

# HANDLING WRONGFUL BIRTH/LIFE CASES IN TODAY'S WORLD

*Presented by:*

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Mr. Britcher is the second vice president of the Association of Trial Lawyers of America—New Jersey Chapter (ATLA-NJ). He is chair of the Amicus Committee of ATLA-NJ. A published author on medical malpractice and product liability law issues, he has served on the editorial board of Leader's Product Liability Newsletter.

To date, nine appellate decisions on cases for which he served as either appellate or amicus counsel have been published. These include *Reynolds v. Gonzales*, \_\_\_\_ N.J. \_\_\_\_ (2002) (amicus); *R.F. v. Abbott Laboratories*, 162 N.J. 596 (2000) (amicus); *N.J.M. v. Breen*, 153 N.J. 424 (1998) (amicus); and *Hawksby v. DePietro*, 319 N.J. Super. 89 (App.Div. 1999).

Mr. Britcher is the recipient of the 1988 Professional Achievement Award of the Young Lawyers Division of the New Jersey State Bar Association.

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# **HANDLING WRONGFUL BIRTH/LIFE CASES IN TODAY'S WORLD**

**BY E. DREW BRITCHER**

There are many routine tests and procedures that should be performed by competent medical providers during pregnancy to evaluate both the health and progress of the fetus. These include a pelvic exam, calculation of the gestational age of the baby, measurement of maternal weight and blood pressure, tests of a sample of maternal urine to look for protein, sugar, and other chemicals in the urine, measurement of the height of the fundus, determination of the size and position of the baby, test of a sample of maternal urine to look for bacteria in the urine, blood tests to check for anemia, blood tests to check for diabetes at **28** weeks, blood tests for blood type and Rh antibodies, blood test to check for syphilis, cultures of cells from the mother's cervix to test for infection, blood test for hepatitis, examination of maternal ankles and lower legs for swelling, serum alpha-fetoprotein measurement to screen for certain birth defects, ultrasound scans as needed to look at the fetus, uterus, amniotic sac, placenta, ovaries, and pelvis, non-stress tests to check the health of the fetus by the heart rate when the fetus moves, triple screen, which provides more accurate screening for birth defects and includes tests for alpha-fetoprotein (AFP), human chorionic gonadotropin (HCG), and unconjugated estradiol (uE<sub>3</sub>).

Women with high risk factors may have additional tests and procedures, such as chorionic villus sampling from the placenta detection of some birth defects, amniocentesis for chromosome information and detection of some birth defects, repeated Rh antibody screening at **28 to 30** weeks and a shot of Rho@ immune globulin for Rh negative mothers, blood tests for clotting studies or liver function, non-stress tests once or twice a week, biophysical profile and stress tests to check the baby's health by the heart rate during uterine contractions.

If the prenatal care or delivery are not handled properly a number of life long injuries and/or disabilities can occur to either mother and/or child. In addition, today's medical technology allows for the identification of a number of conditions during pregnancy that a mother may wish to act upon and not carry the pregnancy to term or that may require intervention to avoid more significant injury to their child.

Conditions such as Down's syndrome, anencephaly, hydrocephaly, holoprosencephaly and spina bifida may be able to be identified prior to birth and allow a mother a choice regarding their pregnancy. Other conditions such as placenta previa, placental abruption, intrauterine growth retardation and macrosomia may be able to be managed in order to lessen the risk of injury to the child.

In the context of wrongful birth/life cases, it is important to note that actions may lie not only for diagnostic errors, but for failure to advise a patient of the availability of testing that could have provided information relevant to their decision to carry their pregnancy to term. In this regard, a good starting point for evaluating these cases is the committee opinions and technical bulletins of the American College of Obstetricians and Gynecologists and the standards for the performance of the standards for the performance of the Obstetrical Ultrasound Examination published by the American Institute of Ultrasound in Medicine.

ACOG Committee Opinion 160, published in October of 1995 (replacing H69, November 1989) establishes CVS as a "relatively safe and accurate procedure" when performed at 10-12 weeks gestation, with a 1 in 3,000 birth risk of transverse digital deficiency. For those with genetic concerns, it can provide an earlier and accepted alternative to mid-trimester amniocentesis. While the procedure has gained in popularity and acceptance it remains a procedure primarily at teaching hospitals.

ACOG technical bulletin 228, published in 1996 establishes that maternal serum screening can serve as an effective method of identifying increased risk of and prenatal identification (in conjunction with other diagnostic testing) of fetal abnormalities that can "enable families to make informed reproductive choices." The markers discussed are alpha-fetoprotein (AFP), human chorionic gonadotropin (hCG) and unconjugated estriol (uE3). Alone or in conjunction, these serum markers can provide an assessment of risk of the existence of Neural Tube Defects and Trisomy, together with other anomalies. Both high and low levels of MSAFP can be predictive of a serious birth defect. An elevation of maternal HCG is a sensitive marker for the detection of fetal Down Syndrome. Decreased level of uE3 is considered a marker for the Down Syndrome and Trisomy 18. False positives are reduced by the use of this "triple screen" of maternal serum, which must be confirmed through amniocentesis and/or targeted ultrasound studies. It is important to note that although published in 1996, this Bulletin cites articles supporting the use of

MSAFP for screening of NTD's as early as 1977 and the multi-screen for Down Syndrome as early as 1984. The failure to offer this screening should be considered a departure from standard of care.

Another area of particular significance to the medical care that can form the basis of these claims is the improper performance, interpretation and/or failure to offer or perform ultrasound evaluations. ACOG Technical Bulletin 187, December **1993** and the AIUM Standards each set forth an extensive list of indications for ultrasonography during pregnancy. Likewise, they both set forth the varied nature of the examinations, based on their purpose and point in gestational development. While multiple ultrasounds can be used to identify significant discrepancies in fetal measurements, the most frequent source of medical error and/or missed diagnostic opportunity related to the performance, interpretation and/or information regarding the value and availability of 2<sup>nd</sup> trimester survey of fetal anatomy and comparative biometrics.

A proper survey of fetal anatomy must obtain and evaluate images of the head, (including the neck for nuchal folds), brain (particularly recognition of the midline and ventricles), spine (at each vertebral level and the skin overlying each), bowels, bladder, kidneys, long bones, umbilical cord (three vessels) and abdominal wall, as well as amniotic fluid volume and biometrical measurements of head circumference, abdominal circumference, biparietal diameter, and femoral length. The absence of a midline in the brain, a clover-leaf shaped cranium, lemon shaped skull, increased nuchal folds, increased size of ventricles, cystic hygromas, absence of vertebral development, skin disruption over the vertebrae are only a few of the possible ominous findings for fetal anomalies. In addition, discrepancies between fetal measurements or ratios, such as BPD/FL can be markers for congenital or genetic anomalies. Again, although published in the 90's many of the underlying articles supporting the use of various measurements or findings as "marker" were published in prominent journals in the early to mid 80's. 3D and 4D imaging have brought and will continue to bring more knowledge, that parents may choose to act upon, to the forefront.

Other ACOG Publications that may provide a source of information for evaluating the adequacy of medical advice and services include:

### **Committee Opinions**

189 (Advanced Maternal Age)

223 (First Trimester Serenity with NJCH Trans)

- 158 (Guidelines for Dx Imaging during pregnancy)
- 166 (Informed Refusal)
- 180 (New Ultrasound Display Standard)
- 214 (Patient choice and maternal fetal relationship)
- 175 (Scope of Services for uncomplicated pregnancy)
- 212 (Screening for the Canavan)
- 162 (Screening for Tay Sachs)

### **Technical Bulletins**

- 230 (Assessment of fetal lung maturity)
- 200 (Genetic technologies)
- 109 (Methods of Mid-trimester AB)
- 171 (Rubella and pregnancy)
- 236 (Teratology)

In order to discuss the outcome of physician negligence in this context it is necessary to focus on wrongful birth and wrongful life actions. The goal is to examine the elements of the causes of action, permissible damages, and the various states, which recognize and/or reject these claims as well as the justifications for their respective holdings and then discuss how one prosecutes a claim, when one is viable.

Aside from a brief explanation of terminology and the types of damages allowed, this shall not focus upon wrongful conception or wrongful pregnancy causes of action.

### **WRONGFUL CONCEPTION/WRONGFUL PREGNANCY**

A wrongful conception or wrongful pregnancy claim refers to an action brought by the parents of an unplanned child against a physician who negligently performed a sterilization procedure or abortion. Although such actions most frequently involve healthy children, they can pertain to children with a disease or abnormality where the disease was not foreseeable and its prevention was not the purpose of the failed abortion or sterilization procedure. Nanke v. Napier, 346 N.W.2d 520,521 (Iowa 1984); Fulton-DeKalb Hosp. Auth. v. Graves, 252 Ga. 441,442 (1984), 314 S.E.2d 653; Miller v. Johnson, 231 Va. 177, 182

(1986), 343 S.E.2d 301. Wrongful conception claims do not rest on the claim that the mother had a right to terminate the pregnancy. Chaffee v. Seslar, 751 N.E.2d 773 (Ind. App. 2001). To the contrary, the failure to have an abortion or place the child up for adoption has been ruled not to be a consideration in determining damages. The jurisdictions that have considered wrongful conception claims have followed three separate paths regarding allowable damages, which consist of either: complete recovery for child rearing costs; child rearing costs offset by benefits of parenthood (only for the amount of such costs, which exceed the benefits, received from parenthood such as value of child's aid, comfort, society, and assistance; and a complete bar to recovery of child rearing costs, which is the, majority approach. Nanke, 346 N.W.2d at 522.

## WRONGFUL BIRTH

The majority of states (29)' recognize the validity of wrongful birth claims. The term wrongful

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Alabama: *Kell v. Banach*, 624 So.2d 1022 (Ala. 1993)

Arizona: *Walkerby Pizano v. Mart*, 164 Ariz. 37 (1990), 790 P.2d 735

California: *Gami v. Mullikin Medical Center*, 18 Ca.App.4th 870 (1993), 22 Cal. Rptr.2d 819;  
*Simmons v. West Covin Medical Clinis*, 212 Cal.App.3d 696 (1989), 260 Cal. Rptr. 772;  
*Andalon v. Superior Court*, 162 Cal.App.3d 600 (1984), 208 Cal. Rptr 899;  
*Call v. Kezirian*, 135 Cal.App.3d 189 (1982), 185 Cal.Rptr.103  
*Turpi v. Sortini*, 31 Cal.3d 220 (1982), 643 P.2d 954, 182 Cal.Rptr.337

Colorado: *Liningerv. Eisenbaum*, 764 P.2d 1202 (Colo.1988)

Connecticut: *Burns v. Hanson*, 249 Conn. 809 (1999), 734 A.2d 96

Delaware: *Garrison v. Medical Center of Delaware*, 581 A.2d 288 (Del. Supr. 1989)

District of Columbia: *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. App. 1987)

Florida: *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992);  
*Fassoulas v. Ramey*, 450 So.2d 822 (Fla. 1983);  
*DiNatale v. Lieberman*, 409 So.2d 512 (Fla.App. 5 Dist. 1982);  
*Moores v. Lucas*, 405 So.2d 1022 (Fla. App. 5 Dist. 1981)

Idaho: *Bake v. Cruz*, 108 Idaho (1984), 698 P.2d 315

Illinois: *Siemieniee v. Lutheran General Hospital*, 117 Ill.2d 230 (1987), 512 N.E.2d 691

Indiana: *Bader v. Johnson*, 732 N.E.2d 1212 (Ind.2000)

Kansas: *Arche v. United States of America*, 247 Kan. 276 (1990), 798 P.2d 4  
*Louisiana: Pitre v. Opelousas General Hosp.*, 530 So.2d 1151 (La. 1988);  
*Pines v. Dr. Carlos D. Moreno, Inc.*, 569 So.2d 203 (La. App. 1 Cir.1990)

Kentucky: *Bogan v. Altman & McGuire, P.S. C.*, 1999-CA-000212-MR (Ky.App.3-2-2001)

Maine: *Thibeault v. Larson*, 1995 ME, 666 A.2d 112

Maryland: *Reed v. Campagnolo*, 332 Md.226 (1993), 630 A.2d 1145

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Massachusetts: *Viccarov. Milunsky*, **406 Mass. 777(1990), 551 N.2d.8**

Nevada: *Green v. UnitedStates*, 111 Nev. 405 (1995). 893 P.2d 345

New Hampshire: *Smith v. Cote*, 128 **N.H.** 231 (1986). 513 A.2d 341

New Jersey: *Berman v. Allan*, 80 N.J. 421 (1979)  
*Hummel V. Reiss*. 129 N.J. 118 (1992);  
*Canesiv. Wilson*, 158 N.J. 490 (1999);  
*Moscatello v. U. of Med. And Dentistry*, 342 N.J. Super. 351 (App. Div. 2001);  
*Lodato v. Kappy. A-1166-99T3(N.J. super. 8-2-2002)*

New York: *Becker v. Schwartz*. 46 N.Y.2d 401 (1978). 414 N.Y.S.2d 895, 386 N.E.2d 807

No. Carolina: (Limited to Pre-Conception)  
*Gallagherv. Duke University. (M.D.N.C. 1986)*. 638 F. Supp. 979)

Oklahoma: *Liddington v. Burns (W.D. Okl. 1995)*, 916 F. Supp. 1127

Rhode Island: *Schloss v. The Miriam Hospital*, 98-2076 (1999)

So. Carolina: *Phillips v. UnitedStates. (1983)*. 575 F.Supp.1309

Tennessee: *Owens v. Foote*, 773 S.W.2d 911 (Tenn. 1989)

Texas: *Nelson v. Kruzen*, 678 S.W.2d 918 (Tex. 1984), 678 S.W.2d 918;  
*Jacobs V. Theimer*, 519 S.W.2d 846 (Tex. 1975), 519 S.W.2d 846

Virginia: *Naccash v. Burger*, 223 Va.406 (1982). 290 s.E.2d 825

Washington: *Harbeson v. Parke-Davis. Inc.*, 98 Wn.2d 460 (1983). 656 P.2d 483

W. Virginia: *James G. v. Caserta*. 175 W. Va. 406 (1985)

Wisconsin: *Dumer v. St. Michael's Hospital*, 69 Wis.2d 766 (1975). 233 N.W.2d 372;  
*Marciniakv. Lundborg*, 153 Wis.2d 59 (1990), 450 N.W.2d 243

Nevada: *Green v. UnitedStates*, 111 Nev. 405 (1995). 893 P.2d 345

New Hampshire: *Smith v. Cote*, 128 N.H. 231 (1986), 513 A.2d 341

New Jersey: *Berman v. Allan*, **80 N.J.** 421 (1979)  
*Hummel V. Reiss*. 129 N.J. 118 (1992);  
*Canesiv. Wilson*, 158 N.J. 490 (1999);  
*Moscatello v. U. of Med. And Dentistry*, 342 N.J. Super. 351 (App. Div. 2001);  
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*Jacobs V. Theimer*, 519 S.W.2d 846 (Tex. 1975), 519 S.W.2d 846

Virginia: *Naccash v. Burger*, 223 Va.406 (1982). 290 s.E.2d 825

birth generally applies to the cause of action of a parent who claims that negligent advice or treatment deprived them of the choice of avoiding conception or of terminating the pregnancy. Procanik by Procanik v. Cillo, 97 N.J. 339, 348(1984). In a wrongful birth case, the duty owed to the parents is the duty to diagnose and inform them of any abnormalities or risk to the infant so that the parents can make an informed decision as to whether or not to terminate the pregnancy. The negligence deprives the parents of the option to carry the pregnancy to term or terminate the pregnancy and causes the parents to experience mental and emotional anguish related to their child's affliction or abnormality. Berman v. Allen, 80 N.J. 421,433 (1979), Procanik, 97 N.J. at 355. Wrongful birth has been defined as an action brought by the parents of a child born with severe defects against a physician who negligently failed to inform them in a timely fashion of an increased risk that the mother will give birth to an impaired child thereby precluding her from making an informed decision as to whether or not to have the child. Smith v. Cote, 128N.H. 231, 236 (1986), 513 A.2d 341. The parental right to recovery is based on a direct injury to their own independent rights and has been determined to be independent from any claim the child may have. Michelman v. Ehrlich, 311 N.J. Super. 57, 69 (App. Div. 1998).

The claims of alleged negligence in wrongful birth and/or wrongful life actions may involve a variety of negligent acts. Examples include the misdiagnosis of an hereditary condition, the misrepresentation of risks associated with conception and delivery of the child, the negligent interpretation or reporting of diagnostic tests, or in certain circumstances, the negligent performance of a sterilization procedure. Lininger v. Eisenbaum, 764 P.2d 1202, 1205 (Colo. 1988).

### **THE HISTORICAL DEVELOPMENT OF THE CAUSE OF ACTION**

One of the first cases to consider a wrongful birth claim was Gleitman v Cosgrove, 49 N.J. 22 (1967). In Gleitman, plaintiff alleged that the defendants negligently failed to inform the mother of the effects which German measles may have upon the infant in gestation. Plaintiff contended that had she been

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*Washington:* Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460 (1983), 656 P.2d 483

*W. Virginia:* James G. v. Caserta. 175 W. Va. 406 (1985)

*Wisconsin:* Dumer v. St. Michael's Hospital, 69 Wis.2d 766(1975), 233 N.W.2d 372;  
Marciniak v. Lundborg, 153 Wis.2d 59 (1990), 450 N.W.2d 243

informed she may have obtained an abortion. In refusing to recognize either the infant plaintiffs wrongful life claims or the parents wrongful birth claim, the New Jersey Supreme Court found that the conduct complained of did not give rise to damages cognizable at law. The court also found that there was a public policy that supported the preciousness of human life, thereby precluding recognition of the claims.

There have been a number of developments since the holding in Gleitman to explain why the majority of courts now recognize wrongful birth claims. The Supreme Court held in Roe v Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) that the constitutional right to privacy encompasses a woman's decision as to whether to undergo an abortion. During the first trimester, a woman may make the decision free from state interference. In the second trimester, "the state in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health, Roe at 164.

When the court addressed these issues in Gleitman, N.J.S.A. 2A:87-1 made it a crime to commit an abortion without lawful justification," which at that time the case law limited to "preservation of the mother's life." State v. Shapiro, 89 N.J.L. 319 (E. & A. 1916); State v. Brandenburg, 137 N.J.L. 124 (Sup. Ct. 1948). Wrongful birth and wrongful life actions are dependent upon a woman's right to terminate a pregnancy for reasons other than the mother's health. Hummel v. Reiss, 129 N.J. 118, 126 (1992). Other important developments subsequent to the court's refusal to recognize a wrongful birth cause of action in Gleitman include the improved ability to detect birth defects in utero and prior to conception, the improved capacity to assess maternal risk factors, and the development of biochemical and cytogenetic tests for assaying amniotic fluid and maternal and fetal blood. Policy considerations that support recognition of wrongful birth claims include the belief that imposing liability upon physicians furthers a societal interest in reducing the incidence of genetic defects. It is also consistent with the general tort principle that a physician whose negligence has deprived a woman of the opportunity to make an informed decision as to whether to abort her fetus should be required to compensate her for damages that were proximately caused by defendant's negligence. Blake v. Cruz, 108 Idaho 253, 256-257 (1984), 698 P.2d 315. Failure to recognize a wrongful birth cause of action would also immunize the medical profession from liability for their performance in one particular area of the medical practice. Bader v. Johnson, 732 N.E.2d 1212, 1219-1220 (Ind. 2000).

The elements of the wrongful birth tort include the traditional requirements of a negligence claim: duty; breach; proximate cause; and injury. Robak v. United States, 658 F.2d 471 (7<sup>th</sup> Cir. 1981); Basten by and through Basten v. U.S., (M.D.Ala. 1994), 848 F. Supp. 962,967; Keel v. Banach, 624 So.2d 1022, 1026 (Ala. 1993); Garrison v. Medical Center of Delaware, 581 A.2d 288 (Del. Supr. 1989); Bader 732 N.E.2d at 1216; Harbeson v. Parke-Davis, Inc. 98 Wn.2d 460 (1983), 656 P.2d 483; Becker v. Schwartz, 46 N.Y.2d 401 (1978), 414 N.Y.S.2d 895, 386 N.E.2d 807; Reed v. Campagnolo, 332 Md. 226 (1983), 630 A.2d 1145. If parents prove these elements of a medical negligence cause of action they are entitled to compensation for damages that flow from the negligence. The injury to the parents is based on their deprivation of the opportunity to make an informed decision as to whether to terminate the pregnancy. The wrongfulness of the tort does not rest in the life, birth, conception, or the pregnancy, but in the negligence of the physician. The harm is not the birth itself, but in the effect that the defendant's negligence has on the parents physical, emotional and financial well being as a result of the denial of the parental right to decide whether to bear a child with a genetic defect. Viccaro v. Milunsky, 406 Mass. 777,785 (1990), 551 N.E.2d 8. Courts that have recognized wrongful birth claims reject the view that the judiciary must defer to the legislature on such matters because of the belief that the claims should be determined in accordance with traditional tort principles. Naccash v. Burger, 223 Va. 406,423 (1982), 290 S.E.2d 825. In Nevada, the court in Greco v. United States compared the mother's wrongful birth claim to one in which a physician negligently fails to diagnose cancer. The lost chance in a wrongful birth cause of action is the mother's legally protected right to choose whether or not to abort a severely deformed fetus. Greco v. United States, 111 Nev. 405,411 893 P.2d 345 (1995).

Proximate cause is an essential element of a wrongful birth cause of action. However, in a wrongful birth action, the parents are not required to prove that the negligence caused the defect because medical causation is not the element at issue. The cognizable harm is the emotional and economic injury suffered by the parents. As such, they must prove that those injuries were proximately caused by the doctor's negligence in depriving them of the opportunity to decide whether or not to become parents of a child with defects. A wrongful birth action generally requires that the physician disclose those medically accepted risks that a reasonably prudent patient in plaintiffs position would deem material to her decision. The definition of a medically accepted risk is based on what a physician knows or should know of the patient's history and condition. Plaintiff must prove that a reasonably prudent patient in her position, if

apprised of all material risks, would have elected a different course of treatment or care. The test of materiality is focused on what the patient would find material. The test of proximate cause is satisfied by showing that an undisclosed fetal risk was material to a woman in her position; that the risk materialized; that it was reasonably foreseeable and not remote in relation to the negligence; and had plaintiff known of that risk, she would have terminated the pregnancy. Canesi v. Wilson, 158 N.J. 490, 506 (1999).

To establish causation under a wrongful birth action, it is necessary for the plaintiff to show that had the defendant not been negligent or not failed to fully inform her, the plaintiff would have been aware of the risk that the child would be seriously affected and either the child would not have been conceived or the pregnancy would have been terminated. Keel, 624 So.2d at 1026-27. The nature of the wrongful birth tort has nothing to do with whether the defendant caused the injury or harm to the child but whether the defendant's negligence was the proximate cause of the parents being deprived of the option of avoiding conception or of making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child. Id. at 1029.

The damages allowable under wrongful birth actions are fairly uniform although they vary in some significant respects. Extraordinary expenses for the care, maintenance, and education of the handicapped child, to the extent that those costs exceed the usual costs of raising an unimpaired child are generally recoverable. Among the justifications for permitting only extraordinary expenses is the desire to prevent windfalls and to ensure that parents will recover only the medical and educational costs attributable to the impairment. Such expenses are thought to be well within the methods of proof available, not speculative, and consistent with the policy that physicians should be liable only for losses proximately caused by their negligence. The damages are part of the mother's loss caused by the deprivation of her right to decide whether to terminate the pregnancy. Haymon v. Wilkerson, 535 A.2d 880, 886 (D.C.App. 1987). One of the policies of tort law is to place a person in a position nearly equivalent to what would have existed had the defendant's conduct not breached a duty owed to the plaintiff thereby causing injury. In the wrongful birth context, this means the situation that would have existed had the child actually been born in the state of health that the parents were led to believe would occur. Kush v. Lloyd, 616 So.2d 415, 424 (Fla. 1992). Courts have also observed that plaintiffs in a wrongful birth action typically desire a child and plan to support it from the outset. Smith, 128 N.H. 231 (1986). As such, ordinary child rearing expenses have

been prohibited.

The courts vary more significantly with respect to the issue of a parental claim for emotional distress damages in a wrongful birth action. Among the states that do not permit an award for emotional damages are Delaware, Kansas, New Hampshire, District of Columbia, and New York. In Delaware, the court prohibited such damages because it found that there was no demonstrable physical injury to the plaintiff as required by state law. Garrison, 581 A.2d at 292-93. In Kansas, the law requires that the parent have witnessed the occurrence, which caused the injury. Visibility of results does not give rise to a claim for emotional damages. Arche v. United States of America, 247 Kan. 276, 282-283, (1990), 798 P.2d 477. In New Hampshire, the court held that emotional distress damages are recoverable to the extent that the emotional distress results in tangible pecuniary losses such as medical expenses or counseling fees. The court adopted such a ruling to avoid the risk of over penalizing the negligent conduct. Smith, 128 N.H. at 245,247. In the District of Columbia, a claim for negligent infliction of emotional distress resulting from wrongful birth is not recognized under the jurisdiction requirement that the mother must have been within the zone of danger where the injury to the child occurred or must have sustained an injury to herself. Cauman v. George Washington University, 630 A.2d 1104, 1109 (D.C.App. 1993); Dyson v. Winfield, (D.C. 2001), 129 F. Supp.2d. 22, 24. New York bars emotional distress damages absent any independent physical injuries. Keselman v. Kingboro Medical Group, 156 A.D.2d 334, 335 (2d Dept. 1989), **548** N.Y.S.2d 287. Such damages have also been considered too speculative. There is also a concern that an award of emotional distress damages in this context will encourage fraudulent claims as well as represent an unwarranted and dangerous extension of malpractice liability. Becker, 46 N.Y.2d at 413-14; Howard v. Lecher, 53 A.D.2d 420,423-25 (2d Dept. 1976), 386 N.Y.S.2d 460.

Conversely, in Virginia, like many of the states that permit recovery for damages for emotional distress, the circumstances of a wrongful birth cause of action justify an exception to any rule that such damages are prohibited unless they result directly from tortiously caused physical injury. Naccash, 223 Va. at 414-16.

Among the jurisdictions that permit a recovery for emotional distress damages, there is some variation as to whether the defendants are entitled to a potential offset of any award. The joy-benefit rule, described in *Restatement (Second) of Torts, section 920 (1977)*, provides in relevant part that :

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.

New Jersey is typical of the states that hold that the defendant is not entitled to an offset of a jury award for emotional damage for the joy and benefit a parent receives from the child. It is thought that in wrongful birth actions, the negligent physician has not conferred any benefit upon the mother by depriving her of the right to decide whether or not to continue or terminate her pregnancy. According to the Appellate Division, the process of the child's conception and birth was a natural one that occurred without the defendant's participation. The defendant did not bring about the benefit of the child's birth but rather interfered with the mother's decision-making process. Lodato v. Kappy, A-1166-99T3(N.J. Super. 8-2-2002). Nevada also prohibits the application of the offset rule to an award of emotional distress damages. The emotional benefits are thought to be too speculative to be considered by a jury. Greco, 111 Nev. at 413-14. In contrast to the New Jersey and Nevada courts; Massachusetts, South Carolina, Idaho, and Washington have allowed an offset of the emotional benefits derived from the existence of the child. Viccaro, 406 Mass. at 782-83; Phillips v. United States, (1983), 575 F. Supp. 1309, 1319-1320; Blake, 108 Idaho at 258; Harbeson, 98 Wn.2d at 476-77.

Most jurisdictions permit damages to be measured by the life of the child, or the child's life expectancy to the extent that the child remains dependant upon the parents. In some jurisdictions, parents have a continuing obligation to provide for their children who cannot care for themselves beyond the age of majority. Basten by and through Basten, 848 F.Supp. 962; Garrison, 581 A.2d 288; Viccaro, 406 Mass. 777; Phillips, 575 F.Supp. 1309; James G. v. Caserta, 175 W. Va. 406 (1985); Blake, 108 Idaho 253; Kush, 616 So.2d 415. In New York, damages are recoverable only until the child's 21<sup>st</sup> birthday because the Legislature chose to terminate parental legal responsibility for the support of their children after age 21. Beyond that age, the state and federal government must assume the obligation to support those in need. Even if parental love causes parents to continue to support their children, the New York court **has** stated that such a moral obligation will not support a claim for damages, because of this legislation. Bani-Esraili v. Wald, 127 Misc.2d 202,203 (1985), 485 N.Y.S.2d 708.

Various Courts have also addressed issues pertaining to the statute of limitations for wrongful birth actions and have generally held that they are governed by the medical malpractice statute of limitations. It has also been held that the cause of action does not accrue until the birth of the child and as such the statute cannot begin to run until the date of the birth. Blake, 108 Idaho at 260. There is no injury until the child is born. Payne by and through Payne v. Myers, 743 P.2d 186, 190 (Utah 1987). Until the birth of the child, the plaintiff cannot know whether she will miscarry or whether the child will be born alive without a defect, nor the extent of the defect. ~~Parents~~ cannot know whether the physician breached the duty not to contribute to the birth of the deformed child until the birth of the child. The birth of the deformed child is the event that gives rise to the wrongful birth claim. Quimby v. Fine, 45 Wn.App. 175, 179 (1986), 724 P.2d 403.

### NO WRONG IN BIRTH

A minority of states have refused to recognize a cause of action for either wrongful birth or wrongful life? Georgia has refused to recognize the action, leaving it to the General Assembly to authorize such action. Etkind v. Suarez, 271 Ga. 352 (1999), 519 S.E.2d 210. In Atlanta Ob. & Gyn. V. Abelson, 260 Ga. 711, 715 (1990), 398 S.E.2d 557, the **court** found that under traditional tort analysis, duty **and** breach did not present a problem but that the analysis broke down when addressing injury and causation.

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- Georgia:* Etkind v. Suarez, 271 Ga. 352 (1999), 519 S.E.2d 210  
*Gale v. Ob/Gyn of Atlanta, P.S.*, 213 Ga.App. 614 (1994), 445 S.E.2d 366  
*Spires v. Kim*, 203 Ga.App. 302 (1992), 416 S.E.2d 780  
*Atlanta Ob. & Gyn v. Abelson*. 260 Ga. 711 (1990), 398 S.E. 2d 557
- Michigan: Statute 600.2971; overruling*  
*Taylor v. Kruapati*, 236 Mich. App. 315 (1999), 600 N.W.2d 670
- Minnesota: Statute 145.424*
- Missouri: Missouri Statute 188.130*  
*Shelton v. St. Anthony's Medical Center*, 781 S.W.2d 48 (Mo. banc 1989)  
*Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. banc 1988)
- North Carolina: Post-conception)*  
*Azzolino v. Dingfelder*, 315 N.C. 103 (1985), 337 S.E.2d 528
- Ohio:* *Hester v. Dwivedi* 89 Ohio St.3d 575 (2000). 733 N.E.2d 11 761
- Pennsylvania:* 42 Pa.C.S.A. section 8305 overrulin  
*Ellis v. Sherman*, 512 Pa. 14 (1986), 515 A.2d 1327  
*Speck v. Finegold*, 497 Pa. 77 (1981), 439 A.2d 110  
*Gildiner v. Thomas Jefferson Univ. Hospital*, (1978), 451 F.Supp.692, United States District Ct. E.D. Pennsylvania
- Utah:* *Payne by and Through Payne v. Myers*, 743 P.2d 186 (Utah 1987)  
*Utah:* Statutes 78-11-24

The court refused to recognize that the life of a child can ever be an injury inflicted upon the parents by the physician. The court further stated it cannot be said that physicians caused the impairment. In North Carolina, the courts recognize pre-conception torts but not post-conception torts. A wrongful birth cause of action will be permitted when a health care provider negligently provides counseling and information which induces a couple to conceive a child that is born with defects, but once conceived, even if tests to determine if the fetus suffers from any genetic defects are misinterpreted or improperly performed no action exists. Azzolino v. Dingfelder, 315 N.C. 103 (1985), 337 S.E.2d 528; Gallagher v. Duke University, (M.D.N.C. 1986), 638 F. Supp. 979. The court in Azzolino refused to recognize a post-conception wrongful birth action explaining: “life even with severe defects may never amount to a legal injury; recognition of the action would encourage fraudulent claims; there is a lack of uniformity among courts concerning the proper measure of damages; as medical science advances, physicians in jurisdictions recognizing wrongful birth actions will be forced to carry a heavy burden in determining what information is important to parents when attempting to obtain their informed consent for the fetus to be carried to term; and physicians will face pressure to recommend abortions.” Azzolino, 315 N.C. at 111-114.

Several states have gone so far as to enact legislation prohibiting wrongful birth and wrongful life actions. Those include Missouri, Michigan, Pennsylvania, Minnesota, Idaho and South Dakota. In Pennsylvania, the Statute prohibiting such actions has withstood a challenge that it violated the Due Process and Equal Protection Clauses of the 14th Amendment of the US Constitution and Art 1, section 1 and Art 3 section 32 of the Pennsylvania Constitution. The court stated that to violate Roe, supra., the state must directly affect or impose a significant burden on a woman’s right to an abortion. The court found that the statute merely extinguished all causes of actions arising from a claim that but for the improper conduct of a medical provider, a child would have been ~~aborted~~ prior to birth. Dansby v. Thomas Jefferson U. Hosp., 424 Pa. Super. 549, 555 (1993), 623 A.2d 816. The Court found the statute to be rationally designed to meet a legitimate state interest, which is that a handicapped child should not be deemed better off dead and of less value than a normal child. The court further reasoned that the statute reflected the state’s refusal to dictate to the medical profession how to practice obstetrics. The court, noting increasing malpractice rates and loss of adequate medical care in obstetrics, stated that the statute rejects a cause of action likely to produce verdicts based on sheer speculation and has freed physicians from liability for birth defects for which a physician is not responsible. Dansby, 424 Pa. Super. at 555-56.

The court in Flickinger v. Wanczyk, (E.D.Pa. 1994), 843 F.Supp. 32, 36, found that the legislature's decision to deny judicial relief to recipients of negligent information did not convert negligent physicians into state actors. It did not encourage negligent behavior by physicians or laboratories. According to the court, considerations of professionalism, ethics and community reputation will discipline the providers of fetal screening information. Similarly, in Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 14 (Minn. 1986), the court found no constitutional violations with a state statute prohibiting wrongful birth and wrongful life actions. The court stated that most adults are fully aware of the risks of childbearing when the mother is over the age of 30 (the case involved the failure to offer prenatal testing for Downs Syndrome). The court also felt that physicians should have some leeway in exercising judgment affecting the treatment of their patients, without the fear of legal sanction.

These statutory prohibitions and the judicial acceptance of them represent a significant setback for the rights of victims of medical malpractice in the wrongful birth and wrongful life setting. Such legislative action has in effect completely immunized certain physicians from any liability regardless of the egregious nature of the malpractice. Physicians who provide negligent genetic counseling or who fail to properly interpret and convey accurate test results will not be held accountable for their actions, solely because of the nature of the action filed against them. Innocent parents and handicapped children will undoubtedly suffer under the guise of the alleged societal goal of honoring human life. Contrary to the various justifications of the courts upholding such legislation, immunizing physicians from such suits will inevitably lead to decreased quality of healthcare and increased feelings of frustration and helplessness among those victimized by the malpractice.

### **WRONGFUL LIFE – THE MINORITY – FOR NOW**

In contrast to the majority of states that recognize wrongful birth claims, the majority of states reject claims for wrongful life. A claim for wrongful life refers to a cause of action brought by or on behalf of an afflicted child who claims that but for the defendants negligent advice to or treatment of its parents, the child would not have been born and would not have to endure life with deformities. Procanik by Procanik, 97 N.J. at 348; Pitre v. Opelousas General Hosp., 530 So.2d 1151, 1154 (La. 1988). The essence of the claim is that the infant's very life is wrongful and that the defendants wrongfully deprived the infant's

mother of information that would have prevented the infant's birth. Procanik by Procanik, 97 N.J. at 348. The cause of action is one in which a child seeks recovery for being born with infirmities. Boone v. Mullendore, 416 So.2d 718 (Ala. 1982). The allegation is not that the doctor's negligence directly caused the defect but that the doctor's negligent practice or failure to properly advise the parents led to the birth of the child in the afflicted condition. Pitre, 530 So.2d at 1154. The term wrongful life, as well as the term wrongful birth, do not apply to cases, which allege that a defendant's tortious conduct caused the abnormalities in infants that would otherwise have been born normal and healthy. Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991).

Only three states recognize a cause of action for wrongful life at this time, New Jersey, Washington and California. A wrongful life cause of action was first recognized in NJ in the case of Procanik by Procanik, 97 N.J. 339 (1984). In Procanik, the infant plaintiff alleged that the defendants were negligent in failing to diagnose that his mother contracted German measles during her first trimester. As a result, the infant plaintiff was born with congenital rubella syndrome. The parents' wrongful birth claim was barred by the statute of limitations. Prior to the Procanik decision, the court in Gleitman and Berman, supra, refused to recognize a cause of action for wrongful life. In Gleitman, the court's decision was based primarily on the belief that it was impossible to ascertain damages. In Berman, the court's justification was that life, whether experienced with or without a major handicap, was more precious than non-life. Berman, 80 N.J. at 429-30.

In Procanik, the court held that the infant plaintiff could recover the extraordinary medical expenses attributable to his affliction, but could not recover general damages for emotional distress or for an impaired childhood. The child or his parents may recover special damages for extraordinary medical expenses incurred during infancy, and the infant may recover those expenses during majority. The court found that the defendants owed the infant a duty and that the infant's claim for medical expenses attributable to his birth defects was reasonably certain, readily calculable, and of a kind daily determined by judges and juries. According to the court, its decision was premised on the needs of the living and not on the concept that non-life is preferable to an impaired life. at, 353. The court noted that if they refused to recognize the infant's wrongful life claim, the plaintiff would be barred from any recovery because the parents' wrongful birth claim was barred by the statute of limitations. New Jersey courts have also held

that a parent's settlement does not extinguish a disabled child's claim for extraordinary medical expenses. Moscatello v. U. of Med. And Dentistry, 342 N.J. Super. 351,355 (App. Div. 2001).

In the same year as New Jersey, Washington recognized a cause of action for wrongful life. In Harbeson v. Parke Davis, the court held that a duty may extend to a person not yet conceived at the time of the negligent act or omission and that the duty is limited by the element of foreseeability. According to the court, recognition of such a duty would provide a deterrent to malpractice, and more comprehensive and consistent compensation to those injured by malpractice than would otherwise be available if the duty was confined to the parents. Harbeson, 98 Wn.2d at 481. The court did not consider that requiring a negligent party to provide the costs of health care of a deformed child to be a disavowal of the sanctity of human life. Id., at 482.

With respect to damages, the Court held the child could recover the extraordinary expenses to be incurred during the child's lifetime. Extraordinary expenses consist of those expenses attributable to the congenital defect. The court considered these extraordinary expenses for medical care and special training to be calculable. The costs of such care may only be recovered once. If the parents recovered the costs for the child's minority in a wrongful birth action, the child would be limited to the costs to be incurred during his majority. Id., at 479-80. General damages were ruled not recoverable.

The first state to recognize a cause of action for wrongful life was California in 1992. In Turpin v. Sortini, 31 Cal.3d 220 (1982), 643 P.2d 954, 182 Cal.Rptr. 337, the court held that the infant-plaintiff, afflicted with a hereditary condition, could maintain a tort action against the medical care provider who negligently failed to advise his parents of the possibility of their first child having the hereditary condition. The parents were deprived of the opportunity to choose not to conceive a second child. In recognizing the cause of action, the court stated that it was hard to see how **an** award of damages to a severely handicapped child would disavow the value of life or suggest that the child was not entitled to the full measure of legal and non-legal rights and privileges accorded to all members of society. The court felt that it was inaccurate for the judiciary to proclaim that the state's public policy established **as** a matter of law that under all circumstances an impaired life is preferable to non-life. Turpin, 31 Cal.3d at 233. The essence of the court's opinion was that logic should not defeat the claim of a severely impaired child in need of assistance.

In Turpin, the court allowed the child to recover special damages for the extraordinary expenses necessary to treat the hereditary ailment. The parents and the child could not recover for the same medical expenses. The court reasoned that such damages were readily measurable and often vital to the child's well-being and survival. Turpin, 31 Cal.3d at 238-39. General damages were not allowed because they were considered to be impossible to assess in any fair and non-speculative manner. The court stated that it was impossible to determine in a reasoned fashion whether the infant plaintiff has in fact suffered an injury in being born impaired rather than in not being born at all. Id., at 236.

Plaintiffs bringing a wrongful life cause of action must prove duty, breach, a proximate causal connection between the negligent conduct and the resulting injury; and actual loss or damage resulting from the negligence. Galvez v. Fields, 88 Cal.App.4<sup>th</sup> 1410, 1419-1420(2001), 107 Cal.Rptr.2d 50. Wrongful life claims require a but for test of proximate causation. Provenzano v. Integrated Genetics (N.J. 1998), 22 F.Supp.2d 406. Plaintiff must establish that but for the defendant's negligence, the infant would not have been born. Rossi by Rossi v. Somerset Ob-Gyn Assoc., (N.J.1994), 879 F.Supp. 411,414-415. To sustain a wrongful life cause of action, the infant plaintiff must establish that his mother would have chosen to abort the pregnancy had she been informed of the defects. Rossi by Rossi, 879 F.Supp. at 415. In Rossi, the parents would not indicate that they would have chosen to abort the fetus had they been aware of the abnormalities. The court granted defendants summary judgment because it concluded that jury would be unable to conclude by a preponderance of the evidence that the parents would have chosen that option.

With respect to causation in a wrongful life cause of action, the issue is whether, but for the physician's negligence, the parents would have avoided conception or aborted the pregnancy and the child would not have existed. Harbeson, 98 Wn.2d.at 483. In Simmons v. West Covina Medical Clinic, 212 Cal.App.3d 696, 705 (1989), 260 Cal.Rptr. 772,the court stated that where the probability of predicting the genetic defect is only 20%, tort principles impose liability only where there is a reasonable medical probability of predicting the outcome of the pregnancy.

In Massachusetts, the court in Viccaro, 406 Mass. 777, refused to recognize a wrongful life cause of action noting that as long as the parents were entitled to recover against the defendant for extraordinary

costs incurred the child did not need his own cause of action to recover those expenses. The court however would not discount the possibility that it might impose liability for extraordinary expenses of childcare after the parents' death. That issue however did not need to be addressed by the court in Viccaro, supra. Despite the rejection of wrongful life claims in Massachusetts, the court in Rosen v. Katz, No. 93-394-A (Feb., 1996), permitted a claim that sought damages for a child's lifetime extraordinary medical and educational costs and expenses. The court reasoned that its holding was a limited extension of the holding in Viccaro, supra. Under the facts of the case the parents were unavailable to sue because the child was given up for adoption and a guardian appointed. Due to the fact that the parents could not recover and there was no duty owed to the adoptive parents, the court allowed the child to proceed with his cause of action to recover extraordinary costs. The court stated that the physician was in no worse a position than he would have been had the parents not placed the child up for adoption and pursued their own rights with a wrongful birth cause of action.

In rejecting the cause of action, other Courts have stated that those courts that recognize a wrongful life cause of action have done so because of the pragmatic consideration that the child exists as a result of the defendant's negligence and that the child may incur substantial and extraordinary expenses for medical care, educational care and special training. Viccaro, 406 Mass. at 784-85; Gami v. Mullikin Medical Center, 18 Cal.App.4<sup>th</sup> 870, 881 (1993), 22 Cal.Rptr.2d 819. In Gami the court stated that the courts that have recognized a cause of action for wrongful life have determined that the traditional requirement that a plaintiff demonstrate injury to recover in tort is less important than ensuring that an impaired child recover the extraordinary medical expenses which his impairment will give rise to, to the extent that the parents are unable to recover. Gami, 18 Cal.App.4<sup>th</sup> at 878.

The overwhelming majority of states do not recognize a cause of action for wrongful life. The rationales behind the widespread rejection of the cause of action are similar. In general, courts have found that the cause of action cannot withstand a rational tort analysis. Adherence to traditional tort principles has been considered paramount to addressing the realistic needs of handicapped children that may be barred from adequate forms of compensation. James G., 175 W.Va. at 415; Cowe, 575 N.E.2d at 635; Nelson v. Kruzen, 678 S.W.2d 918 (Tex. 1984), 678 S.W.2d 918; Hester v. Dwivedi, 89 Ohio St. 3d 575 (2000), 733 N.E.2d 1161. In New York, the court in Keselman, 156 A.D.2d 334, refused to recognize a

wrongful life claim even where the parents' wrongful birth claim was time barred. The case involved amniocentesis results that were erroneously reported as normal and the mother gave birth to a child with Down Syndrome. Wrongful life claims have been rejected because courts have found that the child has not suffered an injury due to the defendant's negligence. Garrison, 581 A.2d at 293. The premise of a wrongful life action is the plaintiffs own birth and suffering constitute a legal injury. The courts have held however that life, even with severe defects, cannot be an injury in the legal sense. Azzolino v. Dingfelder, 315 N.C. at 111; Walker by Pizano v. Mart, 164 Ariz. 37, 43 (1990), 790 P.2d 735; Blake, 108 Idaho 253. To find such an injury would require a valuation of the infant-plaintiff's present station in life, an ascertainment of the value to the child of his not having been born, and a determination that not having been born is of greater value than in having been born. Lininger, 764 P.2d at 1210. In New York, the court found that there is no precedent for a fundamental right of a child not to be born as a whole functional human being. Becker, 46 N.Y.2d at 411.

The majority of courts have also found that wrongful life claims fail because they believe an ascertainment of damages cannot be rationally made. Courts have found it impossible to identify damages based on a comparison between life in an impaired state and nonexistence. Garrison, 581 A.2d at 294; Bruggeman v. Schimke, 239 Kan. 245, 251 (1986), 718 P.2d 635; Dumer v. St. Michael's Hospital, 69 Wis.2d 766, 773 (1975), 233 N.W.2d 372; Blake, 108 Idaho at 260; Hester, 89 Ohio St.3d at 582; Becker, 46 N.Y.2d at 412. A calculation of damages would require courts to weigh the harms suffered by virtue of being born with severe handicaps against the void of nonexistence. Greco, 111 Nev. at 409.

Dissenting opinions from decisions in states that refuse to recognize wrongful birth actions contend that the real comparison is not between the value of an impaired life compared to nonexistence, but a comparison between a normal life and an impaired life. Another criticism of the refusal to recognize a wrongful life claim is that in doing so courts are impliedly holding that life however defective is preferable to nonexistence. However, many of these Courts recognize wrongful birth claims, which agreeably also require a choice between competing values, because the jury considers the intangible benefits of having a child regardless of defects, which is a measure of life versus non-life. A failure to recognize wrongful life claims also defeats one of the purposes of tort law, which is to require a tortfeasor to compensate the victim and deter future conduct by imposing liability. Blake, 108 Idaho 253; Nelson v. Kruzen, 678 S.W.2d 918 (Tex. 1984), 678 S.W.2d 918. In Cowe, the Indiana court observed that states that recognize

wrongful life actions emphasize public policy considerations which include: alleviating financial burdens; responding to the call of the living; fostering societal objectives of genetic counseling and prenatal testing; and discouraging malpractice. Cowe, 575 N.E.2d at 634-635. The court however felt that such issues were better left for the legislature to resolve.

Another reason advanced for rejection of wrongful life claims is that to do so would violate the principle of law that human life is precious and cannot be the basis for compensable harm. Recognition of a legal right not to be born rather than to be born with deformities has been considered a theory contradictory to law. To allow the pursuit of such claims would violate the societal purpose of protecting the quality of human existence. Blake, 108 Idaho 253; Bruggeman, 239 Kan. at 254; Hester, 89 Ohio St.3d at 580. Another rationale is that resolution of such claims would also involve a value judgment about life itself, which is too deeply immersed in individual philosophy or theology to be subject to a reasoned and consistent community response in the form of jury verdicts. Kassama v. Magat, 368 Md. 113, 149 (2001), 792 A.2d 1102. The courts have also embraced related policy considerations to justify their refusal to recognize wrongful life actions. Policy reasons that have been advanced include the beliefs that: courts should not become involved in determining whether a person's life is worthwhile; legal recognition that a disabled life is an injury would harm the interests of the handicapped; the danger of disparate and unpredictable outcomes is great because the requisite finding of an injury hinges upon subjective and intensely personal notions as to the intangible value of life. Smith, 128 N.H. at 250.

As can be seen from the holdings in various jurisdictions, the subject of wrongful birth and wrongful life involve complex issues of morality, theology, philosophy and ~~their~~ relationship to medicine and the law. It is difficult to understand the reluctance of the majority of the states to recognize wrongful life claims especially in light of the widespread acceptance of wrongful birth claims. Although in the majority of cases the recovery of extraordinary expenses will be permitted, circumstances will continue to arise in which severely handicapped children, through no fault of their own, will be denied any recovery from the tortfeasor solely due to the fact that their parents were unavailable to sue for wrongful birth. The majority view that prohibiting these claims reflects ~~an~~ appreciation of the sanctity of human life is appealing on the surface but in reality represents a callous indifference to the needs of the true victims of medical malpractice.

## PRACTICAL CONSIDERATIONS

Anyone handling these claims must realistically recognize several factors in deciding to handle these matter. First, you should be comfortable with the right of a woman to elect an abortion, for any reason, through the end of the second trimester. Second, you must feel that the average pro-choice individual would understand your client's decision. Third, you must recognize the significance of religion and your client's professed religious beliefs. In this regard you should evaluate your client's commitment to the right to choose and convincingness of their decision. However, you should always remember that all questions regarding this issue should be premised on what they would have done at the time, not now that their child is alive. To help in this area, ask the client who can verify that they would make such a decision. Surprisingly, or not, this **has** often turned out to be their mother, who makes the best possible witness most of the time. Fourth, jury selection is everything at trial. You must argue that your clients have a right to a jury that fully accepts the law of abortion rights. **As** such, you should seek the use of a Written Jury Questionnaire that delves into each potential juror's views and influences on abortion. The trial judge must be convinced that you have a right to the same prescreening **as** in capital cases. The argument to be advanced is that there are no two issues upon which jurors have a more developed, imbedded and strong conviction than the death penalty **and** abortion. During trial, focus on the severity of the child's anomalies and be sure to be comfortable with the language of the medicine of abortion and the distinction between the fetus and your client's child.

With careful case selection and proper preparation, these can be exciting and rewarding cases. Many of the families who bring these cases are devastated by the special needs of their children, relieving some of the financial and physical burdens they face will positively impact child and parent(s) alike.