



Winter 1-1-1983

Wrongful Birth: Who Owes What To Whom And Why?

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Torts Commons](#)

Recommended Citation

Wrongful Birth: Who Owes What To Whom And Why?, 40 Wash. & Lee L. Rev. 123 (1983).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol40/iss1/11>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

NOTES

WRONGFUL BIRTH: WHO OWES WHAT TO WHOM AND WHY?

Wrongful birth,¹ wrongful life,² and wrongful conception or wrongful pregnancy³ are new tort actions.⁴ The Supreme Court's decision in *Roe v.*

¹ See *infra* text accompanying notes 11-15 (definition of wrongful birth cause of action). The parents of a child born with defects are the plaintiffs in a wrongful birth suit. *Robak v. United States*, 658 F.2d 471, 474 n.3 (7th Cir. 1981). The plaintiff parents sue a physician or other medical care provider for negligence in genetic counseling, performing an abortion, or performing a sterilization. See *id.* at 475 nn. 8, 9.

² See *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, _____, 190 N.E.2d 849, 851 (1963), *cert. denied*, 379 U.S. 945 (1964); *Gleitman v. Cosgrove*, 49 N.J. 22, _____, 227 A.2d 689, 692 (1967). In one type of wrongful life action, a normal, healthy child sues his parents for his illegitimacy. See *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, _____, 190 N.E.2d 849, 851 (1963), *cert. denied*, 379 U.S. 945 (1964). In the most common form of wrongful life action, a child, through a guardian *ad litem*, sues a physician, hospital, or laboratory for negligently causing the plaintiff child to be born with defects. See *Gleitman v. Cosgrove*, 49 N.J. 22, _____, 227 A.2d 689, 692 (1967). The infant plaintiff born with defects does not allege that the defendant caused the defects. *Id.* Rather, the infant plaintiff charges that he would not have been born at all but for the defendant's negligence. *Id.*

California is the only United States jurisdiction to recognize a cause of action for wrongful life. See *Turpin v. Sortini*, 31 Cal. 3d 220, _____, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982). The *Turpin* court rejected the proposition that in all circumstances an impaired existence is preferable to nonexistence. *Id.* at _____, 643 P.2d at 692, 182 Cal. Rptr. at 345. Every other jurisdiction to consider the wrongful life issue has rejected the infant plaintiff's claim because of the impossibility of showing the element of injury. See *Robak v. United States*, 658 F.2d 471, 474 n.3 (7th Cir. 1981) (action for wrongful birth permitted but wrongful life action properly dismissed); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 694-95 (E.D. Pa. 1978) (same). Courts that have rejected wrongful life claims decline to rule that nonexistence is ever preferable to existence with even the most crippling defects. *Robak v. United States*, 658 F.2d 471, 474 n.3 (7th Cir. 1981); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 694 (E.D. Pa. 1978).

One commentator has suggested that the proposition that nonexistence is never preferable to existence with defects is questionable. See Comment, *A Cause of Action for "Wrongful Life" [A Suggested Analysis]*, 55 MINN. L. REV. 58, 65-66 (1970). If the defects are extremely painful and disabling, life with those defects would have a minus value. *Id.* at 66. Life without defects would have a plus value, and nonexistence would have a zero value. *Id.* Thus, nonexistence would be preferable to existence with defects. *Id.*

³ See *Hartke v. McKelway*, 526 F. Supp. 97, 99 (D.D.C. 1981). In a wrongful pregnancy or wrongful conception action, the parents of a healthy child sue a physician or other health care provider for negligence in performing a sterilization operation. *Id.* Wrongful pregnancy and wrongful birth actions both require that the parents bring suit. *Id.*; see *supra* note 1 (parents are plaintiffs in wrongful birth actions). In wrongful pregnancy actions, unlike wrongful birth actions, the child is born normal and healthy. Compare *Hartke*, 526 F. Supp. at 99 (healthy child conceived following negligently performed sterilization) with *Speck v. Finegold*, _____ Pa. _____, _____, 439 A.2d 110, 113 (1981) (child born with defects following negligently performed vasectomy and abortion). Courts addressing wrongful pregnancy

Wade,⁵ which liberalized abortion laws, combined with dramatic increases in the number of sterilization operations⁶ and more effective prenatal diagnostic techniques,⁷ accounts for the growing number of wrongful birth actions in the last ten years. Courts have taken many different approaches to the wrongful birth cause of action, particularly concerning the issue of damage awards.⁸ Differences of terminology have caused confusion among courts analyzing apparently conflicting judicial

claims generally sustain the claims. See, e.g., *Hartke*, 526 F. Supp. at 100 (permitted wrongful pregnancy claim); *Boone v. Mullendore*, 416 So.2d 718, 720 (Ala. 1982) (same); *Kingsbury v. Smith*, _____ N.H. _____, 442 A.2d 1003, 1005 (1982) (same). The major controversy in wrongful pregnancy cases, as in wrongful birth cases, involves the amount of damages plaintiff parents can recover. See *Hartke*, 526 F. Supp. at 104 (split in authority on whether to award damages for raising a healthy child). See also Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1315-26 (1982) (same damages issues that arise in wrongful pregnancy arise in wrongful birth). The *Hartke* court, for example, awarded damages to the plaintiffs for the medical expenses associated with the pregnancy and birth as well as damages for mental pain and suffering. *Id.* The court refused to grant plaintiffs any damages for the cost of raising the child conceived following the unsuccessful sterilization operation because the court found that the plaintiffs sought to avoid the mother's pregnancy for health reasons, not for economic reasons. *Id.* at 105. In contrast, in *Sherlock v. Stillwater Clinic*, the Minnesota Supreme Court permitted the plaintiff parents to recover the costs of raising a healthy baby conceived after an unsuccessful vasectomy. 260 N.W.2d 169, 176 (Minn. 1977). The Minnesota court reduced the damage award by the benefits to the parents of raising a normal child. *Id.* at 171.

⁴ See *Gleitman v. Cosgrove*, 49 N.J. 22, _____, 227 A.2d 689, 692-93 (1967) (denied recovery to parents and infants). *Gleitman* is the leading case in wrongful life suits. Comment, "Wrongful Life": *The Right not to be Born*, 54 TUL. L. REV. 480, 486 (1980) [hereinafter cited as *Right not to be Born*]. Prior to *Roe v. Wade*, *Gleitman* was also the leading case in wrongful birth suits. See *Robak v. United States*, 658 F.2d 471, 474 (7th Cir. 1981) (importance of *Gleitman* in pre-*Roe v. Wade* wrongful life and wrongful birth cases); see also *Roe v. Wade*, 410 U.S. 113, 164 (1973) (abortion on demand permitted before end of first trimester of pregnancy). The *Gleitman* court rejected an infant's claim for damages resulting from her birth because the damages were impossible to measure. See 49 N.J. at _____, 227 A.2d at 692. Similar difficulty in measuring damages as well as public policy against abortion prevented parents from recovering damages in the wrongful birth action. *Id.* at _____, 227 A.2d at 693.

⁵ 410 U.S. 113 (1973). In *Roe v. Wade*, the Supreme Court permitted abortion on demand before the end of the first trimester of pregnancy. *Id.* at 164. After *Roe*, the uniform nationwide legality and relative ease of obtaining abortions helped eliminate the public policy argument against wrongful birth claims. See *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981) (*Roe* removed political and moral arguments from the abortion issue); *infra* text accompanying notes 95-99 (effect of *Roe* on courts' wrongful birth claim decisions).

⁶ Appleson, *Wrongful Birth Suits on the Rise*, 67 A.B.A. J. 1255, 1255 (1981). According to the Association for Voluntary Sterilization in New York City, physicians performed almost 500,000 more tubal ligations in 1978 in 1971. *Id.*

⁷ *Id.* Amniocentesis is a prenatal diagnostic technique that permits physicians to test the amniotic fluid surrounding the infant for genetic abnormalities. *Berman v. Allan*, 80 N.J. 421, 424-25, 404 A.2d 8, 10 (1978). The amniocentesis test is effective in detecting chromosomal defects in unborn children. *Id.*

⁸ Compare *Berman v. Allan*, 80 N.J. 421, 432-33, 404 A.2d 8, 14 (1979) (no recovery for economic costs of raising child but parents recover for mental suffering) with *Becker v. Schwartz*, 46 N.Y.2d 407, 413-14, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901 (1978) (parents

results.⁹ Courts that have decided wrongful birth and wrongful life cases within the last few years, however, typically have applied the same basic concepts in their opinions.¹⁰

In a wrongful birth action, the parents of a child born with birth defects bring a suit for damages.¹¹ Plaintiff parents sue a physician, hospital, or laboratory.¹² Plaintiffs claim that the defendant was negligent in providing genetic counseling,¹³ in performing an abortion that failed to terminate pregnancy,¹⁴ or in performing a sterilization operation that failed to prevent conception.¹⁵ Three situations generally

recover for economic expenses but no recovery for emotional suffering); see also *infra* text accompanying notes 119-169 (different judicial approaches to damages issue).

⁹ See Comment, *Right not to be Born*, *supra* note 4, at 483 (wrongful life, wrongful birth, and wrongful pregnancy actions confused). Note, *Potshots at the Stork: Toward a Consistent Justification of Recovery for Wrongful Birth Claims*, 35 WASH. & LEE L. REV. 1065, 1065 (1978) (lack of definition of wrongful birth action led to confusion among courts).

¹⁰ See, e.g., *Robak v. United States*, 658 F.2d 471, 474 (7th Cir. 1981) (wrongful birth action by parents for physician's negligence resulting in birth of afflicted child); *Phillips v. United States*, 508 F. Supp. 544, 545 (D.S.C. 1981) (same); *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 113 (1981) (same).

¹¹ See *Robak v. United States*, 658 F.2d 471, 474 (7th Cir. 1981) (by definition, parents, rather than afflicted infant, bring action for wrongful birth). Courts have rejected attempts by the siblings of a child born with defects to recover for the proportional reduction in material and emotional support the birth of an afflicted brother or sister causes. See *White v. United States*, 510 F. Supp. 146, 148 (D. Kan. 1981) (no basis in law for awarding damages to siblings in wrongful birth case); *Aronoff v. Snider*, 292 So. 2d 418, 419 (Fla. 1974) (same).

Parents, as a unit, have sued negligent physicians. See *Naccash v. Burger*, 223 Va. 406, 409, 290 S.E.2d 825, 826 (1982). Parents, individually, also have sued negligent physicians. See *Robak*, 658 F.2d at 478 (husband and wife each sued negligent doctor because each was jointly and severally liable for child's support costs). The decision of parents to sue individually or as a unit often is predicated upon the injury asserted. See *Stribling v. de Quevedo*, 288 Pa. Super. 436, 439, 432 A.2d 239, 240-41 (1980) (primary wage earner husband sued negligent physician for rearing expenses, and mother sued negligent physician for lost earnings and earning capacity).

In a wrongful birth case, plaintiff's child is afflicted with birth defects caused by genetic abnormality or disease. See, e.g., *Robak*, 658 F.2d 471, 473 (7th Cir. 1981) (child's deafness, blindness, heart defect caused by rubella); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 694 (E.D. Pa. 1978) (child's handicaps and reduced life expectancy caused by Tay-Sachs disease); *Berman v. Allan*, 80 N.J. 421, 424, 404 A.2d 8, 10 (1979) (child's mental retardation caused by chromosomal abnormality, Down's Syndrome).

¹² See *Robak v. United States*, 658 F.2d 471, 473 (7th Cir. 1981) (plaintiffs sued United States Army Clinic for negligent genetic counseling); *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 112 (1981) (plaintiffs sued physicians for negligently performed sterilization and abortion); *Naccash v. Burger*, 223 Va. 406, 409-10, 290 S.E.2d 825, 826-27 (1982) (plaintiffs sued physician and laboratory for negligent genetic counseling); cf. *Troppi v. Scarf*, 31 Mich. App. 240, 244, 187 N.W.2d 511, 512-13 (Ct. App. 1971) (wrongful pregnancy action recognized for negligence of pharmacist in dispensing oral contraceptives).

¹³ See *Phillips v. United States*, 508 F. Supp. 544, 545 (D.S.C. 1981) (parents sued physician for negligent failure to inform parents of increased risk of birth of handicapped child).

¹⁴ See *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 113 (1981) (wrongful birth action for unsuccessful abortion of fetus feared to be suffering from genetic disease).

¹⁵ See *id.* (wrongful birth action for negligent sterilization of husband known to be afflicted with inheritable disease).

give rise to wrongful birth actions.¹⁶ First, a physician, hospital, or laboratory may fail to advise prospective parents that the mother has a higher than average chance of bearing a child afflicted with defects.¹⁷ Plaintiff parents do not claim that the defendant's negligence caused the actual defects,¹⁸ since the defects are the result of disease or genetic abnormalities.¹⁹ The plaintiffs in a wrongful birth action sue because the defendant's negligence has denied the plaintiffs the right to choose whether to avoid conception or have an abortion.²⁰ In *Naccash v. Burger*,²¹ for example, the plaintiff parents both were possible carriers of Tay-Sachs disease.²² During the wife's pregnancy, the defendant doctor tested the plaintiff husband for Tay-Sachs.²³ Although the test results indicated that the husband was not a Tay-Sachs carrier, the laboratory had confused the husband's blood sample with the sample of another man.²⁴ The plaintiff husband and his wife actually were carriers of the disease.²⁵ Their daughter was born with Tay-Sachs disease.²⁶ The parents testified that if they had known that the fetus was afflicted with Tay-Sachs disease, the wife would have had an abortion.²⁷ The *Naccash* court recognized a cause of action for negligent genetic counseling.²⁸

¹⁶ See *infra* text accompanying notes 17-50 (typical situations giving rise to wrongful birth suits).

¹⁷ See *Berman v. Allan*, 80 N.J. 421, 424-25, 404 A.2d 8, 10 (1979) (doctors failed to inform mother of amniocentesis procedure).

¹⁸ See *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (wrongful birth not based upon injuries to child that occur before defendant's negligence).

¹⁹ *Id.* (genetic disease rather than defendant's negligence caused defects). In *Robak*, the plaintiff wife, who was one month pregnant, visited an army clinic because she had a rash and fever. *Id.* at 473. The examining physician informed the plaintiff wife that she was pregnant but that she did not have rubella. *Id.* The clinic performed a second test for rubella on the plaintiff wife that indicated that she did have rubella, but no one at the clinic informed her that she had contracted rubella or of the consequences to her unborn child. *Id.* The plaintiff's daughter was born suffering from deafness, cataracts, a heart defect, and possible mental retardation due to rubella syndrome. *Id.*

²⁰ *Id.* at 479 (wrongful birth action based on defendant's negligence, which deprived plaintiffs of right to reject parenthood).

²¹ 223 Va. 406, 290 S.E.2d 825 (1982).

²² *Id.* at 410, 290 S.E.2d at 827. Tay-Sachs is a fatal disease affecting the brain and spinal cord. *Id.* The disease afflicts Jewish infants of Eastern European ancestry. *Id.* Although Tay-Sachs carriers are not physically impaired, a child whose parents both are carriers has a 25% chance of being born with Tay-Sachs. *Id.* An infant afflicted with Tay-Sachs soon suffers from deafness, blindness, mental retardation, and paralysis. *Id.* Death of Tay-Sachs victims usually occurs within four years of birth. *Id.*

²³ *Id.*

²⁴ *Id.* Since both parents must be carriers of Tay-Sachs for their children to be afflicted with the disease, the laboratory in *Naccash* decided to test only the husband. *Id.* If the husband's blood sample tested positive, then the laboratory would have tested the wife. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 414, 290 S.E.2d at 830. The *Naccash* court held that the defendant's negligent failure to identify the plaintiffs as Tay-Sachs carriers deprived the plaintiff wife and her

Another situation giving rise to the wrongful birth cause of action is unsuccessful abortion.²⁹ A physician or hospital may perform an ineffective abortion on a woman whom physicians know is carrying an afflicted fetus or has a high risk of giving birth to an afflicted fetus.³⁰ In *Speck v. Finegold*,³¹ for example, the plaintiff parents believed their unborn child would suffer from birth defects.³² In *Speck*, the plaintiff husband suffered from neurofibromatosis,³³ an inherited disease that causes severe bone deformities and tumors to appear at nerve endings.³⁴ He and his wife had two children who suffered from neurofibromatosis.³⁵ The plaintiffs decided that they could bear neither the pain nor the expense of another child who was afflicted with the disease.³⁶ Accordingly, the husband went to one of the defendant doctors for a sterilization operation.³⁷ Although the doctor performed the vasectomy, the wife became pregnant anyway.³⁸ The wife went to the other defendant doctor for an abor-

husband of the right to accept or reject a parental relationship with the fatally afflicted fetus. *Id.* The court reasoned that deprivation of the right to accept or reject parenthood was a direct injury to the plaintiffs. *Id.*

In addition to Tay-Sachs disease, physicians' negligence in diagnosing Down's Syndrome often provokes wrongful birth claims. See *Berman v. Allan*, 80 N.J. 421, 424-25, 404 A.2d 8, 10 (1979) (parents of child born with Down's Syndrome brought wrongful birth suit). Down's Syndrome is a genetic defect characterized by mental retardation. *STEDMAN'S MEDICAL DICTIONARY* 1386 (5th Unabridged Lawyers' ed. 1982). Pregnant women over the age of 35 run a higher than average risk that their children will be born with Down's Syndrome. *Berman*, 80 N.J. at 424-25, 404 A.2d at 10. Physicians either fail to warn the mother of the increased risk of Down's Syndrome or fail to perform an amniocentesis, which tests amniotic fluid for chromosomal abnormalities indicative of Down's Syndrome. See *id.* (doctors failed to inform mother of amniocentesis procedure).

Negligent testing for rubella also can lead to a wrongful birth suit. See *Robak v. United States*, 658 F.2d 471, 473 (7th Cir. 1981) (wrongful birth action based on erroneous test results for rubella); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 767, 233 N.W.2d 372, 373 (1975) (wrongful birth action based on negligent failure to diagnose rash as rubella).

Another situation in which a faulty diagnosis can lead to a wrongful birth suit occurs when a physician treating a child fails to discover that the child is afflicted with a hereditary disease. See *Turpin v. Sortini*, 31 Cal. 3d 220, ___, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982) (child born with hereditary deafness after physician failed to diagnose same disease in her sister); *Schroeder v. Perkel*, 87 N.J. 53, 57, 432 A.2d 834, 837 (1981) (physician failed to diagnose cystic fibrosis in daughter before parents conceived son). The physician, therefore, is unable to warn the parents that other children the parents conceive could suffer from the same disease. See *Schroeder*, 87 N.J. at 57, 432 A.2d at 837.

²⁹ See *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 113 (1981) (wrongful birth action for unsuccessful abortion of fetus believed to suffer from genetic disease).

³⁰ *Id.* at ___, 439 A.2d at 113.

³¹ ___ Pa. ___, 439 A.2d 110 (1981).

³² *Id.* at ___, 439 A.2d at 113.

³³ *Id.* at ___, 439 A.2d at 112.

³⁴ *Id.* at ___, 439 A.2d at 112 n.2. Neurofibromatosis also is known as von Recklinghausen's disease. *Id.*

³⁵ *Id.* at ___, 439 A.2d at 112-13.

³⁶ *Id.* at ___, 439 A.2d at 113.

³⁷ *Id.*

³⁸ *Id.*

tion.³⁹ After the abortion the wife thought she still was pregnant, but the doctor assured her the operation had been successful.⁴⁰ By the time another doctor confirmed her pregnancy, a second abortion legally could not be performed.⁴¹ The plaintiff wife gave birth to another child afflicted with neurofibromatosis.⁴² The *Speck* court recognized the plaintiffs' wrongful birth claim for the negligently performed sterilization and the negligently performed abortion.⁴³

The *Speck* case is an example of wrongful birth suits based on both ineffective abortions and negligent sterilization operations.⁴⁴ In a wrongful birth action based on a negligent sterilization operation, prospective parents, fearing their children will be born with defects, consult a physician or hospital for a sterilization operation.⁴⁵ The defendant physician operates upon either the husband or the wife.⁴⁶ The sterilization is unsuccessful and the wife later becomes pregnant.⁴⁷ In *Hartke v. McKelway*,⁴⁸ the court held the defendant liable for an unsuccessful sterilization upon finding that the defendant had guaranteed the success of the operation.⁴⁹ The defendant had informed the husband and wife that they no longer needed to use contraceptives to prevent conception.⁵⁰

The plaintiffs' injury in a wrongful birth suit is denial of the right to an informed choice, or any choice at all in the cases of unsuccessful abortions and sterilizations, of whether to have a child.⁵¹ As compensation for their injury, plaintiffs demand damages for both the economic and emo-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*; Harper, *Paying for Birth Risks*, 4 NAT. L.J. 1, 12 (April 12, 1982).

⁴² ___ Pa. ___, ___, 439 A.2d 110, 113 (1981).

⁴³ *Id.* at ___, 439 A.2d at 114.

⁴⁴ *Id.*

⁴⁵ See *id.* at ___, 439 A.2d at 113 (plaintiff husband sought sterilization to prevent conception of child afflicted with neurofibromatosis).

⁴⁶ See *Hartke v. McKelway*, 526 F. Supp. 97, 99 (D.D.C. 1981) (wife underwent sterilization); *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 113 (1981) (husband underwent sterilization).

⁴⁷ See *Hartke v. McKelway*, 526 F. Supp. 97, 99 (D.D.C. 1981) (wife became pregnant after doctor assured her she was sterile). In *Hartke*, the defendant doctor performed a laproscopic cauterization, a sterilization procedure that closes a woman's fallopian tubes, on the plaintiff wife. *Id.* Laproscopic cauterization procedures fail to prevent pregnancy in 1-3 cases per 1,000 operations. *Id.*

⁴⁸ 526 F. Supp. 97 (D.D.C. 1981).

⁴⁹ *Id.* at 99; see *Stribling v. deQuevedo*, 288 Pa. Super. 436, 438-39, 432 A.2d 239, 240-41 (1980) (after physician assured parents of successful sterilization mother became pregnant with fetus who suffered from dextrocardia).

⁵⁰ 526 F. Supp. at 99; see *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 113 (1981) (doctor who performed vasectomy informed husband that husband no longer needed to use contraceptives).

⁵¹ See *Robak v. United States*, 658 F.2d 471, 477 (7th Cir. 1981) (injury in wrongful birth case is failure to diagnose defects and inform plaintiffs of the consequences of the defects); *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 830 (1982) (injury was deprivation of parents' opportunity to accept or reject the continuance of the mother's pregnancy).

tional costs of giving birth to a child suffering from birth defects.⁵² Plaintiffs typically characterize economic costs as pecuniary expenses associated with the pregnancy and birth,⁵³ medical expenses peculiar to raising a child suffering from defects,⁵⁴ and pecuniary expenses incurred in rearing the child in excess of the special medical and training costs.⁵⁵ Similarly, plaintiffs classify emotional suffering damages according to the mental pain and suffering associated with the pregnancy and birth⁵⁶ and associated with raising a child suffering from birth defects.⁵⁷ Plaintiffs also have sued for loss of consortium⁵⁸ and interference with established family relationships.⁵⁹

To justify demands for relief, plaintiffs generally present their claims under a negligence theory.⁶⁰ Some plaintiffs also have alleged

⁵² See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 694 (E.D. Pa. 1978) (plaintiffs sought damages for medical expenses and emotional suffering associated with raising afflicted child); *Berman v. Allan*, 80 N.J. 421, 425, 404 A.2d 8, 10-11 (1979) (plaintiffs sought damages for emotional anguish and support costs of raising afflicted child).

⁵³ See *Stribling v. deQuevedo*, 288 Pa. Super. 436, 439, 432 A.2d 239, 240 (1981) (husband sued physician for wife's medical expenses).

⁵⁴ *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975) (damages limited to expenses reasonably necessary for care and treatment of child's physical condition).

⁵⁵ See *Robak v. United States*, 658 F.2d 471, 478, 478 n.21 (7th Cir. 1981) (damages included costs of supporting afflicted child through adulthood without reduction of costs of raising normal child).

⁵⁶ See *Stribling v. deQuevedo*, 288 Pa. Super. 436, 439, 432 A.2d 239, 241 (1980) (plaintiff wife sued physicians for mental and emotional pain associated with giving birth). In *Stribling*, the plaintiff wife sued the defendant physician for emotional suffering and lost earnings and earnings capacity. *Id.* The plaintiff wife brought her action in trespass. *Id.* The plaintiff husband sued the defendant physician for costs of raising child, wife's medical expenses, and loss of consortium. *Id.*

⁵⁷ See *Naccash v. Burger*, 223 Va. 406, 411, 290 S.E.2d 825, 828 (1982) (plaintiffs sued physician for emotional pain suffered as result of Tay-Sachs afflicted child's worsening condition).

⁵⁸ See *White v. United States*, 510 F. Supp. 146, 149 (D. Kan. 1981). The *White* court ruled that neither husband nor wife could recover for the loss of consortium the wife's pregnancy caused. *Id.* at 149. Loss of consortium is the loss of society, affection, and sexual relations one spouse suffered as the result of injury to the other spouse. *Deems v. Western Maryland Ry. Co.*, 247 Md. 95, ___, 231 A.2d 514, 517 (1967); see *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 170 (Minn. 1977) (loss of consortium claim permitted in wrongful pregnancy suit).

⁵⁹ See *White v. United States*, 510 F. Supp. 146, 149 (D. Kan. 1981). The *White* court rejected plaintiffs' damages demand for interference with established family relationships. *Id.* at 149. Interference with established family relations or a change in family status is the spreading of care and support over a larger family. See *Bowman v. Davis*, 48 Ohio St. 2d 41, 42, 356 N.E.2d 496, 497 (1976) (plaintiffs sought damages for expenses due to change in family status). The economic and emotional support shared within an existing family is reduced, proportionally, when another child enters the family. See *id.*

⁶⁰ See *Phillips v. United States*, 508 F. Supp. 544, 550 (D.S.C. 1981) (traditional negligence doctrine governs wrongful birth claims); *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 113 (1981) (plaintiffs alleged defendants' negligence); see also *infra* text accompanying notes 68-74 (elements of negligence action). Since wrongful birth claims arise because of the negligence of a professional medical care provider, some courts characterize

breach of contract or breach of warranty,⁶¹ particularly when the defendant has performed an unsuccessful sterilization operation.⁶² Because the doctor's agreement to perform a sterilization operation arguably is a contract,⁶³ a failure to perform the operation correctly may constitute an actionable breach of contract.⁶⁴ If the doctor assures the plaintiff of the success of a sterilization operation that later proves to be unsuccessful, the plaintiff may hold the doctor liable for breach of the assurance.⁶⁵ A breach of contract or breach of warranty claim, however, requires the plaintiff to prove the existence of an enforceable promise.⁶⁶ Most judicial decisions in wrongful birth cases focus on the negligence aspects of plaintiffs' claims rather than on breach of contract or warranty.⁶⁷

Courts that decide wrongful birth claims according to a negligence theory require plaintiffs to show that the traditional elements of a negligence claim are present.⁶⁸ Plaintiffs must show that the defendant

wrongful birth claims as medical malpractice claims. See *Robak v. United States*, 658 F.2d 471, 473 (7th Cir. 1981) (plaintiffs brought medical malpractice action based on clinic's negligence); *Green v. Sudakin*, 81 Mich. App. 545, 546, 265 N.W.2d 411, 411 (1978) (damages sought for medical malpractice); *Gleitman v. Cosgrove*, 49 N.J. 22, ___, 227 A.2d 689, 689 (1967) (malpractice suit).

⁶¹ See *Hartke v. McKelway*, 526 F. Supp. 97, 99 (D.D.C. 1981) (breach of warranty claim for wrongful pregnancy following assurance of sterilization). The alleged warranty in *Hartke* was the defendant physician's guaranty to the plaintiff wife that the sterilization was a success. *Id.* The plaintiff wife relied on the defendant physician's statement that wife no longer needed to use contraceptives. *Id.*

⁶² *Id.*

⁶³ See *Green v. Sudakin*, 81 Mich. App. 545, 548, 265 N.W.2d 411, 412 (1978). In *Green*, the plaintiff made an agreement with the defendant physician to have a sterilization operation performed immediately after her pregnancy. *Id.* at 411-12. The defendant physician agreed to perform the operation but did not go through with the procedure and failed to tell the plaintiff wife. *Id.* The *Green* court permitted the plaintiff wife to recover mental suffering damages on the breach of contract claim. *Id.* at 549, 265 N.W.2d at 413.

⁶⁴ *Id.* (doctor held liable for breaching contract to perform sterilization).

⁶⁵ See *Hartke v. McKelway*, 526 F. Supp. 97, 99 (D.D.C. 1981) (breach of warranty claim for wrongful pregnancy following assurance of sterilization).

⁶⁶ See *Gulf Oil Corp. v. Federal Power Comm.*, 563 F.2d 588, 599 (3rd Cir. 1977) (warranty is promise that proposition of fact is true), *cert. denied*, 434 U.S. 1062 (1978), *cert. dismissed*, 435 U.S. 911 (1978).

⁶⁷ See, e.g., *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981) (wrongful birth action essentially medical malpractice negligence claim); *Phillips v. United States*, 508 F. Supp. 544, 550 (D.S.C. 1981) (traditional negligence doctrine governs wrongful birth claims); *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 113 (1981) (wrongful birth action is mere extension of traditional negligence doctrine).

⁶⁸ See *Robak v. United States*, 658 F.2d 471, 477 (7th Cir. 1981); *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829 (1982). The *Robak* court found that the defendants breached the required standard of care for physicians in Alabama. See 658 F.2d at 477. The breach of care owed to plaintiffs proximately caused the plaintiffs' injury. *Id.*

In *Naccash v. Burger*, the Virginia Supreme Court held that the plaintiffs must establish the existence of a legal duty that the defendant owed to them. See *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829 (1982). In Virginia, health care providers owe patients a duty of reasonable care. *Id.* The *Naccash* court also held that plaintiffs must

owed them a duty to use reasonable care in giving genetic counseling or in performing an abortion or sterilization operation.⁶⁹ The Virginia Supreme Court stated in *Naccash v. Burger*⁷⁰ that when a patient presents himself to a health care provider, the physician or hospital is under a legal duty to exercise reasonable care in the patient's treatment.⁷¹ Plaintiffs must show that the defendant's acts constituted a breach of the duty of care owed plaintiffs⁷² and that the negligently performed duty proximately caused⁷³ injury to the plaintiff.⁷⁴ Some defendants have argued that even if they breached a duty owed the plaintiffs, the negligent breach was not the proximate cause of plaintiffs' injury.⁷⁵ The defendant contends that because the fetus suffered from defects before the defendant's negligence occurred, the defendant is not responsible for the child's defects.⁷⁶ The preexisting defect argument, however, misconstrues the nature of plaintiffs' injury.⁷⁷ Plaintiffs claim that the defendant deprived them of the right to accept or reject a parental relationship.⁷⁸ Plaintiffs do not claim the defendant caused the infant's birth defects.⁷⁹

A majority of courts recognize the wrongful birth cause of action in negligence, thereby permitting the plaintiffs some recovery.⁸⁰ None-

demonstrate that defendant breached the duty of reasonable care. *Id.* In *Naccash*, the defendant "virtually conceded" negligent breach of duty. *Id.*

⁶⁹ See *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 114 (1981). The Pennsylvania Supreme Court held that the defendant doctors in *Speck* owed the plaintiffs a duty of care. *Id.* In *Naccash v. Burger*, the Virginia Supreme Court found that the defendant owed the plaintiffs a clear duty of reasonable care in handling the plaintiff husband's blood sample. See *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829 (1982).

⁷⁰ 223 Va. 406, 290 S.E.2d 825 (1982).

⁷¹ See *Id.* at 414, 290 S.E.2d at 829; *supra* note 69 (Virginia doctor owes patient duty of reasonable care).

⁷² See *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829 (1982). The *Naccash* court held that the defendant physician must breach a duty of reasonable care owed to the plaintiff for the plaintiff to recover damages. *Id.* at 414, 290 S.E.2d at 829.

⁷³ See *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (Alabama test of proximate cause is "but for"); *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829 (1982) (plaintiff must show causal connection between defendant's negligence and plaintiff's injury).

⁷⁴ See *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829 (1982) (plaintiffs must show that defendant's negligent breach of duty of reasonable care caused plaintiff actionable injury).

⁷⁵ See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978) (defendant argued that his alleged negligence did not proximately cause plaintiff's damages).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (plaintiff mother claimed she would have aborted fetus if she had known she had rubella).

⁷⁹ *Id.* at 479 (wrongful birth action is not based upon injuries to child).

⁸⁰ See, e.g., *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (damages permitted for plaintiffs' medical malpractice negligence claim); *Gildiner v. Thomas Jefferson Univ.*

theless, judicial decisions have differed on the question of what constitutes a compensable injury in wrongful birth cases.⁸¹ Even when courts agree that parents can recover for the economic costs of raising an afflicted child, for example, courts often measure differently the amount of damages parents can recover.⁸² The New Jersey Supreme Court in *Berman v. Allan*,⁸³ however, stated that mere difficulty in measuring damages should not be the sole reason for rejecting a cause of action.⁸⁴ Courts that reject wrongful life actions do so not because damages are difficult to ascertain, but because the plaintiff infant did not suffer compensable injury.⁸⁵ Both sets of plaintiffs, parents and infants, base their claims on the same negligent acts of defendants.⁸⁶ Only the parents, however, can show that the afflicted infant's existence constitutes an injury.⁸⁷

Because courts recognize wrongful birth actions as a type of negligence claim, wrongful birth actions arguably do not require explicit

Hosp., 451 F. Supp. 692, 696 (E.D. Pa. 1978) (same); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 776, 233 N.W.2d 372, 376 (1975) (same).

⁸¹ See *infra* text accompanying notes 119-169 (varying damages awards).

⁸² Compare *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (no reduction in economic damages award by costs of raising healthy child) with *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975) (damages limited to expenses reasonably necessary for care and treatment of rubella syndrome child's physical condition).

⁸³ 80 N.J. 421, 404 A.2d 8 (1979).

⁸⁴ See *id.* at 426, 404 A.2d at 12 (court extremely reluctant to dismiss complaint solely because damages difficult to measure).

⁸⁵ See *supra* note 2 (wrongful life cause of action); *infra* text accompanying notes 165-168 (*Turpin* court recognized wrongful life suit).

⁸⁶ See *Turpin v. Sortini*, 31 Cal. 3d 220, ___, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982) (wrongful life and wrongful birth actions filed on same set of underlying facts).

⁸⁷ Barnett, *Liability for 'Wrongful Life': California Fashions a Compromise*, 4 NAT. L.J. 18, 19 (August 23, 1982) (California Supreme Court decision to recognize wrongful life claims); *Turpin v. Sortini*, 31 Cal. 3d 220, ___, 643 P.2d 954, 962, 182 Cal. Rptr. 337, 345 (1982). California is the only American jurisdiction to recognize the wrongful life cause of action. See *Turpin* at ___, 643 P.2d at 957, 182 Cal. Rptr. at 340-42. The *Turpin* court rejected other courts' contentions that in all circumstances an individual is better off existing with defects than never having existed. *Id.* at ___, 643 P.2d at 962, 182 Cal. Rptr. at 345. According to the *Turpin* court, when a doctor negligently fails to detect a hereditary ailment, the doctor harms the unborn child by depriving the child's parents of information that may determine whether existence or nonexistence is in the child's best interest. *Id.* The *Turpin* court's recognition of the wrongful life cause of action is emotionally appealing. The plight of infants suffering from severe defects is heartbreaking. Nevertheless, the question remains how to weight the value of life with defects against complete nonexistence. See *Berman v. Allan*, 80 N.J. 421, 431, 404 A.2d 8, 13 (1979) (sympathy for infant's suffering but no damages as matter of law). California courts are willing to speculate on the damages issue. See *Turpin*, 31 Cal. 3d at ___, 643 P.2d at 965, 182 Cal. Rptr. at 347-48. Other jurisdictions eliminate the problem of calculating the value of existence versus nonexistence by permitting parents to recover damages for the expense of rearing an afflicted child, thus providing for the child's care. See *supra* note 80 (economic damages for raising child with defects).

legislative sanction.⁸⁸ As the court in *Naccash v. Burger*⁸⁹ stated, no distinction between a wrongful birth action and any other malpractice action exists.⁹⁰ According to the court in *Gildiner v. Thomas Jefferson University Hospital*,⁹¹ a wrongful birth action is an action in negligence,⁹² and the judiciary is competent to determine the boundaries of common law negligence doctrine.⁹³ The South Dakota legislature, however, has passed laws prohibiting wrongful life and wrongful birth causes of action.⁹⁴ A sponsor of similar Minnesota laws⁹⁵ maintained that recognizing wrongful birth actions would force physicians to run more prenatal tests on prospective mothers which could lead to more abortions.⁹⁶ One of the primary reasons the New Jersey Supreme Court in *Gleitman v. Cosgrove*⁹⁷ refused to recognize a wrongful birth cause of action was the state's public policy opposing the awarding of damages for the deprivation of the opportunity to have an abortion.⁹⁸ Six years after *Gleitman v. Cosgrove*,⁹⁹ the United States Supreme Court in *Roe v. Wade*¹⁰⁰ held that abortion was legal¹⁰¹ and that forcing additional children upon a woman can result in physical and mental harm to the woman.¹⁰² In light of the *Roe* decision, the New Jersey Supreme Court in *Berman v. Allan*¹⁰³ held

⁸⁸ See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978) (wrongful birth claim is ordinary negligence action that does not require special legislative creation since judiciary determines scope of common law negligence); *Naccash v. Burger*, 223 Va. 406, 413, 290 S.E.2d 825, 829 (1982) (citing *Gildiner* with approval).

⁸⁹ 223 Va. 406, 290 S.E.2d 825 (1982).

⁹⁰ See *id.* at 413, 290 S.E.2d at 829 (1982) (no distinction exists between ordinary medical malpractice claim and wrongful birth suit).

⁹¹ 451 F. Supp. 692 (E.D. Pa. 1978).

⁹² See *id.* at 696 (wrongful birth action is ordinary negligence claim). In *Gildiner* one of the defendant doctors assured the plaintiff parents that the results of an amniocentesis procedure would indicate whether or not the plaintiff parents' unborn child would suffer from Tay-Sachs disease. *Id.* at 694. Another defendant doctor, after analyzing the results of the amniocentesis, advised the plaintiff parents that their child did not suffer from Tay-Sachs disease. *Id.* The child was born afflicted with Tay-Sachs. *Id.* The plaintiff sought damages caused by defendant doctors' negligence in testing for Tay-Sachs disease. *Id.* at 695.

⁹³ *Id.* at 696.

⁹⁴ See S.D. CODIFIED LAWS ANN. §§ 21-55-1 & 21-55-2 (Supp. 1982) (prohibiting wrongful life and wrongful birth actions).

⁹⁵ Act of March 22, 1982, ch. 521, § 1, 145.424, 1982 MINN. SESS. LAW SERV. (West) (prohibiting wrongful life and wrongful birth actions).

⁹⁶ Harper, *Paying for Birth Risks*, 4 NAT. L.J. 1, 13 (April 12, 1982). New prenatal diagnostic tests increase the number of wrongful birth suits. See *id.* at 1, 12-13.

⁹⁷ 49 N.J. 22, 227 A.2d 689 (1967).

⁹⁸ See *id.* at ____, 227 A.2d at 693 (public policy against damages for denial of opportunity to take human life).

⁹⁹ 49 N.J. 22, 227 A.2d 689 (1969).

¹⁰⁰ 410 U.S. 113 (1973).

¹⁰¹ See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (abortion on demand before end of first trimester of pregnancy).

¹⁰² *Id.* at 153 (birth of additional children can result in physical harm to mother).

¹⁰³ 80 N.J. 421, 404 A.2d 8 (1979).

that public policy since *Roe v. Wade*¹⁰⁴ supported a mother's right to a meaningful choice in whether to have an abortion.¹⁰⁵ The *Berman* court's interpretation of the effect of *Roe* on wrongful birth claims is in disagreement with the Minnesota law prohibiting wrongful birth suits.¹⁰⁶ Clearly the background controversy over the issue of abortion does affect the wrongful birth cause of action.¹⁰⁷ If courts treat wrongful birth claims as ordinary negligence claims, however, then courts may decide wrongful birth suits without legislative authorization.¹⁰⁸

Judicial cognizance of wrongful birth claims, however, is not the ultimate goal of plaintiffs in wrongful birth actions.¹⁰⁹ Plaintiffs want damages.¹¹⁰ The primary purpose of a damage award is to compensate the harmed party for his injury.¹¹¹ Most courts have recognized wrongful birth actions in the form of a negligence claim.¹¹² Because plaintiffs easily can show they would not have had the child but for the defendant's negligence,¹¹³ most courts have allowed recovery for the medical costs of the birth and raising of a child born with defects.¹¹⁴ The purpose of abortion is to terminate pregnancy, and the purpose of sterilization is to prevent pregnancy.¹¹⁵ In the case of a negligently performed abortion or sterilization, therefore, plaintiffs encounter few problems in proving the

¹⁰⁴ 410 U.S. 113 (1973).

¹⁰⁵ See *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979) (public policy requires that women have meaningful opportunity to decide whether to have abortion).

¹⁰⁶ See *supra* text accompanying notes 95-105 (influence of abortion on wrongful birth suits).

¹⁰⁷ *Id.*

¹⁰⁸ See *supra* notes 92 & 93 (*Gildiner* court held wrongful birth claim is ordinary negligence case that courts are competent to decide without legislative action).

¹⁰⁹ See *Robak v. United States*, 658 F.2d 471, 473 (7th Cir. 1981) (plaintiff parents sought to recover costs of care, education, and maintenance of child).

¹¹⁰ *Id.*

¹¹¹ C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137 (1935).

¹¹² See *supra* note 80 (majority of courts recognize wrongful birth action as negligence claim).

¹¹³ See *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 776, 233 N.W.2d 372, 377 (1975) (court held that mother must show she would have had abortion in order to prevail in wrongful birth).

¹¹⁴ See *Robak v. United States*, 658 F.2d 471, 478 (7th Cir. 1981) (costs included expenses of raising child afflicted with defects); *Schroeder v. Perkel*, 87 N.J. 53, 61, 432 A.2d 834, 842 (1981) (damages limited to expenses actually attributable to affliction); *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975) (damages limited to expenses reasonably necessary for care and treatment of child's physical condition). *But cf.* *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979) (court denied damages for medical expenses incurred in raising child). The actual amount of money awarded for medical costs varies with the severity of the defect. Compare *Naccash v. Burger*, 223 Va. 406, 411, 419, 290 S.E.2d 825, 828, 833 (1982) (parents were awarded \$28,673.50 for care and treatment of daughter who suffered from Tay-Sachs disease) with *Ochs v. Borrelli*, 187 Conn. 253, ____, 445 A.2d 883, 884 (1982) (costs to correct orthopedic defects were \$230 for arch supports).

¹¹⁵ See *Speck v. Finegold*, ____, Pa. ____, ____, 439 A.2d 110, 113 (1981) (husband sought vasectomy to prevent conception and wife sought abortion to terminate pregnancy).

defendant proximately caused the injury.¹¹⁶ In the negligent genetic counseling situation, the parents' purpose in consulting physicians and taking tests often is to determine whether to continue the pregnancy.¹¹⁷ Victims of negligent genetic counseling thus have little difficulty in proving that the defendant's negligence resulted in injury.¹¹⁸ If the plaintiffs can prove the element of injury and the other elements of the wrongful birth cause of action, courts should award damages to the plaintiffs.¹¹⁹

The major controversy over damage awards in wrongful birth suits concerns the consequences of an afflicted child's birth.¹²⁰ Plaintiffs usually seek compensation for the economic cost of raising an afflicted child, as well as damages for the mental pain and anguish that raising an afflicted child entails.¹²¹ Two competing themes, however, are present in courts' damages policies in wrongful birth cases. According to one approach, public policy requires that the courts award no damages.¹²² In *Berman v. Allan*,¹²³ for example, the New Jersey Supreme Court denied plaintiff parents' demand for the economic costs of raising their child, who suffered from Down's Syndrome.¹²⁴ The *Berman* court reasoned that to allow the plaintiffs to recover the costs of raising the child would impose an undue financial burden on the defendant because the defendant would be responsible for all the expenses of raising the child but would receive none of the benefits of parenthood.¹²⁵

¹¹⁶ See *Betancourt v. Gaylor*, 136 N.J. Super. 69, ____, 344 A.2d 336, 339 (1975) (negligent sterilization); *Speck v. Finegold*, __ Pa. ____, ____, 439 A.2d 110, 113 (1981) (negligent abortion and negligent sterilization).

¹¹⁷ See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 693-94 (1978) (plaintiffs would not have continued wife's pregnancy unless assured fetus not afflicted with Tay-Sachs); *Naccash v. Burger*, 223 Va. 406, 410, 290 S.E.2d 825, 827 (1982) (plaintiffs consulted physician to determine whether to continue pregnancy).

¹¹⁸ See *supra* note 117 (plaintiffs in *Gildiner* and *Naccash* testified plaintiff wives would have had abortions if plaintiffs knew fetuses had Tay-Sachs).

¹¹⁹ See *supra* notes 88-92 (wrongful birth action no different from any other negligence claim).

¹²⁰ See *infra* text accompanying notes 119-169 (different damage awards for consequences of afflicted child's birth).

¹²¹ See *Berman v. Allan*, 80 N.J. 421, 425, 404 A.2d 8, 10-11 (1979) (plaintiffs sued defendants for emotional anguish and costs of raising child); *Speck v. Finegold*, __ Pa. ____, ____, 439 A.2d 110, 113 (1981) (same).

¹²² See *Gleitman v. Cosgrove*, 49 N.J. 22, ____, 227 A.2d 689, 693 (1967). In *Gleitman*, the court held that public policy opposed abortion. *Id.* Since *Roe v. Wade*, however, courts that address public policy questions refer either to a policy against bestowing windfalls on plaintiffs and undue burdens on defendants or to rules governing the right of third parties to recover emotional suffering damages for witnessing another person's injury. Compare *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979) (policy against bestowing windfalls) with *Naccash v. Burger*, 223 Va. 406, 415-16, 290 S.E.2d 825, 830-31 (1982) (third party recovery for emotional suffering permitted).

¹²³ 80 N.J. 421, 404 A.2d 8 (1979).

¹²⁴ See *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979) (allowing economic damages would be windfall to plaintiffs).

¹²⁵ *Id.*

Another approach to the damages issue is to apply traditional tort doctrine, holding the defendant liable for all harm that directly and foreseeably results from his negligence.¹²⁶ In *Speck v. Finegold*,¹²⁷ the Pennsylvania Supreme Court permitted recovery for both economic and emotional injuries associated with raising a child born with defects.¹²⁸ The *Speck* court held that a negligent physician, like any other tortfeasor, is liable for the damages he proximately caused.¹²⁹

Some courts have attempted to reconcile the differing approaches to damages by permitting plaintiffs to recover economic and emotional suffering damages, but reducing the damage award by the amount of benefit plaintiffs receive from being parents.¹³⁰ Courts that adopt this position must weigh all the joys, pride, and affection of parenthood against the economic and emotional costs of raising a child suffering from defects.¹³¹ The balancing mechanism courts most often use is the "benefits rule."¹³² The benefits rule provides that when the defendant has harmed the plaintiff and by the same action conferred a benefit on the plaintiff, the court should consider the value of the benefit in mitigating damages.¹³³ Judicial application of the benefits rule results in a compromise designed to reduce the parents' loss without imposing an undue hardship on the defendant.¹³⁴ An objection to balancing pecuniary

¹²⁶ See *Speck v. Finegold*, ___ Pa. ___, ___, 439 A.2d 110, 114 (1981). The *Speck* court held that because damages for mental anguish and the costs of raising the child were the direct and foreseeable result of defendants' negligence, the plaintiffs could recover for mental anguish and the economic cost of raising the child. *Id.*

¹²⁷ ___ Pa. ___, 439 A.2d 110 (1981).

¹²⁸ See *id.* at ___, 439 A.2d at 114 (*Speck* court ruled parents could recover for mental anguish and economic costs of raising a handicapped child).

¹²⁹ *Id.*

¹³⁰ See *Ochs v. Borrelli*, 187 Conn. 253, ___, 445 A.2d 883, 886 (1982) (set off economic cost of raising child by value to parents of parenthood); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 367, 308 N.W.2d 209, 213-14 (1981) (weighed benefits of parenthood against expenses and suffering of raising child).

¹³¹ See *Eisbrenner v. Stanley*, 106 Mich. App. 357, 367, 308 N.W. 2d 209, 213-14 (1981) (weighed tangible and intangible benefits of parenthood against emotional and economic costs of raising afflicted child).

¹³² See, e.g., *Ochs v. Borrelli*, 187 Conn. 253, ___, 445 A.2d 883, 886 (1982) (applied benefits rule to offset economic cost of raising child with value of parenthood); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 367, 308 N.W.2d 209, 213-14 (1981) (used benefits rule to mitigate economic and emotional suffering damages); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175-76 (Minn. 1971) (applied benefits rule in wrongful pregnancy action).

¹³³ *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 170 (1971); RESTATEMENT (SECOND) OF TORTS § 920 comment (a) (1978). Comment (a) to the benefits rule provides that a court only can apply a benefit to mitigate a harm, if the benefit and the harm affect the "same interest" of the plaintiff. *Id.* If the same interest is not affected, a court cannot use the benefits rule to mitigate harm to one interest by considering the benefit to another interest. *Id.* at comment (a).

¹³⁴ See *Mason v. Western Pennsylvania Hosp.*, 286 Pa. Super. 354, 363, 428 A.2d 1366, 1370 (1981) (benefits rule set off prevents windfall to parents and unfair burden to physicians).

expenses and emotional suffering against affection, however, is the highly inexact and speculative nature of putting a price on the intangible rewards of parenthood.¹³⁵

In addition to the practical difficulties in implementing the benefits rule, courts that apply the benefits rule often fail to adhere to the rule's requirement that the harm caused and the benefit conferred affect the same interest of the plaintiff.¹³⁶ For example, both the harm caused and benefit conferred may affect an economic interest of the plaintiff. According to a strict interpretation of the benefits rule, courts should separate the benefits and injuries that a defendant's negligence caused the plaintiffs, depending on the type of benefit or injury.¹³⁷ Under the strict interpretation, courts should apply emotional benefits to offset only emotional suffering.¹³⁸ Similarly, courts should offset economic expenses only with economic benefits.¹³⁹ A defendant's negligence in a wrongful birth action arguably may not affect an economic, emotional, or physical interest of the plaintiffs.¹⁴⁰ Since the defendant's negligence caused the birth of the child, the interest affected for plaintiffs is parenthood or nonparenthood.¹⁴¹ The interest that suffers the economic harm, therefore, is the same interest that the child's existence benefits.¹⁴² The construction of the benefits rule that parenthood or nonparenthood is the interest benefitted or harmed seems consistent with judicial holdings that the plaintiffs' injury in a wrongful birth action is the

¹³⁵ See *Kingsbury v. Smith*, _____ N.H. _____, _____, 442 A.2d 1003, 1006 (1982) (recognized wrongful birth and wrongful pregnancy causes of action but rejected benefits rule as too speculative).

¹³⁶ See Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U. L. REV. 127, 157-159 (1978) [hereinafter cited as *Mandate and Mishandling*]. Courts arguably misinterpret the benefits rule when courts, for example, use emotional benefits of parenthood to offset the economic costs of raising a child. See *id.* at 160. Emotional benefits only should mitigate emotional suffering and economic benefits should mitigate economic costs. *Id.* Any analysis of the benefits rule, however, depends on how a court characterizes the interest affected. Barnett, *supra* note 87, at 19. If a court characterizes the interest affected as parenthood or nonparenthood, then emotional benefits can offset economic costs under the benefits rule. See *id.* (parenthood interest encompasses both economic and emotional aspects).

¹³⁷ See *Mandate and Mishandling*, *supra* note 136, at 160 (separate benefits and harms according to type of interest).

¹³⁸ *Id.* Under the benefits rule, the interest harmed or benefitted is not the plaintiff himself, but rather some purpose of the plaintiff. *Id.* at 158. Interpreting the same provision to mean that a particular purpose of the plaintiff is the interest harmed or benefitted requires that a court only reduce economic harms by economic benefits. *Id.* at 160. Nothing in the benefits rule, however, requires that the interest be a particular aspect of parenthood, rather than parenthood as a whole. See *supra* note 133 (benefits rule).

¹³⁹ See *Mandate and Mishandling*, *supra* note 136, at 159-60 (strict interpretation of benefits rule).

¹⁴⁰ Barnett, *supra* note 87, at 19.

¹⁴¹ *Id.*

¹⁴² *Id.*

deprivation of the right to reject a parental relationship.¹⁴³ If a court were to find that the plaintiff parents sought to avoid or terminate the mother's pregnancy solely for her health or solely for economic reasons, however, then the interest affected is not parenthood or nonparenthood in general but only one aspect of parenthood.¹⁴⁴

In addition to application of the benefits rule, courts have differed on whether to award any damages to plaintiffs for emotional suffering.¹⁴⁵ Courts have denied damages for emotional suffering because of the policy objections against awarding damages to third party witnesses of another's injury.¹⁴⁶ The purpose of the policy against third party witnesses' recoveries is to prevent spurious claims.¹⁴⁷ Plaintiff parents, however, do not sue for their child's defects, which the defendant did not cause.¹⁴⁸ Plaintiffs in a wrongful birth action sue for the deprivation of the right to choose whether or not to have a child.¹⁴⁹ The parents are the legal victims of the defendant's negligence, not the child.¹⁵⁰ Public policy objections to plaintiffs' recovering emotional damages for the injury to another person, therefore, do not apply to parents in wrongful birth claims.¹⁵¹ Consequently, courts should not deny damages for emotional suffering in wrongful birth actions on third party witness enrichment grounds.

Some courts object to awarding emotional suffering damages in wrongful birth actions on the ground that calculation of damages for

¹⁴³ See *supra* text accompanying notes 18-20 (injury in wrongful birth suit is deprivation of right to accept or reject parental relationship).

¹⁴⁴ See *Hartke v. McKelway*, 526 F. Supp. 97, 105 (D.D.C. 1981). In *Hartke*, a wrongful pregnancy case, the court denied the parents damages for the economic expenses of raising a healthy child because the mother sought sterilization solely for health reasons. *Id.* In *Hartke* the mother's interest was the health of herself and her child, not the pecuniary expense of raising a child. *Id.* Since the mother's interest suffered no harm, the court did not allow the plaintiff to recover the economic costs of raising the child. *Id.*

¹⁴⁵ Compare *Berman v. Allan*, 80 N.J. 421, 433, 404 A.2d 8, 14 (1979) (plaintiffs may recover damages for emotional suffering) with *Becker v. Schwartz*, 46 N.Y.2d 401, 413-14, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901-02 (1978) (public policy does not support parents recovery for emotional suffering).

¹⁴⁶ See *Anonymous v. Hospital*, 35 Conn. Sup. 112, _____, 398 A.2d 313, 314 (1979) (no emotional damages for witnessing injury to another); *Howard v. Lecher*, 42 N.Y.2d 109, 112, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 365 (1977) (no cause of action for another's direct injury); see W. PROSSER, *LAW OF TORTS* § 54 at 329 (4th ed. 1971) (general agreement among courts that no recovery allowed for mental disturbance unaccompanied by physical injury).

¹⁴⁷ See *Naccash v. Burger*, 223 Va. 406, 416, 290 N.E.2d 285, 830-81 (1982) (restrictions on emotional damages designed to prevent spurious claims).

¹⁴⁸ See *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (wrongful birth action not based on child's defects).

¹⁴⁹ *Id.* (wrongful birth action based on negligence that deprived plaintiffs of right to reject parenthood).

¹⁵⁰ *Id.* (if wrongful birth was based on child's afflictions parents could not recover).

¹⁵¹ See *Naccash v. Burger*, 223 Va. 406, 416, 290 S.E.2d 825, 831 (1982) (traditional restrictions on emotional suffering recovery do not apply in wrongful birth action).

emotional anguish in a nonspeculative manner is impossible.¹⁵² Emotional suffering damages, however, are not more difficult to estimate in financial terms than damages based upon physical pain.¹⁵³ Emotional injuries are real injuries.¹⁵⁴ Since wrongful birth actions are a type of negligence claim,¹⁵⁵ no reason exists to treat a claim for emotional suffering in a wrongful birth action differently from a similar claim in any other tort action.¹⁵⁶

Since damage awards for emotional suffering in wrongful birth actions are not objectionable on grounds of public policy or speculative-ness,¹⁵⁷ the trend in wrongful birth cases should be toward awarding damages for emotional suffering. Since 1981 both the Pennsylvania Supreme Court and the Virginia Supreme Court have allowed emotional suffering damages.¹⁵⁸ Neither court found that public policy or immeasurability of mental pain and anguish precluded recovery of emotional suffering damages.¹⁵⁹ Because plaintiffs in wrongful birth suits suffer direct injury¹⁶⁰ and because wrongful birth suits are ordinary negligence claims,¹⁶¹ courts that permit recovery for emotional suffering are correct.

In 1982, however, the California Supreme Court held in *Turpin v. Sortini*¹⁶² that an infant plaintiff could not recover emotional suffering damages in a wrongful life suit because the jury could not determine a monetary award in a nonspeculative manner.¹⁶³ The *Turpin* court's

¹⁵² See *Turpin v. Sortini*, 31 Cal. 3d 220, _____, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346 (1982) (mental pain and suffering damages denied because impossible to calculate damages fairly and nonspeculatively); *Gleitman v. Cosgrove*, 49 N.J. 22, _____, 227 A.2d 689, 693 (1967) (impossible to measure damages in wrongful birth action). Although the *Turpin* court only decided the infant's wrongful life action, some of the court's reasoning applies to wrongful birth claims. Barnett, *supra* note 87, at 18; *infra* text accompanying notes 163-167 (*Turpin* court's reasoning inapplicable to wrongful birth emotional suffering recovery); see *Turpin*, 31 Cal. 3d 220, _____, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982) (court only decided wrongful life suit).

¹⁵³ PROSSER, *supra* note 146, § 54 at 328.

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* note 67 (wrongful birth action is extension of traditional negligence doctrine).

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* text accompanying notes 148-155 (public policy or speculativeness objections should not preclude awards of emotional damages).

¹⁵⁸ See *Speck v. Finegold*, _____ Pa. _____, _____, 439 A.2d 110, 114 (1981) (emotional distress damages recoverable); *Naccash v. Burger*, 223 Va. 406, 416, 290 S.E.2d 825, 831 (1982) (same).

¹⁵⁹ See *supra* note 158 (*Speck* and *Naccash* courts permitted damages to plaintiffs for emotional suffering).

¹⁶⁰ See *supra* note 51 (defendant's negligence injured plaintiffs in wrongful birth action).

¹⁶¹ See *supra* note 67 (wrongful birth action is extension of traditional negligence doctrine).

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

¹⁶³ See *id.* at _____, 643 P.2d at 964, 182 Cal. Rptr. at 347 (impossible to measure emo-

reasoning in rejecting emotional suffering damages awards in wrongful life cases does not apply to parents in wrongful birth suits.¹⁶⁴ The *Turpin* court said that although measuring pain or suffering in financial terms in ordinary personal injury cases is difficult, at least jurors are familiar with the plaintiff's injury in a personal injury case.¹⁶⁵ In an ordinary personal injury case the plaintiff allegedly has lost the opportunity to live without mental pain and suffering.¹⁶⁶ In a wrongful life action, however, the infant plaintiff has lost the status of nonexistence.¹⁶⁷ According to the *Turpin* court, jurors have no rational standard that they can use to measure an infant's emotional suffering caused by the loss of nonexistence.¹⁶⁸ Plaintiff parents in a wrongful birth suit are analogous to plaintiffs in an ordinary personal injury case because defendant's negligence in a wrongful birth suit arguably has deprived plaintiff parents of the opportunity to live life without pain and suffering.¹⁶⁹ Therefore, the *Turpin* court's objection to awarding emotional suffering damages in wrongful life actions does not apply to plaintiffs in wrongful birth actions.

In wrongful birth cases, plaintiff parents suffer direct injury from the birth of a child afflicted with defects.¹⁷⁰ The defendant's negligence deprives parents of the right to choose whether or not to have a child.¹⁷¹ Because wrongful birth claims are common law negligence claims,¹⁷² ordinary negligence damages rules should apply to wrongful birth claims.¹⁷³ If the economic costs and emotional suffering of raising a child afflicted with defects were direct and foreseeable results of the defendant's negligence, then plaintiffs should be able to recover damages for economic costs and emotional suffering.¹⁷⁴ Objections to awarding damages in wrongful birth actions because of policy against abortion¹⁷⁵

tional suffering damages in wrongful life case); see also *Harbeson v. Parke-Davis*, 51 L.W. 2421, 2422 (Jan. 6, 1983) (same).

¹⁶⁴ See *infra* text accompanying notes 165-168 (*Turpin* court's reasoning inapplicable to wrongful birth emotional suffering recovery).

¹⁶⁵ See *Turpin*, 31 Cal. 3d 220, _____, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 346 (1982) (jurors have basis to measure plaintiff's injury in personal injury case).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* notes 57 and 67 (wrongful birth is ordinary negligence claim and parents suffer injury).

¹⁷⁰ See *supra* note 51 (defendant's negligence injured plaintiffs).

¹⁷¹ See *id.*

¹⁷² See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978) (wrongful birth action is common law negligence action).

¹⁷³ See *Speck v. Finegold*, _____ Pa. _____, _____, 439 A.2d 110, 114 (1981) (defendant liable for all harm directly and foreseeably resulting from negligence).

¹⁷⁴ *Id.*

¹⁷⁵ See *supra* note 5 (effect of *Roe v. Wade* on abortion policy objections to wrongful birth claims).

or spurious claims¹⁷⁶ are not valid in wrongful birth actions.¹⁷⁷ Difficulties in valuing mental pain and suffering in wrongful birth actions are not greater than in any other tort action.¹⁷⁸ Difficulty in valuing emotional suffering, therefore, should not prevent courts from awarding damages for parents' emotional suffering in wrongful birth actions.¹⁷⁹ If courts choose to lessen defendant's monetary liability, courts can apply the benefits rule correctly to offset economic damages with emotional benefits because the parents' injury is the deprivation of the right to choose whether to have a child.¹⁸⁰

FREDERICK W. BOGDAN

¹⁷⁶ See *supra* text accompanying notes 147-151 (plaintiffs suffer direct injury in wrongful birth cases and thus are not mere witnesses of another's injury).

¹⁷⁷ See *supra* text accompanying notes 101-108 and 147-151 (public policy arguments against wrongful birth actions are invalid).

¹⁷⁸ See *supra* text accompanying notes 152-155 (no reason to treat emotional suffering claim differently in wrongful birth suit than in other tort actions).

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* text accompanying notes 140-144 (benefits rule permits offsetting emotional harm with economic benefits).

