (arguing for parental liability where they proceed with a pregnancy fully aware of a significant risk of giving birth to a genetically impaired child); *see also* Ron Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 357 (1984) (states that have abolished parental immunity should recognize a tort duty owed by a mother to her unborn child).

say that the parents have made a "poor" decision and have wronged the child.[285]

Although the conflict between the interests of the parents and the potential child is difficult to reconcile, it is possible to strike a balance between the parents' unencumbered procreative rights and the harm to the child upon the making of a reckless decision. Courts have not hesitated to intervene on behalf of children when their parents' decision, although based on their own moral and religious beliefs, is against the best interests of the child.[286] These interventive efforts on behalf of the child suggest there is a point where the freedom of parental decision-making must yield to the interests of the state and the child.

Parents at risk for giving birth to children afflicted with genetic disorders will come to different decisions about whether or not to proceed with the pregnancy. Parents faced with a prognosis that their child will be born with Tay-Sachs disease, for example, would more likely avoid bringing the child into the world. Other diseases, such as cystic fibrosis,[287] may not manifest the same degree of severity or immediacy of onset, and parents may not come to the same conclusion that the child's life should be avoided. By whom and by what standard should the propriety of the parents' decision be judged? Would a "reasonable parent" standard be appropriate?[288]

Judging a parent's actions in bringing about the child's life from the perspective of a reasonable person is unsound since most decisions in this regard are based upon individualized moral and religious beliefs. This does not mean, however, that the Learned Hand

---

285. L.M. Purdy, *Genetic Diseases: Can Having Children be Immoral?*, *in* BIOMEDICAL ETHICS, *supra* note 31, at 468.

286. *See, e.g.*, Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968).

287. *See supra* note 251.

288. The California Supreme Court has adopted a "reasonable parent" standard for judging whether parental conduct is actionable by way of a negligence action brought by the child. Gibson v. Gibson, 479 P.2d 648, 652-53 (Cal. 1971); *see also* Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980). *See generally* Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused By Parent's Negligence—Modern Cases*, 6 A.L.R.4th 1066 (1981). Statistics on parental procreative decision-making in situations where a fetus is diagnosed with a genetic disorder could help to define the reasonable parent standard. *See* Ruth Faden et al., *Prenatal Screening and Pregnant Women's Attitudes Toward the Abortion of Defective Fetuses*, 77 AM. J. PUB. HEALTH 288 (1987) (reporting that 80% of 490 women believed abortion was justified after amniocentesis confirmed neural tube defect in fetus); Mitchell S. Golbus et al., *Prenatal Genetic Diagnosis in 3000 Amniocenteses*, 300 NEW ENG. J. MED. 157, 160 (1979) (reporting that 93.8% of women elected to terminate their pregnancies after genetic abnormalities were detected in their fetuses).

formula[289] could not be applied on a case-by-case basis to judge whether or not the parents' choice was negligent.[290] Again, consideration should be given to the child's possible condition and the competing interests of the parents in bringing about her life, factoring into the analysis the parents' moral and religious convictions.

2. Sanctity of Life

The sanctity of life argument, which posits that life no matter how impaired is sacrosanct, has been at the root of numerous court decisions denying claims for wrongful life.[291] The right-to-die cases and common sense, however, dictate that life is not always a blessing; rather the sanctity of life is wholly dependent on the quality of that life.[292]

The sanctity of life argument fails to reconcile those instances where the quality of the life is so reduced that the reasonable individual would deem it an unmitigatible burden.[293] If life is indeed priceless, the law should require that medical providers render their services in such a way as to promote the utmost quality of potential life. It would be unreasonable to conclude that society's outlook on the sanctity of life incorporates lives of great suffering. As right-to-

---

289. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) ("[I]f the probability [of injury] be called P; the [gravity of the] injury, L; and the burden [of adequate precaution], B; liability depends upon whether B is less than L multiplied by P. . . .").

290. Dworkin, *supra* note 189, at 100; *see also* Grodin v. Grodin, 301 N.W.2d 869, 871 (Mich. Ct. App. 1980) (remanding case to trial court to determine whether mother's decision to use tetracycline during her pregnancy constituted a reasonable exercise of parental discretion).

291. *See* Blake v. Cruz, 698 P.2d 315, 321 (Idaho 1984); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 702 (Ill. 1987); Bruggeman v. Schimke, 718 P.2d 635, 642 (Kan. 1986); Smith v. Cote, 513 A.2d 341, 352-53 (N.H. 1986); Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979); *see also* Rogers, *supra* note 95, at 752-53.

292. "Any attempt to make life—understood as a set of vital logical processes—unconditionally good in itself is a 'vitalism' that should be rejected in favor of a view that life is only conditionally good." BEAUCHAMP & CHILDRESS, *supra* note 238, at 157 (citing Richard A. McCormick, *The Quality of Life, The Sanctity of Life*, HASTINGS CENTER REP. 8 (Feb. 1978)). As another commentator has aptly recognized,

> life is not merely a matter of being alive in some purely biological or bio-physical sense of the term. Something can be alive or capable of life in the latter sense, yet not alive or capable of life in the sense implied in or by the expressions mentioned above. . . . [A] full life . . . is one full of significant experience and activity, and we apply it in the first instance only to human beings.

Henry D. Aiken, *Life and Right to Life*, *in* ETHICAL ISSUES IN HUMAN GENETICS, *supra* note 52, at 173.

293. Kelly, *supra* note 204, at 498-500.

die cases illustrate, there is a point where the need to alleviate pain and suffering reduces the efficacy of the life-at-all-cost philosophy.

Taking the sanctity of life argument to its logical end, a child would have no right of action even if the medical provider maliciously withheld information from the parents. Why should the law allow for such an abuse of medical authority on the altar of the sanctity of human life, particularly when the rest of society must account for similar conduct in other contexts, and may even be called upon to support the child's handicapped existence? The consequences of the sanctity of life argument appear unreasonable.

Some argue that improvements in prenatal diagnosis have shifted the efforts of the scientific community away from disease treatment in favor of disease prevention.[294] Society will therefore embrace higher standards for human health, and will look upon those born with avoidable handicaps as unfit to be alive.[295] The issue is well stated by ethicist Leon Kass, who warns:

> A child with Down's syndrome or with hemophilia or with muscular dystrophy born at a time when most of his (potential) fellow sufferers be destroyed prenatally is liable to be looked upon by the community as one unfit to be alive, as a second class (or even lower) human type. He may be seen as a person who need not have been, and who would not have been, if only someone had gotten to him in time.[296]

According to this view, society will become increasingly critical of minor physical and social handicaps and will accept nothing less than the "perfect human."[297] "[T]he concept of 'normality' sufficient to make life worth living is bound to be 'upgraded,' and the acceptance of 'abnormality' and care for abnormal is bound to be degraded in our society."[298] Thus, the threshold for those ailments justifying

---

294. ANDREWS, *supra* note 185, at 137.
295. *E.g.*, Smith v. Cote, 513 A.2d 341, 353 (N.H. 1986).
296. Leon R. Kass, *Implications of Prenatal Diagnosis for the Human Right to Life*, *in* ETHICAL ISSUES IN HUMAN GENETICS, *supra* note 52, at 185, 189.
297. Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978).
298. Callahan, *supra* note 186, at 85. Ethicist Daniel Callahan points out that "while in principle the parents of a fetus with a detected case of Down's syndrome are still left to decide whether to carry it to term, . . . it is possible to detect tendencies which would rob people of their choice and 'blame' them for the defective children they bring into the world." *Id. But see* Dworkin, *supra* note 189, at 96 (wrongful birth actions do not devalue the child's life but serve only to compensate the parents and assure the child maximum life opportunities by freeing her of the economic burdens precipitated by her impaired existence); Shaw, *supra* note 10, at 110 ("[I]f there were fewer persons born with birth defects, society might become more aware of, and more sensitive to, their needs, cherish them as individuals, and seek better ways to provide for them.").

prenatal diagnosis, and even state intervention in decisions of contraception and abortion, may be lowered to dangerous levels, inevitably leading to the adoption of laws compelling eugenics.

Improvements in genetic technology must advance, even at the expense of social stigma. Tort law is not responsible for the stigma associated with being born with a given handicap; it serves only to encourage prudent behavior through pecuniary penalty. Thus, the exactitude of science, and not the expansion of tort law, will make it increasingly difficult for society to accept the birth of avoidably impaired children. The wrongful life action adds little to the possibility of such an unfortunate phenomenon as social stigmatization, since scientific advancement will occur with or without the action.

3. Defensive Medicine

Opponents of wrongful life assert that recognition of the action will cause medical providers to practice defensive medicine, causing overuse of genetic testing even where not medically indicated simply to avoid potential liability.[299] Thus, contrary to the proponents' view that permitting wrongful life will improve the standard of medical care by forcing medical providers to be more diligent in their practice, opponents suggest that the action will actually cause medical care to become too costly for those who can least afford it.[300]

State-of-the-art scientific technology, not the law itself, defines the standard of medical care expected of providers and imposed by law. The law merely measures the utility and practicality of a given procedure against the provider's failure to utilize it.[301] Only then does the law impart an obligation upon the provider to practice according to this standard. The law does not create the standard; science does that.

So long as parents have freedom of procreative decision-making, they can control the destiny of affected children. Prenatal diagnosis

---

Professor Shaw continues by posing this rhetorical question: "Is it true that if we could raise the standard of living of most of those living at poverty levels, then those who were still poor would be treated worse, not better . . . ?" *Id.*

299. James Bopp, Jr. et al., *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461, 486-90 (1989).

300. *Id.* at 489.

301. Science, however, independently implements a risk-utility balancing whenever it develops new medical technologies for use in the field. The Food and Drug Administration's approval of pharmaceuticals is an excellent example of such a balancing. Only when the benefits of a particular drug outweigh its potential adverse effects is the drug approved for use in the field. The argument that science would not embrace a risk-utility standard in the absence of legal sanction may therefore be unjustified.

has taken the mystery out of genetic defects and "parents no longer accept genetic defects in their children as an ill which God or nature visits upon them."[302] Although the choice is ultimately with the parents, the genetic counselor has, at very least, an obligation to impart all the available information necessary to that decision. When the genetic counselor fails in this respect, the opportunity of procreative choice has been withheld from the parents. Without the law as a deterrent on negligent and reckless health care, the genetic counselor has less incentive to perform adequately and more incentive to ignore the wishes of the parents, the child, and society, all of whom desire to avoid lives of great suffering.

There is no debating that medicine is not an exact science; there are many uncertainties and no guarantees. However, when science enlightens society to the causes, treatments, and cures of disease, the medical community should be expected to conform to the technological advancement and heightened societal expectations of the medical care society receives. Likewise, the law should embrace these improvements in the standard of care. The wrongful life action seeks to achieve this end—to encourage more prudent genetic care for the unborn and her parents.

4. Judicial Deference to Legislative Pronouncement

Several courts have refused to recognize the wrongful life action on the basis that the action presents profound issues of public policy better left for legislative resolution.[303] In refusing to legislate from the bench, however, these courts no doubt recognize the improbability that their state's legislature would legitimate the wrongful life action. In essence, these courts have "made a decision by not making a decision."[304]

A claim for wrongful life will not be actionable under all circumstances. The child must first prove that her handicap is one which would justify her preference for nonexistence. Legislatures are incapable of identifying in the abstract those conditions that would justify such a claim and those that would not. A statute that simply provides that wrongful life is an actionable tort would be of limited usefulness, since the trier of fact would still be required to scrutinize the child's handicaps and the beliefs and opinions of family members

---

302. ANDREWS, *supra* note 185, at 138; *see also* Ellis v. Sherman, 478 A.2d 1339 (Pa. Super. Ct. 1984) (refusing to recognize wrongful life action).

303. *See* Cowe v. Forum Group, Inc., 575 N.E.2d 630, 635 (Ind. 1991); Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978); Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986).

304. Mack v. Mack, 618 A.2d 744, 775 (Md. 1993) (Chasanow, J., concurring in part).

as to the child's preference for nonexistence before it could determine whether the child's claim for wrongful life is meritorious.[305]

Deference to legislative pronouncement is not the appropriate response to the wrongful life action. As one commentator has expressed, "[i]f the view of public policy expressed by the courts is not acceptable, the legislature may speedily revise the expression by appropriate statutory provision."[306] Some state legislatures have demonstrated disapproval of their court's wrongful life and wrongful birth decisions, and have passed legislation prohibiting these actions.[307]

The vast majority of state legislatures to pass legislation on wrongful life and wrongful birth actions have denied the actions outright. At least eight states have enacted legislation which prohibits actions for wrongful life and/or wrongful birth.[308] Although the scope of the legislation varies, each law effectively permits the state to substitute its judgment for that of the child and imposes upon the family unit a uniform rule that life is always preferable.[309] The constitutionality of statutes prohibiting wrongful life and/or wrongful birth actions has been confirmed by at least two state appellate courts,[310] but has been challenged by several commentators.[311]

---

305. *Cf. id.*

306. Hopkins, *supra* note 275, at 331.

307. *See, e.g.,* Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477 (Cal. App. Ct. 1980) (dictum), *superseded by* CAL. CIV. CODE § 43.6 (West 1982); Blake v. Cruz, 698 P.2d 315 (Idaho 1984), *superseded by* IDAHO CODE § 5-311 (1990); Speck v. Finegold, 439 A.2d 110 (Pa. 1981), *superseded by* 42 PA. CONST. STAT. ANN. § 8305(a)-(b) (Supp. 1993).

308. *See supra* note 307; *see also* ILL. ANN. STAT. ch. 38, para. 81-21 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 34-1-1-11 (Burns Supp. 1989); N.D. CENT. CODE § 32-03-43 (Supp. 1989); S.D. CODIFIED LAWS § 21-55-1 (1987); UTAH CODE ANN. § 78-11-24 (1987 & Supp. 1989). Currently, Maine is the only state to enact legislation affording infants the right to maintain a wrongful life action for the limited purpose of collecting special damages. ME. REV. STAT. ANN. tit. 24, § 2931 (West 1990). Similar legislation has been proposed in other states. For example, legislators in the State of Washington proposed the following: "Damages for the birth of an unhealthy child born as a result of professional negligence shall be limited to damage associated with the disease, defect or handicap suffered by the child." H.B. 178, 48th Leg., Reg. Sess. (1983); S.A.B. 3269, 48th Leg., Reg. Sess. (1983).

309. Capron, *supra* note 189, at 653.

310. *See* Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 13-15 (Minn. 1986) (en banc) (construing MINN. STAT. ANN. § 145.424 (West 1989)); Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 819-21 (Pa. 1993) (construing 42 PA. CONST. STAT. ANN. § 8305(a)-(b) (Supp. 1993)).

311. *See generally* Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017 (1987) (legislation prohibiting wrongful birth actions is unconstitutional). *Contra* Recent Developments, *To Be or Not to Be: The Pennsylvania General Assembly Eliminates Wrongful Birth and Life Actions*, 34 VILL. L. REV. 681 (1989) (state legislation prohibiting wrongful life and wrongful birth actions is constitutional).

Those legislatures that have adopted prohibitive legislation should rethink their positions, and those which have not yet addressed the issue should do so with the aim of aiding those who innocently must suffer for the practice of careless medicine.[312]

IV. STRICT LIABILITY FOR DEFECTIVE GENETIC COUNSELING

One alternative for holding medical providers accountable on principles of negligence is to impose upon them strict liability for their life-causing omissions. According to this approach, damages would inure to the plaintiff not merely because the provider's negligence caused an otherwise avoidable life, but because the avoidable life will bring with it foreseeable suffering. Imposing strict liability on providers who disseminate avoidably inaccurate genetic information will reduce the burden on the plaintiff to prove her life with handicap constitutes a legally cognizable injury, and will likewise relieve the courts of the unnecessary metaphysical considerations they contend prevent any monetary award for wrongful life.[313]

A. Strict Products Liability as a Model

Strict products liability is a tort theory that has arisen out of warranty law as a means by which users and consumers of products may recover for injuries sustained from "defective products."[314] The genesis of strict products liability can be attributed to several twentieth century decisions by Justice Traynor of the Supreme Court of California.[315] The essence of those decisions is incorporated into section 402A of the *Restatement (Second) of Torts*, which a majority of jurisdictions has adopted as the basis for imposing strict products liability.[316]

---

312. Legislators may wish to consider various proposed model statutes. *See* ME. REV. STAT. ANN. tit. 24, § 2931 (West 1990); Kathryn J. Jankowski, *Wrongful Birth and Wrongful Life Actions Arising From Negligent Genetic Counseling: The Need for Legislation Supporting Reproductive Choice*, 17 FORDHAM URBAN L.J. 27, 56-57 (1989); Bruce L. Belton, Comment, *Wrongful Life: A Legislative Solution to Negligent Genetic Counseling*, 18 U.S.F. L. REV. 77, 106-08 (1983).

313. *Cf.* Ron Weiss, Comment, *Wrongful Birth and Wrongful Life: In Search of a Logical Consistency*, 2 ANN. SURV. AM. L. 507, 521-22 (1987) (advocating no-fault liability for wrongful life).

314. *See infra* notes 319-20 and accompanying text (discussing defectiveness of products).

315. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963) (Traynor, J.); Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

316. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (Traynor, J., Reporter's Advisory Committee Member). Today, courts have modified their approach to

Strict liability is generally thought of as liability without fault—liability imposed merely because an act was committed without regard to the level of care exercised by the defendant in seeking to avoid the risk of harm to others.[317] This portrayal of strict products liability, however, is not completely accurate because the defendant's culpability remains an important factor in the analysis.[318] Under strict products liability, a seller of a defective product[319] is liable if the

---

strict liability and rely less on the dictate of section 402A for their decisions. FISHER & POWERS, *supra* note 175, at 49; *see also infra* note 319 (discussing various tests for determining whether a product is defective). *See generally* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 829-31 (1973) (reviewing legislative history of section 402A).

317. The *Restatement* approach to strict products liability is not the only common law source for the imposition of strict liability. The owners of wild animals who stray and injure bystanders are held strictly liable for any resulting injury notwithstanding the owner's utmost care in keeping the animal. RESTATEMENT (SECOND) OF TORTS § 504 (1977). Similarly, those who participate in ultrahazardous activity, such as blasting, are held strictly liable for injuries to third persons. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 551-54 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1965) (listing factors). The abnormality of the risk, a consideration relevant in products cases, is the basis for the imposition of strict liability in non-product cases as well. KEETON ET AL., *supra*, at 542.

318. Although implicit in the meaning of "strict liability" is the concept of liability without fault, many jurists recognize that fault remains an element in strict products liability actions. *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161-62 (Cal. 1972); Phipps v. General Motors Corp., 363 A.2d 955, 963 (Md. 1976); Phillips v. Kimwood Mach. Co., 525 P.2d 1033 (Or. 1974); *see also* Michael M. Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661, 697 (concluding that application of strict liability to service transactions makes persons who render services liable for most but not all failures); William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 777-82, 791-94 (1983) (asserting that the distinction between negligence and defectiveness in strict liability is illusory); *infra* note 333.

319. A multiplicity of tests have been devised to address whether a product is "defective" so as to justify imposition of strict products liability. Each incorporates some form of culpability into its analysis. They include the *unreasonably dangerous test*, RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965); the *risk-utility test*, Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036-37 (Or. 1974); the *consumer expectation test*, Sours v. General Motors Corp., 717 F.2d 1511, 1514 (6th Cir. 1983); *failure to warn*, Davis v. Wyeth Labs., Inc., 399 F.2d 121, 128-29 (9th Cir. 1968); the *cheapest cost-avoider test*, Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972); and the *causation test*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). The theories underlying these tests are equally applicable to the imposition of strict liability for medical services and are discussed more fully *infra* at Part IV.C. For a detailed discussion of these tests in the strict products liability context, see generally FISHER & POWERS, *supra* note 175, at 57-123 and Frank J. Vandall, *Applying Strict Liability to Professionals: Economic and Legal Analysis*, 59 IND. L.J. 25, 41-48 (1983).

plaintiff can show that the product was unreasonably dangerous and the defect was present when the product left the seller's control.[320]

Prior to the development of strict liability, negligence law provided the only means by which a consumer could recover for injuries caused by defective products. The unique position of both the seller and the user, however, brought to light several shortcomings in the negligence theory which disadvantaged the consumer plaintiff and which caused courts to formulate modifications to the negligence approach.[321] The essence of strict liability today "is to insure that the costs of injuries resulting from defective products are borne by manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[322]

At the core of any strict products liability action is proof that a product was defective. The defect may be one of design, manufacture, or failure to warn of a danger inherent in the use or misuse of a product. Courts have developed various tests in their attempts to evaluate whether or not a product is defective.[323] The predominant tests, most frequently applied in design defect cases, are the risk-utility and consumer expectation tests.

The risk-utility test incorporates the Learned Hand cost-benefit formula familiar to negligence actions by balancing the likelihood and magnitude of harm against the usefulness of the product and the ability of the designer at reasonable expense to make the design safer.[324] Where the utility or affordability of the product would be destroyed by an alternate, albeit safer design, the design at issue is not defective.[325]

A product is defective under the consumer expectation test if the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[326] The type of product in dispute usually dictates the class of persons that comprise the ordinary user or consumer. A machine used only by machinists would be defective only if the ordinary machinist would not anticipate the attendant risk of injury posed by

---

320. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).
321. *See infra* Part IV.C. (discussing policy reasons for imposing strict liability).
322. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963).
323. *See supra* note 319.
324. *Cf.* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.); *see also supra* note 289.
325. Barker v. Lull Eng'g Co., 573 P.2d 443, 455-57 (Cal. 1978); Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1038 (Or. 1974); Wade, *supra* note 316, at 837-38.
326. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

the machine during its ordinary use;[327] an alleged defect in an automobile would be judged according to the expectations of the ordinary driver.[328]

B. Erroneous Genetic Counseling as a Defective Treatment

The same considerations relevant to a finding of defectiveness of products are applicable to the determination of defectiveness in the genetic counseling process. A consumer of products justifiably relies on the seller to introduce into the market products which are safe. To the same extent, the patient relies on the genetic counselor to disseminate accurate information on the risk of giving birth to a genetically impaired child. Under either the risk-utility or consumer expectation approach, failed genetic counseling meets the definition of defectiveness as that term is used in products cases.

The complexity of the genetic information and the patient's inability to partake in the genetic evaluation process suggests that the patient relies on the genetic counselor to a greater extent than the average consumer relies on the seller of products to produce safe ones.[329] Those prospective parents in need of genetic counseling represent the class of ordinary consumers whose expectations are relevant to the quality of treatment they expect. Their expectations, in combination with the known risks of error disclosed by the counselor, establish the standard under a strict liability analysis. Ordinary patients do not expect perfect results, nor do they expect a cure where one is not promised.[330] Likewise, prospective parents do not expect the birth a perfect baby and remain aware that the unbridled acts of nature may cause unexpected misfortune.

Prospective parents expect reasonable care in the dissemination of genetic information, which includes accurate testing for genetic conditions, evaluation of test results, and disclosure of material risks

---

327. *See* Hoffman v. E.W. Bliss Co., 448 N.E.2d 277, 285 (Ind. 1983) (punch press); *cf.* Knitz v. Minster Mach. Co., 432 N.E.2d 814, 818 (Ohio) (punch press is defective if more dangerous than ordinary consumer expectation), *cert. denied sub nom.* Cincinnati Milicron Chems., Inc. v. Blankenship, 459 U.S. 857 (1982).

328. *See* Sours v. General Motors Corp., 717 F.2d 1511 (6th Cir. 1983) (automobile hardtop); General Motors Corp. v. Simmons, 545 S.W.2d 502 (Tex. Civ. App. 1976) (automobile side window), *rev'd on other grounds*, 558 S.W.2d 855 (Tex. 1977).

329. Greenfield, *supra* note 318, at 689-90; Timothy J. Crowley & Tony L. Johannsen, Comment, *Extending Strict Liability to Health Care Providers: Can Consumers Afford the Protection?*, 13 TEX. TECH L. REV. 1435, 1462 (1982); William R. Hadley, Note, *Torts—Strict Liability—The Medical Malpractice Citadel Still Stands*—Hoven v. Kelble, 79 Wis. 2d 444, 256 N.W.2d 379 (1977), 11 CREIGHTON L. REV. 1357, 1371 (1978).

330. *See* Sullivan v. O'Connor, 296 N.E.2d 183, 185 (Mass. 1973).

of error in the counseling process. If attainment of a reliable diagnosis of the genetic condition is possible prior to the conception or birth of a handicapped child, the failure to attain a diagnosis of the condition would render the treatment defective. If state-of-the-art technology allows for the accurate diagnosis of the condition with which the child is born, then it is reasonable for the parents as consumers to expect that the condition will be diagnosed.[331]

Because medical providers involved in wrongful life cases have not caused the genetic anomaly, but have deprived the patient of necessary information, genetic counseling is uniquely suited for the application of strict liability. A failed procedure may prevent a parent from making the ultimate decision to proceed with or to terminate a pregnancy, but it is never alleged that a failed procedure caused the impairment, at least in the literal sense of the word "caused."[332] A genetic counselor would not be strictly liable merely because a child is born with a detectible disorder. A showing of breach of care would remain a necessary prerequisite to recovery.[333]

A genetic counselor whose obligation is to discern the possibility of genetic abnormality in patients and potential children is keenly aware of the risks as well as the harm that may result from an error in treatment. The counselor must expect that parents will rely on the information they receive, and should recognize the profound harm that will come to potential life if genetic information is not properly communicated to those who must act upon it.[334]

---

331. *See* Hadley, *supra* note 329, at 1378. *But see* Cunningham v. MacNeal Mem. Hosp., 266 N.E.2d 897, 902 (Ill. 1970) (state-of-the-art evidence is not relevant in strict products liability claims), *superseded by* ILL. REV. STAT. ch. 91, para. 181 (1973).

332. As discussed *supra* notes 199-200 and accompanying text, the medical provider's omission may be seen as "causing" the handicap in an abstract sense, since she necessarily causes the life with handicap.

333. This Article does not advocate a standard of "absolute liability" as opposed to one of "strict liability" in wrongful life cases. The plaintiff must demonstrate that she was owed a duty as a consumer, that incorrect medical information was disseminated, and that the disseminated information was relied on by her parents. Although strict liability makes it easier for the plaintiff to recover where proof of negligence is difficult, it does not abandon every consideration relevant to the law of negligence. *See supra* note 318 and accompanying text and *infra* note 379 and accompanying text.

334. *See* Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1255 (Ill. 1977). This assumes the parents would have acted on the information had they been provided with it. Otherwise, one could not say that a medical provider's breach of care proximately caused the child's life. *See supra* Part III.C. A similar approach is adopted in products cases involving misuse of otherwise safe products, where a finding of defectiveness often turns on whether the misuse was foreseeable. *See* Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83-84 (4th Cir. 1962); Dosier v. Wilcox-Crittendon Co., 119 Cal. Rptr. 135, 136-67 (Cal. Ct. App. 1975); Moran v. Faberge, Inc., 332 A.2d 11, 20 (Md. 1975).

The number of wrongful life cases reported to date indicates that the risk of erroneous genetic counseling is substantial when established medical standards are not followed. Further, the gravity of potential harm—the involuntary creation of an avoidable, handicapped life—is profound. The cost to the genetic counselor in avoiding the giving of erroneous advice is minimal, however; all she must do is adhere to established medical standards. No greater standard is either necessary or proposed under this analysis. As discussed below, however, the present inability of the legal system to redress the plight of the handicapped child who sues for wrongful life offers little incentive for the genetic counselor to take the necessary steps to avoid erroneous genetic counseling.[335]

C. Policy Considerations for Imposing Strict Liability

Once a product is deemed defective, a number of policy rationales justify imposing strict liability upon the manufacturer or distributor of the product. They include (1) the difficulty of proving specific acts of negligence; (2) increased incentive to promote product safety; (3) the superior position of manufacturers to prevent and insure against injury; (4) more efficient risk-spreading of the victim's loss among the purchasers of products; and (5) the obligation assumed by manufacturers and distributors who must sacrifice something for the benefit they derive from consumer spending.[336] The significance of these factors is not exclusive to products liability cases; each has its place in the analysis of wrongful life cases.

1. Difficulty in Proving Negligence

One rationale for imposing strict liability upon the seller of a product is based on the difficulty of proof encountered by a plaintiff

---

335. *See infra* Part IV.C.2.

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

KEETON ET AL., *supra* note 317, at 25; *see also supra* note 253.

336. *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) (listing several justifications). For a general discussion of the various policy considerations underlying strict products liability, see generally David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980) and William C. Powers, *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415 (1984).

in the typical products case. According to this rationale, the manufacturer of a product is uniquely insulated in its manufacturing and design processes so as to make it very difficult for the plaintiff to access the proof necessary to prove negligence.[337] Essentially, this rule suggests that because the plaintiff may encounter difficulty meeting the breach of duty element of the tort, the courts will relieve her of that burden and will require only that she prove the product was defective or abnormally dangerous at the time it left the seller's control.[338]

The courts have made clear that it is difficult if not impossible for the wrongful life plaintiff to prove the injury element of the tort. Yet the problem of proof that warrants giving special treatment to plaintiffs in products cases is no different than the problem of proof encountered by the wrongful life plaintiff. The result is the same: the wrongful life plaintiff cannot overcome the insurmountable problem of proving injury, a difficulty that, concededly, has not been caused by the complexity of the defendant's conduct, but rather is imposed by the courts who refuse to hold that life is an injury.

2. Incentive to Act Prudently: An Economic Perspective to Genetic Counseling

Under traditional negligence law, the injurer and the victim are each accountable for the activity that results in injury, and changes in activity that could avoid the injury. The injurer is motivated to avoid accidents by the prohibitive cost of a legal judgment and the more economical means of avoiding the accident before it occurs. Similarly, the potential victim has an incentive to change her activity level, since a failure to do so may be deemed contributory negligence and may bar any recovery.

---

337. Professor Powers suggests that the difficulty of proof rationale is the only one that supports the distinction between sales and services in strict products liability cases. Powers, *supra* note 336, at 426.

338. *See, e.g., id.* The related tort concept of *res ipsa loquitur* operates in much the same way. The plaintiff alleging medical malpractice sometimes cannot identify the particular defendant who caused the injury, or, in other cases, cannot causally link the complained of injury with the surgical treatment she underwent. *Res ipsa* allows a plaintiff to proceed with her negligence action and imposes on the physician an inference that the complained of harm does not ordinarily occur absent negligence. *See* Ybarra v. Spangard, 208 P.2d 445 (Cal. Ct. App. 1949).

Again, the justification for this doctrine is premised on the inherent difficulty of proof—proof of a culpable party and/or proof of causation. Similarly, the wrongful life plaintiff cannot prove in the logical or philosophical sense her injury; however, she usually has no problem proving duty, breach, and causation. The plaintiff's damages are tangible, though her harm arguably is not.

The efficiency of strict liability can be judged by identifying the activity levels of both the potential injurer and the potential victim in a particular circumstance and determining whether a change in activity level by either, but particularly the victim, will promote accident avoidance.[339] Strict liability is particularly suited to those activities where the cost of accident avoidance exceeds the expected judgment costs so that the injurer has no incentive to take precautions, and where activity level changes by potential victims would neither effect accident avoidance nor be economically practical.[340]

The genetic counselor must undertake very little by way of activity level modification to prevent defective counseling. All that is usually required is more careful scrutiny before giving advice to the patient. In the typical wrongful life case, the plaintiff is not alleging injury caused by a defective medical instrument, drug or other substance used in treatment, nor is she challenging the basis of a medical decision involving affirmative medical treatment. The asserted defect in treatment is the absolute failure to pass along information upon which only the parents could act. Thus, the medical provider who fails to render appropriate genetic counseling is not effectuating a risk inherent in the medical treatment, but is creating the risk independent of the standard established by the medical community. Applying strict liability against genetic counselors does not establish a higher standard than ordinary care for the practice, and only serves to ensure that the standard is realized by both doctor and patient.

---

339. POSNER, *supra* note 253, at 160-61. Professor Guido Calabresi takes the analysis one step further by focusing on "which of the parties to the accident is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs. . . ." Calabresi & Hirschoff, *supra* note 319, at 1060. Accordingly, Judge Posner's analysis would be expanded to focus not only on whether the risk of accident itself justifies a reduction of activity level, but also on who best can evaluate their activity levels. Again, in the medical malpractice context, to answer Calabresi's query, the medical provider is in a far superior position because of her specialized training and experience. Vandall, *supra* note 319, at 36. In this regard, however, it is important not to place undue weight on the provider's unique ability to evaluate the accident costs since, particularly when wrongful life is alleged, the parents and their child are in a better position to assess the pecuniary and nonpecuniary harm resulting from the child's handicapped life.

340. POSNER, *supra* note 253, at 163. Although I use Professor Posner's economic theory to promote the application of strict liability to wrongful life claims, other commentators criticize Posner's approach and suggest that adjustments in activity level are exactly what strict liability seeks to avoid, since those valued activities which cannot be made safer by the injurer at reasonable cost are most appropriately within the scope of strict liability. Although this assumption may be true of inherently dangerous activities, activity level changes by medical providers is the best means of avoiding defective genetic counseling.

In examining the costs to the genetic counselor in adopting more exacting standards for information giving, and the possible costs for her failure to render proper counseling, it is clear that there is little incentive for her to take the additional precautions needed to avoid genetic malpractice. Unfortunately for the analysis, this result comes from the inability of the legal system to redress the harm to the child for the provider's mistake; it does not come from internal cost inefficiencies of the care itself which might otherwise render such care economically impractical. This brings us full circle to the concept of deterrence, which is part of both negligence and strict liability law. Accordingly, one might rightfully ask whether the imposition of strict liability is justified merely because other forms of tort law are unable to provide adequate redress to potential victims. As seen in other contexts, the answer appears to be in the affirmative.[341]

3. Genetic Counselor as Best Accident Avoider

The genetic counselor has the ability to avoid the accident, but has little economic incentive to do so. The wrongful life plaintiff, on the other hand, has no ability to avoid harm, but much incentive to do so. The unborn patient is powerless in the genetic counseling process. Her life or nonlife, therefore, depends on the acts or omissions of the counselor. The child's parents, who are also patients of the medical provider, on the other hand, are not completely powerless, and may participate in accident avoidance at relatively low economic cost by seeking a second opinion. In many instances, however, the element of time which is critical to the medical provider's ability to diagnose the genetic condition, and the parents' ability to act to avoid conception or procure an abortion, militates against the plausibility of seeking a second opinion.[342]

4. Genetic Counselor as Best Risk Allocator

Notwithstanding the one-on-one relationship between the genetic counselor and the patient (which some commentators argue prevents medical providers from spreading the risk of loss among the entire population),[343] the counselor's ability to spread the risk of loss

---

341. *See supra* Part IV.C.1.

342. *See supra* notes 179-81 for a description of various prenatal diagnostic procedures.

343. These commentators argue that because the medical provider is unable to spread the risk among the entire population, the distribution of risk among her patients unfairly imposes on relatively few people the entire cost of the risk. *See, e.g.*, Crowley & Johannsen, *supra* note 329, at 1457 ("Retailers have a cost-minimizing effect on the loss reallocation, whereas doctors and hospitals will have a cost-maximizing effect."); *see also* Magrine v. Krasnica, 227 A.2d

remains far superior to that of the patient-consumer's. The counselor usually maintains medical malpractice insurance whereas the patient cannot insure against the eventuality of defective treatment.[344] Likewise, premium increases for malpractice insurance can be passed on to patients by way of increased fees.[345] Simply because the provider has insurance should not categorically force the burden of loss upon her, although it is one factor to consider.[346]

5. The Obligation of the Genetic Counselor as a Market Participant

For many courts, the question as to with whom responsibility for the risk of injury rests depends on the benefits one derives from the risk-causing activity. Where the actor derives substantial benefit from consumer spending, the benefit obtained requires the assumption of additional responsibility toward those from whom the benefit is gained. Courts have found that a seller's responsibility to the consumer originates from the benefit it derives from those who purchase its products.[347]

According to this approach, the genetic counselor owes allegiance to the consumer-patient to assume the consequences of improper genetic counseling without becoming the insurer of perfect results. Where an avoidable act or omission results in inaccurate genetic information which is relied on by parents to their detriment, the

---

539, 545 (N.J. Super. Ct. App. Div. 1967) (service providers generally do not have the assets, volume of business or area of contacts which would allow them to spread the risk of loss in the same manner as a manufacturer or retailer of a product), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam*, 250 A.2d 129 (N.J. 1969).

344. Although the medical provider is clearly in a better position to procure insurance to cover the risk of malpractice, some commentators propose medical providers should require that their patients insure against the eventuality of malpractice. RICHARD POSNER, TORT LAW, CASES AND ECONOMIC ANALYSIS 517-18 (1982); Vandall, *supra* note 319, at 37.

345. Magrine v. Spector, 241 A.2d 637, 643 (N.J. Super. Ct. App. Div. 1968) (Botter, J., dissenting), *aff'd per curiam*, 250 A.2d 129 (N.J. 1969); James M. Brown, *Social Resource Allocation Through Medical Malpractice*, 6 WILLIAMETTE L.J. 235, 243-45 (1970); Hadley, *supra* note 329, at 1372. *But see* Crowley & Johannsen, *supra* note 329, at 1457 (arguing that medical providers are inefficient loss reallocators).

346. Whether the reallocation of risk through increased insurance premiums is an efficient means of risk spreading is an age-old debate that is beyond the scope of this Article. For further discussion of the issue, see generally JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE (1987).

347. *See, e.g.*, Dillard Dept. Stores, Inc. v. Associated Merchandising Corp., 782 P.2d 1187 (Ariz. Ct. App. 1989); Kasel v. Remington Arms Co., 101 Cal. Rptr. 314 (Cal. Ct. App. 1972).

medical provider as a market participant should assume the risk of loss. The risk is proportionate to the number of patients the provider sees. The more patients she sees, the more risk she assumes. The increased risk is the price she must pay to society for achieving a successful practice. This price is not an unreasonable one, especially since the counselor controls the extent of her liability. The more careful she is the less risk she encounters.

D. Judicial Rationales For Not Imposing Strict Liability on Medical Providers

Relatively few cases have addressed the application of strict tort liability to pure service transactions;[348] more have addressed the situation where the faulty service is a direct result of a defective product.[349] Of the handful of reported decisions addressing the application of strict liability to defective medical services not involving the use of a product,[350] several are worthy of discussion.

---

348. In such cases, courts have generally declined to apply strict liability. *See, e.g.*, Gagne v. Bertran, 275 P.2d 15 (Cal. 1954) (test hole driller); Swett v. Gribaldo, Jones & Assocs., 115 Cal. Rptr. 99 (Cal. Ct. App. 1974) (soil engineer); City of Mounds View v. Walijarvi, 263 N.W.2d 420, 425 (Minn. 1978) (en banc) (architect); *see also infra* note 353 (listing cases involving medical services). Other courts have held similar professionals strictly liable for defectively rendered services. *See, e.g.*, Broyles v. Brown Eng'g Co., 151 So. 2d 767 (Ala. 1963) (per curiam) (civil engineers); *cf.* Buckeye Union Fire Ins. Co. v. Detroit Edison, 196 N.W.2d 316 (Mich. Ct. App. 1972) (utility company). The non-discretionary nature of the services at issue played a significant role in the courts' decisions to impose strict liability.

349. These hybrid sales-service transactions arise in many settings, and are handled by courts in diverse ways. *See* Newmark v. Gimbels, Inc., 258 A.2d 697 (N.J. 1969) (beautician held strictly liable for burning customer's scalp with defective hair product). *But see* Finn v. G.D. Searle & Co., 677 P.2d 1147 (Cal. 1984) (physician not strictly liable for prescribing injury-causing pharmaceutical); Magrine v. Krasnica, 227 A.2d 539 (N.J. Super. Ct. Law Div. 1967) (dentist not strictly liable for use of defective hypodermic needle), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam*, 250 A.2d 129 (N.J. 1969); Coyle v. Richarson-Merrell, Inc., 584 A.2d 1383 (Pa. 1991) (pharmacist not strictly liable for filling prescription with defective drug); Rogers v. Miles Labs., Inc., 802 P.2d 1346 (Wash. 1991) (blood bank not strictly liable for distributing tainted blood product).

Hybrid cases are irrelevant to the issue of whether strict liability is appropriate in the context of medical services because most of those decisions hinge on the underlying product defect and the server's ability to know of its existence before the product is used. *See generally* Marc L. Carmichael, Annotation, *Liability of Hospital or Medical Practitioner Under Doctrine of Strict Liability in Tort, or Breach of Warranty, for Harm Caused by Drug, Medical Instrument, or Similar Device Used in Treating Patient*, 54 A.L.R.3d 258 (1974 & Supp. 1993).

350. *See infra* note 353 and *supra* note 348.

In *Hoven v. Kelble*,[351] the Supreme Court of Wisconsin ruled that the plaintiffs could not maintain an action in strict liability against a physician for defective medical treatment during a lung biopsy.[352] The court analyzed the policy arguments for and against treating professional services and sales differently, and held that imposing liability against those rendering professional medical services could have unforeseeable adverse consequences on society's ability to obtain specialized medical care.[353]

In *Helling v. Carey*,[354] an ophthalmologist was held liable for failing to test for glaucoma in a patient who was below the age where existing medical standards deemed such testing medically indicated.[355] Although the provider's care did not fall below the established standard of care in the profession, the court, after considering the relatively low risk, minimal cost, and nondiscretionary nature of the provider's decision to employ the test, deemed the existing standard too low.[356] The concurring opinion in *Helling*, however, suggests that the rationale for the court's decision was based on principles of strict liability and not on negligence, as the majority had suggested.[357]

> It seem[s] to me we are, in reality, imposing liability, because, in choosing between an innocent plaintiff and a doctor, who acted reasonably according to his specialty but who could have prevented the full effects of this disease by administering a simple, harmless test and treatment, the plaintiff should not have to bear the risk of loss. As such,

---

351. 256 N.W.2d 379 (Wis. 1977).
352. *Id.* at 393.
353. *Id.* at 391-92. Other jurisdictions have taken a similar approach and have denied recovery for claims of defective medical services premised on strict liability. *See* Dubin v. Michael Reese Hosp. & Med. Ctr., 415 N.E.2d 350 (Ill. 1980) (physician who overradiated tumor with x-rays not strictly liable); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (optometrist who improperly fitted patient with contact lens not strictly liable); Nevauex v. Park Place Hosp., Inc., 656 S.W.2d 923 (Tex. Ct. App. 1983) (hospital not strictly liable for misapplication of radiation treatments); Black v. Gundersen Clinic, Ltd., 448 N.W.2d 247 (Wis. 1989) (physician not strictly liable for failing to disclose risks of surgery). Some states have excluded by statute strict liability actions against medical providers in some situations. *E.g.*, ARIZ. REV. STAT. ANN. § 32-1481A (1993); IND. CODE ANN. § 16-8-7-2(a) (West 1993); LA. REV. STAT. ANN. § 9:2797 (West 1993); TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon Supp. 1991).
354. 519 P.2d 981 (Wash. 1974) (en banc), *superseded by* WASH. REV. CODE ANN. § 4.24.290 (West 1988).
355. *Id.* at 983.
356. *Id.*
357. *Id.* at 984 (Utter, J., concurring).

imposition of liability approaches that of strict liability.[358]

A similar view was expressed by Justice Tobriner in his concurring opinion in *Clark v. Gibbons*.[359] *Clark* involved malpractice claims against an orthopaedic surgeon for prematurely terminating a spinal operation, and against an anesthesiologist for failing to use the proper anesthesia which had worn off before the operation was terminated.[360] The plaintiff was awarded damages based on *res ipsa loquitur*,[361] although Justice Tobriner argued against application of a negligence standard in favor of one that would impose strict liability:[362]

> A system openly imposing liability without fault without any pretense of negligence . . . can avoid unwarranted imputations of fault while permitting the rational development of badly needed doctrine. Simultaneously, such a system can insure that the burdens of unexplained accidents will not fall primarily upon the helpless but will be borne instead by those best able to spread their cost among all who benefit from the surgical operations in which these misfortunes occur.[363]

One of the most persuasive arguments against the application of strict liability to professional service transactions is the difficulty of judging the professional's behavior since her decisions are not consistent in a given circumstance and depend on a case-by-case evaluation of the circumstances which often require a spontaneous response. Strict liability, critics contend, would only lead to judicial second-guessing of the professional's judgment, which is counterproductive to aggressive medical decision-making.[364] Although this may well be

---

358. *Id.* at 983 (Utter, J., concurring).
359. 426 P.2d 525 (Cal. 1967).
360. *Id.* at 528-29.
361. *Id.* at 535.
362. *Id.* at 539 (Tobriner, J., concurring).
363. *Id.*
364. *E.g.*, Allen H. Cox, III, Note, *The Medical Profession and Strict Liability for Defective Products—A Limited Extension*, 17 HASTINGS L.J. 359, 366 (1965). The rationale against imposing strict liability upon professionals is well stated by the Minnesota Supreme Court in City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978) (en banc):

> Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity;

true of certain medical decision-making, it is incompatible to other, purely "mechanical" treatments.[365] For example, an erroneous interpretation of test results or a failure to disclose a known or knowable risk of treatment is not usually a matter of professional judgment, but is purely a matter of mechanical oversight.[366] Under these circumstances strict liability would not interfere with professional decision-making since there is little or nothing for the provider to contemplate other than how and to whom the information should be conveyed.[367] This approach of distinguishing between medical treatment and medical services was employed by one federal court that refused to adopt the "technical or artificial distinction between sales and services" and held several hospitals liable for negligent treatment of the plaintiff who was injured in a motor vehicle accident caused by an improperly installed tire.

In *Johnson v. Sears, Roebuck & Co.*,[368] the court bifurcated the types of medical services rendered in a hospital into professional medical services and "mechanical or administrative services," and held the latter type subject to strict liability when defectively rendered.[369] The court reasoned that defective mechanical and administrative hospital services may result in serious consequences to a patient; the patient has no control over the quality of the service; and the inexactitude of medical science requires at very least that the doctor have the proper facilities with which to render the maximally

---

> and an architect cannot be certain that a structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Id. at 423.

365. Greenfield, *supra* note 318, at 700.

366. Only when the medical provider fails to disclose a risk because she has concluded that disclosure would be harmful to the patient does the provider exercise professional judgment in withholding the information. Use of this "therapeutic privilege" to withhold known risks of treatment is rarely justified. *See* KEETON ET AL., *supra* note 317, at 192; *see also* Alan Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413 (the therapeutic privilege must be restrictively framed so physicians do not substitute their own judgment for the patient's in every instance of medical decision-making).

367. *See* Jane P. Mallor, *Liability Without Fault for Professional Services: Toward a New Standard of Professional Accountability*, 9 SETON HALL L. REV. 474, 493-94 (1978); *see also supra* Part III.B; *cf.* Helling v. Carey, 519 P.2d 981, 983 (Wash. 1974) (en banc).

368. 355 F. Supp. 1065, 1066 (E.D. Wis. 1973).

369. The court did not address the applicability of strict liability to professional medical services. *Id.* at 1066-67.

attainable standard of care.[370] Thus, a court entertaining a claim for strict liability must make an ad hoc determination of the type of services alleged to be defective, and must take into account the particular facts of the case to ensure that the patient is not seeking to impose no-fault liability for a failure to cure.[371]

The court's decision in *Johnson* offers an insightful approach that is appropriate for some if not all wrongful life cases. An administrative hospital service is any service the hospital must perform at the request of a physician which, although critical to the patient's treatment, does not affect the exercise of medical discretion in rendering actual treatment. Genetic counseling can be seen as at least primarily mechanical in nature. Little professional discretion is left with the provider to decide whether or not to disclose genetic information.[372] This is particularly true in situations where the provider fails to inquire about a woman's maternal age, has carelessly mishandled blood samples or has misinterpreted otherwise unambiguous test results. In those situations, imposition of strict liability is appropriate.

Unlike cases where courts have decided that a service was so inextricably linked to other discretionary treatment decisions that strict liability should not be imposed, incorrect dissemination of information is not merely a part of genetic counseling; it usually represents the entire extent of the "treatment." Particularly in those cases where the provider's omission involves the failure to inquire—failure to take a family history or failure to prescribe diagnostic testing—the imposition of strict liability will likely have little effect on the progress of medicine.

The medical provider defending against a wrongful life claim does not defend on the ground that she did not deviate from the standard of care; rather her defense usually rests on the plaintiff's inability to prove injury. Accordingly, it would be inappropriate to deny a strict liability action premised on wrongful life because of its possible consequences on the provision of care since the physician's or counselor's conduct is unquestionably culpable notwithstanding the plaintiff's inability to prove injury.

One suggested consequence of extending strict liability to medical services is a substantial increase in litigation, resulting in increased health care costs. Concededly, this is a difficult phenomenon to predict, although it appears unlikely that this consequence will be realized in wrongful life claims premised on strict liability in tort. The number of cases initiated would be no greater than the number

370. *Id.* at 1067.
371. *Id.*
372. *See supra* Part III.B.

of negligence actions presently brought for wrongful life. Relieving wrongful life plaintiffs of their burden of proving injury to a philosophical certainty will encourage early settlement of legitimate claims since the defendant no longer will have the issue of injury on which to hang her hat.

The effect of a strict liability judgment against a medical provider for failed genetic counseling may not, as some propose, cause across-the-board cost increases for genetic care.[373] It is unlikely that rate hikes for malpractice insurance throughout the specialty will result in unaffordable health care. Instead, those providers who act negligently will bear the brunt of the economic fallout for their neglect by having to answer to disciplinary committees within the specialty. These committees will be forced to regulate the conduct of its members in order to keep malpractice insurance rates within the specialty from rising to unaffordable levels.[374] Other than outright removal from the specialty, pecuniary sanction is the most feasible way to discipline habitually careless providers, which, in turn, will force them to charge higher fees for their services.

The positive effect of this is that the consumer will be motivated to seek substitute health care that is cheaper and probably safer. Hence, the negligent provider will treat fewer patients, which will

---

373. *See, e.g.*, Hoven v. Kelble, 256 N.W.2d 379, 391 n.17 (Wis. 1977); Greenfield, *supra* note 318, at 687.

374. Internal provider discipline appears to be the most feasible means to sanction the careless provider, since the claims experience of individual providers is rarely considered by insurance companies when setting insurance rates. *See* Andrew D. Freedman & John M. Freedman, *No-Fault Cerebral Palsy Insurance: An Alternative to the Obstetrical Malpractice Lottery*, 14 J. HEALTH POL., POL'Y & LAW 707, 714 (1989); Cynthia C. Gallup, *Can No-Fault Compensation of Impaired Infants Alleviate the Malpractice Crisis in Obstetrics?*, 14 J. HEALTH POL., POL'Y & LAW 691, 696 n.8 (1989). *But see* Blaine F. Nye & Alfred E. Hofflander, *Experience Rating in Medical Professional Liability Insurance*, 60 J. RISK & INS. 150 (1988) (proposing that prior history of doctors should be used to determine insurance premiums). Some carriers provide incentives for the practice of more careful medicine by offering claim-free discounts (which generally range from 5 to 30%) to those providers who have had no malpractice claims against them, and disincentive by assessing surcharges (which may raise an insured's premium up to 300%) against those who are habitually negligent. Telephone Interview with Lawrence Smarr, Chairman, Data Sharing Committee of the Physicians Insurance Association of America (August 20, 1991). Realistically, however, a provider would have to be negligent to an unusually high degree before a surcharge would be assessed, especially when considering that only one in ten acts of malpractice results in the filing of a legal malpractice claim. PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 24 (1985). From this, one begins to realize that malpractice insurance is a particularly efficient means of spreading risk, so much so that individual physicians feel no real effect on their rates from their own claims experience.

reduce the likelihood of future carelessness.[375] The market will adjust the allocation of risk according to the likelihood that the risk will come to fruition, and will discipline the careless provider by pricing her services out of the market.[376]

This economic theory presupposes (incorrectly according to some who advance the theory of health at any cost)[377] that patients choose their providers according to the fees they charge, and not so much because of their reputation and experience. As with any consumer product, reputation and experience in the industry lends credibility to the product and enters into the consumer's purchasing decision. At some point, however, a substantial disparity in price between the reputable product and one whose price is significantly lower will motivate the consumer to purchase the cheaper alternative in the hope that its quality will be comparable to the higher priced product, resulting in a net savings.[378]

The same is likely true for consumer decisions regarding medical care. A provider's reputation, although a factor in the patient's initial decision to engage her services, may become less significant if the price for those services is not compatible with the patient's ability to pay for them. The patient is not oblivious to the cost of her treatment. She must either pay the provider directly, or she must make copayment if she is fortunate enough to have health insurance. Thus, the patient is affected by the cost of the provider's services, and will be motivated to seek cheaper alternatives when the provider's fees prove too burdensome or when they appear disproportionate to the fees charged by similar specialists in the field.

The suggested strict liability approach to wrongful life is used to relieve the plaintiff of her burden of proving legal injury and

---

375. POSNER, *supra* note 253, at 166.

376. Some commentators, however, question whether increases in insurance rates would give the provider adequate incentive to avoid accidents, because the physician may pass the increased costs on to the patient. *See* Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 YALE L.J. 1141, 1156 n.78 (1975).

377. Some commentators argue that individuals seldom shop for medical care using fees as the sole or primary criterion. Adding strength to this contention is the reality that many patients are insured or seek medical care in emergency situations where there is neither the need nor the time to deliberate on cost. Similarly, few patients can anticipate what the diagnosis will be and what tests or procedures may be necessary to achieve the diagnosis. Crowley & Johannsen, *supra* note 329, at 1457.

378. Concededly, such "risk-taking" is less likely to occur when one's life is on the line. Especially for routine, nonlife threatening procedures, however, a patient is more apt to shop around. In fact, many health insurance plans do the shopping for the patient by restricting covered treatments to those rendered by participating providers, or by limiting the payment of fees to what the plan considers reasonable and customary.

does not promote judicial second-guessing of the provider's professional medical judgment. The standard of care remains relevant to the strict liability analysis. Strict liability should not be imposed upon a medical provider whenever the plaintiff cannot sustain her burden of proving any of the elements required in negligence actions. There must always be proof of a duty owed and a breach of that duty, essentially amounting to a showing of fault.[379] Imposing strict liability on genetic counseling is more than an escape device for disadvantaged plaintiffs; it is a more efficient method of risk-spreading and accident avoidance than the law of negligence, which has proved incompatible with the injury element of the tort.

Application of strict liability to medical professionals is not a novel concept; legislators and academicians for years have proposed such an approach.[380] Unfortunately, the idea has been greeted with undue judicial reluctance.[381] Two states, however—Virginia and Florida—have enacted legislation providing no fault compensation for children born with birth-related neurological injuries caused by the negligence of obstetricians during the delivery process.[382] These no-fault laws were enacted to counter skyrocketing rates and the outright unavailability of malpractice insurance.[383] Both states' laws require very serious handicaps as a condition precedent to recovery. The Virginia plan requires that the claimant be "permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living"; and the Florida plan requires that the claimant be "permanently and substantially mentally and physically impaired."[384]

---

379. *See supra* notes 318 and 333 and accompanying text.

380. *See, e.g.*, S. 215, 94th Cong., 1st Sess. (1975) (sponsored by Senators Inouye and Kennedy proposing no-fault compensation for injuries sustained from the provision of health care services). At least one commentator contends that the doctrine of informed consent is simply another means of imposing strict liability upon medical providers. *See* Alan Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability By Way of Informed Consent*, 56 NEB. L. REV. 51, 123-32 (1977).

381. *See supra* notes 348 and 353 and accompanying text.

382. *See* VA. CODE ANN. § 38.2-5000 to -5021 (Michie 1990 & Supp. 1993); FLA. STAT. ANN. § 776.301-.316 (West 1986 & Supp. 1993). These laws work much like workers' compensation laws and essentially impose strict liability on the provider with a limit on compensable injury to the special medical and habilitative care necessitated by the handicap. The plans also provide for payment of reasonable attorneys' fees and wage stipends for those age 18 and over who are unable to work because of their handicap. Gallup, *supra* note 374, at 693. These programs are financed by a tax assessed against medical providers. *Id.*

383. Gallup, *supra* note 374, at 693-94.

384. VA. CODE ANN. § 38.2-5000 to -5021 (Michie 1990 & Supp. 1993); FLA. STAT. ANN. § 776.301-.316 (West 1986 & Supp. 1993).

Although these laws present their own shortcomings,[385] each has achieved what they were enacted to do—reduce malpractice insurance rates while providing guaranteed compensation for seriously impaired newborns injured at the hands of careless medical providers.[386] These laws serve as good models for the concept of strict liability for wrongful life claims and suggest that strict liability is a feasible alternative to negligence as a means of redressing claims which might otherwise bring with them profound social and economic consequences.

Strict liability does not resolve all the uncertainties surrounding the child's claim for wrongful life. The issue of damage calculation still remains. At very least, the child is entitled to the readily measurable special damages which the law is well suited to impose upon the defendant. This Article further proposes that nonpecuniary pain and suffering damages are calculable and should be awarded in those circumstances where the child is born with a severe handicap. Although many courts express extreme reluctance over the uncertainties flowing from the assessment of nonpecuniary damages in wrongful life claims, those uncertainties may be overcome in the same way that courts have dealt with equally difficult damage calculations for emotional distress, loss of consortium, loss of profits and loss of enjoyment of life's pleasures. Several states have accomplished this by placing statutory ceilings on the amount of noneconomic damages a plaintiff may recover.[387]

Some will argue that any proposition that strict liability should be applied to genetic counseling misses the mark engraved by social priority. Rather than adjust the legal and medical systems to cater to the wrongful life claim, we must take the less drastic alternative of barring the action as a matter of law. The lack of evidence as to the adverse social and scientific ramifications flowing from acceptance of wrongful life claims suggests that the latter alternative is the more drastic of the two.

V. CONCLUSION

Opponents of the wrongful life cause of action maintain that society should not expect so much from justice and the legal system—that society's expanded expectation of justice is undesirable in a world where, they argue, the sanctity of life is a fortiori superior to freedom of choice. Society, however, is justified in expanding its expectation of justice in light of the expanded role technology plays

---

385. *See* Gallup, *supra* note 374, at 703-04.

386. For other proposals for imposing strict liability against obstetricians, see generally Freedman & Freedman, *supra* note 374.

387. *See supra* note 265 and accompanying text.

in the creation and perfection of life. Individuals should have the opportunity to take advantage of these technologies through their medical providers who are, in essence, their brokers in the market of genetic technology.

It is no doubt difficult for many to embrace a concept which permits individuals to stand before a court and argue post hoc that their lives on whole are not worth the pain they experience. The difficulties of this concept for most, however, are as out of touch with the reality of the child's life as is their ability to weigh the burdens of the plaintiff's impaired existence with nonlife. Those who are fortunate enough to be free of genetic handicaps cannot fully identify with the child's condition. If, however, you would ask these same people if they would choose life or death if their lives would bring great pain and suffering, many would choose death without any rational basis for the decision that death is preferable.

Wrongful life cannot be rationalized against every notion of justice and being. Nonetheless, the concept behind the action—that some lives are not worth living—is one whose time has come. Just as courts have expanded the concept of duty to the unborn where the progression of the law paralleled the development of medical technologies, so too should courts expand the rights of the unborn to benefit from today's technology. To receive anything less is to sustain compensable injury.

The metaphysical dilemma of life versus nonexistence has unnecessarily interfered with the rights of the unborn to recover for the deprivation of state-of-the-art medical care. It is not necessary to labor over such a comparison. Instead, courts need only focus on the deprivation of information to the parent or guardian ad litem.

Parents of the prospective child have the most complex and agonizing decision to make when deciding between allowing the child to be born into a life of suffering and not bringing her into the world at all. The parents' decision involves a weighing of possible benefits and burdens to the child born with the impairment, and the parents' own ability to live with a child who requires extraordinary attention, and who will likely die prematurely.

Courts have well recognized the difficulties of such a decision, and have struggled with the same questions parents must ask themselves, such as: When a child will not live a healthy or full life, is it better that the parent allow it to be born, or should they avoid or terminate the life? Whose interest must the parents take into account when making such a decision? Is it possible for parents to make this decision without placing their own interests before the child's? How severe must the impairment be before it is possible to say with some certainty that life is an injury? The queries, although difficult, are not insurmountable for the parents and, thus, need not be for the courts. Once the parents have made their decision, it should be

respected by the medical provider as the decision of both parents and child, and accorded legal protection through pecuniary sanction.

In time, science and biotechnology may help parents to achieve the creation of the perfect baby, free of the congenital infirmities that are currently the subject of wrongful life and other birth-related causes of action. The law, functioning as it does, will inevitably embrace those scientific advances by modifying the common law standard of care for medical providers to follow when rendering treatment or advice to prospective parents. It is understandable that courts would prefer to postpone consideration of the legitimacy of such novel causes of action in the hope that science itself will resolve the issue.[388] The unfortunate reality, however, is that the ability to prevent and treat most genetic disorders is far from a scientific reality. Courts must confront the issue head on, and must encourage the pace of technology to achieve the maximally attainable state of medical care by recognizing the wrongful life action.

---

388. The future holds promising for the alleviation of many genetic diseases. At the center of recent scientific efforts is the Human Genome Project, a multi-billion dollar, federally backed, worldwide research effort with a goal of mapping the location of every chromosome, gene and base pair of DNA that make up the human cell. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, MAPPING OUR GENES—THE FEDERAL GENOME PROJECTS: HOW VAST, HOW FAST? OTA-BA-373, at 1 (1988). It is estimated that there are between 50,000 and 100,000 human genes of which approximately 1,700 have already been mapped, *id.* at 9, including the genes for Tay-Sachs disease, cystic fibrosis, and sickle-cell trait. *Id.* By identifying the location of every gene, the Human Genome Project is expected to have a profound impact on biomedical science and will enable medical providers to treat and prevent many of the genetic diseases that afflict mankind. *Id.* at 1. For a comprehensive report on the Human Genome Project, see generally U.S. DEPT. OF ENERGY, OFFICE OF ENERGY RESEARCH, HUMAN GENOME, 1989-90 PROGRAM REPORT (1990); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, MAPPING OUR GENES—THE FEDERAL GENOME PROJECTS: HOW VAST, HOW FAST? OTA-BA-373 (1988). Perhaps such scientific advancement will eventually render the wrongful life action a nullity, since healthy life, as opposed to no life at all, may be the otherwise attainable condition of the handicapped child. *See supra* note 7.