Approved February 29, 1984
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~p.m.~~ on February 10, 1984 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~: were: Senator Pomeroy, Winter, Burke, Feleciano, Gaines, Hein and Werts

Committee staff present: Mary Torrence, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Pat Goodson, Right to Life of Kansas, Inc.
John Brookens, Kansas Bar Association
Austin K. Vincent, Kansans For Life
Kathleen Sebelius, Kansas Trial Lawyers Association
Jerry Levy, Kansas Trial Lawyers Association

Senate Bill 258 - Wrongful life or birth actions prohibited.

The chairman pointed out this is a carry-over bill from the 1983 Legislative Session.

Pat Goodson testified in support of the bill. A copy of her testimony, and a copy of an article from the Washington Law Review with an analysis of Harberson v. Parke Davis are attached (See Attachments No. 1,2,3).

John Brookens testified the Kansas Bar Association is philosophically opposed to a theory of a cause of action of a wrongful life if you have a perfectly normal child. He suggested the committee hear from psychologists, psychiatrists, and attorneys who have tried cases as this. The bar association is unable to take a position on this precise bill. There is concern with the terms wrongful birth, wrongful conception, and wrongful life; they think they should be defined. A committee member inquired, if any research has been done in terms of whether or not the child has rights, rather than, the parents has rights; are there any studies of persons who have some level of birth defect and if they would rather not be born? Mr. Brookens replied, I think it deserves very careful attention. A copy of an article entitled "Wrongful life, Wrongful Birth: Emerging Theories of Liability" is attached (See Attachment No. 4).

Austin Vincent testified in support of the bill. A copy of his testimony is attached (See Attachment No. 5). He stated, we are putting pressure on doctors to abort.

Kathleen Sebelius testified in opposition to the bill and referred to an article she will make available to the committee, which is a national review of this area of the law indicating what is happening around the country.

Jerry Levy appeared in opposition to the bill. He stated as a trial lawyer there are two cases involved in this type of litigation. The case of the healthy child. He would not take the case when a healthy child is born. On the other side, you are taking away the right of the parents, who have a right to have or not have children. How defective is defective. The certainty of genetic impairment is no longer a mystery. With this bill you are telling the parents who decide not to have a child that they do not have a cause of action. He thinks the courts can handle this with the proper instruction to the jury. The parents still have that right to make that decision. Mr. Levy stated he feels the courts and the lawyers,

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./pxxx on February 10, 1984.

Senate Bill 258 continued

with this type of problem are going to handle it. We can certainly understand the burden on the parents and society when a severely deformed nonfunctioning child is born. A committee member inquired, if we should limit it to exclude the normal healthy births and take care of the others? Mr. Levy replied, I don't know that there is a way to do it. A committee member inquired, are we putting too much faith in juries on an ad hoc basis; are we requiring too much of them to weigh existence of life in the first place? If we allow these kinds of cases to continue, are we allowing these kinds of cases to continue? Mr. Levy replied, I can't answer that.

Senator Hein moved that the minutes of January 31, 1984, be approved. Senator Burke seconded the motion. The motion carried.

The meeting adjourned.

2-10-84

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Joan Knox	Topeka	K.B.A.
Pastor Vincent	Topeka	Kansans for Life
[illegible]	Topeka	S & S
Darlene Pegg Stearns	Topeka	Consultation of Churches
Pat Goodson	KC	RTL
Marjorie VanBuren	Topeka	CVA
Melissa Ness	Topeka	NARAL
Barb Reinert	"	KWPC
Jerry Levy	Topeka	KTLA
Kathleen Sebelius	"	KTLA
Ann Brookens	"	KBA Assn
D. Fuller		AP
Susan Schroeder	"	Budget Division
Chris Cohen	Kansas	Ks Lawyers
M. Hauver	Topeka	Capital-Journal
Sandy Kasse	Wheaton	RTLA
[illegible]	Topeka	C-J
Jayne W. Shellhorn	KCK	MHA LWV KCK, BPW KCK
Janice M. Jones	KCK	BPW KCK/LWV KCK/MHA
Penny Humphrey	Topeka	KS Planned Parenthood
Debra K. Hazlett	"	KANSANS FOR LIFE

2-10-84

Attach. #1

Testimony Senate Judiciary

February 10, 1984

Mr. Chairman, members of the committee. I am Pat Goodson. I represent Right To Life of Kansas, Inc.

A major purpose of our organization is the restoration of a sanctity of human life ethic to the law of our land; an ethic that was so badly impaired by the Roe v. Wade abortion decisions; and to stop the further deterioration of that ethic. We appreciate the opportunity to appear in support of Senate Bill 258 because we believe it is necessary in that goal.

For a number of years wrongful birth or wrongful pregnancy cases have been debated. Courts had generally rejected these suits on the basis that a persons life - the birth of a child was a blessing. In the wake of Roe v. Wade however courts have begun to favor the notion that the birth of a child was something less than a blessed event. Without legislation such as that proposed today, these cases seem inescapably a part of our future.

Mr. Chairman I have included a copy for the committee of the testimony I gave on this bill last year, and I will not repeat that testimony, but today I want to bring to your attention a case decided by the supreme court of the state of Washington which typifies our concerns with this type of lawsuit. I also included an excellent analysis of the case, Harberson v. Parke-Davis with my testimony.

In Harberson, the Washington supreme court relied on the U S supreme court abortion decisions. Accepting or acknowleging the fact that a woman has the right to have an abortion under Roe v. Wade, the court outlined in the wrongful birth section of their decision two areas I want to address

The court stated that for the purposes of the decision that they were going

Atch. 1

to render, wrongful birth will be viewed as an action based on an alleged breach of duty of health care providers where the breach is the proximate cause of the birth of a defective child. The court outlines that parents may avoid the birth of a defective child by aborting the fetus. Immediately in defining injury and duty, then, they are clearly addressing the question of aborting defective children. The difficulty in this inalysis is recognized by the court. They state:

" Are these developments the first steps towards a "Facist-Orwellian societal attitude of genttic purity...or Huxley's Brave New World?" Or do they provide positive benefits to individual families and to all society by avoiding the vast emotional and economic costs of defective children."

The court opted for the latter and then stated:

"Therefore we hold that parents have a right to prevent the birth of a defective child and the health care providers a duty correlative to that right."

Once having made this determination, the courtthen reaches what it considers the inevitable consequence of recognizing the parents' right to avoid the birth of a defective child and goes on to hold that the birth of such a child is the act onable injury. This is the point at which the court has determined that the injury is not the defect, but that the injury is in fact birth . To do this, of course, they must have made the judgment that non-existence or non-life is a greater value than to be born with some type of handicap or disability. They offer no raticnale for this, but made the prudential judgment that because of the "vast economic and emotional costs of defective children" that non-life has a greater value.

In considering wrongful life causes of action, the court began with a definition:

"In a wrongful life claim, the child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence--his failure to adequately inform the parents of the risk--has caused the birth of the child. The child argues that but for the inadequate advice, it would not have been born to experience the pain and suffering attributable to deformity."

The court clearly establishes the child's individual right to bring such a cause of action. This expands Roe v. Wade decisin which gives the mother the right to an abortion and clearly establihses that a child has a right to be aborted.

This case of cours was in Washington state. Recent cases in Kansas have gone in antohter direction thankfully.

Judge Michael Corrigan of Wichiat ruled in December that the parents of a health child born following a failed sterilization coud not recover the costs of pregnancy.

In making his ruling Judge Corrigan stated to [illegible] award the cost of rearing a child "attacks the family unity". We agree with Judge Corrigan but the case has been appealed and it could have a different outcome on appeal.

Because of the preeminence of these lawsuits and the likeliehood of an appellate court reversal this bill is badly needed. Because of the dangerous precedent in Washington and elsewhere it is essential that both wrongful birth and wrongful life actions be prohibited and we would reccomend the addition of

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language to further clarify that this is the intent of Senate bill 258.

Section 1 a) of the bill as drafted precludes the "wrongful life" action itself, that is a claim made on behalf of a chiild that he or she should noth have been born.

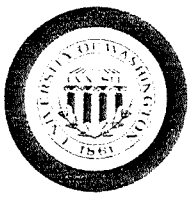
We suggest a new section to be inserted which would preclude the so called wrongful birth action that is a claim mad e by parents that they would have had an abortion had they known their child to be handicapped, but were not so informed by one with the "duty" to determine this and inform them of it It also has the effect, when an abortion results in a live birth, of precluding anyone from obtaining damages because the child survived.

New section:
No person shall be entitled to maintain an action or receive an award of damages based on the claim that but for the negligence of another, a child would have been aborted.

2-10-84.

Attach. #2

WASHINGTON LAW REVIEW



Atch. 2

#2

WASHINGTON RECOGNIZES WRONGFUL BIRTH AND WRONGFUL LIFE—A CRITICAL ANALYSIS—*Harbeson v. Parke-Davis, Inc.*, 98 Wn. 2d 460, 656 P.2d 483 (1983).

Ten years ago the United States Supreme Court gave parents the legal right to prevent the birth of children by holding that women have a constitutionally protected right to abortion.[1] Since then, medical science has become increasingly accurate at detecting and predicting birth defects.[2] Parents therefore have more information on their risk of bearing a child with birth defects, in addition to having the freedom to prevent birth.

As a result, the courts have been faced with an increasing number of lawsuits brought by children with birth defects and by their parents.[3] Both parents and children claim that medical malpractice, or failure to impart material information to the parents, precluded the parents' right to an informed decision on whether to give birth to the child.[4] The parent, under a wrongful birth claim,[5] seeks damages for the financial and emotional costs of raising an impaired child. The child, under a wrongful life claim,[6] asserts that he or she would have been better off not being born and seeks compensation for birth in an impaired condition.

Claims for wrongful birth and wrongful life often arise out of the same event: birth of a handicapped child. Because the claims rest on different policy considerations and because they involve different types of injury, courts have treated them differently.[7] Allowing either cause of action, however, requires courts to determine that birth of an impaired child is an injury.

The Washington Supreme Court recently recognized both wrongful birth and wrongful life causes of action in *Harbeson v. Parke-Davis, Inc.*[8] The court joined a growing number of jurisdictions that grant a

1. Roe v. Wade, 410 U.S. 113 (1973).
2. *See infra* note 39 and accompanying text.
3. *See* Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 DUQ. L. REV. 857, 857 (1980); Note, *Wrongful Life and a Fundamental Right to be Born Healthy:* Park v. Chessin; Becker v. Schwartz, 27 BUFFALO L. REV. 537, 537 (1978) [hereinafter cited as *Fundamental Right to be Born Healthy*]; Note, *Child v. Parent: A Viable New Tort of Wrongful Life?*, 24 ARIZ. L. REV. 391, 391 (1982).
4. *See infra* notes 33–35 & 91–93 and accompanying text.
5. *See infra* text accompanying notes 33–36.
6. *See infra* text accompanying notes 91–94.
7. *See infra* notes 37 & 95 and accompanying text.
8. 98 Wn. 2d 460, 656 P.2d 483 (1983) (certification from the United States District Court for the Western District of Washington).

wrongful birth claim.[9] In recognizing the wrongful life claim, however, the court broke with the great weight of authority.[10]

This Note briefly examines the facts of the *Harbeson* case. Then, in separate sections, the Note reviews the legal background for the wrongful birth and wrongful life causes of action and analyzes and criticizes the court's reasoning on each claim. The analysis and criticism of the wrongful birth claim is necessary to an evaluation of the court's recognition of both the wrongful birth and wrongful life claims since the court relied on its wrongful birth reasoning in recognizing the wrongful life claim. The Note concludes that the court did not adequately establish the crucial elements of a wrongful birth cause of action, though accepted tort principles support recognition of wrongful birth claims. It also concludes that the court did not adequately support its recognition of a wrongful life cause of action and that wrongful life claims are incompatible with accepted tort principles. The Note further concludes that accepted tort principles would have supported recovery in this case, making it unnecessary to allow the claims for wrongful birth and wrongful life. Finally, the Note suggests alternatives to tort litigation to ease the burden of birth defects on the deformed child and on the deformed child's family.

I. THE FACTS OF *HARBESON*

During Jean Harbeson's first pregnancy in 1970 she suffered a grand mal seizure[11] and learned that she was an epileptic.[12] Her doctors prescribed the drug Dilantin to control her convulsions.[13] Three months later, Mrs. Harbeson gave birth to a normal boy.[14] After the birth she continued to take Dilantin.[15] Between November 1972 and July 1973 Leonard and Jean Harbeson informed three Air Force doctors that they were considering having other children and that they were concerned about the risks to the fetus of taking Dilantin during pregnancy.[16] Each

9. *See infra* note 37 and accompanying text.

10. *See infra* note 95 and accompanying text

11. A grand mal seizure is a major seizure characterized by loss of consciousness, muscle spasms, and repetitive jerking. STEDMAN'S MEDICAL DICTIONARY 472 (4th lawyer's ed. 1976).

12. Harbeson v. Parke-Davis, Inc., 98 Wn. 2d 460, 462, 656 P.2d 483, 486 (1983).

13. *Id.* Dilantin is the first choice of doctors in the treatment of epilepsy. Further, Mrs. Harbeson had experienced adverse reactions to other anticonvulsants that the doctors had prescribed. Finding of Fact No. 13, Findings of Fact and Conclusions of Law, Harbeson v. Parke-Davis, Inc., No. C78-302T (W.D. Wash. Dec. 4, 1981) (copy on file with the *Washington Law Review*) [hereinafter cited as Finding of Fact or Conclusion of Law].

14. *Harbeson*, 98 Wn. 2d at 462, 656 P.2d at 486.

15. *Id.* at 463, 656 P.2d at 486.

16. *Id.*

doctor told them that Dilantin could cause cleft palate[17] and temporary hirsutism,[18] but no more serious defects. None of the doctors searched the literature or consulted other sources for information that might associate Dilantin with more serious birth defects.[19]

Relying on the doctors' assurances, Mrs. Harbeson became pregnant twice while continuing to take Dilantin as prescribed.[20] She gave birth to daughters in April 1974 and May 1975. Both girls suffered from fetal hydantoin syndrome,[21] which is accompanied by mild to moderate mental and physical birth defects.[22] The Harbesons said that had they been informed of the potential birth defects associated with the use of Dilantin during pregnancy, they would not have had any more children.[23]

Leonard Harbeson brought a wrongful birth action for himself and his wife in the United States District Court for the Western District of Washington.[24] He also brought a wrongful life action as guardian ad litem for

17. Cleft palate is a congenital defect characterized by a fissure in the midline of the palate resulting from the failure of the two sides to fuse during embryonic development. The condition is surgically correctable. MOSBY'S MEDICAL & NURSING DICTIONARY 237 (1983). The Harbeson girls were not affected by cleft palate. Finding of Fact No. 32.

18. Hirsutism is the growth of excessive body hair in a masculine distribution due to heredity, hormonal dysfunction, or medication. Treatment of the specific cause will stop the growth of the hair. MOSBY'S MEDICAL & NURSING DICTIONARY 513 (1983). The Harbeson girls were not affected by hirsutism. Finding of Fact No. 32.

19. *Harbeson*, 98 Wn. 2d at 463, 656 P.2d at 486.

20. *Id.* The U.S. District Court, *see infra* note 24, did not determine whether prescription of Dilantin during pregnancy was negligent given Mrs. Harbeson's need for an anticonvulsant and her inability to take other anticonvulsants to control her serious epilepsy. According to the PHYSICIANS' DESK REFERENCE, anticonvulsants, when being used to prevent major seizures, should not be discontinued during pregnancy because of the strong possibility of precipitating seizures "with attendant hypoxia and threat to life." PHYSICIANS' DESK REFERENCE 1420 (36th ed. 1982).

21. Fetal hydantoin syndrome was first described in August 1975. Hanson & Smith, *The Fetal Hydantoin Syndrome*, 87 J. OF PEDIATRICS 285 (1975). The syndrome is associated with a group of drugs called hydantoins, of which Dilantin is one, Finding of Fact No. 8, and involves birth defects such as cleft palate, hirsutism, growth deficiencies, cardiac defects, skeletal anomalies, developmental defects, and mild to moderate retardation. Finding of Fact No. 31.

22. *Harbeson*, 98 Wn. 2d at 463, 656 P.2d at 486.

23. *Id.* It is not clear whether the Harbesons would have aborted if they had been informed of the defects after conception. The district court concluded only that they would not have had any more children. Finding of Fact No. 34. This is a potentially important distinction because if the Harbesons would have been unwilling to abort, the physicians would be relieved of liability simply by passing on the available information about Dilantin, whereas if the Harbesons claimed that they would have aborted to avoid the defect, the physicians may have had the additional duty to give the Harbesons information about amniocentesis. Given the sketchy information available about Dilantin in 1972 and 1973, *see infra* note 27, the information may not have been sufficient to influence a reasonable person's decision to conceive. *See infra* note 48. It may have been sufficient, however, to lead a reasonable person to undergo amniocentesis after conception to detect the improbable but possible defects associated with Dilantin. Thus, the physician's duty may depend on what the Harbesons meant by saying that they would not have had any more children.

24. Harbeson v. Parke-Davis, Inc., 98 Wn. 2d 460, 461, 656 P.2d 483, 483 (1983). Defendants in the suit were the United States of America, employer of the three military doctors who treated Jean

his two daughters.[25] The Harbesons claimed that the two girls were born with physical and mental defects because the doctors failed to inform the parents of the risks of birth defects caused by Dilantin.[26] The United States District Court for the Western District of Washington found that Dilantin caused the defects and that all four Harbesons were entitled to recover damages.[27] The district court certified four questions of law to the

Harbeson, and Parke-Davis, Inc., manufacturer of Dilantin. *Id.* at 462, 656 P.2d at 486. The trial was split because the claim against the United States could not be tried to a jury under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2402 (1976). Conclusion of Law No. 3. The claim against Parke-Davis, Inc. was tried to a jury. Finding of Fact No. 2. The claim against the United States was tried to the United States District Court for the Western District of Washington, Judge Jack E. Tanner presiding. Finding of Fact No. 3.

25. *Harbeson*, 98 Wn. 2d at 464, 656 P.2d at 487.

26. *See id.* at 462–63, 656 P.2d at 486. Because the alleged negligent act of the doctors was a failure to impart material information to the Harbesons under the informed-consent doctrine, the injury suffered by the Harbesons was not the children's defects but the births themselves. *See id.* at 472, 656 P.2d at 491. Thus, the claims were based on wrongful birth and wrongful life. *Id.* at 476, 483, 656 P.2d at 493, 497.

27. *Id.* at 464, 656 P.2d at 487. Among the pertinent Conclusions of Law were the following:

4. Dilantin was a proximate cause of the defects and anomalies suffered by Elizabeth and Christine Harbeson.

5. The physicians at Madigan were the agents of the Defendant United States of America, and said Defendant is responsible for the acts and omissions of the Madigan physicians.

6. Plaintiff, Leonard Harbeson, is the duly appointed guardian ad litem for the minor plaintiffs herein, Elizabeth and Christine Harbeson, and is authorized to bring the present action on their behalf.

7. The physicians at Madigan failed to conduct a literature search or to consult other sources in regard to the effects of Dilantin during pregnancy, even though the plaintiffs Leonard and Jean Harbeson specifically asked all three Madigan physicians about possible birth defects associated with the mother's consumption of Dilantin during pregnancy. Said acts of the Madigan physicians:

a. breached the standard of care for the average physician acting under the same or similar circumstances, and the physicians were thereby negligent;

b. were not reasonably prudent, and therefore, were negligent.

8. An adequate literature search, or consulting other sources, would have yielded such information of material risks associated with Dilantin in pregnancy that reasonably prudent persons in the position of the Harbesons would attach significance to such risks in deciding whether to have further children.

9. Each of the four Harbeson Plaintiffs has sustained permanent and severe damages and injuries past, present and future, as a direct and proximate result of the negligence of the Madigan physicians.

10. Plaintiffs are entitled to recover damages from the Defendant United States of America.

Harbeson, 98 Wn. 2d at 463–64, 656 P.2d at 486–87.

These conclusions of law become questionable, at best, when some of the facts on which they are based are examined. First, Conclusion of Law No. 4 should be viewed in light of the fact that the jury in the claim against Parke-Davis, Inc., found that Dilantin was not the cause of the defects. Special Verdict Form, Response 1, Harbeson v. Parke-Davis, Inc., No. C78-302T (W.D. Wash. Dec. 4, 1981) (copy on file with the *Washington Law Review*). Even the current edition of the PHYSICIANS' DESK REFERENCE states that reports linking anticonvulsants to defects cannot be regarded as sufficient to prove a cause and effect relationship. PHYSICIANS' DESK REFERENCE 1420 (36th ed. 1982). Second, Conclusion of Law Nos. 7 & 8 are weakened by an examination of the meager information that a literature search would have revealed had the physicians made one. The literature search should have

Washington Supreme Court to determine the status of wrongful birth and wrongful life actions in Washington.[28]

The Washington Supreme Court held: (1) both wrongful birth and wrongful life are recognized causes of action in Washington;[29] (2) the Harbesons had claims based on both medical malpractice and lack of informed consent;[30] (3) the damages recoverable by Leonard and Jean Harbeson for wrongful birth were the excess costs of raising two children with defects over the costs of raising two normal children;[31] and (4) the damages recoverable by Elizabeth and Christine Harbeson for wrongful life were the excess costs for special medical treatment and training required because of their defects over the costs of medical treatment and training required by children not afflicted with those defects.[32]

II. WRONGFUL BIRTH

A. Legal Background

A claim for wrongful birth is an action brought by parents against a

taken place in 1972 and 1973, but the first article describing fetal hydantoin syndrome was not published until 1975. *See supra* note 20. Further, the PHYSICIANS' DESK REFERENCE for the years 1972–1973 in describing Dilantin said that "evidence of a teratogenic effect in the human has not been established." Finding of Fact No. 33. The only other literature specifically noted by the District Court was an article in a British journal, Speidel & Meadows, *Maternal Epilepsy and Abnormalities of the Fetus and Newborn*, 2 LANCET 839 (1972), [hereinafter cited as Speidel], that discussed fetal abnormalities in children with epileptic mothers. Finding of Fact No. 20. That article, however, did not specifically link those defects to Dilantin. Speidel, *supra*, at 843; Respondent's Brief at 5, Harbeson v. Parke-Davis, Inc., 98 Wn. 2d 460, 656 P.2d 483 (1983). Thus, it seems unlikely that the physicians would have found any significant information linking Dilantin to birth defects even if they had made a literature search.

28. *Harbeson*, 98 Wn. 2d at 464, 656 P.2d at 487. The certification was pursuant to the procedures established in WASH. REV. CODE § 21.60.020 (1981) and WASH. R. APP. P. 16.16 (1977). The four questions were:

1. May Plaintiff parents Leonard and Jean Harbeson maintain a "wrongful birth" action?

2. If the answer to question number one is "yes",

a. Are the claims of Leonard and Jean Harbeson controlled by RCW 4.24.010 and/or RCW 4.24.290?

b. May Leonard and Jean Harbeson recover damages?

3. May Plaintiff children Elizabeth and Christine Harbeson maintain a "wrongful life" claim?

4. If the answer to question three is "yes",

a. Are the claims of Elizabeth and Christine Harbeson controlled by RCW 4.24.290?

b. May Elizabeth and Christine Harbeson recover damages?

Harbeson, 98 Wn. 2d at 464, 656 P.2d at 487.

29. *Id.* at 467, 483, 656 P.2d at 488, 497.

30. *Id.* at 477, 656 P.2d at 494.

31. *Id.*

32. *Id.* at 483, 656 P.2d at 497. The child's damages are limited to the costs for special care and training during the child's majority if the parents recovered such costs for the child's minority in a wrongful birth action. *Id.* at 480, 656 P.2d at 495.

physician[33] whose negligence in treating the mother caused her to give birth to a deformed child. The negligence can be either (1) a failure to provide parents with material facts necessary to an informed decision whether to conceive or give birth to a child,[34] or (2) a failure to conform to the accepted standard of care in performing medical treatment undertaken to prevent the conception or birth of a deformed child.[35] In short, the parents claim that "but for" the physician's negligence, they would not have conceived or given birth to the deformed child.[36] Consequently, the parents seek to recover damages to compensate them for the added financial and emotional costs of caring for and raising that child.

All eleven jurisdictions that have considered the question of wrongful birth recognize the claim.[37] This trend is largely a product of two concurrent developments.[38] The first is the expanding ability of medical science

33. In most wrongful birth and wrongful life cases the negligent act is by a physician. Logically, however, the elements of the two claims could also be proven in a claim against other providers of health care if their negligence caused a lack of information or false information on which the parents based their decision to bear the child. Thus, ultrasonography technicians, lab technicians performing amniocentesis tests, and similar professionals may be liable under wrongful birth and wrongful life claims.

34. *Harbeson*, 98 Wn. 2d at 465, 656 P.2d at 487; Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 715 (1982) [hereinafter cited as Rogers]

35. Speck v. Finegold, 497 Pa. 77, 439 A.2d 110, 113 (1981); *Harbeson*, 98 Wn. 2d at 467, 656 P.2d at 488.

36. Wrongful birth claims must be distinguished from other related claims. In wrongful birth claims the parents do not claim that the physician caused the defects but, rather, that the physician caused the birth itself. Birth is the injury, and the physician caused it by precluding the parents' informed decision on whether to conceive, bear, or abort the deformed child. Thus, the injury is not actionable under standard medical malpractice principles. The children in wrongful birth cases have mental or physical defects. If the children are born healthy but unwanted, the claim is more accurately called "wrongful conception" or "wrongful pregnancy." *See* Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Rogers, *supra* note 34, at 740-41.

37. Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (construing Alabama law); Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Recognition of the claim appears to be a clear trend in the law. Rogers, *supra* note 34, at 741–48. The Illinois Supreme Court recently rejected a "wrongful birth" claim, but the births in both of the consolidated cases were of healthy children. Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983). Thus, the claims technically were not wrongful birth claims. *See supra* note 36.

38. Rogers, *supra* note 34, at 743; Note, *Torts—Wrongful Birth—New Jersey Recognizes Emotional Distress Damages in a Wrongful Birth Action Involving a Deformed Child*—Berman v. Allan, 55 WASH. L. REV. 701, 704 (1980) [hereinafter cited as *Wrongful Birth Note*].

to predict and detect birth defects before conception or birth. These advances make it possible to detect the majority of known birth defects and allow parents to determine before birth whether the child will be affected by any of them.[39] As these advances have become accepted and available, the courts have become more willing to find negligence in a physician's failure to inform parents of their availability.

The second and more important development is the decision of the United States Supreme Court in *Roe v. Wade*.[40] In *Roe v. Wade*, the Court placed abortion decisions within a woman's constitutionally protected right of privacy.[41] The decision also denied constitutional protection to the fetus because the fetus is not a "person" within the meaning of the fourteenth amendment.[42] Thus, the parents may decide to abort if they know or have reason to believe that the child could be born with birth defects. Given the availability of means to discover birth defects during pregnancy and given the parents' legal right to act on that information to prevent birth, courts have found that a physician's negligent interference with that right is actionable.[43]

39. The two most refined diagnostic techniques are amniocentesis and ultrasonography. Amniocentesis is an obstetric procedure in which a small amount of amniotic fluid containing fetal cells is removed for laboratory analysis. The procedure is accomplished by inserting a needle attached to a syringe through the woman's abdomen and into her uterus. MOSBY'S MEDICAL & NURSING DICTIONARY 48 (1983). Amniocentesis can detect all known chromosomal abnormalities and 70 of 125 known metabolic defects. NATIONAL FOUNDATION/MARCH OF DIMES, BIRTH DEFECTS, TRAGEDY AND HOPE 15–16 (1977).

Ultrasonography is the "location, measurement or delineation of deep structures by measuring the reflection or transmission of ultrasonic waves." STEDMAN'S MEDICAL DICTIONARY 1508 (4th Lawyer's ed. 1976). Ultrasonography may be used by itself to detect anatomical abnormalities or in combination with amniocentesis. MOSBY'S MEDICAL & NURSING DICTIONARY 48 (1983). It is an especially desirable procedure because it presents no discernible risk to the fetus. *See* Note, *Father and Mother Know Best: Defining Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L. J. 1488, 1493 n.22 (1978).

40. 410 U.S. 113 (1973). It is generally recognized that *Roe v. Wade* is the primary development allowing recognition of wrongful birth claims. Robak v. United States, 658 F.2d 471, 474 (7th Cir. 1981); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 14 (1979); Note, Robak v. United States: *A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.-KENT L. REV. 725, 732 (1982) [hereinafter cited as *Damage Formula Note*]; *Wrongful Birth Note*, *supra* note 38 at 704; Comment, *"Wrongful Birth": Should Liability be Imposed Upon a Physician Who Fails to Warn Parents of the Risks of Defects in Their Unborn Children?*, 14 GONZ. L. REV. 891, 900 (1979).

41. 410 U.S. 113, 153 (1973). The Supreme Court derived the woman's right of privacy from the fourteenth amendment and held that this right included the right to make decisions on whether to abort. *Id.* The woman's right to abort is virtually unlimited in the first trimester and is limited only by the state's interest in maternal health in the second trimester. Thus, the woman has time to undergo fetal testing and get the results while she still has a relatively unfettered right to an abortion. She may still abort in the third trimester unless the state has exercised its right to regulate or prohibit abortions in the interest of protecting the potential life of the fetus. Roe v. Wade, 410 U.S. 113, 164–65 (1973).

42. *Id.* at 158.

43. The necessity of *Roe v. Wade* to wrongful birth claims has been recognized by the courts.

#2

B. *The* Harbeson *Court's Reasoning*

The court noted that a wrongful birth claim has been defined as an action in which parents allege that their physician's failure to inform them of the increased possibility that the mother would give birth to a child suffering from birth defects precluded an informed decision about whether to have the child and resulted in the birth of a deformed child.[44] The *Harbeson* court expanded this standard definition of wrongful birth to include the negligent performance of medical procedures designed to avoid conception, discover a defect, or terminate a pregnancy.[45] In both cases, the negligence is alleged to be the proximate cause of the birth of a deformed child.

Because wrongful birth is based on negligence, specifically medical malpractice, the court examined the tort principles that govern actions against physicians. The four elements necessary to recover in any negligence action are: duty, breach, proximate causation, and injury.[46] Duty, according to the court, is the critical concept.[47] The court noted that the physician's duty to the patient includes the obligation to impart all material information regardless of community standards.[48] Medical science

See, e.g., Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 14 (1979); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372, 377 (1975). *Roe v. Wade* is unnecessary to wrongful birth claims based on pre-conception negligence or failure to inform, in which the parents claim that but for the physician's negligence they would not have conceived. The decision is, however, necessary for claims based on post-conception failure to inform, at least in states where abortions are against public policy. In these claims the parents must assert that "but for" the physician's negligence they would have aborted.

44. *Harbeson*, 98 Wn. 2d at 465, 656 P.2d at 487 (quoting Comment, *Berman v. Allan*, 8 HOFSTRA L. REV. 257, 257–58 (1979)).

45. *Harbeson*, 98 Wn. 2d at 467, 656 P.2d at 488.

46. *Id.* at 468, 656 P.2d at 489 (citing Hunsley v. Giard, 87 Wn. 2d 424, 434, 553 P.2d 1096, 1102 (1976)).

47. *Harbeson*, 98 Wn. 2d at 471, 656 P.2d at 491.

48. *Id.* at 470, 656 P.2d at 490. The informed-consent doctrine requires that information be given to patients because a reasonable person would consider it in making a decision, not because other practitioners in the community would give it to their patients. *See generally* Zebarth v. Swedish Hosp. Med. Ctr., 81 Wn. 2d 12, 499 P.2d 1 (1972) (discussing the informed-consent doctrine in Washington); Miller v. Kennedy, 11 Wn. App. 272, 522 P.2d 852 (1974)(same), *aff'd per curiam*, 85 Wn. 2d 151, 530 P.2d 334 (1975). The legislature adopted the informed-consent doctrine in 1976. Act of Feb. 21, 1976, ch. 56, § 8(3), 1975–76 Wash. Laws 217–18 (codified at WASH. REV. CODE § 7.70.030(3) (1982)). The statutory elements of an informed-consent action are as follows:

> (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:
>
> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

has given the health care system the ability to detect birth defects in the unborn child and to predict them before conception.[49] The court noted that, given accurate information, parents may prevent the birth of a deformed child even after conception.[50] The court concluded that it must recognize the benefits of these legal and scientific developments and held that the parents have a right to prevent the birth of deformed children.[51]

The court found that physicians have a duty, "correlative" to that right, to impart to parents all material information on the likelihood of birth defects in future children to enable parents to decide whether to avoid conception or birth of such children.[52] If any medical procedures are undertaken, the physician also has the duty to use reasonable care.[53]

The court found the second element of the tort analysis more straightforward. It said that "[b]reach [of the duty] will be measured by failure to conform to the appropriate standard of skill, care, or learning."[54] This standard of care is defined both by statute[55] and by judicial decision[56] and includes the duty to inform the patient of material risks.[57]

> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.
>
> (2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his representative would attach significance to it in deciding whether or not to submit to the proposed treatment.

WASH. REV. CODE § 7.70.050 (1982).

49. *Harbeson*, 98 Wn. 2d at 472, 656 P.2d at 491. *See also supra* note 15 and accompanying text.

50. *Harbeson*, 98 Wn. 2d at 472, 656 P.2d at 491.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 473, 656 P.2d at 492 (citing WASH. REV. CODE §§ 4.24.290, 7.70.040 (1982) and Gates v. Jensen, 92 Wn. 2d 246, 595 P.2d 919 (1979)).

55. The Washington legislature has defined the standard of care in two statutes. The first statute provides in part:

> In any civil action for damages based on professional negligence against a hospital . . . or against a member of the healing arts . . . the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care and learning possessed by other persons in the same profession and that as a proximate result of such failure the plaintiff suffered damages, but in no event shall the provisions of this section apply to an action based on the failure to obtain the informed consent of a patient.

WASH. REV. CODE § 4.24.290 (1982).

The second statute provides:

> The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:
>
> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

WASH. REV. CODE § 7.70.040 (1982).

The court derived the third element, injury, from its discussion of duty. The court reasoned that the "inevitable consequence" of recognizing the right of parents and the correlative duty of the physician is "that the birth of [a deformed] child is an actionable injury." [58] Thus, just as the physician's duty is a product of the parents' right, the parents' injury is a product of the breach of the physician's duty.

Finally, the court considered proximate cause. Proximate cause is established by showing that the breach of a duty was a cause in fact of the injury and that, as a matter of law, liability should result.[59] Cause in fact in wrongful birth claims is established by proving that "but for" the physician's breach of duty, the deformed child would not have been born. The court decided that, in wrongful birth cases, cause in fact establishes proximate cause.[60]

After reviewing the four elements of the wrongful birth claim, the court concluded that imposing liability is a policy decision. It decided to recognize a cause of action for wrongful birth because the claim (1) "conforms comfortably to the structure of tort principles,"[61] (2) "is a logical and necessary development" given legal and scientific advances,[62] and (3) "will 'promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong.' "[63]

More troublesome to the court was the issue of damages.[64] The court relied on section 4.24.010 of the Washington Revised Code, which provides an action for the death or injury of a child. The court acknowledged that the statute is not on point,[65] but thought that the policy considerations underlying the statute applied equally to wrongful birth.[66] The court held

56. The standard of care in Washington is set forth in Gates v. Jensen, 92 Wn. 2d 246, 253, 595 P.2d 919, 924 (1979) and Helling v. Carey, 83 Wn. 2d 514, 519, 519 P.2d 981, 983 (1974). The applicable standard of care in 1972 and 1973—the average practitioner standard—was set forth in Hayes v. Hulswit, 73 Wn. 2d 796, 797, 440 P.2d 849, 850 (1968).

57. *Harbeson*, 98 Wn. 2d at 470, 656 P.2d at 490.

58. *Id.* at 473, 656 P.2d at 492.

59. *Id.* at 476, 656 P.2d at 493.

60. *Id.*

61. *Id.* at 467, 656 P.2d at 488.

62. *Id.*

63. *Id.* at 473, 656 P.2d at 491 (quoting Rogers, *supra* note 34, at 757).

64. *Id.* For a discussion of how other courts have treated the damages problem, see Rogers, *supra* note 34, at 750–52 and Comment, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127 (1978) [hereinafter cited as *Wrongful Birth Damages*]. *See also* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (allowing pecuniary but not emotional damages); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981) (granting both pecuniary and emotional damages).

65. *Harbeson*, 98 Wn. 2d at 475, 656 P.2d at 493.

66. *Id.* The statute provides in part:

> The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support . . . . In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

WASH. REV. CODE § 4.24.010 (1982).

that "recovery may include the medical, hospital, and medication expenses attributable to the child's birth and to its defective condition, and in addition damages for the parents' emotional injury caused by the birth of the defective child."[67]

C. *Analysis*

The claim for wrongful birth is the easier of the two causes of action to support logically because of the United States Supreme Court's decision, in *Roe v. Wade*, that a woman has a constitutionally protected right to an abortion.[68] Recognition of a cause of action for wrongful birth not only relies on *Roe v. Wade*[69] but is a logical consequence of that decision.[70] If a woman has a constitutionally protected right to abort, and the fetus has no constitutionally protected right to life, the woman has a claim against any physician who interferes with the woman's exercise of her right by breaching the duty to impart material information to the woman or by failing to use reasonable care in treating her.[71]

Even granting the justification for wrongful birth claims that originates in *Roe v. Wade*, the *Harbeson* court failed to establish several crucial elements of the claim. Two issues deserve special attention: injury and damages.

67. *Harbeson*, 98 Wn. 2d at 475, 656 P.2d at 493.

68. Roe v. Wade, 410 U.S. 113 (1973); *see supra* notes 41–43 and accompanying text.

69. *See supra* note 40 and accompanying text.

70. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 14 (1979). Courts that considered the claim before *Roe v. Wade* denied recovery because of the public policy against abortion. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 701 (1967) (Francis, J., concurring); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41, 46 (Sup. Ct. 1968), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd mem.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972). Courts that have considered the wrongful birth claim since *Roe v. Wade* have granted recovery on the grounds that because a woman has a constitutionally protected right to an abortion, she also has a right to have all available information necessary for an informed decision on whether to exercise that right. *See, e.g.*, Robak v. United States, 658 F.2d 471, 475 (7th Cir. 1981); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695 (E.D. Pa. 1978). At least one commentator has even suggested that wrongful birth claims should be allowed as one way to put meaning into the woman's right to an abortion. *Wrongful Birth Note*, *supra* note 38, at 706.

71. Phillips v. United States, 508 F. Supp. 544, 550 (D.S.C. 1981); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 14 (1979); Rogers, *supra* note 34, at 753.

#2

1. *Injury*

The court stated that birth is the actionable injury,[72] but it never made clear how it determined that birth is an injury. The court approached the question from a concept of duty: that is, the court found the injury to be a product of a breach of duty.[73] In essence, the court found that the parents had the right to avoid the birth of a deformed child, and a breach of the duty to protect that right led to the injury, which was the birth of a deformed child. But this reasoning puts the cart before the horse. "Duty" is shorthand for the conclusion that the defendant has a legal obligation to protect the plaintiff from any of the defendant's actions that risk injury to the plaintiff.[74] Thus, crucial to the concept of duty is the prior determination that the defendant's actions risk injury to the plaintiff.

It is plausible that the additional economic and emotional costs of raising a deformed child are an injury to parents who could have avoided them.[75] Therefore, the court's failure to realize that injury—not duty—is the critical concept is not fatal to its recognition of wrongful birth. This failure, however, weakens the court's discussion of wrongful life. The court relied on its wrongful birth reasoning to establish the wrongful life cause of action. The court's failure to recognize that injury is the critical concept and to show that birth with defects is an injury is fatal to its analysis when, as in the wrongful life claim, the injury cannot be independently established.[76]

2. *Damages*

Assuming that birth is an injury, the court's rationale for granting the damages that it did is faulty. The court relied on section 4.24.010 of the Washington Revised Code, which it acknowledged is not on point.[77] This statute provides an "[a]ction for injury or death of a child"[78]—an action that arises in a situation very different from the birth of a deformed child. Under the statute, the parents' loss is basically measured by the difference between the parents' condition before the child's injury or death and their

72. *Harbeson*, 98 Wn. 2d at 473, 656 P.2d at 492.
73. *Id. See supra* note 58 and accompanying text.
74. W. PROSSER, LAW OF TORTS § 53 (4th ed. 1971). As articulated by Judge, later Justice, Cardozo, "[t]he risk reasonably to be perceived defines the duty to be obeyed." Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99, 100 (1928). *See also infra* notes 158–60 and accompanying text.
75. *Wrongful Birth Damages*, *supra* note 64, at 131; *see, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977); Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901 (1978) (discussing the elements of the injury).
76. *See infra* note 127 and accompanying text.
77. *Harbeson*, 98 Wn. 2d at 475, 656 P.2d at 493.
78. WASH. REV. CODE § 4.24.010 (1982).

condition after the injury or death. Because the parents of a deformed child had no chance of having a normal child, they have not had their condition worsened in the same way. Thus, section 4.24.010 applies to a loss the parents neither suffered nor could have suffered.

The policy considerations that should underlie damage awards in wrongful birth claims are also different from those underlying section 4.24.010. One policy consideration is the certainty with which damages are measurable. A fundamental principle is that the plaintiff must establish the amount of damages with reasonable certainty.[79] The requirement of reasonable certainty is necessary to eliminate speculation and conjecture in the award of damages.[80] If damages are uncertain or based on undue speculation, the damages claim should be dismissed.[81] Allowing damages for the death or injury of a child is, presumably, a determination that such damages may be fixed with reasonable certainty.

For two reasons, damages in wrongful birth claims lack the certainty of damages in claims for the death or injury of an existing child. First, since tort damages are compensatory in nature,[82] the purpose of damages is to restore the parents to the position they would have been in had the injury not occurred.[83] Thus, the parents' condition before and after the child's injury must be compared. In the case of injury to an existing child, this is relatively straightforward: the amount of damages is the value of the difference between life with the previously healthy child and life with the injured child. In wrongful birth claims it is far more difficult since life with an impaired child should be compared to a situation that never existed: life with a child without defects. In short, in claims of injury to an existing child both the pre-injury and post-injury situations are known and may be compared to measure damages. In wrongful birth claims, only the post-injury situation is known and it must be compared to a condition that did not exist.

Uncertainty in the measure of damages in wrongful birth claims also arises from the rule that the damages from a tortious act must be reduced by the value of any benefit from the act.[84] The courts that have considered

79. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.3 (1973); *Wrongful Birth Damages*, *supra* note 64, at 147.
80. D. DOBBS, *supra* note 79, § 3.3; *Wrongful Birth Damages*, *supra* note 64, at 147.
81. D. DOBBS, *supra* note 79, § 3.3; *Wrongful Birth Damages*, *supra* note 64, at 147.
82. D. DOBBS, *supra* note 79, § 3.1; C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 137 (1935).
83. *Wrongful Birth Damages*, *supra* note 64, at 146; C. MCCORMICK, *supra* note 82, at § 137.
84. The RESTATEMENT (SECOND) OF TORTS, states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

wrongful birth claims recognize that there is some benefit in having even a deformed child.[85] Thus, in fixing damages the benefit should be offset against the harm.[86]

In claims for the injury or death of an existing child, the benefits and harms of the injurious act are determined by comparing the condition of the parents before and after the injury. In wrongful birth claims, the benefit of a deformed child to parents who could not have had a normal child must be assigned a value and offset against the costs of the child before damages can be fixed.[87] This valuation involves an uncertainty not present in the types of damages section 4.24.010 of the Washington Revised Code was intended to measure.

Thus, section 4.24.010 should not be used to determine the types of damages allowed in wrongful birth claims. Certainly, the legislature did not contemplate wrongful birth claims when it enacted section 4.24.010.[88] Damages in wrongful birth claims are more uncertain than damages for death or injury of an existing child. The policy that damages be reasonably certain is satisfied by applying section 4.24.010 to injury or death of an existing child, but not to birth of deformed children.

In conclusion, the court's acceptance of the wrongful birth cause of action can be justified, given the Supreme Court's protection of a woman's right to abort. Nevertheless, the court failed to develop adequately the elements of the claim. Two major issues that the Washington courts will have to define in granting wrongful birth claims are injury and damages. The *Harbeson* court's reasoning on both issues is, at best, superficial.

RESTATEMENT (SECOND) OF TORTS § 920 (1979). For a discussion of the benefits rule, see *Damage Formula Note, supra* note 79, at § 3.6; *Wrongful Birth Damages, supra* note 64, at 145–64. *See also* D. DOBBS, *supra* note 79, at § 3.8; C. MCCORMICK, *supra* note 82, at § 40.

85. *E.g.*, Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974) (parents electing to keep the impaired child in effect assert that the benefits outweigh the costs); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 517–18 (1971); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 14 (1979).

86. *Wrongful Birth Note, supra* note 38, at 710. This is true of both pecuniary and emotional damages. *Wrongful Birth Damages, supra* note 64, at 158; *Wrongful Birth Note, supra* note 38, at 711.

87. *Wrongful Birth Damages, supra* note 64, at 130; *Wrongful Birth Note, supra* note 38, at 711.

88. WASH. REV. CODE § 4.24.010 was originally enacted in 1869. Act of Dec. 2, 1869, § 9, 1869 Wash. Terr. Stat. 4. It was amended to read as it does now in 1973. Act of Apr. 24, 1973, ch. 154, § 4, 1973 Wash. Laws 1124–25. Thus, the present statute was enacted several years before states began recognizing wrongful birth claims, *see supra* note 37, and fifteen years before the Washington court considered wrongful birth.

III. WRONGFUL LIFE

A. *Legal Background*

A claim for wrongful life is an action brought by or on behalf of a child suffering from birth defects.[89] The child sues a physician for negligence in permitting the child's conception or birth. That negligence can be either (1) a failure to provide the parents with material facts necessary to an informed decision on whether to conceive or give birth to a child,[90] or (2) a failure to conform to the accepted standard of care in performing medical treatment or tests undertaken to prevent the conception or birth of a deformed child.[91] The claim is not that the negligence caused the defect, but, rather, that "but for" the negligent act, the child would not have been born to experience the pain and suffering attributable to the deformity.[92]

Wrongful life claims have been almost uniformly denied. Seven of the eight jurisdictions that considered the question prior to *Harbeson* do not recognize a cause of action for wrongful life.[93] Each of these courts allows actions for wrongful birth,[94] but only the California Supreme Court has allowed an action for wrongful life. In *Turpin v. Sortini*,[95] the California Supreme Court allowed special damages to compensate for the added cost of life in an impaired condition, but denied general damages for pain and suffering.[96]

Courts have refused to grant wrongful life claims for two primary reasons. First, the courts have reasoned that recognizing a duty to the unborn child to prevent its birth with defects represents a "disavowal" of the

89. Like wrongful birth claims, wrongful life claims must be distinguished from several similar claims. In wrongful life claims, the plaintiff-child is born with mental or physical defects. The child does not claim that the physician caused the defects but, rather, that the physician negligently caused him or her to be born and thus to experience the pain and suffering associated with the defects. Children who are born healthy but unhappy with their life have claims more accurately called "dissatisfied life" or "unplanned life." Rogers, *supra* note 34, at 717–18; *see also* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (child born illegitimate after father falsely promised to marry mother to induce her to engage in sexual relations with him).

90. *Harbeson*, 98 Wn. 2d at 478, 656 P.2d at 494; Rogers, *supra* note 34, at 715.

91. *Harbeson*, 98 Wn. 2d at 478, 656 P.2d at 494.

92. Comment, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480, 485 (1980) [hereinafter cited as *Wrongful Life Comment*].

93. Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (dicta); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

94. *See supra* note 37.

95. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

96. *Id.* at 240, 643 P.2d at 966, 182 Cal. Rptr. at 351.

sanctity of life, thus going against one of society's most deeply held beliefs: that life in any condition is more precious than non-life.[97] Because a wrongful life claim forces a court to conclude that non-life is preferable to life with defects,[98] courts have found that these claims violate the "public policy supporting the preciousness of human life."[99]

Second, the courts have concluded that the plaintiff has suffered no injury cognizable at law.[100] Without finding injury, a court cannot assess or award damages. Tort damages attempt to compensate for a loss suffered by the plaintiff by comparing the plaintiff's situation before and after the tortious act.[101] In a wrongful life claim, injury is measured, not by the difference between life in a deformed condition and normal life, but by "the difference in value between life in an impaired condition and the 'utter void of nonexistence.' "[102] The courts have found themselves incompetent to make this comparison.[103] The inability to evaluate the difference between impaired life and nonexistence leads to an inability to establish injury and, hence, to assess damages.

97. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 13 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978); *Fundamental Right to be Born Healthy*, *supra* note 3, at 542. At least one commentator has suggested that recent right-to-die cases, *e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976), illustrate that society no longer views life in any condition as more precious than non-life. Rogers, *supra* note 34, at 736. But the right-to-die cases are not analogous to wrongful life cases. In the right-to-die cases, the person has experienced life and is making a determination that life as he or she knows it is not worth living. *E.g.*, *In re* Quinlan, 355 A.2d at 663–64; Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1632–34 (1974). In wrongful life cases, the child has not experienced life and cannot know what it will be like with the defects. Consequently, the unborn child in wrongful life cases cannot make the same determination that is involved in the right-to-die cases. Further, the unborn child actually makes no decision at all in wrongful life cases. The court just determines that the child would rather not be born than be born with his birth defects.

98. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 711 (1967) (Weintraub, C.J., concurring and dissenting).

99. *Id.* at 693; *accord* Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 13. *Contra* Turpin v. Sortini, 31 Cal. 3d 220, 233, 643 P.2d 954, 961–62, 182 Cal. Rptr. 337, 344–45 (1982).

100. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978).

101. Turpin v. Sortini, 31 Cal. 3d 220, 232, 643 P.2d 954, 961, 182 Cal. Rptr. 337, 344 (1982); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 11 (1979); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 413, 386 N.E. 2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

102. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979) (quoting Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967)).

103. *See, e.g.*, Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 413, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372, 376 (1975). Even the *Harbeson* court conceded that the comparison of impaired life and nonexistence "is a task that is beyond mortals, whether judges or jurors." *Harbeson*, 98 Wn. 2d at 482, 656 P.2d at 496.

B. *The* Harbeson *Court's Reasoning*

The court stated that "[w]rongful life is the child's equivalent of the parents' wrongful birth action."[104] It saw the two claims as so related that "it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care."[105] Consequently, the court analyzed wrongful life in the same manner as wrongful birth, focusing in turn on duty, breach, injury, and proximate causation.

The court noted that one problem with finding a duty to the child in this circumstance is that the alleged negligence always occurs before birth and often before conception. The court dismissed this problem, however, by stating that Washington courts have allowed actions for prenatal injuries for twenty years.[106] It also cited the California Supreme Court for the proposition that a duty can exist prior to conception.[107] The court held, therefore, that the physician owes a duty to unborn and unconceived persons subject only to the limitation of foreseeability.[108]

The *Harbeson* court then rejected the position that recognizing a duty to an unborn child to prevent birth with defects disavows the sanctity of life.[109] It agreed with the California Supreme Court's decision, in *Turpin v. Sortini*, that an award of damages to a handicapped child neither disavows the sanctity of life nor suggests that the child is not entitled to the rights and privileges accorded to all members of society.[110]

After rejecting these two arguments and noting the advantages of recognizing such a duty,[111] the court held that the physician has a duty to the

104. *Harbeson*, 98 Wn. 2d at 478, 656 P.2d at 494. The court said:

> In a wrongful life claim, "[t]he child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence—his failure to adequately inform the parents of the risk—has caused the *birth* of the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity."

Id (quoting Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L. REV. 480, 485 (1980)).

105. *Harbeson*, 98 Wn. 2d at 479, 656 P.2d at 495 (quoting Turpin v. Sortini, 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982)).

106. *Harbeson*, 98 Wn. 2d at 480, 656 P.2d at 495 (citing Seattle-First Nat'l Bank v. Rankin, 59 Wn 2d 288, 367 P.2d 835 (1962)).

107. *Harbeson*, 98 Wn. 2d at 480, 656 P.2d at 495 (citing Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982)).

108. *Harbeson*, 98 Wn. 2d at 480, 656 P.2d at 495.

109. *Id.* at 481, 656 P.2d at 496.

110. *Id.* (citing Turpin v. Sortini, 31 Cal. 3d 220, 232–33, 643 P.2d 954, 961, 182 Cal. Rptr. 337, 344 (1982)). The California Supreme Court said:

> To begin with, it is hard to see how an award of damages to a severely handicapped or suffering child would "disavow" the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.

Turpin, 31 Cal. 3d at 233–34, 643 P.2d at 961–62, 182 Cal. Rptr. at 344–45.

111. *Harbeson*, 98 Wn. 2d at 481, 656 P.2d at 496; *see also supra* note 63.

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unborn or unconceived child. This duty is to inform the parents of the material risks that the child will suffer birth defects and to conform to the appropriate standard of care if action is taken to prevent conception or birth of the child.[112]

The court considered the second element of the wrongful life claim to be easily established: the physician breaches his or her duty by failing to observe the appropriate standard of care.[113]

The court noted that the injury element of a claim for wrongful life has been the most difficult to establish. Nevertheless, the court rejected the argument that it is impossible to determine whether birth is an injury and, therefore, to measure compensatory damages.[114] It held that general damages could not be recovered because they are impossible to assess, but concluded that special damages are calculable with reasonable certainty and should be recoverable.[115]

Finally, the court held that establishing cause in fact establishes proximate cause.[116] If the plaintiff child would not have been born "but for" the negligence of the physician, then there is "no reason a finder of fact could not find that the [physician's] negligence was a proximate cause of the [child's] injuries."[117] Having established duty, breach, causation, and injury, the court stated that a cause of action for wrongful life exists in Washington.[118]

C. *Analysis*

The court treated the claim for wrongful life as "the child's equivalent of the parents' wrongful birth action."[119] This parallel structure is important in examining the court's reasoning. Much of the necessary analysis of the four elements of the claim for wrongful life was simply taken as established by the court's earlier discussion of the claim for wrongful birth.[120]

To the extent that the court used its wrongful birth reasoning to recognize the wrongful life claim, the analysis is inadequate. Even though the two claims arise from the same negligent act or omission, they are differ-

112. *Harbeson*, 98 Wn. 2d at 480, 656 P.2d at 495.
113. *Id.* at 482, 656 P.2d at 496.
114. *Id.*
115. *Id.* The special damages consist of the costs of special medical treatment and training beyond that required by children not afflicted with the plaintiff's birth defects. *Id.*
116. *Id.* at 483, 656 P.2d at 497.
117. *Id.*
118. *Id.*
119. *Id.* at 478, 656 P.2d at 494.
120. *See id.* at 480, 656 P.2d at 495.

ent in at least three respects. First, the two claims differ in the fundamental question of injury to the plaintiff. In wrongful birth claims, the court must determine whether the parents have been injured, while in wrongful life claims the question is whether the child has been injured. These are different questions which may yield different answers.[121] Because of the difference between the alleged injuries in the two claims, wrongful life is not the "child's equivalent"[122] of the parent's wrongful birth claim.

Second, the claims differ in the comparison that lies at the heart of each. In wrongful birth claims, the birth of the child can be determined to be an injury to the parents by comparing two known situations: life with normal children and life with children with birth defects. This process is common to all tort actions. In wrongful life claims, however, birth can be determined to be an injury to the child only by comparing a known situation with an unknown situation: life with birth defects and nonexistence. This process is totally unknown to tort actions. Thus, the fundamental comparison required by each claim is different.

Finally, the claims differ in the nature of the duty imposed by each. The physician's duty to the parents is to protect their right not to have children with birth defects. The physician's duty to the child is to protect the child's right not to be born. The parents' right is grounded in the availability of information about birth defects and in their right to an abortion.[123] There is no apparent foundation for the child's right not to be born.[124] Thus, the analogy fails because the element of duty is different for each claim.

In short, wrongful life actions cannot be supported by analogy to wrongful birth actions. The two causes of action are different in injury, duty, and measure of harm. Thus, courts can grant one claim and not the other. These differences become more apparent in examining the court's reasoning on each of four aspects of the wrongful life cause of action: injury, duty, proximate cause, and damages.

1. *Injury*

The concept of injury is crucial to the court's analysis.[125] A court must

121. Many of the courts that have granted wrongful birth claims have denied wrongful life claims. *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
122. *Harbeson*, 98 Wn. 2d at 478, 656 P.2d at 494.
123. *See id.* at 472, 656 P.2d at 491; *see also supra* notes 41–43 and accompanying text.
124. *See infra* notes 159–61 and accompanying text.
125. *See supra* part II.C.1.

establish an injury to the plaintiff before it can discuss duty or damages. A finding that birth is an injury to the deformed child is a prerequisite to a discussion of (1) any duty owed to that child before birth,[126] and (2) what types of damages will be allowed for the injury.[127]

The *Harbeson* court, however, never established that birth with deformities is an injury. Other than a bare statement that birth is the injury,[128] the court's analysis is limited to an attempt to overcome the two major obstacles courts have found to reaching such a conclusion: (1) the difficulty of measuring damages, and (2) the argument that allowing wrongful life claims will disavow the sanctity of life.[129]

The court attempted to overcome the first obstacle by disallowing claims for general damages and allowing only the recovery of special damages. Thus, the court found "unpersuasive" the objection that damages are too uncertain to be allowed.[130]

This analysis misses the major thrust of the objection. The major obstacle other jurisdictions have encountered was not in quantifying damages, but in finding any injury for which the plaintiff could be compensated.[131] Essentially, the court ignored the question of injury and proceeded straight to the question of damages. Injury must be established before damages even become an issue.[132] The measure of damages is secondary

126. Establishing that birth in an impaired state is an injury is crucial to the discussion of duty. Duty is only the conclusion that the defendant ought to be under a legal obligation to avoid risking injury to the plaintiff. *See* W. PROSSER, *supra* note 74, § 53. Stating that there is a duty begs the essential question of whether the plaintiff's interests are entitled to legal protection against injury by the defendant's conduct. *Id.* Thus, before the court can impose a duty to the unborn child on physicians, it must first determine that the result of a breach of that duty—birth with defects—is an injury to the child. *See supra* note 74 and accompanying text.

127. The concept of injury is also crucial to the discussion of damages. Damages are awarded to compensate injury. They attempt to restore an injured person to the position he or she occupied before the wrong occurred. Turpin v. Sortini, 31 Cal. 3d 220, 232, 643 P.2d 954, 961, 182 Cal. Rptr. 337, 344; Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967); C. MCCORMICK, *supra* note 82, § 137.

Damages can compensate an injury, but they should not be used to prove its existence. Similarly, damages should be awarded only to compensate the specific injury claimed. Thus, before the court can discuss damages in a claim for wrongful life, it should independently establish (1) that birth is in fact an injury, and (2) that the damages will compensate only that specific injury.

128. *Harbeson*, 98 Wn. 2d at 483, 656 P.2d at 497.

129. *Id.* at 482, 656 P.2d at 496–97.

130. *Id.*

131. *E.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979).

132. As the California Supreme Court recently stated: "In the first place, the problem is not . . . simply the fixing of damages for a conceded injury, but the threshold question of determining whether the plaintiff has in fact suffered an injury by being born with an ailment as opposed to not being born at all." *Turpin*, 31 Cal. 3d at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.

Unlike the Washington Supreme Court, the California Supreme Court realized that the primary question was a determination of injury, not an assessment of damages. Unfortunately, the *Turpin* court made the same mistake that the *Harbeson* court did in confusing the determination of injury with an assessment of damages. *See infra* note 133.

to the issue of whether the child has "suffered any damage cognizable at law by being brought into existence."[133]

This failure to establish that birth is an injury to a deformed child is fatal to the court's analysis of the wrongful life cause of action. The *Harbeson* court's inability to establish that birth is an injury to the child results from the impossibility of this task. In wrongful life claims, the alleged injury is birth in a deformed condition.[134] Since the child's only other alternative was nonexistence, determination of whether the child has in fact been injured requires a comparison of life in an impaired condition with nonexistence.[135] But such a comparison is literally impossible because the notion of nonexistence is unfathomable.[136]

In the first wrongful life case, the New Jersey Supreme Court determined that "[t]his court cannot weigh the value of life with impairments against the nonexistence of life itself."[137] This problem has concerned every court that has examined a wrongful life cause of action.[138] All but the *Harbeson* and *Turpin* courts have held that their inability to make this comparison was fatal to the wrongful life cause of action.[139] The *Harbeson* and *Turpin* courts merely avoided the issue by discussing damages instead of injury.[140] Because determination of injury in wrongful life

133. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979). The California Supreme Court stated:

> [R]ecovery should be denied because (1) it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born, and (2) even if it were possible to overcome the first hurdle, it would be impossible to assess general damages in any fair, nonspeculative manner.

Turpin, 31 Cal. 3d at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346. Again, the *Turpin* court correctly perceived the problem as the impossibility of finding an injury and a subsequent problem of uncertain damages. The court reasoned to a finding of injury by disallowing uncertain general damages and allowing the easily calculable costs of the defects. *See id.* at 237–38, 643 P.2d at 965, 182 Cal. Rptr. at 348. But these special damages do not compensate the claimed injury in wrongful life actions. *See infra* note 170 and accompanying text. Furthermore, existence of the injury should not be proven by showing that damages are recoverable; rather, granting damages should be based on a prior finding of injury. *See infra* text accompanying note 168.

134. *See supra* notes 89–92 and accompanying text.

135. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979).

136. *See id.*

137. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967).

138. *See, e.g.*, Elliott v. Brown, 361 So. 2d 546, 547–48 (Ala. 1978); Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372, 375–76 (1975).

139. Phillips v. United States, 508 F. Supp. 537, 543 (D.S.C. 1980); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 694 (E.D. Pa. 1978); Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900–01 (1978); Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372, 375–76 (1975).

140. *See Harbeson*, 98 Wn. 2d at 482, 656 P.2d at 496; *Turpin*, 31 Cal. 3d at 237–38, 643 P.2d at 965, 182 Cal. Rptr. at 348.

claims requires a comparison of life in an impaired condition with the unfathomable notion of nonexistence, wrongful life claims "should be dismissed for failure to state legally cognizable causes of action."[141]

The Washington court summarily dismissed the second obstacle[142] by concluding that awarding damages to a deformed child does not disavow the sanctity of life.[143] Once again, however, the court missed the major thrust of the objection.

Life with defects may be less desirable than life without defects. If so, compensating the child for defects is not a disavowal of the sanctity of that life. But wrongful life actions regard birth, not the defects, as the actionable injury.[144] The very basis of the wrongful life claim is that life with defects is not worth living and ought to be destroyed before birth. Such a disavowal of life runs counter to society's deeply rooted belief that life, in whatever condition, is more precious than nonexistence.[145]

Society's belief in the sanctity of life permeates the documents on which our society is founded. The Declaration of Independence declares man's "unalienable" right to life to be a "self evident" truth,[146] and the United States Constitution characterizes life as one of the three fundamental rights deserving special protection.[147] The Washington State Constitution declares that governments "are established to protect and maintain individual rights"[148] and includes the right to life in a list of personal rights.[149] States universally reserve the highest penalties for persons depriving others of their right to life.[150] The principle that all life is to be preserved, and that it is government's purpose to do so, lies at the heart of our society.

The sanctity of any given life is not dependent on the condition of that life. It is life itself and not only life in a perfect condition that is "jealously safeguarded."[151] The amount of protection given to a person's life does not vary with the degree of his or her defects. Thus, courts conclude that "life—whether experienced with or without a major physical handicap—is more precious than non-life."[152] Allowing wrongful life claims contradicts that fundamental notion, for it turns life into an actionable injury.

To summarize, the court's discussion of injury suffered from three defects. First, injury is a threshold issue that must be resolved before any discussion of duty or damages is possible. The court's reasoning was flawed because its attempts to show injury relied on its conclusion that there was a duty and its confusion of injury with damages. Second, the court misconceived the problem resulting from the inability to compare life in an impaired condition with nonexistence. Contrary to the court's assumption, this problem does not merely affect the court's ability to grant general damages, it precludes the conclusion that there was an injury. Third, the wrongful life cause of action contradicts our fundamental concern for the sanctity of life because it requires the court to decide that nonexistence is preferable to life with defects.

2. *Duty*

The court's inability to justify adequately the concept of injury has important ramifications for its discussion of duty. The court should not impose a duty on the physician to avoid the birth of a deformed child unless the child's birth is an injury to the child. If the birth is a benefit to the child, or at least neither a benefit nor an injury, the physician has no duty to prevent the birth.

The court enumerated several benefits to society that would accompany recognizing a duty to the child.[153] While these policy considerations are themselves open to debate,[154] that argument is unnecessary: absent a showing of injury to the child, no duty should attach to the physician.[155]

141. Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978).

142. *See supra* notes 97–99 and accompanying text.

143. *Harbeson*, 98 Wn. 2d at 481, 656 P.2d at 496 (quoting *Turpin*, 31 Cal. 3d at 233, 643 P.2d at 961–62, 182 Cal. Rptr. at 344–45); *see also supra* notes 109–10 and accompanying text.

144. *Harbeson*, 98 Wn. 2d at 478, 656 P.2d at 494; Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L. REV. 480, 485 (1980).

145. Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978); *see also supra* notes 97–99 and accompanying text.

146. The Declaration of Independence para. 2 (U.S. 1776).

147. U.S. CONST. amend. V and amend. XIV § 1.

148. WASH. CONST. art. I § 1.

149. WASH. CONST. art. I § 3.

150. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 13 (1979). Even in imposing its highest penalty, a state may not execute a convicted murderer without giving him or her special procedural protections. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972).

151. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 13 (1979).

152. *Id.* at 12.

153. *Harbeson*, 98 Wn. 2d at 481, 656 P.2d at 496. The policy considerations articulated by the court are fostering genetic counseling and prenatal testing, discouraging medical malpractice, and providing comprehensive compensation for victims of medical malpractice. *Id.*

154. The court never established why furtherance of these policies is beneficial. If they are beneficial, it is only because birth in an impaired state is an injury and, therefore, allowing it to happen is medical malpractice. The court's failure to establish that birth is an injury prevents it from showing that these policies are beneficial and ought to be promoted.

155. The court should not promote these policies by imposing a duty on the physician that is unwarranted by the case before it. If the physician has done no wrong—has not injured the child—it should not be within the court's power to impose a duty on the physician solely for the benefit of society.

Failure to establish that birth is an injury precludes recognition of a duty owed by the physician to the unborn child regardless of the benefits to society.

Further, even if birth with defects is an injury, there is a second prerequisite to establishing a duty: the plaintiff must have a right to legal protection of his interests.[156] No duty can be imposed on the physician unless the unborn child has a legally protected right to be born free of defects.[157] Thus, "the essential postulate of any wrongful life claim is the 'right of a child to be born as a whole, functional human being.' "[158] This right is essential to finding a duty to the preborn child, yet the court never dealt with the issue.

Failure to establish expressly that the child has a right not to be born should bar imposition of a duty on the physician to the child because there are several indications that such a right does not exist. First, there is no precedent for recognizing a right to be born as a whole, functional human being.[159] Second, the United States Supreme Court has cast doubt on the possibility that an unborn child has any legally protected rights, by denying that an unborn child has a legally protected right to life.[160] Finally, "rights" exist between persons as legal entities in society. They do not exist between persons and non-persons. As legal non-persons,[161] unborn children are incapable of having rights. Thus, the right to be born healthy is a necessary prerequisite to the imposition of a duty on the physician in a claim for wrongful life, but the existence of such a right has not been established. The Washington Supreme Court did not even discuss that right.

3. *Proximate Cause*

The court's analysis of proximate cause is also superficial. The court assumed that birth is the actionable injury and that physicians have a duty

156. W. PROSSER, *supra* note 74, § 53.

157. Rogers, *supra* note 34, at 716.

158. *Id.* (quoting Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110, 114 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978)). Other articulations of this legally protected right include "a fundamental right to be born healthy," *Fundamental Right to be Born Healthy*, *supra* note 3, at 553, and "a right not to be born," Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 711 (1967) (Weintraub, C.J., concurring and dissenting).

159. Becker v. Schwartz, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978); Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978).

160. Roe v. Wade, 410 U.S. 113, 156–59 (1973). The *Harbeson* court did not hesitate to recognize that prenatal injuries suffered by the child are actionable. *Harbeson*, 98 Wn. 2d at 480, 656 P.2d at 495. Presumably, this is so because the unborn child has a right not to be injured in utero. At the same time, however, the same unborn child has no right to life. It seems inconsistent that the child may seek compensation for being injured but not for being destroyed.

161. Roe v. Wade, 410 U.S. 113, 158 (1973).

to the child to prevent birth in an impaired condition by informing the parents of the risks of birth defects. But between the physician's information and the birth is an intervening cause: the parents. The parents can decide to have the child anyway.[162]

Only two conclusions can be drawn from this. Either (1) informing the parents of the defect relieves the physician of all liability, or (2) the physician's duty to the child is not only to inform the parents, but also to ensure that the abortion is performed. The second choice seems unreasonable because it would deny the parents the right to make basic reproductive decisions, and because forcing an abortion on the mother would be a tortious invasion of her rights and body.[163] Thus, the physician should be relieved of liability once he or she has informed the parents of the material risks. But that is not the end of the problem.

First, if the parents decide to give birth to the deformed child, the child is still injured if birth is the injury. The reasons for compensating the child for the injury remain compelling. The parents therefore must be the proximate cause of the injury. Potentially, this gives the child a wrongful life claim against the parents. At least one appellate court that granted a wrongful life cause of action has realized that claims against parents are a logical consequence.[164]

Second, the claim for wrongful life vests in the child before birth and possibly even before conception.[165] The parents' decision to bear the deformed child cannot prejudice the child's claim against the physician. Therefore, if the physician only advises the parents of the risk of birth defects and does nothing more, such as counsel the parents to abort, a judge or jury may still find that the physician proximately caused the birth.[166] Thus, the parents' knowing decision to bear a deformed child may not relieve the physician of liability to the child.

162. *Harbeson*, 98 Wn. 2d at 472, 656 P.2d at 491.

163. Roe v. Wade, 410 U.S. 113, 154 (1973) (a woman's decision to abort or not is within her right to privacy).

164. Curlender v. Bio-Science Labs., 106 Cal. App. 3d 811, 165 Cal. Rptr. 477, 488 (1980), *rev'd in part*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 953, 182 Cal. Rptr. 33tr. 337 (1982). *See also* Waters, *Wrongful Life: The Implications of Suits in Wrongful Life Brought by Children Against Their Parents*, 31 DRAKE L. REV. 411 (1981–82) (concluding that a wrongful life suit brought by a child against its parent is irreconcilable with a mother's constitutionally protected right to privacy and with the doctrine of parental immunity); Note, *Child v. Parent: A Viable New Tort of Wrongful Life?*, 24 ARIZ. L. REV. 391 (1982) (same).

165. *Harbeson*, 98 Wn. 2d at 472, 656 P.2d at 491.

166. *See* W. PROSSER, *supra* note 74, § 45. Proximate cause simply means legal cause—that is, a cause of the injury to which liability should attach. Thus, if the judge or jury finds that if the physician had done something more than just inform the parents of the risks of birth defects the child would not have been born, the physician is a cause of the birth. If the judge or jury finds further that the physician should be liable for the alleged injury, the physician could be the proximate cause of the birth as well.

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4. Damages

The court's analysis of damages suffers in two ways from its failure to establish injury in wrongful life claims. First, the court raised the damages issue for the wrong purpose. The question of recoverable damages can arise only after the existence of an injury is established.[167] It begs the question to disallow general damages, as the court did, in an effort to avoid the problem of an injury that results in uncertain damages. The uncertainty of general damages is a direct result of the uncertainty of whether there is an injury and what that injury is. Disallowing uncertain elements of recoverable damages does not remove this problem.

Second, even granting that birth with defects is a compensable injury, the court misanalyzed the damages issue. Any damages allowed in a wrongful life claim should compensate the child for harm arising because life with defects is less desirable than nonexistence.[168] But the special damages allowed by the court compensate for the difference in burden between life with defects and normal life, not between life with defects and nonexistence.[169]

An award of special damages does not compensate for the relevant injury in wrongful life actions because it compensates someone who, were it not for the injury, would not exist.[170] Nothing the physician could have done would have given the plaintiff a normal life. Since tort damages are compensatory in nature,[171] it is inconsistent with basic tort principles to view the injury for which the physician is legally responsible solely by reference to the plaintiff's present condition.[172] It is also necessary to recognize that if the physician had not been negligent, the child would not have been born.[173]

Furthermore, although the relevant injury in wrongful life claims is the birth, special damages compensate for the defects. Only general damages

167. *See supra* note 127 and accompanying text.

168. This follows from the compensatory nature of tort damages. Tort damages place the plaintiff, as far as money can, in the position he or she would have been in had there been no negligence. *Turpin*, 31 Cal. 3d at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344; C. McCORMICK, *supra* note 82, § 137. In wrongful life cases, this requires comparison of life with nonexistence. *See supra* notes 134–35 and accompanying text.

169. The court awarded damages for medical treatment and training "beyond that required by children not afflicted with fetal hydantoin syndrome." *Harbeson*, 98 Wn. 2d at 483, 656 P.2d at 497.

170. *Turpin*, 31 Cal. 3d at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344.

171. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 11 (1979); D. DOBBS, *supra* note 79, § 3.1; C. McCORMICK, *supra* note 82, § 137.

172. *Turpin*, 31 Cal. 3d at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344; *Wrongful Life Comment*, *supra* note 92, at 495–98.

173. *Turpin*, 31 Cal. 3d at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344; Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978); *Fundamental Right to be Born Healthy*, *supra* note 3, at 542.

can compensate for the injury. According to the court, wrongful life is a claim by a child for "the pain and suffering attributable to the deformity."[174] But pain and suffering damages are general damages, which the court denied. Special damages are not a substitute for general damages and are inappropriate in this context because they do not compensate for the claimed injury. Thus, the court granted the wrong damages for the wrong reasons. In denying general damages and awarding special damages, the court illustrated its faulty analysis of damages under a wrongful life claim and denied the child the only damages that could compensate for the alleged injury.

A proper analysis of damages under a wrongful life claim indicates that the courts cannot award damages in a wrongful life action. The court should not award general damages because courts are incapable of making the comparison necessary in computing compensatory damages.[175] The New Jersey Supreme Court stated that:

> [s]uch a computation would require the trier of fact to measure the difference in value between life in an impaired condition and the "utter void of nonexistence." Such an endeavor, however, is literally impossible. . . . [M]an "who knows nothing of death or nothingness," simply cannot affix a price tag to non-life.[176]

The court should not award special damages because such damages compensate for the defects, not for the injury. Thus, there should be no recoverable damages under a wrongful life claim.

In conclusion, the wrongful life cause of action should be denied. Wrongful life claims fail principally because of the inability of courts to establish that birth with defects is an injury to the child. Inability to find an injury precludes discussion of the other elements of the claim because they all depend on the existence of an injury. Even if injury is granted, there is the inherent problem that the only damages that can compensate the child for the injury are uncertain general damages. The *Harbeson* court did not eliminate these obstacles to recognizing the wrongful life cause of action.

IV. ANALYSIS OF THE TORT RECOVERY IN *HARBESON*

A. *Alternatives to the Creation of New Causes of Action in* Harbeson

Unless the tort system is to become simply an umbrella under which

174. *Harbeson*, 98 Wn. 2d at 478, 656 P.2d at 494.

175. *See supra* notes 134–37 and accompanying text.

176. Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 12 (1979) (citations omitted) (quoting Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 711 (1967) (Weintraub, J., concurring and dissenting)).

judges may grant relief according to preference, the courts should analyze cases and reason to holdings within the confines of accepted tort principles. Existing principles should not be stretched beyond recognition in order to allow recovery in specific cases. If a claim does not fit within accepted tort principles, there should be no recovery unless the tort principles are changed by the legislature.[177] At the very least, a court should adhere to accepted tort principles unless the facts of the case present a clear need to depart from them.[178]

The Washington Supreme Court did not have to recognize the causes of action for wrongful birth and wrongful life to compensate the plaintiffs in this case. By prescribing Dilantin without making a literature search or consulting other sources, the defendant physicians caused the children's defects.[179] These defects were an injury to both the parents and the children under traditional tort analysis.[180] The United States District Court found that the physicians breached the standard of care and were negligent.[181] That negligence was the proximate cause of the children's injuries.[182] Thus, accepted tort theories of medical malpractice would have allowed recovery of all the damages that the court allowed under both causes of action. The court never had to reach the question of whether either cause of action is recognized in Washington.

B. *Alternatives to Tort Litigation*

Although birth with defects should not be a compensable injury to the

177. When existing tort principles preclude recognition of a cause of action, it is generally viewed as a bar to judicial recognition of the claim. New causes of action are legislative decisions. *See, e.g.*, Roth v. Bell, 24 Wn. App. 92, 104, 600 P.2d 602, 609 (1979) (granting a cause of action to a child for injury to a parent is a legislative decision). Several courts have felt that this is true of the wrongful life claim. *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 413, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978). Several state legislatures have barred the wrongful life claim by statute. *E.g.*, MINN. STAT. ANN. § 145.424 (West 1982 Supp.); S.D. CODIFIED LAWS ANN. §§ 21-55 (1982 Supp.). The California legislature has barred wrongful life claims against parents. CAL. CIV. CODE § 43.6 (West 1982). The Washington legislature also considered legislation to bar the wrongful life cause of action in Washington. H. 178, 48th. Wash. Leg. (1983); S. 3269, 48th. Wash. Leg. (1983).

178. Hunsley v. Giard, 87 Wn. 2d 424, 434, 553 P.2d 1096, 1102 (1976) (court should adhere to traditional principles, theories, and standards of tort law in order to avoid confusion in the law). Even the *Harbeson* court was careful to try to fit wrongful birth and wrongful life into existing tort principles. *Harbeson*, 98 Wn. 2d at 471, 480, 656 P.2d at 491, 495.

179. *Harbeson*, 98 Wn. 2d at 463–64, 656 P.2d at 486–87.

180. *See* Seattle-First Nat'l Bank v. Rankin, 59 Wn. 2d 288, 291, 367 P.2d 835 (1962) (recognizing child's cause of action for prenatal injuries); Moen v. Hanson, 85 Wn. 2d 597, 599–600, 537 P.2d 266, 267 (1975) (holding that an unborn viable fetus is a "child" under WASH. REV. CODE § 4.24.010, thus allowing parents to sue for death or injury of an unborn viable fetus); W. PROSSER, *supra* note 74, § 55.

181. *Harbeson*, 98 Wn. 2d at 464, 656 P.2d at 487.

182. *Id.* at 463–64, 656 P.2d at 486–87.

child under tort law, this does not mean that the resulting burdens should be ignored. It indicates only that the alleged wrongdoers were not in fact wrongdoers and, therefore, that physicians should not bear the cost of alleviating the burden of the defects. This is so even if they were wrongdoers to others at the same time. Because wrongful birth and wrongful life claims are inherently different, a solution to the former problem may be in a tort claim. A solution to the latter problem is better found elsewhere.

Denying recovery under a wrongful life claim does not solve the child's problem: the defects still exist. The same regard for the sanctity of life that should lead to rejection of wrongful life claims[183] requires us to assist the child and his or her parents in bearing this burden. Thus, the pertinent consideration becomes who should bear the expense. If it is not to be the health care system, then some other mechanism must be found.

A logical mechanism lies within the structure of public welfare programs. Existing social welfare programs manifest society's judgment that public funds should be devoted to helping individuals who have special problems. Private organizations also provide a feasible alternative to tort recovery. By soliciting private contributions, organizations can fund programs designed specifically for individuals with mental and physical birth defects.

Of course, even with these programs some needs go unfulfilled. But these programs need not be viewed as the only possibilities for aiding children with birth defects. Rather, they are models and foundations for programs that could be designed to help such children. By improving existing programs and initiating new programs where old ones leave off, alternatives to tort recovery can be found to assist these children.

This Note does not suggest a specific proposal to aid children with birth defects. Such an undertaking requires detailed study of existing programs and exploration of available possibilities. This Note simply suggests that the solution is a matter of priorities. Disallowing tort recovery for life with defects simply forces us to look elsewhere. Such an undertaking is necessary and, if given the proper priority, should succeed. Denying wrongful life claims because of a fundamental belief in the sanctity of life should force society to better assure the quality of all life.

VI. CONCLUSION

In *Harbeson v. Parke-Davis, Inc.*, the Washington Supreme Court recognized claims for wrongful birth and wrongful life, but the court's logic

183. *See supra* notes 97–99 & 146–152 and accompanying text.

#2

does not support its conclusions. It failed to demonstrate that birth with defects is an injury to the child. Because this essential premise is unsupported, no duty to the child should be imposed on the physician to prevent that child's birth with defects, and no damages for wrongful life should be allowed to compensate for the unproven injury.

This failure of the court's logic is not fatal to its recognition of the wrongful birth claim because this claim is a logical result of existing precedent. The court, however, insufficiently established (1) that the birth of a deformed child is in fact an injury to the parents, and (2) that if the birth is an injury to the parents, the damages set forth in section 4.24.010 of the Washington Revised Code are appropriate.

The cause of action for wrongful life should not be allowed because no one can determine that birth is an injury to a child born with defects. No one knows how to think of nonexistence, let alone whether it is more desirable than impaired life. Because every other element of a tort action is based on the ability to establish that an injury has in fact occurred, wrongful life claims should not be recognized.

Philip J. VanDerhoef

attach. #3

Wrongful Life Suits? The Solution in Kansas

To curtail the growing number of wrongful life and wrongful birth lawsuits, pro-life supporters in Kansas have proposed the bill pictured on the opposite page. The following testimony was offered by Mrs. Patricia Goodson of Right to Life of Kansas in February, 1983.

Mr. Chairman, members of the Judiciary Committee: I am pleased and grateful for the opportunity to appear today in support of Senate Bill 258.

The pro-life movement has been deeply concerned over a series of so-called wrongful birth or wrongful life lawsuits. We all know what the term wrongful death means, but wrongful birth and wrongful life are relatively new terms.

A few years ago, attorneys began taking cases of children with physical and mental handicaps against their parents. The attorneys' argument on behalf of the child was that "I would be better off if I were not alive," and "But for the 'wrongful' act of my parents I would not have been born.

In other words, the child argued that not getting an abortion was a wrongful act which causes him to be alive, thus wrongful life. The child then asked for damages from his parents (or their insurance company), just as happens in wrongful death cases.

This kind of logic can also be directed at a physician. The parents can sue a physician, saying that the physician failed to perform some test, as in the case of a recent lawsuit in the state of Washington, the physician failed to warn the parents that medication taken by the mother could have damaged the child she was carrying, thus depriving them of the knowledge that their unborn child was not perfect so they could have aborted him or her.

Thus, but for the wrongful act of the physician in not warning that the child was not perfect, the child would not have been born. Thus we have wrongful birth.

If I were to be cynical, I might say the distinction between wrongful life and wrongful birth is whose insurance company will pay the bill.

A proposed bill now before the Kansas Senate would prohibit lawsuits relating to wrongful conception and birth.

Ominous Decisions

Courts in several states have allowed such actions. In the absence of legislative action against the "wrongful life" tort theory, it seems well on its way to full acceptance in court jurisdictions across the United States.

The implications of this development are ominous and suggest things that are terribly disquieting about the state of our civilization's attitude towards the sanctity of human life. For regardless of their theoretical insulation from the politics and culture of everyday American life, the attitudes of the courts reflect to a large extent where we are as a society.

The notion that human life, whether it results from a botched sterilization or a failure to obtain information that would have led to a eugenic abortion, ever can be "wrongful" is inimical to the reverence for life that always has been an integral part of the moral foundation of Western civilization.

The idea that a handicapped child would lead a life that would better never have been lived, or that the parents of such a child are "damaged" by that child's presence in their family, not only bespeaks a pervasive social prejudice against the handicapped, but also involves judgments that are beyond the moral abilities of courts, legislatures or society as a whole to make. Is it a measure of our moral degeneration that the courts of modern American society would not reject outright the idea of "wrongful life" in all of its legal embodiments?

A Redress for Envy?

As the Illinois Appeals Court warned, "The legal implications of such a tort are vast, the social impact could be staggering."

In the same opinion it went on to say, "What (disturbs) us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born a certain color, another, because of race, one for being born with hereditary disease; one for being born into a large and destitute family, another because a parent has

Atch. 3

an unsavory reputation" (*Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 259, 260, 262; 90 N.E. 2d 849, 858, 859; 1963).

Legislation Can Work

As you know, state legislatures are empowered to create and to abolish civil actions and courts have accorded them very broad powers in this regard. Senate Bill 258 would protect physicians or others and would prevent a child from bringing action against its parents on the grounds that the child should not have been conceived or should not have been born but for a "wrongful" action.

I am aware of legislation similar to Senate Bill 258 that has been enacted in three other states—Minnesota, California and South Dakota. I have attached copies of these three laws to my testimony. I believe the bill before you incorporates the best of these. Perhaps in light of testimony it would be wise to add specific provision for wrongful life such as in Minnesota.

No Right to Sue

Senate Bill 258 is constitutional. The U.S. Constitution under present case law guarantees the right of individuals to procure abortion. But it cannot be argued that the Constitution guarantees the right of anyone to sue anyone for money damages for any form of conduct, much less for failure to perform or to recommend an abortion.

It has been argued that wrongful birth legislation is unnecessary even in states where the cause of action has been specifically recognized because "conscience laws" already protect individual institutions and practitioners. It is true that Kansas law protects individual practitioners and institutions from being sued for refusing or failing to participate in providing abortion services. But it is not clear that the law would permit a physician or institution to fail to refer for abortion, or at least to indicate to a patient that she ought to consider a test to discover whether she carries a handicapped child where the only "cure" for the handicap is abortion.

Moreover, the "conscience" law would not protect physicians who have no such "conscientious objection" to abortion.

A Valid Warning

Right to Life of Kansas believes that the Illinois Court was accurate in its warning. When society recognizes that a family member has a cause of action for "wrongful birth" or "wrongful life" against another family member, a physician, a hospital or anyone else, it has indeed devalued human life. To say that nonexistence is better than life is really to say that life is worthless.

And once we say that nonexistence is better than being born with a handicap, surely it is better than being born illegitimate or as a member of a minority, or as poor, or as not good looking or whatever.

In order to protect themselves from these kinds of suits, physicians, hospitals and other health care professions will be quick to advise abortions and parents, fearing similar liability, will be quick to follow the advice.

In conclusion, this piece of legislation prevents us from putting a price tag on life; it prevents us from seeing one another and ourselves in strict economic terms; it preserves essential family relationships and mutual respect; and it recognizes that each of us has a value which goes beyond dollars.

I urge adoption of S. 258. Thank you.

Action:

A.L.L. recommends this bill to those who have no wrongful life legislation in their own state. Feel free to use Mrs. Goodson's testimony as an outline for your own; use the bill as a model for your own state's statute. Please let us know how you make out—American Life Lobby, PO Box 490, Stafford, VA 22554.

SENATE BILL No. 258

AN ACT concerning civil actions; prohibiting certain tort actions relating to wrongful conception or birth.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) No person shall be entitled to maintain an action or receive an award of damages based on the claim that, but for the negligence of another, the person would not have been conceived or would have been aborted.

(b) Nothing in this section shall be construed to preclude a cause of action based on a claim that, but for the negligence of another, tests or treatment would have been provided, or provided properly, which would have made possible the prevention, cure or amelioration of any disease, defect, deficiency or handicap, but abortion shall not be considered to prevent, cure or ameliorate any disease, defect, deficiency or handicap.

(c) The failure or refusal of any person to perform or have an abortion shall not be considered in awarding damages or imposing a penalty in any action and shall not be a defense in any action.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

#3

Kansas judge allows suits for negligence when sterilization fails

By Jake Thompson
Of the Mid-America Staff

About a million Americans are sterilized each year. On a rare occasion the surgery doesn't work. A baby is born.

On Wednesday a Wichita district judge ruled for the first time in Kansas on whether a woman who had been sterilized could sue a hospital for money to rear, educate and clothe a child born despite the surgery. Judge Michael Corrigan said no.

However, he did set a state precedent by allowing parents, if they can prove negligence, to seek damages for the costs of a pregnancy and birth and of the emotional trauma from bringing a healthy but unwanted child into the world.

Thursday Journal

The case brought by Ella M. Byrd of Wichita will be appealed to a state appellate court, her attorney said, and she will seek those costs cited by the judge.

Beyond Kansas' borders, parents nationwide have filed at least 100 lawsuits against doctors and hospitals over sterilizations that failed.

The demands made by people who have babies after being sterilized are causing substantial worry for some physicians, according to DeAnne Nehra, a spokesman for the American College of Obstetrics and Gynecology.

"A lot of them have stopped the practice of vasectomies and tubal ligations even though they inform the patient it's not 100 percent guaranteed," Ms. Nehra said. "And many physicians are giving up obstetrics altogether because of fear of malpractice lawsuits."

Nan Hunter, an attorney for the American Civil Liberties Union in New York, said lawsuits like Mrs. Byrd's are increasing. Several courts have ruled that if someone is found negligent, money can be awarded, she said.

In Mrs. Byrd's case, she contended that doctors at Wichita's Wesley Medical Center told her she wouldn't become pregnant after she had a tubal ligation in 1975. But she became pregnant and gave birth to a healthy boy in 1977.

She asked for the costs of delivering her child, for damages for money she might have earned if the pregnancy hadn't kept her from work and for child support.

Weeding through options, Judge Corrigan said Wednesday that Kansas law didn't support ordering a hospital or doctor to pay for rearing a healthy child born after a sterilization. He argued that determining that cost was impossibly speculative.

He also said: "It attacks the family unity. The worse off the parents can paint the child, the more damages

See SUITS, Page A-16, Col. 1

Continued from Page A

they can get. The more healthy the child is, the less they get."

In that instance, he said, awarding money would only heighten the anxiety of a child who knew he wasn't wanted and whose parents sued to have someone else pay for his support.

Such births are not always a result of negligence.

Of the estimated 968,000 sterilizations performed last year in the nation, 99.6 percent of the women's were successful and 99.2 of the men's vasectomies were, according to Mirriam Ruben, a spokesman for the Association for Voluntary Sterilizations, a nationwide group based in New York.

That number dipped from slightly more than 1 million sterilizations because of federal funding cuts, the dour economy and fears of health risks, officials said.

Negligence in sterilizations does occur, Ms. Ruben said, but sometimes pregnancy occurs because the severed or tied organs grow back together or because of other rare health reasons.

Chris Christian, the Wesley Medical Center attorney, said that's what he will try to prove in court in the future.

"As far as Wesley is concerned, we'll fight this to the end because we feel the hospital was not negligent in the surgery," Mr. Christian said.

He said Judge Corrigan's ruling was "excellent" and wouldn't dampen his argument.

In his decision, the judge said other state courts, notably Alabama's, laid the groundwork. Last year an Alabama appellate court ruled that an unexpected birth of a normal child wasn't cause for collecting child support from whoever performs sterilization surgery, he said.

Judge Corrigan cited the Alabama case and said: "The birth of a normal, healthy child and the joy and pride of raising that child are benefits on which no price can be placed. The benefits far outweigh any economic loss suffered by the parents."

California allows parents to seek child support money if the child is born with a birth defect.

In New Hampshire, a parent can collect only for costs of a pregnancy, Ms. Ruben said. New Jersey and Washington only allow damage suits if a child is impaired.

In Kentucky earlier this year, the state court compromised. Parents now have a right to child support money, but that the amount should be reduced by an intangible benefit a child provides to parents in joy, the court said.

Ms. Ruben said ordering a hospital or doctor to pay child support money raises another thorny, as yet unexplored, concern.

"If the doctor is going to have to pay for all the costs of rearing a child, does the doctor become a guardian and get all the rights of a guardian?" she said.

Kansas City Times - Thurs. Dec 15, 83

Wichita Eagle Cynthia Greer/Staff Artist
Thursday Dec. 15, 1983

Judge: Hospital Needn't Pay for Child-Care Cost

By Jim Cross
Staff Writer

A Wichita woman can't make a hospital pay for rearing her child, whether or not doctors botched a sterilization operation, a Sedgwick County judge ruled Wednesday.

The judge said he agreed with courts in other states that have ruled against lawsuits seeking child support to pay the costs of the 18 years the child is a dependent.

It was the first ruling by a Kansas judge on the controversial issue. The woman's attorney said he will appeal the decision to a higher court.

Sedgwick County District Judge Michael Corrigan ruled Wednesday afternoon against the claim by Ella M. Byrd, 31.

Byrd sued Wesley Medical Center and two of its doctors in 1980. She said her third child was born Dec. 18, 1977, two years after the doctors performed a tubal ligation to keep her from having any more children.

● RULING, 4D, Col. 1

Judge Rules For Hospital In Lawsuit

● RULING, From 1D

THE RULING does not prohibit Byrd from suing for the medical expenses of delivering the child or seeking damages for any pain and suffering she experienced as a result of the unexpected pregnancy.

There were no witnesses or evidence Wednesday, even though both sides said they had opinions from economists about how much it costs to raise a child. Byrd's lawyers estimated the cost at $60,000 to $80,000. Wesley's lawyers said it would be about $30,000 to $40,000.

During the hearing, Byrd's attorney, Ralph Baehr, compared the case to a paternity suit.

"Kansas courts have never had any trouble saying that if a man is responsible for the birth of a child he is responsible for rearing that child," Baehr said.

WESLEY'S ATTORNEY, Chris Christian, argued that a ruling against the doctor who performed the sterilization would be unfair.

"He gets all of the burdens and none of the benefits of having the child," Christian said.

In his ruling, Corrigan quoted frequently from five or six similar cases in other states.

He cited cases saying there is no way to put a price tag on the "joy and pride" of having a child and that a ruling in Byrd's favor could "meddle with the concept of life" and "undermine the family."

Byrd didn't attend the hearing. Baehr said she didn't feel comfortable discussing the case with reporters.

But after the ruling, Baehr said he wanted to set the record straight on how Byrd felt about her son.

"The child is wanted and loved and will continue to be," he said.

Attach. #4 2-10-84

Wrongful Life, Wrongful Birth: Emerging Theories Of Liability

Don C. Smith, Jr., '79, has recently co-authored Handling Pregnancy and Birth Cases (Shepard's/McGraw Hill 1983). From 1979-1981 he was assistant Press Secretary to Governor John Carlin.

In every phase of contemporary life medical technology and science have made possible the diagnosis of once mysterious diseases and ailments. In no area of medicine is this more true than in preconception genetic testing and prenatal medical care.

Today, genetic counselors are using greatly improved tests to predict genetic disorder before conception takes place.[1] More definite preconception predictions for various types of genetic maladies are now a reality because of the development of sophisticated biochemical tests.[2]

Moreover, physicians now have the ability to diagnose many prenatal health problems including Tay Sachs disease.[3] This ability has been made possible because of the development of new prenatal diagnostic tests such as amniocentesis[4] and ultrasonography.[5]

These advances make it possible, in some cases, for parents to chose not to conceive a child based on the threat of a genetic disorder or to abort an already conceived child if the child will be born with serious physical and, or mental impairment. The parents' decision whether to conceive a child, or to abort a fetus, is a constitutionally protected right.[6]

Generally, these medical tests and procedures are performed thoroughly and accurately. However, as with the delivery of other medical services, sometimes a mistake is made and the parents are denied the opportunity to decide on the proper course of action.

Because of the increasing reliance on these medical tests and procedures, and because mistakes have been associated with the carrying out of these tests and procedures, courts have recently been called upon to resolve a novel and troublesome issue: May there be recovery by an infant, or the infant's parents, based on the theory the infant would not have been allowed to be born had the parents known that the infant would be born in a severely unhealthy condition?

The action brought by, or in the name of, the infant under these circumstances is known as a wrongful life action. The action alleges that the infant would not have been born but for the defendant's negligence in failing to adequately inform the infant's parents that the infant would be born in a defective or diseased condition.[7] Moreover, the action alleges that the infant will be subjected to a life of misery, lack of accomplishment, and pain.[8] The infant seeks to be recompensed for his or her pain and suffering and for the costs associated with the extraordinary expenses that the infant will incur for medical and other special care during the infant's life.[9]

By contrast, the action brought by the parents under the same factual setting is referred to as a wrongful birth action.[10] The wrongful birth action alleges that as a proximate cause of the defendant's negligence the parents were deprived the opportunity to abort the child, or never conceive the child, and thus suffered emotional injury and injury associated with the continuing costs of providing for the unhealthy infant.[11]

It is important to note that the parents' action is separate from the infant's action.[12] Moreover, wrongful life and wrongful birth actions should be distinguished from wrongful pregnancy and wrongful conception actions. The latter two actions involve the birth of an unplanned, but usually healthy, infant due to contraceptive failure.[13] Wrongful pregnancy and wrongful conception actions are brought by the parents, and these actions seek recovery for the parents' expenses associated with the birth of the unplanned child.[14]

Initially, courts were reluctant to recognize wrongful life and wrongful birth actions. In **Gleitman v. Cosgrove**[15] the New Jersey Supreme Court rejected both actions. In **Gleitman** the plaintiffs alleged that Mrs. Gleitman had contracted rubella during a pregnancy. They alleged that she informed her physician, the defendant, of this fact, but that the physician did not warn her of the dangers of prenatal exposure to the disease. They also alleged that it was a well known medical fact, at the time of the diagnosis, that prenatal exposure to rubella could result in serious prenatal defects. Subsequently, the infant was born in a severely unhealthy condition. The court barred the wrongful life action based on the rationale that to recognize the action would violate public policy that discouraged the performance of abortions.

(continued on next page)

Wrongful Life, Wrongful Birth: *continued:*

Moreover, Chief Justice Weintraub wrote that to evaluate the infant's claim would be to enter an area in which no person could find the way. The court rejected the parents' wrongful birth action based on the abortion-public policy rationale and the belief that it would be impossible to measure damages.

However, during the last decade as the practice of genetic and prenatal testing has become more widely known and understood, some courts have begun to move away from the **Gleitman** rationale in the wrongful life setting, and most courts have disagreed with the **Gleitman** holding on the wrongful birth issue. Because of the differences between the actions, it is necessary to discuss the respective developments of the two actions separately.

The first court to consider the wrongful life theory following **Gleitman** was the Wisconsin Supreme Court. In **Dumar v. St. Michael's Hospital**[16] the court was faced with a claim by an infant who, like the Gleitman infant, had been born with serious defects following prenatal exposure to rubella. The infant alleged that the defendants had negligently failed to diagnose the mother's contraction of rubella, and thus had not informed the mother about the chances of prenatal injury. The court refused to recognize the wrongful life action based on the difficulty in determining the infant's damages. The court concluded that the infant's damages could not be measured by any standards recognized by law.

Subsequently, the New York Court of Appeals[17] rejected the wrongful life action and appellate courts in Florida[18] and Texas[19] denied recognition of the action.

However, several recent decisions have held that a wrongful life action should be recognized. The first decisions recognizing the action were made by appellate courts in California[20] and New York[21]. The California Supreme Court was the first court of final appeal to recognize the action. In **Turpin v. Sortini**[22], the California court stated that an infant bringing a wrongful life action had suffered an injury. Moreover, the court stated that when a defendant negligently fails to diagnose an hereditary ailment, the defendant harms the potential child by depriving the parents of information which may be necessary to determine whether it is in the child's best interests to be born with defects, or not to be born at all. The court also held that the infant could recover damages for the expenses that would be associated with the infant's unhealthy condition, but it rejected the infant's claim for pain and suffering because of the impossibility of determining the extent of the injury.

The Washington Supreme Court was the second supreme court to recognize the action. In **Harbeson v. Parke-Davis, Inc.**[23] the infant alleged that the defendant-physician failed to inform the infant's mother that use of an anticonvulsant drug during the mother's pregnancy might harm the infant. The child was born in an unhealthy condition, and the infant alleged that his condition was a proximate cause of the physician's failure to inform the mother of the risks involved. The court held that the costs of such negligence should be placed on the party whose actions caused the infant's continuing need for special medical care and treatment. Therefore, the court granted recovery for the expenses that would arise from the special medical care and treatment, but it rejected the claim for damages based on pain and suffering.

Therefore, today there is authority for both the recognition and rejection of the wrongful life action. However, it is unclear whether any discernable trend has yet been established.

The concept of wrongful birth, by contrast, has received more judicial approval, and today the trend is towards the recognition of the action.[24]

For example, the court that decided the **Gleitman** case has changed its position on the issue of wrongful birth. In **Berman v. Allan**[25] the New Jersey Supreme Court said that in light of the changes that had taken place since its earlier decision, the public policy reasons relating to the **Gleitman** rationale were no longer valid. Moreover, the court stated that a physician who negligently deprives a mother of the opportunity to exercise the right to have an abortion performed should be required to make amends for the damage which the physician proximately causes. Any other ruling, the court believed, would in effect immunize those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses, which, if born, would suffer from genetic defects.

Today, the most litigated issue in the wrongful birth area is not whether the action should be recognized but what types of damages should be recoverable. The types of damages that have been held recoverable include the costs associated with raising and educating the infant[26], medical expenses[27], the costs of daily therapy[28], and compensation for the parents' emotional suffering.[29]

Although most of the activity involving wrongful life and wrongful birth actions has taken place in trial and appellate courts, some legislatures have begun to address the issues. Thus far the legislative enactments involving wrongful life and wrongful birth actions have severely limited the availability of these actions for injured plaintiffs. For example, a South Dakota statute[30] provides that there shall be no cause of action or award of damages on behalf of any person based on the claim that but for the

(continued on page 14)

Wrongful Life, Wrongful Birth: *continued:*

conduct of another the person would not have been conceived, or once conceived would not have been permitted to be born alive. Minnesota has enacted a similar statute.[31] The Kansas State Judiciary Committee had hearings on SB 258, which would have severely limited the opportunity to initiate these actions, but the measure was tabled.[32]

In summary, it appears that the focal issues that exist in these actions are the following: Should wrongful life actions be recognized, and if so, what elements of damages should be recoverable. And, what elements of damages should be recoverable in wrongful birth actions.

None of these questions is easily resolved, and consideration of the relevant cases indicates that there is significant disagreement about how the questions should be answered.

However, the reality of these actions is that an unhealthy infant exists due to the negligence of a physician or genetic counselor. Moreover, fundamental in American jurisprudence are the principles that for every wrong there is a remedy, with few exceptions, and that an injured party should be compensated for all provable damages proximately caused by the wrongdoer.

It is appropriate that these principles be applied to wrongful life and wrongful birth cases. Application of the principles encourages the accurate and thorough delivery of medical services to prospective parents. Moreover, the principles provide a legal avenue of recovery to persons to at least partially redress an undeniable wrong.

FOOTNOTES

1 Fraser, Survey of Counseling Practices, Ethical Issues in Human Genetics 7 (1973).
2 Id.
3 Peters and Peters, Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action, 18 Duquesne LR 857 (1980).
4 Removal of amniotic fluid from the pregnant mother; the fluid is used in prenatal diagnosis of certain chromosomal disorders such as Down's Syndrome. Blakiston, Gould Medical Dictionary (4th ed McGraw-Hill 1979).
5 Fetal x-ray used to determine the prenatal development of organs. Blakiston, Gould Medical Dictionary (4th ed McGraw-Hill 1979).
6 **Roe v. Wade**, 410 US 113 (1973)
7 Peters and Peters, Note 3 above.
8 Petition from **Phillips v. United States**, 508 F. Supp 537 (D SC 1980).
9 See, e.g., **Turpin v. Sortini**, 31 Ca3d 220, 182 CalR 337, 643 P2d 954 (1982).
10 Peters and Peters, Note 3 above.
11 See, e.g., **Phillips v. United States**, 508 F. Supp 544 (D SC 1980); **Berman v. Allan**, 80 N.J. 421, 404 A.2d 8 (1979).
12 Peters and Peters, Note 3 above.
13 Holt, Wrongful Pregnancy, 33 South Carolina LR 759 (1982).
14 See, e.g., **Ochs v. Borrelli**, 187 Com. 253, 445 A.2d 883 (1982) [hospital costs]; **Hartke v. McKelway**, 526 F. Supp 97 (D.DC 1981) [applying District of Columbia law] [medical costs]; **Cockrum V. Baumgartner** 99 IIA3d 271, 425 NE2d 968 (1981) [rearing costs] [but see 9 Family Law Reporter 2317 (1983) where Illinois Supreme Court reverses lower court's ruling on rearing costs]; **Public Health Trust v. Brown**, 388 So2d 1084 (Fla 1980) [mother's pain and suffering]. For a more complete discussion of wrongful pregnancy and wrongful conception actions see Handling Birth and Pregnancy Cases (Shepard's/McGraw Hill 1983) § § 3.8-3.51.
15 **Gleitman v. Cosgrove**, 49 N.J. 22, 227 A.2d 689 (1967).
16 **Dumer v. St. Michael's Hospital**, 69 Wis.2d 766, 233 N.W.2d 372 (1975).
17 **Becker v. Schwartz**, 46 N.Y.2d 410, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978).
18 **DiNatale v. Lieberman**, 409 So.2d 512 (Flas. 1982).
19 **Nelson v. Krusen**, 635 S.W.2d 582 (Tex. 1982).
20 **Curlender V. Bio-Science Laboratories, Inc.**, 106 Ca.AM.3d 811, 165 Cal.R ptr.477 (1980).
21 **Park v. Chessin**, 60 AD2d 80, 400 NYS2d 110 (1977) [but see **Becker**, at Note 17, where the wrongful life holding of **Park** was reversed].
22 **Turpin**, Note 9 above.
23 **Harbeson v. Parke-Davis, Inc.**, 9 Family Law Reporter 2217 (Wash 1983).
24 As recognizing the action, see: **DiNatale**, at Note 18 above; **Schroeder v. Perkel**, 87 NJ 53, 432 A2d 834 (1981); **Becker**, at Note 17 above; **Gildiner v. Thomas Jefferson University Hospital**, 451 F Supp 692 (ED Pa 1978) [applying Pennsylvania law]; **Phillips v. United States**, 508 F. Supp 544 (D SC 1981) [applying South Carolina law]; **Jacobs v. Theimer**, 519 S.W.2d 846 (Tex. 1975); **Harbeson**, at Note 23 above; **Dumer**, at Note 16 above.
25 **Berman**, at Note 11 above.
26 **Becker**, at Note 17 above.
27 **Schroeder**, at Note 24 above.
28 **Schroeder**, at Note 24 above.
29 **Moores V. Lucas**, 405 So.2d 1022 (Fla. 1981); **Naccash v. Burger**, 290 S.E.2d 825 (Va. 1982).
30 SD Codified Laws Ann §21-55-1.
31 1982 Minnesota Laws, Ch. 52.
32 Senate and House Actions Report (March 30, 1983), Kansas Legislative Information System.

Mark Elrod '72 President of the Kansas Bankers' Association Trust Division congratulates Doug Hanisch for receiving the annual award for excellence in courses in trusts, tax and estate planning.

2-10-84
Attach. 7.5

TESTIMONY OF AUSTIN K. VINCENT OF TOPEKA, KANSAS
IN SUPPORT OF SB-258 TO PROHIBIT ACTIONS FOR WRONGFUL
BIRTH BEFORE THE SENATE JUDICIARY COMMITTEE
FEBRUARY 9, 1984

I. Generally, the courts have not allowed recovery in tort for wrongful life or birth. Gleitman v. Cosgrove, 49 NJ 22; Stewart v. Long Island College Hospital, 296 NYS 2d. 41.; Berman v. Allan, 404 A 2d 8 (N.J. 1978). Reasons given include:

A. Logical impossibility of measuring difference between life with defects and utter void of nonexistence;

B. Policy reasons against allowing tort damages for failing to take an embryonic life.

II. There will eventually be exceptions. Becker v. Schwarts 413 NY.S. 2d 895 disallowed damages for psychic and emotional injury to parents, but allowed pecuniary damages for losses which were the consequences of birth of a defective child.

III. The right to recover for wrongful birth would put the physician in the position of guessing whether an unborn person would want to be born and would further a mentality of genetic superiority.

IV. The viable child in utero is virtually unprotected under Kansas law. K.S.A. 21-3407. Wrongful birth cause of action would only further endanger this highly vulnerable being by inducing parents to abort for financial reasons (to avoid liability) and prodding physicians to think twice before attempting to save a defective child.

Atch. 5