Fitting a Square Peg in a Round Hole: Why Traditional Tort Principles Do Not Apply to Wrongful Birth Actions

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FITTING A SQUARE PEG IN A ROUND
HOLE: WHY TRADITIONAL TORT
PRINCIPLES DO NOT APPLY TO
WRONGFUL BIRTH ACTIONS

Paula Bernstein*

A clinical instructor asks his students to advise an expectant mother on
the fate of a fetus whose father has chronic syphilis. Early siblings were
born with a collection of defects such as deafness, blindness, and
retardation. The usual response of the students is: “Abort!” The
teacher then calmly replies: “Congratulations, you have just aborted
Beethoven.”

INTRODUCTION

Imagine the joy of finding out that you or your spouse is pregnant. Imagine going to your physician and asking the doctor to perform tests to find out about possible abnormalities with your child. Imagine no one telling you anything to suggest that you would give birth to other than a perfectly healthy baby. Now imagine that when your child is born, he or she is born with severe birth defects—birth defects that could have and should have been detected. Would you consider suing your physician? Finally, imagine that in order to recover compensation, you must be willing to prove that you would have chosen to abort rather than go through with the pregnancy.

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The above situation was real for Margery and Michael Dansby. After their baby girl was born with birth defects, the Dansbys brought suit against their physician alleging failure to perform a proper amniocentesis as well as failure to provide information regarding possible abnormalities. The Dansbys sought compensation for economic losses and emotional and psychological injuries. The Superior Court of Pennsylvania, however, dismissed the case under a state statute that proscribes "wrongful birth" actions. Pennsylvania is not alone in prohibiting these suits. Citing public policy and inability to apply tort principles, eleven states enacted similar bars to wrongful birth actions either through legislative or judicial action. This, however, is the minority view, as most states allow wrongful birth actions.


3. 42 PA. CONS. STAT. § 8305 (2001) (providing in part: "There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.") Id.

4. See IDAHO CODE § 5-334 (Michie 1998); MINN. STAT. ANN. § 145.424 (West 1998); MO. ANN. STAT. § 188.130 (West 1996); 42 PA. CONS. STAT. § 8305 (2001); S.D. CODIFIED LAWS § 21-55-2 (Michie 1987); UTAH CODE ANN. § 78-11-24 (1996); Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982) (declining to create a cause of action recovering the expense of raising a child; Atlanta Obstetrics and Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (refusing to recognize a cause of action for wrongful pregnancy based on separation of powers and stating that creation of a new cause of action is not within the domain of the courts); Taylor v. Kurapaty, 600 N.W.2d 670 (Mich. Ct. App. 1999); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985); Morris v. Sanchez, 746 P.2d 184 (Okla. 1987) (failing to recognize wrongful birth where the child is born healthy).

Wrongful birth actions can arise when a child is born with a handicap or deformity and: (1) the physician failed to inform the patient of the risk of conceiving a defective child; (2) the physician negligently performed a prenatal diagnostic test; or (3) the physician failed to accurately report the findings of the prenatal diagnostic test to the parents. A successful wrongful birth action requires the parents then to prove that the physician acted outside the scope of the recognized standard of care; that the patient wanted a prenatal diagnostic test; and that if the test results were revealed to the parents, they would have chosen to abort the “defective” fetus. Acknowledging this cause of action also requires courts to concede that giving birth to a child with birth defects is an “injury” to the parents. Not surprisingly, states vary on how to handle wrongful birth actions.

This Comment addresses how several states handle wrongful birth actions and analyzes the conflicting public policy concerns associated with this emerging tort. Part I distinguishes wrongful birth actions from wrongful life and wrongful pregnancy or conception torts and provides background information on each of these torts. Part II addresses why some states bar wrongful birth actions and why others choose to allow them. Part III focuses on the conflicting public policy concerns that underlie a state’s decision to prohibit wrongful birth actions. Part IV concludes with a prediction that if statutes and common law grounds for denying the actions are challenged in the U.S. Supreme Court, it is likely that public policy concerns will drive the Court’s determination of whether or not tort principles apply to wrongful birth actions.

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7. See Stever, supra note 6 at 283-284.

8. See id. at 285.
I. WRONGFUL BIRTH ACTIONS DISTINGUISHED FROM WRONGFUL LIFE AND WRONGFUL CONCEPTION TORTS

Courts and legislatures have distinguished wrongful birth actions from two related torts, namely, wrongful life actions and wrongful pregnancy or conception torts. Although all three actions arise from essentially the same event—the birth of an unwanted or unplanned child, usually with birth defects—courts treat these torts differently.

A. Wrongful Life Actions

One of the first wrongful life claims was Zepeda v. Zepeda. In this case, an illegitimate child sued his father for having conceived him out of wedlock, thus subjecting him to a lifetime of scorn. Most often, in wrongful life cases a child born with a birth defect sues the mother’s physician for damages. Wrongful life actions are sometimes coupled with wrongful birth actions. Whereas in a wrongful birth action the parents claim harm or injury, in wrongful life cases, the child, or a representative of the child, asserts that but for the physician’s failure to inform the parents that the child would be born with birth defects, the child would not have been born at all, and thus would not have suffered injuries.

These wrongful life actions require the presumption that had the mother known of the defect she would have elected to abort the fetus. The claims also require the court to recognize that the non-existence of a life is preferable to a life inflicted with a handicap or defect. Courts have essentially rejected these arguments, citing the preciousness of life and the inability to find harm in allowing one to live. Currently, only California

10. Id. at 851. The court refused to recognize a wrongful life claim and deferred the determination to the legislature. Id. at 859.
12. Id.
and Washington recognize wrongful life claims.\textsuperscript{14}

\textbf{B. Wrongful Conception Actions}

Wrongful conception or pregnancy cases, on the other hand, involve situations where sterilization was performed incorrectly and a subsequent pregnancy results in an action against the negligent physician. One of the first wrongful conception cases was \textit{Christensen v. Thornby.}\textsuperscript{15} In \textit{Thornby}, Mr. Christensen’s doctor failed to perform a proper vasectomy, which resulted in Mrs. Christensen becoming pregnant, a condition that was potentially fatal for her. Mrs. Christensen survived the pregnancy and gave birth to a healthy baby. Thereafter, Mr. Christensen brought an action against his physician to indemnify him for the great emotional distress suffered during Mrs. Christensen’s pregnancy.\textsuperscript{16} The court conducted a cost-benefit analysis and held that the “blessing” of the child outweighed any cost or anxiety caused by the physician’s failure to properly perform the vasectomy.\textsuperscript{17} Because the child in a wrongful conception case is normally born healthy, courts typically will limit damages in these cases to the expenses associated with giving birth. The rationale for this limitation was articulated in \textit{Macomber v. Dillman.}\textsuperscript{18} In \textit{Macomber}, the court held that “for reasons of public policy... a parent cannot be said to have been damaged or injured by the birth and rearing

\textsuperscript{14} See Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (allowing the plaintiff to recover special damages but not general damages because of the difficulty in assessing whether being born was in fact an injury); Harbeson v. Parke-Davis, Inc. 656 P.2d 483 (Wash. 1983) (en banc) (allowing the plaintiff to recover full damages).

\textsuperscript{15} 255 N.W. 620 (Minn. 1934).

\textsuperscript{16} See id. Mr. Christensen claimed that the anxiety was a result of concern that his wife, who had been told that childbearing could be fatal, might have died during pregnancy as a result of the failed vasectomy. \textit{Id.} at 621.

\textsuperscript{17} See \textit{id.} at 622.

\textsuperscript{18} 505 A.2d 810 (Me. 1986).
of a healthy, normal child."\(^\text{19}\)

**C. Wrongful Birth Actions**

Wrongful birth actions emerged primarily as a result of two occurrences.\(^\text{20}\) The first concerns the advances in medical technology that make prenatal diagnostic testing possible.\(^\text{21}\) Such advances allowed for the detection of birth defects *in utero*. This new technology gave parents the opportunity to consider how these defects would affect their lives and the life of their child. The second occurrence was the United States Supreme Court's decision in *Roe v. Wade*.\(^\text{22}\) *Roe* placed abortion within the constitutionally protected right to privacy.\(^\text{23}\) These two occurrences provided parents with the option to choose to abort a fetus they believe would likely be born with birth defects. Consequently, many courts now allow parents to bring an action against a physician who, through his or her negligence in failing to properly find a defect *in utero*, impairs the parents' right to abort.\(^\text{24}\)

Wrongful birth actions are thus distinguishable from wrongful life or wrongful conception torts. Generally, courts are more willing to allow recovery for wrongful birth actions than for wrongful life or wrongful conception actions, primarily because courts can apply more easily traditional tort principles to wrongful birth actions.

**II. THE DIFFICULTY ESTABLISHING WRONGFUL BIRTH AS A TORT**

Courts that recognize wrongful birth claims do so by fitting the action within the framework of tort law. In *Harbeson v. Parke-Davis*,\(^\text{25}\) the Washington Supreme Court, in deciding whether or not to recognize

\(^{19}\) *Id.* at 813.


\(^{21}\) See Stever, *supra* note 6, at 290 n.55 ("Amniocentesis, as well as fetoscopy, chorionic villus sampling, ultrasound examination and cytogenic assessment are some of the tests currently employed in prenatal genetic diagnosis.") (citing Standards for Obstetric-Gynecologic Services 19 (1985)).

\(^{22}\) 410 U.S. 113 (1973).

\(^{23}\) *See id.*

\(^{24}\) *See statute and cases cited supra* note 5.

\(^{25}\) 656 P.2d 483 (Wash. 1983) (*en banc*).
wrongful birth actions, concluded that such action "conforms comfortably to the structure of tort principles" and is a "logical and necessary development" of tort law.\textsuperscript{26} The court analyzed the elements of a medical malpractice claim—duty, breach, proximate cause, injury, and damages—in terms of the wrongful birth action. Like other states, the Supreme Court of Washington held that wrongful birth actions fit "within the conceptual framework of [the] law of negligence."\textsuperscript{27}

The tort of medical malpractice requires a showing that the physician owed a duty of care to the plaintiff, and that the physician breached that duty. Physicians are required to "have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing."\textsuperscript{28} Wrongful birth actions, unlike medical malpractice claims, do not involve a physical injury to the plaintiff. Rather, the alleged injury is based on the physician's depriving the plaintiff of the right to choose whether or not to terminate the pregnancy of a defective fetus.

Some state legislatures and courts, however, believe that wrongful birth actions do not fit neatly into the framework of tort principles.\textsuperscript{29} In fact, applying the elements of a malpractice suit has caused some courts difficulty.\textsuperscript{30} The first two prongs of the four-prong tort analysis—duty and breach—can easily be established. It is generally recognized that a physician owes a duty of care to the patient, and that not performing a prenatal diagnostic test, or performing the tests deficiently, will be seen as a breach of the physician's duty. The difficulty, however, emerges when a party attempts to establish an injury. As the Supreme Court of Georgia held, "[w]here the traditional tort analysis begins to break down is with the third prong, that of injury. In order to satisfy that prong, we must recognize the life of the child as the injury which has been inflicted upon plaintiffs by the defendants."\textsuperscript{31} Because of the difficulty in applying tort

\begin{thebibliography}{9}

\bibitem{26} Id. at 488.
\bibitem{27} Id. at 494.
\bibitem{28} Stever, \textit{supra} note 6, at 283 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 4 at 20-25 (W. Keeton, et al. eds., 5th ed. 1984)).
\bibitem{29} \textit{See} \textit{e.g.}, Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (en banc); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985); Atlanta Obstetrics and Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990).
\bibitem{30} \textit{See} \textit{id}.
\bibitem{31} Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990).
\end{thebibliography}
elements to wrongful birth actions, some courts have opted not to recognize the cause of action. In fact, even in states that do permit wrongful birth actions, courts struggle with applying traditional tort elements.

**A. State Courts that Apply Medical Malpractice Principles to Wrongful Birth**

**1. Washington**

The Washington Supreme Court first recognized wrongful birth claims in 1983 in *Harbeson v. Parke-Davis.* Applying traditional tort principles, the court held that the cause of action "conforms comfortably to the structure of tort principles and that recognition of wrongful birth claims is a logical and necessary development" of tort law. In *Harbeson,* plaintiff Jean Harbeson, an epileptic, and her husband, Leonard Harbeson, a member of the United States Air Force, sued physicians for failing to inform them of the risks associated with taking a prescription drug during Mrs. Harbeson's pregnancy and the potential effects it might have on the birth of their daughters. Mrs. Harbeson had a complicated pregnancy in which she suffered seizures. To control seizures during her first pregnancy, Mrs. Harbeson's physicians prescribed the anticonvulsant drug Dilantin. When the Harbesons decided to have more children, they informed three doctors of their desire and inquired about the risks involved with Mrs. Harbeson's continued use of Dilantin. Each doctor informed the couple that the risks involved were minor. Relying on the doctors' assurances, Mrs. Harbeson continued to take Dilantin and subsequently gave birth to two daughters, one in April 1974, the second in May 1975. Both daughters, however, suffered from physical and developmental birth defects known as "fetal hydantoin

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32. 656 P.2d 483 (Wash. 1983) (en banc). With this opinion, the court also became one of the few states to recognize wrongful life claims.
33. Id. at 488.
34. See id. at 486. Mrs. Harbeson took the drug during her first pregnancy and gave birth to a healthy boy, Michael. Id. at 486.
35. Id. at 486.
36. See id. at 486. The doctors assured the Harbeson's the only risks associated with taking Dilantin included causing cleft palate and temporary hairiness. Id. at 486.
37. Id.
syndrome." Because of the birth defects, the Harbesons filed suit claiming that if they had known of these potential injuries, they would not have brought the pregnancies to term.

The Harbeson court was faced with deciding whether or not the traditional tort concepts of duty, breach, injury and proximate cause applied to wrongful birth injuries. The court considered it a "major step toward recognizing the wrongful birth action" when it recognized that a duty existed. The second element of tort analysis, breach, was easily established. The court held that breach could be measured as the failure to apply the appropriate standard of care. Finding injury proved more difficult for the court. Having already established that parents have a right to avoid a defective birth, the court recognized that the birth of a defective child could therefore be an injury. After recognizing that a wrongful birth was an injury, the court was forced to determine how to measure the extent of that injury.

Calculating damages presents a challenge for many courts considering wrongful birth actions, and Washington is no exception. The court reviewed Washington state law and identified a relevant statute, RCW 4.24.010. The statute provided that in an action for an injury to their child, parents could recover damages for medical needs, loss of the child's love and companionship, services and support, and injury to the parent-child relationship. The statute, however, was not directly applicable because it allowed for parents to be compensated for their child's injuries. The "injury" in a wrongful birth action is the birth of the child. The court,

38. Id. at 489. The daughters suffered "mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids) hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other . . . defects" Id. at 489.

39. See id.

40. See, e.g., Harbeson, 656 P.2d at 492; Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985); Atlanta Obstetrics and Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990); Id. at 492 (relying on the fact that all other jurisdictions to have considered the issue at that time recognized a duty).

41. Harbeson, 656 P.2d 483, 488.


44. Id. at 492.
nevertheless, found "no compelling reason that the policy should not apply in wrongful birth actions." Thus the court held that parents in wrongful birth actions could recover damages for medical expenses and for their emotional injuries.

When considering whether the Harbesons' physicians were the cause of the couple's injuries, the court stated that proximate cause could be established by showing that the physicians' breach of duty caused the injury and that liability should attach as a matter of law. The court also stated that cause in fact would be established by showing that, but for the breach, there would have been no injury. The court already determined that the injury was not the birth defect, but the birth of the child itself. Therefore, the court held that the proximate cause prong would be satisfied if cause in fact could be established. That is, but for the doctors' failure to inform the Harbesons of the potential birth defects associated with Mrs. Harbeson's medication, the court questioned whether the children would have been born. The court held that were it not for the physicians' negligence, the children would not have been born.

The Washington Supreme Court had little difficulty establishing that wrongful birth actions fit neatly within the traditional tort principles of malpractice. The court, therefore, allowed wrongful birth lawsuits to be filed in the state courts. Other states agreed with the Washington court decision and also allow wrongful birth actions. Some states, however, have refused to consider the tort claims under the name "wrongful birth," and instead will only allow the tort to be filed as a medical malpractice cause of action. Two states with such a practice are Nevada, and most recently, Indiana.

45. Id. at 493. (holding that "[t]he statute is not directly in point because a wrongful birth claim does not allege injury to the child as the cause of the parents' injury; rather it alleges the birth of the child is the cause of the injury.") Id.
46. See id. at 493. (noting, however, that damages could be offset by the emotional benefits to the parents resulting from the birth of the child).
47. Id. at 493.
48. See id.
49. See Harbeson, 656 P.2d at 493.
50. See statutes and cases cited supra note 4.
52. See id.
2. Nevada

In 1995, the Nevada Supreme Court affirmatively answered the question of whether a mother of a child born with defects has a cause of action. Under the state's common law of negligence, the court held against a physician who caused the mother to be unaware of the fact that her baby would be born with serious defects. The court, however, refused to label the suit a "wrongful birth" action, and only considered the case as a claim for medical malpractice.

Sundi Greco brought an action to recover damages "arising out of the negligence of physicians who... negligently failed to make a timely diagnosis of physical defects and anomalies afflicting the child when it was still in the mother's womb." Mrs. Greco asserted that because of her physicians' negligence she was denied the opportunity to terminate her pregnancy that ultimately caused her to give birth to a child with severe birth defects. Sundi Greco asserted that her physicians' negligence denied her the opportunity to terminate her pregnancy and thereby caused damages attendant to the avoidable birth of an unwanted and severely deformed child.

The court applied medical malpractice principles and found that Greco's physicians negligently failed to perform tests that would have discovered her fetus's deformities, thereby denying her the opportunity to terminate her pregnancy. The court rejected the defendant's arguments that Mrs. Greco suffered no injury and that, even if she had, the injury was not caused by her physicians.

First, the court did not have any trouble finding that the birth of a

55. Id. at 347 n.2.
      [the child] was born with congenial myelomeningocele (spina bifida). Congenital macro/hydrocephaly, bilateral talipes varus deformity and Arnold Chiari malformation, type two. [The child] required placement of a ventriculoperitoneal shunt for hydrocephalus. He has paraplegia with no sensation from the hips down and suffers permanent fine and gross motor retardation and mental retardation.
      Id.
56. Id. at 346.
57. See id. at 348.
58. Id.
deformed baby constituted an injury. They described the birth as "an unpleasant and aversive event and the cause of inordinate financial burden." Citing the enormous physical, emotional, and financial burdens that a child with serious birth defects will have on a family, the court concluded that an injury had occurred as a result of the physician's medical malpractice.

The defendants also claimed they should be free from liability because their care, while possibly negligent, did not cause the defects to the child. The court, straying from the standard tort principle of "causal injury," stated that the injury to Greco was not the birth of a child with deformities, but the lost right to choose whether or not to terminate her pregnancy. Thus, the doctors did not cause the harm to the fetus, as with traditional torts, but instead they were the cause of the loss of the option to terminate. The court held that this injury was sufficient to establish cause. Acknowledging its deviation from traditional tort principles when it addressed damages, the court stated that "[c]ourts in these cases have struggled with what items of damages are recoverable because, unlike the typical malpractice claim, claims such as Sundi Greco's do not involve a physical injury to the patient's person." Despite this derivation from traditional notions of causation, the court found all the necessary elements to establish a cause of action for a medical malpractice claim. Thus, the court allowed the wrongful birth action, notwithstanding its reluctance to call it such.

3. Indiana

Most recently, the Indiana Supreme Court, in *Bader v. Johnson*, declined to adopt the new tort of "wrongful birth." Like the Nevada Supreme Court, the Supreme Court of Indiana allows plaintiffs, in what would be termed a "wrongful birth" action, to bring a negligence claim against their physician. In *Bader*, the court held that "[l]abeling the

59. Id. For cases holding the contrary view, see discussion infra Section II.B.
60. 893 P.2d at 349.
61. See id. at 351.
62. Id. at 349.
63. Id.
64. Id. (emphasis added).
66. See id.
67. See id.
Johnsons' cause of action as 'wrongful birth' adds nothing to the analysis, inspires confusion, and implies the court has adopted a new tort.\textsuperscript{68} The court instead applied traditional tort principles to the suit that was brought by Ronald and Connie Johnson against their physician for failing to inform them that their unborn child had multiple birth defects.\textsuperscript{69} In response to the Johnsons' claim, the defendants filed a motion for summary judgment contending that Indiana does not recognize wrongful birth actions.\textsuperscript{70} The court, quoting the Nevada Supreme Court decision in \textit{Greco}, stated, "we see no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the name of 'wrongful birth,'" but permitted the plaintiffs to go forward on a medical malpractice cause of action.\textsuperscript{71}

Relying on traditional tort principles, the court held that the defendant, Healthcare Providers, owed a duty to the plaintiffs to disclose the results of an ultrasound that would have shown "a fetus with a larger than expected cavity within the brain and an unusual head shape."\textsuperscript{72} Healthcare Providers breached that duty because the standard of care fell below the applicable standard of care.\textsuperscript{73} The court then addressed the final elements of a medical malpractice action—compensable injury proximately caused by the breach. Although Healthcare Providers contended that the child's injury was not caused by their actions, the court disregarded this argument.\textsuperscript{74} The court, like the courts in Washington and Nevada, identified the parents' emotional suffering, rather than the child's birth defects, as the injury.\textsuperscript{75} The Johnsons claimed that but for the defendant's failure to inform them of the results of the ultrasound, they would have aborted the fetus. The court questioned, however, whether or not the Johnsons could meet their burden of proving that the fetus would have been aborted.\textsuperscript{76} The court stated that it would not handle the

\begin{thebibliography}{99}
\bibitem{68} Id. at 1216.
\bibitem{69} Id. at 1215.
\bibitem{70} Id.
\bibitem{71} Id.
\bibitem{72} Id. at 1215.
\bibitem{73} Id. at 1218.
\bibitem{74} Id. at 1218-19.
\bibitem{75} Id. at 1219.
\bibitem{76} Id. at 1218. The court determined that whether or not the Johnson's could
Johnsons' case any differently from any other medical malpractice claim. It held that damages could be awarded for medical expenses associated with the pregnancy, delivery, child care, lost income, and emotional suffering.

Notwithstanding, in his dissent, Justice Dickson took issue with the court's treatment of wrongful birth actions as a medical malpractice action, especially with regard to how the court calculated damages. Justice Dickson believed that courts and juries were ill equipped to deal with cases that involved "a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all." His dissent stated that such treatment established a "troubling precedent." He anticipated that the court's decision would lead to allowing parents to recover damages for the expenses associated with the birth and rearing of other "unwanted" children.

Some state courts have responded similarly and apply traditional medical malpractice or negligence principles to wrongful birth actions. Other states, however, prohibit wrongful birth actions, citing an inability to apply traditional tort principles to these actions. These states have found that traditional tort principles would have to be compromised in order to allow wrongful birth actions to fit neatly within them. Some courts have banned the actions and left further action up to the state legislatures. These courts have rejected the invitation to compromise tort principles in order to accommodate wrongful birth actions, basing these decisions primarily on public policy and the sanctity of life.

meet the burden of proving that they would have elected to abort was an issue for the trial court.

77. Id. at 1220.
78. Id.
79. Id. at 1223. (Dickson, J., dissenting).
80. Id.
81. Id.
82. Id.
B. State Courts That Proscribe Wrongful Birth Actions Because Traditional Tort Principles Do Not Apply

1. North Carolina

In Azzolino v. Dingfelder,\(^8\) the parents of Michael L. Azzolino brought suit against Mrs. Azzolino’s obstetric physicians. The Azzolinos claimed that Mrs. Azzolino’s physicians negligently failed to inform them of the need for an amniocentesis, a test that would have revealed that Mrs. Azzolinos would give birth to a child with Down’s Syndrome.\(^{84}\) The parents claimed that if they had known about the test, they would have learned about Michael’s affliction before his birth and would have had an abortion.\(^{85}\)

The North Carolina Supreme Court denied the Azzolinos’ claim, holding that wrongful birth actions could not fit into traditional tort analysis. Although the court found that the physicians had a duty to inform the Azzolinos of possible birth defects, and that the duty was breached, it had difficulty determining whether the physicians’ breach of the duty proximately caused the parents’ injury. Furthermore, the court was unwilling to consider life an “injury.”\(^{86}\) Focusing on these two issues, the court criticized other state courts for applying tort principles that, in its opinion, clearly did not apply, stating that:

[c]ourts which purport to analyze wrongful birth claims in terms of "traditional" tort analysis are able to proceed to this point but no further before their "traditional" analysis leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into entirely untraditional analysis by holding that the existence of a human life can constitute an injury cognizable at law.\(^{87}\)

The court also had difficulty calculating damages. Noting courts that allowed wrongful birth actions are unable to reach a consensus on how to assess or award damages, the court suggested this lack of uniformity arises from the inability to consider life an “injury.”\(^{88}\) A central issue in

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83. 337 S.E.2d 528 (N.C. 1985).
84. See id. at 530.
85. See id.
86. Id. at 534.
87. Id. at 533-34. (emphasis in original).
88. See id. at 534. Some courts have allowed the parents to recover the
calculating damages is whether the love and affection the parents will receive from the impaired child should offset the amount awarded. The court also questioned whether or not parents would be required to attempt to mitigate the damages; for example, would physicians be able to reduce damages by suggesting that the parents could have put their child up for adoption? Finally, the court noted that wrongful birth cases require parents to convince a jury that if they had known the fetus was defective they would have chosen to abort the fetus, and would not have changed their minds.

The court ultimately held that the legislature is better suited to decide questions surrounding wrongful birth actions because it is not “required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit.” Thus, the court refused to recognize wrongful birth actions.

2. Georgia

In 1990, the Supreme Court of Georgia considered whether or not to recognize wrongful birth actions in Atlanta Obstetrics & Gynecology Group v. Abelson. Mr. and Mrs. Abelson filed suit against Dr. William Tippins and his associates after their daughter Brittany was born with Down’s Syndrome. The Abelsons claimed that the defendants failed to inform Mrs. Abelson of the risks associated with pregnancy at her age. The couple also claimed that the defendants did not inform her of the availability of an amniocentesis. The Abelsons sought general and

extraordinary expenses resulting from the child’s impairment but not the expenses they would normally incur in rearing the child. Other courts have permitted damages only for the parents’ pain, suffering and mental anguish resulting from the birth of the defective child. Others have allowed both the extraordinary expenses and recovery for mental anguish. At least one court has allowed parents to recover all expenses involved in rearing the child with no reduction of the damages awarded by the cost of rearing a normal child (citations omitted). See id.

89. Id. at 534.
90. Id. at 535.
91. See id.
92. Id. at 537.
93. 398 S.E.2d 557 (Ga. 1990).
94. See id. at 558. Mrs. Abelson was thirty-seven years old. Id. at 558
95. See id. at 558 n.1 “Amniocentesis is said to be highly reliable in ascertaining whether a fetus is afflicted with Down’s Syndrome”. Id.
special damages for, among other things, birth-related expenses, pain and suffering, emotional damages, and the costs of raising Brittany.

The state Supreme Court dismissed the case because the court refused to recognize wrongful birth actions. The court made it clear that wrongful birth actions could not fit within traditional tort principles. It found that although breach and duty could be easily recognized, damages and causation would not conform to basic tort principles. Following the rationale of the North Carolina Supreme Court in Azzolino, the Georgia Supreme Court held, "[w]e are unwilling to take any such step because we are unwilling to say that life, even with severe [impairments], may ever amount to a legal injury." Thus, the court refused to find that the birth of a child, even with birth defects, could be considered an injury that physicians might inflict upon parents. The court further reasoned that because the physician did not cause the defect, traditional principles of causation could not be followed.

An analysis of traditional tort law principles, even as applied in an age of ever advancing medical technology, simply does not authorize a finding that a physician, who has provided postconception prenatal care to an expectant mother, should be held liable, even to a limited extent, for an impairment which the child unquestionably inherited from her parents and an impairment which was already in existence when the parents first came into contact with the physician.

The Abelson court, like the North Carolina court, deferred future action to the state legislature. The Georgia court held that the legislature was the "forum wherein all of the issues, policy considerations and long range consequences involved in recognition of the novel concept of a 'wrongful birth' cause of action can be thoroughly and openly debated and ultimately decided." Georgia lawmakers, however, have not passed legislation regarding wrongful birth actions, and the Abelson decision barring wrongful birth actions remains binding.

96. See id. at 563.
97. Id.
98. See id. at 561-63.
99. Id. at 561 (quoting Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985)).
100. Id. (emphasis added)
101. Id. at 560.
102. Id.
3. Michigan

In 1999, the Court of Appeals of Michigan joined the North Carolina and Georgia courts when the court reversed prior holdings and held that it would no longer recognize a cause of action for wrongful birth. Although the court had previously recognized wrongful birth actions, it held that "resulting jurisprudence defie[d] all logic," and that the cases allowing wrongful birth actions had been wrongly decided. The court held in Taylor v. Kurapati that wrongful birth actions had no place in the state's jurisprudence, absent a legislative directive. The case was initiated when Mr. and Mrs. Taylor brought suit against their physician for incorrectly interpreting an ultrasound that would have detected that their child would be born with "gross anatomical deformities including missing right shoulder, fusion of left elbow, missing digits on [her] left hand, missing femur on [the] left leg and short femur on [the] right." The court abandoned the use of tort principles to allow wrongful birth actions and instead based its holding on public policy. The Michigan court noted that even though Roe v. Wade provided a constitutionally protected right to privacy, it "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." The court held that Michigan law favors childbirth over abortion, and that the state has "no obligation to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective, and eugenic abortion."

The Michigan court stated that assessing causation and damages would

105. Id. at 684.
106. Id. at 687.
108. See id. at 673.
109. Id. at 674.
111. Taylor, 600 N.E.2d at 687.
112. Id. at 689.
be difficult, as they would be "based on after-the-fact, possibly self-serving, testimony that the parents would have sought an abortion had they known of the child's potential disability." In addition, permitting wrongful birth actions would demand that a jury weigh the costs of raising a child born with birth defects against the benefits to the parent of having a disabled child. The court concluded that such benefits are "unquantifiable," stating:

How, for example, would a hypothetical Grecian jury, operating under Michigan jurisprudence, measure the benefits to the parents of the whole life of Homer, the blind singer of songs who created the Iliad and the Odyssey? Absent the ability to foretell the future and to quantify the value of the spoken and then the written word, how, exactly, would the jury do that?

Conceding that the decision in Taylor deviated from its prior holding, the court maintained that rejecting wrongful birth actions was a "much sounder rule of law." The court concluded that if the state was going to recognize the tort, it should do so in the proper arena—the legislature.

As the preceding cases indicate, some courts are reluctant to find a cause of action in wrongful birth cases. Rather, they defer to the state legislature to address this issue. Until now, courts have been unable to uniformly apply traditional tort principle to wrongful birth actions. The decision whether or not to allow the tort varies by state. State courts that have proscribed wrongful birth actions generally have held that legislatures are in a better position to decide whether or not to allow such suits. Following this cue, six states that prohibit wrongful birth actions do so statutorily.

In Pennsylvania, for example, the legislature was concerned that by allowing wrongful birth actions, the state would be sanctioning eugenic abortions of less-than-perfect children. The legislation sought to

113. Id. at 688 n.44.
114. Id. at 688.
115. Id.
116. Id. at 691.
117. Id.
118. See IDAHO CODE § 5-334 (Michie 1998); MINN. STAT. ANN. § 145.424 (West 1998); MO. ANN. STAT. § 188.130 (West 1996); 42 PA. CONS. STAT. ANN. § 8305 (West 1998); S.D. CODIFIED LAWS § 21-55-2 (Michie 1987); UTAH CODE ANN. § 78-11-24 (1996).
prevent the courts from endorsing the idea that the birth of a handicapped child is a damaging event. Another objective was to prevent physicians from accepting eugenic abortions in order to avoid being sued in wrongful birth action. Thus public policy issues play a significant role when courts and legislatures consider the appropriateness of wrongful birth actions.

III. PUBLIC POLICY ISSUES

Given the majority of states that allow for wrongful birth actions, it is likely that the U.S. Supreme Court will hear a challenge to a state statute or common law rule that prohibits such law suits. There are compelling legal arguments as to why the tort should or should not be permitted, so the Court is likely base its decision on public policy concerns. The most persuasive of these arguments are the fear of eugenic abortions, the possible effects on the medical community, and the sanctity of life.

A. The Slippery Slope; Eugenic Abortions

The fear of eugenic abortions is one of the major controversies surrounding wrongful birth actions. As medical technology advances and new diagnostic techniques allow doctors to discover birth defects in utero, potential parents are put in the position of being able to decide whether to abort a defective fetus. The Harbeson majority eloquently articulated its concern over whether this will lead to eugenic abortions. The court questioned: “Are these developments the first steps towards a ‘Fascist-Orwellian societal attitude of genetic 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 cost of defective children?”

Likewise, the Court of Appeals of Michigan expressed similar concerns about the possibility of eugenic abortions and wrote extensively about the issue in Taylor.

The very phrase “wrongful birth” suggests that the birth of the disabled child was wrong and should have been prevented. If

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120. See id.
121. See id.
122. See discussion infra Section II.
123. Harbeson, 656 P.2d at 492 (Wash. 1983) (citations omitted).
one accepts the premise that the birth of one "defective" child should have been prevented, then it is but a short step to accepting the premise that the birth of classes of "defective" children should be similarly prevented, not just for the benefit of the parents but also for the benefit of society as a whole through the protection of the "public welfare."\textsuperscript{125}

The court was concerned primarily with the possibility that allowing wrongful birth actions would begin a descent down a slippery slope of eugenic abortions as medical technology became more and more advanced.\textsuperscript{126}

The Washington Supreme Court, on the other hand, chose to recognize the benefits of emerging technology and held that parents have the right to choose to abort a defective fetus and that physicians have a duty to provide parents with the information to make that choice.\textsuperscript{127} The North Carolina Supreme Court recognized the issue was a bit more complicated. In \textit{Azzolino}, the court noted that states that allow wrongful birth actions would eventually be required to determine the point at which a fetus is "defective."\textsuperscript{128} Similarly, courts will have to determine what constitutes a "defective" fetus.\textsuperscript{129} Indiana Supreme Court Justice Brent Dickson, writing in his dissent in \textit{Bader}, pondered: "Will our courts face actions by parents seeking child-rearing costs because the gender of their child was not as expected, when they had sought genetic counseling for the purpose of terminating the pregnancy in the event that the child was the 'wrong gender?'"\textsuperscript{130}

Although parents, as a result of \textit{Roe v. Wade}, do have the right to abort a "defective" baby, states may still choose to "make a value judgment favoring childbirth over abortion."\textsuperscript{131} States that have chosen to prohibit wrongful birth actions are exercising that judgment. Should the U.S. Supreme Court elect to decide whether to allow states to continue prohibiting wrongful birth actions, it will have to give weight to the fact that these states have established that life, no matter how "defective,"

\textsuperscript{125} \textit{Id.} at 688.

\textsuperscript{126} \textit{See Id.}

\textsuperscript{127} \textit{See} Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (\textit{en banc}).

\textsuperscript{128} \textit{Azzolino} v. Dingfelder, 337 S.E.2d 528, 535 (N.C. 1985).

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Bader} v. Johnson, 732 N.E.2d 1212 (Ind. 2000).

\textsuperscript{131} Taylor, 600 N.W.2d at 687 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).
cannot be an injury, and that preventing these lives from coming into being is simple eugenics.

B. The Effects on the Medical Community

There are divergent views on how wrongful birth actions affect the medical community. States that allow wrongful birth actions, either as such or as medical malpractice claims, note that health care providers ought to be held accountable when they fail to inform patients of a possible birth defect that should have been detected. In Indiana, for example, the court stated that prohibiting wrongful birth actions would "immunize those in the medical field from liability for their performance in one particular area of medical practice." 132 Those subscribing to this theory feel that there is no reason why a doctor who negligently treats a patient in any other situation would be held accountable, but not when the doctor misinforms parents about the risks of bearing a child born with deficiencies. In Washington, the court held that there is a duty for physicians to disclose to potential parents that their child will be born with defects. 133 The court believed that imposing this duty would "promote societal interest in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong." 134 States such as Washington believe that wrongful birth actions promote full disclosure by physicians, that negligence by a physician ought to be punished, and that punitive damages should be allowed to the parents as redress.

Not all states believe that the medical community needs to be so strictly monitored, however. Addressing the concern, the Superior Court of Pennsylvania interpreted the Pennsylvania statute barring wrongful birth actions as reflecting a "refusal to dictate to the medical profession how to practice in the field of obstetrics." 135 The Pennsylvania legislature was

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133. See Harbeson v. Parke-Davis, Inc. 656 P.2d 483, 491 (Wash. 1983) (noting specifically that the duty does not obligate a physician to perform an abortion if the doctor refuses to do so on moral or religious grounds).

134. Id. (citing Rogers, Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing, 33 S.C. L. REV. 713, 757 (1982)).

also concerned with rising medical malpractice insurance rates that would no doubt be increased if physicians were subject to a cause of action that would "produce verdicts based on sheer speculations." States that prohibit wrongful birth actions justifiably fear that allowing such claims will foster lawsuits against the doctor when a child is not born as expected. Doctor James Delahunty, the founder of the Association of Pro-Life Obstetricians and Gynecologists, summarized this fear by warning that "if genetic tests give them the wrong results they blame the doctor."

Allowing wrongful birth actions will place physicians in the precarious position of having to determine what information needs to be given to the parents so that they can make an informed decision about whether or not to bring the fetus to term. In an effort to avoid litigation, doctors in these jurisdictions will undoubtedly perform more tests than are medically necessary, thus creating the likelihood of a substantial rise in prenatal care costs. Physicians in this position may face increased pressure to recommend abortions in cases where it is uncertain whether or not a fetus may be born with a birth defect. Increased prenatal testing will inevitably lead to increased detection of possible birth defects, and physicians may find it necessary to take the "safe" route of recommending abortion in order to avoid a wrongful birth action. This will undoubtedly increase the number of eugenic abortions, and raise additional issues regarding conflicts between the patient's right to information and the moral and religious convictions of the doctor.

Thus, the repercussions on the medical field in states that allow wrongful birth actions could be significant. It is likely that would-be

136. Id.
139. Note, Wrongful Birth Actions: The Case Against Legislative Curtailment, 100 HARV. L. REV. 2017, 2032 (1987) (citing Appellants’ Brief at 33, Hickman v. Group Health Plan, Inc., 396 N.W. 2d 10 (Minn. 1986) (No. 85-2013)). Opponents of wrongful birth actions believe that allowing such actions will result in the practice of so-called "defensive medicine." "Wrongful birth actions will force physicians anxious to avoid malpractice liability ‘to offer to each obstetrical patient virtually every known test or procedure that might provide information concerning the fetus’ characteristics or qualities, regardless of whether the test or procedure is medically necessary for either the fetus or mother.’"
physicians would avoid the fields of obstetrics and gynecology because of the rise in medical malpractice premiums and the moral dilemmas that will be associated with informing a parent of likely birth defects.

C. The Effects on the Child

Another public policy concern is the effect that a wrongful birth action will have on the child. In *Flowers v. District of Columbia*, the court held that it would be harmful to a child to learn that his parents, had they known of the defect prior to birth, would have chosen to abort him. Although *Flowers* was a wrongful conception case, the court stated its belief that "the damage to the child will be significant; that being an unwanted or 'emotional bastard,' who will someday learn that its parents did not want it, and, in fact, went to court to force someone else to pay for its raising," will be harmful. The court understood that to be successful in a wrongful birth action, the parents would have to prove that their child was unwanted and of no benefit to them. Detractors of this argument may believe that, as one author notes, "by the time the child is old enough to understand the nature of his parent's lawsuit against the physician he should have enough independent evidence to evaluate the nature of his parents' feelings towards him." However, courts and lawmakers need to be concerned that even though a child will have independent evidence of his or her parent's love, there will always be contradictory evidence (and a court transcript) to prove that the child's parents convinced a jury that the child was unwanted and would have been aborted if the opportunity had presented itself.

D. The Effects on Others with Disabilities

In deciding whether to proscribe wrongful birth actions, the U.S. Supreme Court would have to consider that allowing parents to recover based on the "fact" that their handicapped child was an "injury" sends a message to those with disabilities that their lives are less worthy. The Pennsylvania Court in *Dansby* held that proscribing wrongful birth

141. See id.
142. Id. at 1077 n.5 (citations omitted).
actions "reflect[ed] the state's view that a handicapped child should not be deemed better off dead and of less value than a 'normal' child."144 When a state allows wrongful birth actions, even when bending traditional tort principles to do so, it sends a pernicious message to its citizens with disabilities; that the state places a higher value on its "normal" citizens.

The debate surrounding wrongful birth actions is an emotional one, touching on such issues as abortion, sanctity of life, and ethics and standards for physicians. However, it is the author's belief that the public policy issues behind the prohibition of wrongful birth actions are the issues that will ultimately determine how the Supreme Court, if called upon, will decide whether or not states can prohibit wrongful birth actions.

CONCLUSION

With the advent and emergence of new medical technology comes the ability to determine with some certainty whether or not a child will be born with defects. These medical advances, coupled with the Supreme Court's decision to allow abortions, give couples the ability to terminate a pregnancy when they believe it is in their best interest, or in what they perceive to be the best interest of the fetus. Problems arise, however, when the right to choose whether or not to abort is hindered by negligence on behalf of the parents' health care provider. When physicians fall below their standard of care and fail to inform parents of their child's probable defects, they deprive the parents of the right to abort that child. Whether this breach of duty is actionable, however, is dependent on the state in which one brings the action.

There has been no consistent pattern among the state courts and legislatures whether this negligence is actionable, and whether parents are entitled to recover damages. Tort principles that provide the rationale in states that permit wrongful birth actions are often compromised to allow recovery for the parents. States that proscribe wrongful birth actions are steadfast in their belief that all of the elements necessary for a tort are not met in wrongful birth actions because of the difficulty in calculating causation and damages. The inability to apply tort principles in wrongful birth situations is based on the legislatures' and the courts' overriding public policy concerns regarding eugenic abortions, the effects on the medical community, and the refusal by the state to recognize that those

born with handicaps are less desirable than those born without. Should the constitutionality of wrongful birth actions be challenged in the U.S. Supreme Court, it is likely that public policy issues will determine whether the court recognizes such a tort.