Wrongful Birth: Who Owes What To Whom And Why?

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NOTES

WRONGFUL BIRTH: WHO OWES WHAT TO WHOM AND WHY?

Wrongful birth,\(^1\) wrongful life,\(^2\) and wrongful conception or wrongful pregnancy\(^3\) 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 959, 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, which liberalized abortion laws, combined with dramatic increases in the number of sterilization operations and more effective prenatal diagnostic techniques, 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. 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.

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.

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).

Aminiocentesis 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.

7 Id. Aminiocentesis 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.

results. 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.

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


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).


See id. (wrongful birth action for negligent sterilization of husband known to be afflicted with inheritable disease).
give rise to wrongful birth actions. 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. Plaintiff parents do not claim that the defendant's negligence caused the actual defects, since the defects are the result of disease or genetic abnormalities. 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. In Naccash v. Burger, for example, the plaintiff parents both were possible carriers of Tay-Sachs disease. During the wife's pregnancy, the defendant doctor tested the plaintiff husband for Tay-Sachs. 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. Their daughter was born with Tay-Sachs disease. The parents testified that if they had known that the fetus was afflicted with Tay-Sachs disease, the wife would have had an abortion. The Naccash court recognized a cause of action for negligent genetic counseling.

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18 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).
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 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
Wrongful Birth

Another situation giving rise to the wrongful birth cause of action is unsuccessful abortion. 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. In Speck v. Finegold, for example, the plaintiff parents believed their unborn child would suffer from birth defects. In Speck, the plaintiff husband suffered from neurofibromatosis, an inherited disease that causes severe bone deformities and tumors to appear at nerve endings. He and his wife had two children who suffered from neurofibromatosis. The plaintiffs decided that they could bear neither the pain nor the expense of another child who was afflicted with the disease. Accordingly, the husband went to one of the defendant doctors for a sterilization operation. Although the doctor performed the vasectomy, the wife became pregnant anyway. The wife went to the other defendant doctor for an abor-

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.


Id. at ___, 439 A.2d at 113.


Id. at ___, 439 A.2d at 113.

Id. at ___, 439 A.2d at 112.

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

Id. at ___, 439 A.2d at 112-13.

Id. at ___, 439 A.2d at 113.

Id.

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

The Speck case is an example of wrongful birth suits based on both ineffective abortions and negligent sterilization operations. 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. The defendant physician operates upon either the husband or the wife. The sterilization is unsuccessful and the wife later becomes pregnant. In Hartke v. McKelway, the court held the defendant liable for an unsuccessful sterilization upon finding that the defendant had guaranteed the success of the operation. The defendant had informed the husband and wife that they no longer needed to use contraceptives to prevent conception.

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. As compensation for their injury, plaintiffs demand damages for both the economic and emo-

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29 Id.
30 Id.
31 Id.: Harper, Paying for Birth Risks, 4 NAT. L.J. 1, 12 (April 12, 1982).
33 Id. at ___ 439 A.2d at 114.
34 Id.
35 See id. at ___ 439 A.2d at 113 (plaintiff husband sought sterilization to prevent conception of child afflicted with neurofibromatosis).
37 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.
41 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. Plaintiffs typically characterize economic costs as pecuniary expenses associated with the pregnancy and birth, medical expenses peculiar to raising a child suffering from defects, and pecuniary expenses incurred in rearing the child in excess of the special medical and training costs. Similarly, plaintiffs classify emotional suffering damages according to the mental pain and suffering associated with the pregnancy and birth and associated with raising a child suffering from birth defects. Plaintiffs also have sued for loss of consortium and interference with established family relationships.

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

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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.
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.
breach of contract or breach of warranty, particularly when the defendant has performed an unsuccessful sterilization operation. Because the doctor’s agreement to perform a sterilization operation arguably is a contract, a failure to perform the operation correctly may constitute an actionable breach of contract. 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. A breach of contract or breach of warranty claim, however, requires the plaintiff to prove the existence of an enforceable promise. Most judicial decisions in wrongful birth cases focus on the negligence aspects of plaintiffs’ claims rather than on breach of contract or warranty.

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. Plaintiffs must show that the defendant


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.

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.


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. The Virginia Supreme Court stated in *Naccash v. Burger* 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. Plaintiffs must show that the defendant's acts constituted a breach of the duty of care owed plaintiffs and that the negligently performed duty proximately caused injury to the plaintiff. 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. 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. The preexisting defect argument, however, misconstrues the nature of plaintiffs' injury. Plaintiffs claim that the defendant deprived them of the right to accept or reject a parental relationship. Plaintiffs do not claim the defendant caused the infant's birth defects.

A majority of courts recognize the wrongful birth cause of action in negligence, thereby permitting the plaintiffs some recovery. None-
theless, judicial decisions have differed on the question of what constitutes a compensable injury in wrongful birth cases. 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. The New Jersey Supreme Court in *Berman v. Allan*, however, stated that mere difficulty in measuring damages should not be the sole reason for rejecting a cause of action. 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. Both sets of plaintiffs, parents and infants, base their claims on the same negligent acts of defendants. Only the parents, however, can show that the afflicted infant's existence constitutes an injury.

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

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

9 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).


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

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


84 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. As the court in *Naccash v. Burger* stated, no distinction between a wrongful birth action and any other malpractice action exists. According to the court in *Gildiner v. Thomas Jefferson University Hospital*, a wrongful birth action is an action in negligence, and the judiciary is competent to determine the boundaries of common law negligence doctrine. The South Dakota legislature, however, has passed laws prohibiting wrongful life and wrongful birth causes of action. A sponsor of similar Minnesota laws maintained that recognizing wrongful birth actions would force physicians to run more prenatal tests on prospective mothers which could lead to more abortions. One of the primary reasons the New Jersey Supreme Court in *Gleitman v. Cosgrove* 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. Six years after *Gleitman v. Cosgrove*, the United States Supreme Court in *Roe v. Wade* held that abortion was legal and that forcing additional children upon a woman can result in physical and mental harm to the woman. In light of the *Roe* decision, the New Jersey Supreme Court in *Berman v. Allan* held

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

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.

See *id* at 696.


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


410 U.S. 113 (1973).


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

that public policy since *Roe v. Wade* supported a mother's right to a meaningful choice in whether to have an abortion. 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. Clearly the background controversy over the issue of abortion does affect the wrongful birth cause of action. If courts treat wrongful birth claims as ordinary negligence claims, however, then courts may decide wrongful birth suits without legislative authorization.

Judicial cognizance of wrongful birth claims, however, is not the ultimate goal of plaintiffs in wrongful birth actions. Plaintiffs want damages. The primary purpose of a damage award is to compensate the harmed party for his injury. Most courts have recognized wrongful birth actions in the form of a negligence claim. Because plaintiffs easily can show they would not have had the child but for the defendant's negligence, most courts have allowed recovery for the medical costs of the birth and raising of a child born with defects. The purpose of abortion is to terminate pregnancy, and the purpose of sterilization is to prevent pregnancy. 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).
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).
defendant proximately caused the injury. In the negligent genetic counseling situation, the parents' purpose in consulting physicians and taking tests often is to determine whether to continue the pregnancy. Victims of negligent genetic counseling thus have little difficulty in proving that the defendant's negligence resulted in injury. 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.

The major controversy over damage awards in wrongful birth suits concerns the consequences of an afflicted child's birth. 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. 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. In Berman v. Allan, 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. 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.

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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 infra 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).
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. In Speck v. Finegold, the Pennsylvania Supreme Court permitted recovery for both economic and emotional injuries associated with raising a child born with defects. The Speck court held that a negligent physician, like any other tortfeasor, is liable for the damages he proximately caused.

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. 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. The balancing mechanism courts most often use is the "benefits rule." 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. Judicial application of the benefits rule results in a compromise designed to reduce the parents' loss without imposing an undue hardship on the defendant.

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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.


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.


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).

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


\(^{136}\) 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. 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.

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

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142 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.
150 See Robak v. United States, 658 F.2d 471, 479 (7th Cir. 1981) (wrongful birth action not based on child's defects).
152 Id. (wrongful birth action based on negligence that deprived plaintiffs of right to reject parenthood).
153 Id. (if wrongful birth was based on child's afflictions parents could not recover).
emotional anguish in a nonspeculative manner is impossible.\textsuperscript{152} Emotional suffering damages, however, are not more difficult to estimate in financial terms than damages based upon physical pain.\textsuperscript{153} Emotional injuries are real injuries.\textsuperscript{154} Since wrongful birth actions are a type of negligence claim,\textsuperscript{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.\textsuperscript{156}

Since damage awards for emotional suffering in wrongful birth actions are not objectionable on grounds of public policy or speculativeness,\textsuperscript{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.\textsuperscript{158} Neither court found that public policy or immeasurability of mental pain and anguish precluded recovery of emotional suffering damages.\textsuperscript{159} Because plaintiffs in wrongful birth suits suffer direct injury\textsuperscript{160} and because wrongful birth suits are ordinary negligence claims,\textsuperscript{161} courts that permit recovery for emotional suffering are correct.

In 1982, however, the California Supreme Court held in \textit{Turpin v. Sortini}\textsuperscript{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.\textsuperscript{163} The \textit{Turpin} court’s

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\item \textsuperscript{152} See \textit{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); \textit{Gleitman v. Cosgrove}, 49 N.J. 22, ___, 227 A.2d 689, 693 (1967) (impossible to measure damages in wrongful birth action). Although the \textit{Turpin} court only decided the infant's wrongful life action, some of the court’s reasoning applies to wrongful birth claims. \textit{Barnett, supra} note 87, at 18; \textit{infra} text accompanying notes 163-167 (\textit{Turpin} court’s reasoning inapplicable to wrongful birth emotional suffering recovery); \textit{see Turpin}, 31 Cal. 3d 220, ___, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982) (court only decided wrongful life suit).
\item \textsuperscript{153} \textit{Prosser, supra} note 146, § 54 at 328.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{See supra} note 67 (wrongful birth action is extension of traditional negligence doctrine).
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{See supra} text accompanying notes 148-155 (public policy or speculativeness objections should not preclude awards of emotional damages).
\item \textsuperscript{159} \textit{See supra} note 158 (\textit{Speck} and \textit{Naccash} courts permitted damages to plaintiffs for emotional suffering).
\item \textsuperscript{160} \textit{See supra} note 51 (defendant’s negligence injured plaintiffs in wrongful birth action).
\item \textsuperscript{161} \textit{See supra} note 67 (wrongful birth action is extension of traditional negligence doctrine).
\item \textsuperscript{162} 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
\item \textsuperscript{163} \textit{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. 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. In an ordinary personal injury case the plaintiff allegedly has lost the opportunity to live without mental pain and suffering. In a wrongful life action, however, the infant plaintiff has lost the status of nonexistence. 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. 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. 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. The defendant's negligence deprives parents of the right to choose whether or not to have a child. Because wrongful birth claims are common law negligence claims, ordinary negligence damages rules should apply to wrongful birth claims. 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. Objections to awarding damages in wrongful birth actions because of policy against abortion.
or spurious claims176 are not valid in wrongful birth actions.177 Difficulties in valuing mental plain 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

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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).