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Wrongful Birth and Wrongful Conception: A Parent's Need for a Cause of Action

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WRONGFUL BIRTH AND WRONGFUL CONCEPTION: A
PARENT’S NEED FOR A CAUSE OF ACTION

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I. INTRODUCTION

Thomasine McAllister and her husband Edward had their first child in May of 1991.¹ A month later, the McAllisters received a letter from the State Health Department advising them that they may be carriers of genetic traits that may cause sickle cell disease in their children.² The McAllisters decided to get tested to prevent having another child that may be afflicted with sickle cell disease.³ Dr. Khie Sem Ha drew blood from the McAllisters and told them that if there was anything to be concerned about, he would contact them.⁴ Even though Mrs. McAllister visited Dr. Ha for other reasons after the testing, she was never informed of the test results.⁵ As it turned out, there was a one-in-four chance that the McAllisters could have a child afflicted with sickle cell disease.⁶ This became evident to the McAllisters in June of 1994, when their second child was diagnosed with the disease.⁷

Although this situation may seem rare, it has become a recurring problem throughout the country. Numerous couples have had to deal with the sadness and

¹McAllister v. Ha, 496 S.E.2d 577 (N.C. 1998).

²*Id.* at 50. Sickle cell disease is inherited through the autosomal recessive gene and is most prevalent in African-Americans. Fifteen percent of children with sickle cell disease will die from infections before the age of five. LYNN B. JORDE ET AL., *MEDICAL GENETICS* 269 (2d ed. 1999).

³McAllister, 496 S.E.2d at 580.

⁴*Id.*

⁵*Id.*

⁶*Id.* “The result of the 1991 blood tests showed that plaintiff-husband carried the O Arab factor sickle cell. This combined with the traits carried by plaintiff-wife created a one-in-four risk of bearing a child with sickle cell disease.” *Id.*

⁷McAllister, 496 S.E.2d at 580.

resulting implications of this situation. Many innocent children have been born with diseases that parents tried to prevent. As a result, an increase in medical malpractice suits and the expanding field of genetic testing have given rise to a few different causes of action. Claims for wrongful birth, wrongful conception or wrongful pregnancy, and wrongful life have become popular as a way of dealing with these tragic situations.

The purpose of this note is to demonstrate the need for wrongful birth and wrongful conception claims. Arguments have been made that these claims should be combined into one cause of action. The rationale for this argument is that by combining the two claims, chaos in the courts will be reduced. This note will show the need to maintain these claims as separate from one another. This note also demonstrates the proper stance of the courts in rejecting the wrongful life cause of action.

Part II of this note gives an overview of medical malpractice and the claims of wrongful birth and wrongful conception or wrongful pregnancy. Part III gives an overview of the claim of wrongful life and argues for its abandonment. This section also discusses the reaction of the courts to this claim. Part IV deals with the differences between wrongful conception and wrongful birth and the need to maintain these causes of action as separate and distinct to ensure proper medical care and the right to choose. Part V of this note deals with the issue of damages and the debates between different jurisdictions regarding the damages that should be awarded to successful plaintiffs.

II. CAUSES OF ACTION

The legal system has developed many medical malpractice causes of action to protect innocent people from harm. Claims for wrongful birth and wrongful conception or wrongful pregnancy now exist in most jurisdictions. However, plaintiffs who have attempted wrongful life claims have had little success.

A. *Medical Malpractice and Genetic Testing.*

The law has recognized medical malpractice as a legitimate cause of action for many years. A physician owes a duty of care to a patient under his or her supervision. A physician or surgeon who renders professional services must meet certain requirements.⁸ First, the physician must possess the degree of professional learning, skill and ability that others similarly situated ordinarily possess.⁹ Second, the physician must exercise reasonable care and diligence in the application of his or her knowledge and skill to the patient's case.¹⁰ Finally, the physician must use his or her best judgment in the treatment and care of his or her patients.¹¹ This standard of care has since been updated to now hold a physician responsible for providing care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar

⁸Hunt v. Bradshaw, 88 S.E. 2d 762 (N.C. 1955).

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

communities at the time of the alleged act giving rise to the cause of action.¹² The burden is on the plaintiff to prove such negligence or want of skill and that it resulted in injury to the plaintiff.¹³ If all the factors are not met, the physician is not considered to have acted negligently. A bad result for a patient does not automatically mean that a physician has acted negligently.

Medical malpractice can be the result of a failure to provide informed consent to a patient, failure to properly perform a surgery, or a physician's negligent handling of a patient's problems. With advances in technology, the physician's duty to his or her patients has increased. As a result, a medical malpractice suit can now be brought for such acts as negligently performing sterilization procedures,¹⁴ a failure to maintain or insert intrauterine devices,¹⁵ incorrect interpretation of ultrasounds,¹⁶ and the negligent failure of a physician to inform parents of possible genetic diseases.¹⁷ In many of these claims, a child is born as a result of a doctor's action (e.g., negligent sterilization), or a doctor's inaction (e.g., failure to reinsert intrauterine devices). The child may have been unplanned as a result of a negligent sterilization procedure, or the child may have been born with serious genetic defects if the physician failed to inform the parents of the possibilities of such defects. Many questions are left to be decided as to what will happen to the child and how the child will be cared for. Another question that arises with these types of claims is who will pay for the child's expenses? Should the parents be held responsible for the expenses of a child that they tried to prevent? If the parents are not held responsible, is the court justified in awarding damages for the expense of raising a child? These are just some of the concerns the court must consider when deciding wrongful birth and wrongful conception or wrongful pregnancy cases.

¹²Jackson v. Bumgardner, 347 S.E.2d 743, 745 (N.C. 1986).

¹³James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985).

¹⁴Nunnally v. Artis, 492 S.E.2d 126 (Va. 1997). "The Supreme Court held that wrongful conception action accrued, and the statute of limitations began to run, when patient conceived and became pregnant." *Id.* at 126.

¹⁵See *Jackson*, 347 S.E.2d 743. The court held:

1) complaint stated cause of action for medical malpractice based on wrongful conception; 2) husband did not have standing, and recoverable damages did not include costs of rearing unplanned child; and 3) physician's promise to replace intrauterine device was incidental to surgical treatment and could not serve as basis for breach of contract claim.

Id. at 752.

¹⁶See *Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. Ct. App. 1999) ("Parents of child who was born with severe disabilities brought action against physician who had interpreted ultrasound of fetus and hospital where he worked, alleging that physician's negligence in making interpretation had deprived them of right to make reproductive decision.").

¹⁷See *McAllister*, 496 S.E.2d 577 ("Parents whose child suffered from sickle cell disease brought action for medical malpractice and negligent infliction of emotional distress against physician who performed blood tests on parents, alleging that he negligently failed to inform them of one in four risk that their child would suffer from such disease.").

One newly developing area receiving a lot of attention is the field of genetic testing.¹⁸ The area of genetics no longer deals only with rare disorders; genetic tests are also being developed for more common diseases such as heart disease, diabetes, and various cancers.¹⁹ Genetic testing can also be used to alert couples of possible genetic problems that can result if the couple were to conceive a child. Since mistakes can be made in the genetic testing process, tort causes of action are available as a remedy. Also, to uphold public policy, courts hold physicians liable if they fail to inform patients of the availability of genetic testing for serious disorders.²⁰

Many medical malpractice claims have been brought against doctors by parents of children born with genetic diseases.²¹ In most of these cases, the parents allege either that the physicians failed to inform the parents of the availability of genetic testing for the unborn child or that the physician negligently performed the genetic testing.²² These claims automatically make physicians, genetic counselors, and genetic testing laboratories possible defendants in civil law suits.²³

1. Wrongful Birth

“Wrongful birth” is a relatively new, court-made cause of action. Potential defendants to this claim include physicians, genetic counselors, and genetic testing laboratories. A wrongful birth action is brought by the parents of a child, on the parent’s behalf, to recover damages for the birth of an impaired or disabled child.²⁴ The basic theory of a wrongful birth claim is that the physician failed to discover a birth defect and failed to advise the parents of the defect so that they could intelligently decide whether to have the child or to terminate the pregnancy.²⁵

The impairments in the child usually result from an act or an omission of the defendant physician, or because the defendant physician failed to diagnose or discover a genetic defect in the previously tested parents or the infant in time for the parents to make an informed decision as to whether to continue the pregnancy.²⁶ Wrongful birth claims only apply when a child is born with a defect.²⁷ Actions of

¹⁸See JORDE, *supra* note 2, at 275. Prenatal diagnosis is a major focus of genetic testing and several important areas of technology have evolved to provide this service. The principle aim of prenatal diagnosis is to supply at-risk families with information so that they can make informed choices during pregnancy. *Id.*

¹⁹See Lori Andrews, *Genetic Fallout: New Technologies are Changing the Legal Landscape*, 31 TRIAL, Dec. 1, 1995 available at 1995 WL 15142771 (“The duty to provide genetic information will touch more health care professionals as genetic research expands from an emphasis on birth defects to an emphasis on chronic disease.”).

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987).

²⁵James G., 332 S.E.2d 872.

²⁶*Id.*

²⁷*Id.*

this type are brought by parents who claim that they would have avoided conception or terminated the pregnancy had they been properly informed.²⁸

The first wrongful birth claims were brought in the late 1960s and caused some disturbances in the courts because defendants were being sued for the genetic defects in the child, even though they could not have done anything to prevent or correct those defects.²⁹ The parents could not do anything either since abortions were illegal until 1973.³⁰ Since then, the wrongful birth cause of action has become more stable and is now recognized in a majority of jurisdictions.³¹

In 1982, Virginia courts first recognized a claim for wrongful birth.³² Parents of a child born with Tay-Sachs disease went to their physician for genetic testing during the fourth month of pregnancy to determine if the parents were carriers for the disease.³³ An employee of the health care provider incorrectly labeled the blood samples and the results erroneously showed that both parents were not carriers.³⁴ As a result, the parents were never given accurate information regarding the condition of their unborn child and the fact that the child would be afflicted with the disease.³⁵ Without accurate information, the parents were unable to make an informed decision regarding the termination of the pregnancy.³⁶ Since Tay-Sachs is a serious and painful disease that usually results in death after a few years of life, options such as pregnancy termination are usually acceptable to most couples.³⁷ When the child was born with Tay-Sachs, the parents sued the health care provider.³⁸ The court determined the parents were owed a legal duty, the mislabeling of the samples and subsequent misinformation was a breach of that duty, the mislabeling was the cause

²⁸Thomas Reasler Foutz, "Wrongful Life": *The Right Not To be Born*, 54 TUL. L. REV. 480, 84 (1980).

²⁹Interview by Jean Hellwege with Lori Andrews, 25 TRIAL, July 1, 1999, available at 1999 WL 17784251.

³⁰Roe v. Wade, 416 U.S. 113 (1973).

³¹Helewege, *supra* note 29.

³²Naccash v. Burger, 290 S.E.2d 825 (Va. 1982).

³³*Id.* Tay-Sachs disease is especially common among Ashkenazi Jews, with a heterozygote frequency of about one in thirty. JORDE, *supra* note 2, at 270. Tay-Sachs disease is an autosomal recessive lysosomal storage disorder in which the lysosomal enzyme B-Hexosaminidase A is deficient. *Id.* This causes a buildup of substrate, GM2 ganglioside, in neuronal lysosomes. *Id.* The accumulation of this substrate damages the neurons and leads to blindness, seizures, hypotonia and death by the age of five. *Id.*

³⁴*See Naccash*, 290 S.E.2d at 825 ("The Court examined the causation and held that the negligent mislabeling led to an erroneous negative report which in turn caused the parents to decide to continue the pregnancy rather than abort the fetus. The court said that there must be an actionable injury.").

³⁵*Id.*

³⁶*Id.*

³⁷JORDE, *supra* note 2, at 270.

³⁸*Naccash*, 290 S.E.2d 825.

of the parent's decision to continue the pregnancy, and an actionable injury had resulted.³⁹

In this case, the health care provider was not held liable because the child was born with the disease, rather because it negligently informed the parents that the child could not contract the disease. This negligently provided information took away the parents' right to choose. Therefore, the parents were not given the opportunity to decide to abort the fetus or to continue with the pregnancy.⁴⁰

Although Virginia has accepted the tort cause of action of wrongful birth, some jurisdictions reject this claim.⁴¹ One such jurisdiction is North Carolina.⁴² Mr. and Mrs. Azzolino brought an action in North Carolina for wrongful birth alleging that the defendant-physician's negligent failure to inform them of the availability of amniocentesis and genetic counseling prevented the termination of Mrs. Azzolino's pregnancy and resulted in a child afflicted with down syndrome.⁴³ The court refused to allow relief for the claim of wrongful birth absent a clear mandate by the legislature.⁴⁴ The court based its conclusion on the arguments that different jurisdictions have failed to provide guidelines for damages in these cases and the responsibility of the parents to mitigate damages.⁴⁵ The court also stated the wrongful birth claim was one that resulted in a "slippery slope."⁴⁶ The court was concerned about how parents would define "defective."⁴⁷ The court also posed questions such as whether the sex of the child could eventually become a defect.⁴⁸ The main reason the *Azzolino* court refused to allow a tort cause of action for wrongful birth is because it would encourage the abortion of unborn children with defects.⁴⁹

The problem with *Azzolino* is that the parents are no longer able to decide for themselves whether or not to have the child. When a physician does not communicate all the necessary information to the parents, he or she is taking away the parent's freedom to choose. The rejection of the wrongful birth cause of action could lead to questions of constitutionality.⁵⁰ Claims can be brought for violation of

³⁹*Id.*

⁴⁰*Id.*

⁴¹Hellwege, *supra* note 29.

⁴²See *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985) (holding that "neither claims for wrongful birth nor claims for wrongful life were cognizable").

⁴³*Id.* at 530.

⁴⁴*Id.* at 533.

⁴⁵*Id.* at 534.

⁴⁶*Id.*

⁴⁷*Azzolino*, 337 S.E.2d at 535.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰Hellwege, *supra* note 29.

liberty or invasion of privacy under the constitution. The right to terminate a pregnancy is also a constitutionally protected right.⁵¹

2. Wrongful Conception or Wrongful Pregnancy

Another controversial cause of action is the claim of wrongful conception or wrongful pregnancy. The parents of a healthy, yet unplanned, child typically bring an action for wrongful conception or wrongful pregnancy.⁵² The parents generally bring this action against the physician for negligently performing an abortion or sterilization procedure.⁵³ The parents can also bring this type of action against a pharmaceutical manufacturer for negligently filling a contraceptive prescription.⁵⁴

To bring a wrongful conception claim, the resulting child need not have a genetic defect. The basic harm of this tort is the actual conception of the child. In many cases the parents have tried to prevent having children for various personal reasons ranging from economics to preference. No matter what the reason, this is a personal decision that a couple is entitled to make.⁵⁵

A wrongful conception claim does not depend on the choice of birth control, permanent or temporary, a couple chooses to use.⁵⁶ A woman may choose the type of birth control that she feels comfortable with. This may be a birth control pill, tubal ligation, or one of the many other forms of prevention. Whether the form chosen is temporary, such as a diaphragm, or permanent, such as sterilization, does not make a difference in a wrongful conception claim.⁵⁷ The woman is still able to bring the claim if the preventive measure failed in some way and the result is an unwanted or unplanned child.

The basic wrongful conception claim arises in a situation like that of Mr. and Mrs. Rouse. In 1987, Mrs. Rouse was under the care of Dr. Wesley for a tubal ligation.⁵⁸ Dr. Wesley informed Mrs. Rouse that “the procedure would result in her being unable to conceive a child and that the procedure would be permanent.”⁵⁹ Tissue samples received by Dr. Wesley after the surgery showed that although part

⁵¹See *Roe*, 410 U.S. at 153-54 (“The right of privacy found in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

⁵²*Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981).

⁵³*Id.* at 546.

⁵⁴*Id.*

⁵⁵*Roe*, 410 U.S. 113.

⁵⁶See *Jackson*, 347 S.E.2d at 749 (“We find no rational basis for distinguishing between temporary and permanent methods of birth control for the purpose of determining whether a complaint states a cause of action for medical malpractice resulting in wrongful conception. There appears to be no compelling reason to limit a patient’s right to non-negligent health care to permanent sterilization procedures as opposed to the insertion of an IUD.”).

⁵⁷*Id.*

⁵⁸See *Rouse v. Wesley*, 494 N.W.2d 7 (Mich. Ct. App. 1992) (“Parents of child born after unsuccessful tubal ligation sterility procedure sued hospital and doctors, alleging wrongful pregnancy or wrongful conception.”).

⁵⁹*Id.* at 8.

of the fallopian tube was removed, the tubular structure was still intact.⁶⁰ Dr. Wesley failed to inform Mrs. Rouse that the surgery was unsuccessful and that she could become pregnant.⁶¹ As a result, in 1988, Mrs. Rouse did become pregnant with her sixth child.⁶²

Even though the Rouse child was born healthy, Mr. and Mrs. Rouse sued Dr. Wesley for wrongful conception.⁶³ The court, following the majority of jurisdictions, allowed the cause of action.⁶⁴ Many jurisdictions will allow a claim for wrongful conception under the rationale that an avoidable pregnancy resulting from negligent medical care is a recognizable injury.⁶⁵ Most courts uphold this type of claim to regulate the medical community.⁶⁶ If doctors were permitted to negligently perform sterilization procedures or abortions and were not held liable for a potential resulting injury, they would in a sense be immune from their own negligence.⁶⁷

Although most wrongful conception claims involve healthy children, some may involve children born with abnormalities.⁶⁸ A couple may have consulted a genetic counselor and found that their child could be born with genetic defects and from this information decided to prevent conception. If conception still occurs and the child is born with or without defects, the parents may sue for wrongful conception.⁶⁹

In 1982, Palmo Lee Simmons had a vasectomy.⁷⁰ In 1983, as a result of an unsuccessful vasectomy, Mrs. Simmons became pregnant.⁷¹ The Simmons' child was born with severe abnormalities.⁷² The court allowed the claim of wrongful conception based on the physician's negligent performance of the sterilization procedure.⁷³ The court reasoned that had it not been for the negligence of the physician, the Simmons' child would not have been born.⁷⁴

By allowing a couple to bring a claim for wrongful conception, or wrongful pregnancy, the court recognized that a wrong has occurred. However, the court did not discriminate between healthy and unhealthy children. The harm that had

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³*Rouse*, 494 N.W.2d 7.

⁶⁴*Id.*

⁶⁵*Jackson*, 347 S.E.2d 743.

⁶⁶*Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974).

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Simmons v. Hertzman*, 651 N.E.2d 13 (Ohio Ct. App. 1994).

⁷⁰*Id.* at 14.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 15, 16.

⁷⁴*Simmons*, 651 N.E.2d at 16.

occurred is the actual conception or pregnancy that the couple tried to avoid. The harm was not the resulting healthy or unhealthy child.

The majority of jurisdictions allow a cause of action for wrongful conception. The basic argument for the validity of a wrongful conception cause of action is that a person has attempted to avoid pregnancy itself.⁷⁵ The injury that is alleged in the claim is the pregnancy itself, and that the physician's negligence is the cause of that pregnancy.⁷⁶ In these jurisdictions, it makes no difference if the child is born with abnormalities or is born healthy.

A wrongful conception cause of action is needed in the law to continue to regulate the medical profession and to allow couples to remedy a pregnancy they took steps to prevent. Without this cause of action, a couple has no reassurance that the preventive measures they are taking will be effective and the medical community will be unregulated.

III. WRONGFUL LIFE

Another birth-related tort claim is wrongful life. "Wrongful life" refers to a claim brought by or on behalf of a defective child against a physician.⁷⁷ The child alleges that because of the physician's negligent treatment or counseling to his or her parents, the child was born.⁷⁸ The basic claim of a wrongful life action is that the child would have been better off never having been born.⁷⁹ Usually, a wrongful life claim is brought in conjunction with a wrongful conception or wrongful birth claim. Instead of the suit being brought by the parents and for the parents as in a wrongful birth or wrongful pregnancy claim, a wrongful life suit is brought by the child or on behalf of the child. Most jurisdictions do not recognize this claim as a legitimate cause of action upon which relief may be granted.⁸⁰ These jurisdictions refuse to create precedent that a child would have been better off if he or she had never been born.⁸¹

Ashley Glascock, a child born with severe defects, tried to bring a wrongful life claim against her mother's treating physician in Virginia.⁸² The child alleged that during her mother's pregnancy the treating physician should have tested for fetal malfunctions and should have warned her parents of potential birth defects.⁸³ The

⁷⁵Gallagher v. Duke Univ., 852 F.2d 773 (4th Cir. 1998).

⁷⁶*Id.*

⁷⁷*Azzolino*, 337 S.E.2d at 528, 529.

⁷⁸*Id.* at 532.

⁷⁹Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?*, 64 MO. L. REV. 29 (1999).

⁸⁰*Id.* at 75.

⁸¹*Id.*

⁸²*Glascock v. Laserna*, No. L93-101, 1993 WL 946053, at *1 (Va. Cir. Ct. May 3, 1993) "Ashley was born on November 27, 1987, by cesarean section, with a number of congenital abnormalities and deformities." *Id.*

⁸³*Id.*, at *1, *2.

physician failed to request the tests and told the parents that everything was normal.⁸⁴ As a result, the child was born with severe genetic defects.⁸⁵

Although a claim for wrongful birth was recognized in this case, the claim for wrongful life was rejected.⁸⁶ To recognize the claim the court determined it must find the existence of a legal duty owed to the child by the doctor, a breach of that duty, causation, and an actionable injury.⁸⁷ The court determined that there was no actionable injury.⁸⁸ The court rationalized its conclusion on the idea that “life, with or without deformities, is more precious than no life at all. To entertain a cause of action premised on a contrary view is unacceptable.”⁸⁹

The theory used by *Gluscock* is the majority view concerning wrongful life. Many plaintiffs allege that they have suffered damages because their parents were not properly informed of the defects with which they would be born.⁹⁰ These plaintiffs allege that their parents were not given the opportunity to make an informed decision regarding the termination of the pregnancy.⁹¹ Although these allegations follow the same lines as a wrongful birth claim, they are usually rejected by a majority of jurisdictions for lack of injury.⁹² The courts are unable to characterize life as an injury. Without an actionable injury, there can be no cause of action.

The Supreme Courts of California, Washington and New Jersey are the only jurisdictions that recognize a claim for wrongful life.⁹³ These courts limit this finding to actions brought by children who suffer from severe birth defects.⁹⁴ The problem with these jurisdictions is that they are allowing life to be an injury.

The Court of Appeals of New York agrees that life is not an injury and, therefore, should not be considered one. “Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.”⁹⁵ Unlike other jurisdictions, the court is able to recognize that the question of life is not one that it should be dealing with. The court continued,

Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind

⁸⁴*Id.*, at *1.

⁸⁵*Id.*

⁸⁶*Id.*, at *5, *7.

⁸⁷*Gluscock*, 1993 WL 946053, at *7.

⁸⁸*Id.*, at *1.

⁸⁹*Id.*, at *7.

⁹⁰*Id.*, at *1.

⁹¹*Id.*

⁹²*Gluscock*, 1993 WL 946053, at *2.

⁹³*James G.*, 332 S.E.2d at 880.

⁹⁴*Id.*

⁹⁵*Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978).

[have placed] on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such propositions are staggering.⁹⁶

The court finished by considering some questions that have also been posed by other jurisdictions. “Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?”⁹⁷

Most courts are unable to answer these questions and society should not begin to ask them. If a child is born with abnormalities that could have been foreseen, the parents have a remedy under a wrongful birth claim to argue that they would not have had the child had they known of the abnormalities. This concept is recognized by the law as valid because the law does not recognize the existence of life until birth and a woman is entitled to have an abortion if she so chooses.⁹⁸ Under the law, an abortion is not the taking away of life.⁹⁹

The law does recognize wrongful birth and wrongful conception because the parents, and not the child, bring the claims. The parents are suing for the harm that the pregnancy or birth caused them. They are not suing for the harm of life as a child sues for through a claim of wrongful life. In a wrongful birth claim, the parents are not claiming that the child should not have been born. The only claim they are making is that the physicians acted negligently in informing them that the child could be born with defects, therefore limiting their choice to have the child.

The tort of wrongful life is one that devalues human existence. “The court recognizes that all human life is presumptively valuable. Simply stated, a child should not be considered a ‘harm’ to its parents so as to allow recovery for the customary cost of raising the child.”¹⁰⁰ This claim does not state that the child was deprived of a choice as to whether or not to be born. Wrongful birth and wrongful conception claims differ because the parents are actually claiming that they were deprived of their right to choose. In a wrongful life claim, the child actually claims that he or she would have been better off if he or she had not been born. For these reasons, most jurisdictions do not allow the claim of wrongful life.

⁹⁶*Id.*

⁹⁷*Id.*

Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson’s choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make. Recognition of so novel a cause of action requiring it must, creation of a hypothetical formula for the measurement of an infant’s damages is best reserved for legislative, rather than judicial attention.

Id.

⁹⁸*See Roe*, 410 U.S. at 153-54 (“The unborn have never been recognized in the law as persons in the whole sense. Texas may not, by adopting one theory of life, override the rights of the pregnant woman that are at stake.”).

⁹⁹*Id.*

¹⁰⁰*Taylor*, 600 N.W.2d 670.

IV. A NEED FOR WRONGFUL BIRTH AND WRONGFUL CONCEPTION

In all jurisdictions, arguments are made against the tort concepts of wrongful birth and wrongful conception. Some jurisdictions allow one concept without allowing another. There are even arguments made that the two causes of action should be considered as a single cause of action.¹⁰¹

A. *Wrongful Birth*

Aside from wrongful life, the cause of action that encounters the most opposition is wrongful birth. Again, wrongful birth may occur when a physician does not inform a patient about available testing that might reveal possible defects in a fetus.¹⁰² The problem occurs because the parents' right to choose to terminate the pregnancy has been taken away.¹⁰³ This concept leads to a few problems.

Arguments are made that the physicians cannot be held liable because they were not the cause of the defects or abnormalities in the child.¹⁰⁴ Many physicians argue that since the defect is genetic, not the result of negligence and in most cases incurable, the physicians' failure to detect it and inform the parents cannot be considered a cause of the condition, and therefore no actionable injury has occurred.¹⁰⁵ The problem with this argument is that the parents are suing for the harm done to them, not for the genetic abnormalities that result in their children. The parents sue because of the physicians' negligence in informing them that their child may be abnormal and the legal harm that resulted from the elimination of the parents' right to choose.¹⁰⁶ The parents are not holding the physician responsible for the abnormalities of the child. They are only trying to hold the physician responsible for not making them either aware of the potential defects or for not informing them of the actual defects and in turn giving them the opportunity to terminate the pregnancy.

Under Restatement (Second) of Torts § 431 (1965), "an actor's negligent conduct is a legal cause if it is a substantial factor and if no rule of law relieves the actor from liability because of the manner in which the negligence resulted in harm."¹⁰⁷ The parents' allegations, if proved, would "present sufficient evidence from which the

¹⁰¹Mark Strasser, *Misconception and Wrongful Births: A Call for a Principled Jurisprudence*, 31 ARIZ. ST. L.J., 61 (1999).

¹⁰²*See Reed v. Campagnolo*, 810 F. Supp. 167 (D. Md. 1993) ("Parents of child who suffered from genetically caused abnormalities brought medical malpractice action against physicians who had rendered prenatal care.").

¹⁰³*Id.*

¹⁰⁴*Id.* at 239.

¹⁰⁵*See id.* ("The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor.").

¹⁰⁶*See id.* ("The child's birth defects were already in operation at the time of the alleged negligence of the physicians, under the chain of causation alleged by the plaintiffs, the physicians could have prevented the harm to the parents."). Therefore, the alleged negligence of the physicians was a substantial factor in the legal harm to the parents.

¹⁰⁷*Reed*, 810 F. Supp. at 167.

trier of fact could find that the alleged negligence of the physicians was a substantial factor in the legal harm to the parents."¹⁰⁸ That legal harm is the loss of the right to choose to terminate or to continue the pregnancy.

Another argument that may be raised when dealing with a wrongful birth action is that of "over utilization."¹⁰⁹ Physicians attempt to argue that many unnecessary tests will have to be ordered to guard against being found negligent for misinforming parents. Physicians argue that there may not be a medical justification for these tests, and they only cause increased medical bills for the patients.¹¹⁰ Although this argument does take into consideration the rising costs of medical treatments today, it also fails to take into consideration the exorbitant costs of caring for a child born with abnormalities. Most courts reject this argument by determining that medical procedures and cost containment in the medical field are not for the courts to determine.¹¹¹

In certain jurisdictions, the arguments made against wrongful birth claims are found to be persuasive. Most courts do not allow the wrongful birth claims based on the idea of an inability to calculate damages and the idea that life, even with defects, cannot be considered an injury.¹¹² The problem with this concept is that an injury has occurred to the parents of the child, not to the child itself. This is how the claim of wrongful birth differs from wrongful life. By not allowing the wrongful birth cause of action, the courts in these jurisdictions are giving physicians and other health care providers a "free pass" to act negligently. If the physician's negligence goes unchecked by the courts, then there is no need for the physicians to maintain a duty of care to their patients. This will create many problems for society such as extreme distrust of physicians and harm to innocent patients. The disallowance of the claim may also be considered unconstitutional because the parents' right to choose has been violated. Questions of the parents' right to terminate a pregnancy, their right to privacy, and their constitutionally protected right to liberty can all be addressed in these jurisdictions.

Even when a jurisdiction recognizes both a wrongful conception and a wrongful birth cause of action, there are still arguments that these two torts should be combined into one.¹¹³ The argument made is that by distinguishing between the two concepts chaos is created in the judicial system.¹¹⁴ There are many problems with this argument. In a wrongful conception case, a normal child may be born as a result of an ineffective sterilization procedure. There must be a remedy for the parents of the child, whether or not the child is abnormal or healthy. The parents of the healthy child implemented the proper steps to ensure that they would not have children, no matter what their reasoning may be. If the courts disregard this fact, they are disregarding the parents' right to liberty and free choice. The courts are also

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Id.* at 240.

¹¹¹*Id.*

¹¹²*Azzolino*, 337 S.E.2d 528.

¹¹³*Strasser*, *supra* note 79, at 29.

¹¹⁴*Id.*

allowing the negligence of physicians to not have any consequences. In a wrongful birth case, an abnormal child is born as a result of the negligence of a physician. There are differences between the two situations such as different damages and amounts that must be established, the statute of limitations may begin to run at different times, and the difference in harm to the parents such as raising a healthy child or raising a child born with abnormalities.

B. Wrongful Conception

Certain jurisdictions recognize a claim for wrongful conception or wrongful pregnancy while not allowing a claim for wrongful birth. Again, the parents of a healthy child that is usually the result of a negligent sterilization procedure bring a claim for wrongful conception or wrongful pregnancy.¹¹⁵ The claim is usually brought because the child was unwanted. Certain jurisdictions distinguish the claims of wrongful birth and wrongful conception by the idea that in a wrongful conception case the child should not have been conceived and was only born because of the negligence of the physician. In a wrongful birth case the idea is that the child was already conceived and the defect that the fetus has was not a result of the negligence of a physician.

Although the two causes of action do have these differences, it is irrational to allow one and not the other. Whether a child was already conceived should not make any difference to the court. In both cases the physician is negligent. The physician either negligently performed a sterilization procedure or failed to test for or inform the parents of defects in the fetus. In both causes of action an unplanned pregnancy occurred. In many circumstances, the denial of a wrongful birth cause of action may be unconstitutional because a woman has a right to choose whether or not she wants to continue the pregnancy.¹¹⁶

V. DAMAGES

Damages in wrongful conception or wrongful birth cases are hotly debated among jurisdictions. Some courts take the position that the recovery of damages is contrary to public policy.¹¹⁷ These courts believe that to consider a child to be an injury offends fundamental concepts of human life and therefore no recovery is permitted.¹¹⁸ Fortunately, for parents of unplanned or abnormal children, this idea has started to change. The courts no longer view awarding damages as offensive to human life. They are beginning to realize that these claims are for the pregnancy and the lost right to choose. They are no longer looking at the claims as being brought to show that an unwanted child is an injury.

¹¹⁵Phillips, 508 F. Supp. 544.

¹¹⁶Roe, 410 U.S. at 153-54.

¹¹⁷Schork v. Huber, 648 S.W.2d 861 (Ky. 1983).

There is no reason to allow the parents to recover for the costs of raising a child and then place an unreasonable financial burden upon the doctor for a misdiagnosis or possible negligence in performing sterilization. The parents would retain the benefit of having the child while seeking to place the enormous expenses of his raising on the physician.

Id.

¹¹⁸*Id.* at 862.

Currently, there are four different theories of recovery for wrongful conception and wrongful birth claims. The first theory is to prohibit recovery because to award damages offends the fundamental concept of human life.¹¹⁹ A no recovery theory only enhances the harm caused by the physician. The parents bringing the wrongful birth and wrongful conception claims are doing so because they would have either terminated the pregnancy or tried not to conceive in the first place. To permit the no-recovery rule for parents' injuries goes against public policy and allows the physicians' negligence to go unchecked. Under this theory, the parents bear the burden of the physicians' negligence. Fortunately, only Nevada has continued to adhere to this theory of recovery.¹²⁰

The second theory on damages is full recovery. Under this type of recovery, the parents are able to recover the expenses of rearing a child usually to the age of majority. This type of recovery is generous, thus many states are reluctant to grant this type of relief.¹²¹

The third theory on damages is the benefits rule.¹²² This rule comes from the Restatement (Second) of Torts and states that "[W]hen the defendant's tortious conduct has caused harm to plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff which was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."¹²³ The basic idea of this rule is that the benefits of the child will be weighed against the harm that is caused by the negligence of the physicians.

The final theory of recovery is that of limited damages.¹²⁴ In situations involving a wrongful pregnancy action, many states allow a plaintiff to recover the damages immediately and proximately related to the failed sterilization and to the pregnancy and delivery of the child.¹²⁵ This theory of recovery does not allow damages for the raising of a normal child.¹²⁶ In situations involving a wrongful birth action, damages are usually limited to the birth of the child and to the extraordinary costs incurred as a result of the child's birth defects until the child reaches the age of majority.¹²⁷

The theory of limited damages seems to be the most popular theory. The limited damage theory provides relief for the actual pregnancy and birth that would not have occurred but for the negligence of the physicians. The theory also takes into consideration the benefits rule. By not allowing damages to raise a healthy child, the limited-damage approach recognizes that some good may come from an unplanned child. The parents usually come to love the child and are not burdened by his or her existence. In a wrongful-birth situation, the parents receive an award for the

¹¹⁹*Id.* at 866.

¹²⁰*Smith*, 728 S.W.2d 738.

¹²¹*Id.* at 742.

¹²²*Id.* at 743.

¹²³RESTATEMENT (SECOND) OF TORTS § 920 (1982).

¹²⁴*Smith*, 728 S.W.2d at 744.

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*James G.*, 332 S.E.2d 72.

extraordinary care that is necessary for the caring of the child. The parents are able to receive benefits for the child, although he or she may be abnormal. With the limited damage approach, the court is able to assist parents in a fair and reasonable manner while dealing either with the child or with unplanned children.

VI. CONCLUSION

Wrongful birth and wrongful conception must be recognized as causes of action. Wrongful birth must be recognized because of a woman's right to choose to have a child or not.¹²⁸ If a physician does not properly inform a woman that her fetus may be abnormal, and does not perform the necessary tests or render proper prenatal care, then the physician is taking away the woman's right to decide to terminate the pregnancy by not giving her all the relevant information.

Wrongful conception must be recognized as a way to regulate the medical field. If there is no remedy afforded to couples who receive negligent sterilization, the medical profession may become more negligent in its work and cause great harm to innocent patients. To have no remedy to this problem is contrary to public policy and will harm society as a whole. The tort of wrongful conception will help guard against such problems as negligent sterilization or the mislabeling of birth control devices or pills.

Wrongful conception and wrongful birth must also be recognized as separate and distinct causes of action. This is necessary to guard against problems with statutes of limitations and finding the original sources of harm. In many medical malpractice situations, the statute of limitations begins to accrue when the harm has occurred. In cases of wrongful conception and wrongful birth the harm is initiated at different times. For wrongful conception, the harm occurs at the moment of conception. For wrongful birth, the harm begins at the time of birth. If these two causes of action were not recognized as different and distinct, many problems will arise as to when the statute of limitations begins to accrue. Does the statute of limitations begin to accrue at conception or at birth? The difference in time may be essential to timely filing a claim.

The concept of wrongful life should be rejected. A child should not be able to bring a claim stating that he or she would be better off by not being born. This idea goes against public policy. If this is permitted, issues such as suicide and physician-assisted suicide would be brought into question. This would create confusion and many problems with society and the concept of life. Also, the question of whether or not someone would be better off by not being born is not one for the courts to decide.

Once a claim is established, the courts should recognize the limited-damage theory of recovery. The theory allows for recovery of the expense of the pregnancy and the medical care of abnormal child. The theory balances the physician's negligence with the parents' burden. The theory is also reasonable since it recognizes the benefits of a child, wanted or unwanted, on parents and society in general.

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¹²⁸See *Roe*, 410 U.S. at 153-54 ("Prior to viability, the physician, in consultation with the pregnant woman is free to decide that a pregnancy should be terminated without interference by the state.").