MEDICAL TRIAL TECHNIQUE QUARTERLY

FRED LANE • HAROLD L. HIRSH

Vol. 51 No. 3

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WRONGFUL PREGNANCY: WRONGFUL LIFE AND WRONGFUL BIRTH

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Editor's Note: Many believe that the birth of a child is a joy and a pleasure beyond measure. Sometimes this event is fraught with disappointment, even despair. This scenario is often based on the fact that the child is unwanted and its birth is the result of substandard medical care. Yet the law is conflicted. On the one hand, the law wants to compensate the injured. On the other hand, there is the concept of the "right to life" (anti-abortion philosophy), as well as the desire to reduce malpractice claims. Some state legislatures and courts have decided on compensation and created the doctrines of wrongful birth—some have even created the doctrine of wrongful life. Other jurisdictions have rejected these doctrines, articulating that birth of a child is not compensable. The author reviews these concepts.

In the generally consistent body of tort law concerning liability for medical negligence, a proverbial question mark lies at the intersection of the controversial areas of pregnancy, abortion, informed consent and disability. The novel torts of wrongful birth and wrongful pregnancy have caused dramatic rifts in the concept of medical malpractice. They have also contorted states' laws in ways that initially seem inconsistent. Given the many similarities between actions for wrongful birth and wrongful pregnancy, it is difficult to understand how a state could permit one while denying the other. However, an analysis of the differences between the two claims and the underlying justifications behind state laws will reveal that such a position may in fact be consistent. Missouri, for example, has tailored its moral reasoning to the factual intricacies of such cases, and has succeeded in developing a coherent body of law. On the other hand, states like Pennsylvania and Georgia ground their differential treatment of wrongful birth and wrongful pregnancy in arguments too weak to

support such a distinction. An analysis of the differences between wrongful birth and wrongful pregnancy claims will help make clear which states offer the most consistent justifications for their positions.

INTRODUCTION AND HISTORY: WRONGFUL BIRTH, WRONGFUL PREGNANCY, WRONGFUL LIFE

DEFINING THE THREE CAUSES OF ACTION

Academic discussions of physician negligence in the context of conception and childbirth frequently touch on three novel causes of action—wrongful birth, wrongful life, and wrongful conception or pregnancy. While all three claims are viewed as medical malpractice to some degree, courts and legislatures typically focus more on their differences than their similarities. Thus, any further analysis must be grounded in clear definitions of these three terms. Note, however, that this paper will focus exclusively on wrongful birth and wrongful conception claims.

WRONGFUL BIRTH

"Wrongful birth" actions are brought by parents who conceive and bring to term a congenitally disabled child, and argue that they did so only because they were misinformed about the likelihood or severity of the disability. The parents claim that, but for the negligence of a medical provider in providing them with accurate information about the child's condition, they would have chosen to prevent the child's conception or to terminate the pregnancy. The parents' injury is grounded in the fact that they were precluded from making an informed medical decision as the result of a negligent act. As described in *Lininger By and Through Lininger v. Eisenbaum*, the negligent act in a wrongful birth claim may include "the misdiagnosis of a hereditary condition, the misrepresentation of the risks associated with conception and delivery of a child . . . [or] the negligent interpretation of diagnostic tests."[1] Such a negligent act can occur either pre- or post-conception.

WRONGFUL LIFE

"Wrongful life" actions are based on the same set of facts as

1. Lininger By and Through Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988).

wrongful birth claims, but are brought by the disabled child whose birth would have been prevented had the parents been fully informed. The child in a wrongful life claim asserts that, due to the medical provider's negligence, he suffered an injury in being gestated to term and born with a disability. For the most part, this paper will not address wrongful life actions.

WRONGFUL PREGNANCY/WRONGFUL CONCEPTION

"Wrongful pregnancy" actions, (which include both basic "wrongful pregnancy" and "wrongful conception"), are brought by parents against medical providers whose negligence in treatment led to the conception and birth of an unwanted child. Wrongful conception cases most commonly arise where a provider's negligence in performing surgical sterilization (or in preparing or dispensing a prescription for contraception) results in the birth of a healthy but unwanted child. Wrongful pregnancy cases also involve failed abortion procedures. Parents in such cases seek redress for the mother's physical and emotional injuries resulting from pregnancy and childbirth, as well as both parents' economic losses in raising an unplanned child. In light of how similarly most states treat the two, this paper will use "wrongful pregnancy" to mean both traditional wrongful pregnancy and wrongful conception.

HISTORY AND CURRENT LAW

Prior to the 1973 resolution of *Roe v. Wade*, states were for the most part unwilling to recognize a cause of action for wrongful birth. In *Gleitman v. Cosgrove*, for example, the New Jersey Supreme Court came to this conclusion partly on the grounds that abortion violated public policy (non-therapeutic abortions were at the time illegal in NJ), and partly because of the difficulty in assessing damages.[2] After the Supreme Court acknowledged in *Roe* a woman's right to have an abortion, courts in New Jersey and other jurisdictions began to recognize a cause of action for wrongful birth as an extension of common law tort

2. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 22 A.L.R.3d 1411 (1967) (abrogated by, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979)).

principles.[3] However, 30 years after *Roe*, the wrongful birth question is still highly controversial and subject to public debate. Currently, eight states have explicitly banned wrongful birth claims through legislation, and Georgia has a similar prohibition based in common law. Furthermore, New Jersey, Kansas, and Wisconsin have each recently proposed legislation to prohibit causes of action based on wrongful birth.

Wrongful life claims are prohibited in all states but California, Washington, and New Jersey; the majority of jurisdictions are consistent in holding that a child cannot be "more injured from having been born than it would have been never having been born in the first place."[4] Most courts uniformly assert that the "new tort" of wrongful life bears little resemblance to traditional medical negligence, which typically does not acknowledge an individual's interest in nonexistence.[5]

The least controversial of the three claims is wrongful pregnancy. The majority of states, both pre- and post-*Roe*, recognize a cause of action for wrongful pregnancy, which is considered to be a simple extension of common law medical malpractice principles.

Understanding Damages

Jurisdictions considering any of the above claims must choose from four theories of recovery. Each corresponds to a different understanding of injury and liability, and sheds light on the states' underlying justifications for permitting or forbidding novel interpretations of medical negligence.

States that prohibit any form of recovery to plaintiffs claiming injury on the grounds of wrongful birth, wrongful life, or wrongful conception typically do so because awarding damages would offend the fundamental concept of human life. All three

3. For example, see Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), where the court held that, after Roe, a woman could no longer be denied the opportunity to decide to have an abortion. More recent cases, including Canesi ex rel. Canesi v. Wilson, 158 N.J. 490, 730 A.2d 805 (1999) have affirmed this position.

4. Robak v. U.S., 658 F.2d 471, 474 (7th Cir. 1981).

5. Some jurisdictions, however, have begun to acknowledge a cause of action for wrongful life in right-to-die cases.

claims are based in part on the notion that an individual can be injured by the birth of an unwanted child. Particularly in wrongful life cases, states are reluctant to acknowledge that unplanned or imperfect human existence can be a compensable injury.

Under the "benefits rule" of recovery, parents may recover damages related to the medical provider's negligence, as long as these damages are offset by the benefits received from the child's existence. Typically, states adopting the benefits rule do so because they believe a child's life, even if unplanned or imperfect, provides parents with happiness and emotional comfort that must be acknowledged when calculating damages.

However, most courts reject the benefits rule for wrongful birth and wrongful conception claims, arguing, as did the Georgia Supreme Court in *Fulton-DeKalb Hospital Authority v. Graves*, that "the benefit rule appears to be an attempt to apply the theory of consequential damages and consequential benefits to human life and parenthood."[6] The court in that case stated that it was "not willing to impose such a theory in this area of delicate human relations."[7] Most states instead have chosen to adopt a theory of limited recovery. Under limited recovery, parents can recover damages proximately related to unexpected aspects of the child's birth. For wrongful conception, damages may include the cost of the failed sterilization, pregnancy, and delivery of the child. For wrongful birth, parents may recover the cost of childbirth, as well as any extraordinary costs incurred as a result of the child's defects. However, only rarely do courts permit recovery of the costs of rearing a healthy child. If recovery of childrearing expenses is permitted at all, it is typically subject to offset by the benefits rule.

Finally, a few states grant full recovery of all damages proximately related to the negligence in question. Both New Mexico and Wisconsin allow parents suing for wrongful conception to recover not only the costs of pregnancy and childbirth, but also all expenses of raising a healthy child to the age of majority.

6. Fulton-DeKalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 655 (1984).

7. Fulton-DeKalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 655 (1984).

SIMILARITIES BETWEEN WRONGFUL BIRTH AND WRONGFUL PREGNANCY

Much recent scholarship has suggested that wrongful birth and wrongful pregnancy actions are so similar in kind that states cannot logically prohibit one while permitting the other.[8] Indeed, the two claims have a great deal in common, both in terms of their relationship to the goals of the tort system, and the justifications many states offer for prohibiting or allowing such actions. Inasmuch as wrongful birth and wrongful pregnancy are based on similar understandings of parental rights, physician liability, and notions of harm, it does seem inconsistent for a state to allow parents to bring wrongful pregnancy actions while prohibiting wrongful birth claims. However, there are a few significant differences between the two claims that would justify differential treatment. It is necessary to understand these disparities fully before coming to any conclusions about the consistency of states' laws.

DEFINITIONAL SIMILARITIES

Reduced to their most basic components, actions for wrongful birth and wrongful pregnancy are both claims arising from the birth of a child that would not have occurred but for a medical provider's negligence. In wrongful pregnancy (or wrongful conception), a procedure designed to prevent conception or to terminate an existing pregnancy fails due to medical negligence, and the direct result is the birth of an unwanted child. In wrongful birth, medical negligence in pre-or post-conception genetic testing or counseling—or negligent interpretation of ultrasound or amniocentesis results—prohibit parents from getting the information necessary to make an informed decision regarding abortion or conception. The result is the birth of a child that would not have been born had the medical provider not acted negligently. This definitional similarity serves to justify many states' interpretation of both claims as types of basic medical malpractice.

SIMILARITIES BASED ON TORT LAW JUSTIFICATIONS

Likewise, states that permit causes of action for both wrongful birth and wrongful conception often do so explicitly because prohibiting such actions would frustrate the primary goals of the tort system. First, the state interest in encouraging due care and punishing or deterring negligent physicians is directly promoted by holding physicians liable in cases of wrongful birth or wrongful conception. "Any other ruling," held the Idaho Supreme Court in *Blake v. Cruz*, "would in effect immunize from liability those in the medical field providing inadequate guidance to [patients]."[9] While critics of wrongful birth actions argue that discipline by professional societies provides enough deterrence,[10] this position is directly at odds with traditional understandings of medical negligence. Even in the most obvious cases of medical malpractice (for example, operating on the wrong leg), common law has acknowledged that professional discipline alone is not as effective in promoting due care as tort liability enforceable in a court of law.

Secondly, states have an interest in compensating victims of negligence for the costs associated with their injuries, which they cannot recover by means of professional disciplinary proceedings. The Idaho Supreme Court, addressing wrongful birth in *Blake*, identified as a basic tort principle that "a physician whose negligence has deprived a woman of the opportunity to make an informed decision . . . should be required to compensate her for the damage he has proximately caused."[11] This responsibility stems in part from the reasoning identified in *Pitre v. Opelousas General Hospital*, that physicians' "capacity to bear and distribute the losses is far superior" to that of the patient-plaintiffs.[12] While some jurisdictions criticize the idea of victim compensation for wrongful birth and wrongful pregnancy as a kind of "medical paternity suit,"[13] I remain unconvinced by their attempts to distinguish these damages from those in traditional malpractice cases.

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8. See, for example, Mark Strasser, "Misconceptions and Wrongful Births: A Call for A Principled Jurisprudence," 31 Ariz. St. L.J. 161 (1999).

9. Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984), citing Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 14 (1979).

10. Edmonds by James v. Western Pennsylvania Hosp. Radiology Associates of Western Pennsylvania P.C., 414 Pa. Super. 567, 607 A.2d 1083, 1087 (1992).

11. Blake v. Cruz, 108 Idaho 253, 698 P.2d 315, 318-319 (1984).

12. Pitre v. Opelousas General Hosp., 530 So. 2d 1151, 1157, 74 A.L.R.4th 777 (La. 1988).

13. Wilson v. Kuenzi, 751 S.W.2d 741, 745 (Mo. 1988).

JUSTIFICATIONS FOR PROHIBITING WRONGFUL BIRTH ALSO APPLY TO WRONGFUL PREGNANCY

It is not particularly surprising that the tort law justifications for wrongful birth and wrongful pregnancy are similar, given that both claims can be characterized as medical malpractice claims at heart. More interesting is the fact that the various arguments presented in favor of legislation prohibiting wrongful birth actions ("wrongful birth legislation") can often be applied just as successfully to wrongful pregnancy actions, which, in contrast, are permitted by nearly every state. Arguments for wrongful birth legislation can be roughly divided into legal justifications and policy justifications; both categories include arguments that would support a prohibition on wrongful pregnancy actions equally well.

LEGAL JUSTIFICATIONS

The first legal argument against wrongful birth claims is that they do not satisfy either of two elements of a cause of action for negligence: Injury and/or causation. Of these two, only the argument from injury is valid; however, because it applies equally to wrongful pregnancy claims, it cannot be used to support differential treatment of these claims.

The injury objection is by far the more common, and has been presented by nearly every court and legislature advocating for a prohibition on wrongful birth actions. Proponents of this position argue that the parents in a wrongful birth case can prove no injury, because tort law refuses to acknowledge life (in this case, the life of an unwanted child) as a harm; this view is also consistent with the benefits offset rule of recovery. The Georgia Supreme Court expressed this perspective most clearly in *Fulton-DeKalb Hosp. Authority v. Graves*, asserting, "We instinctively recoil from the notion that parents may suffer a compensable injury on the birth of a child."[14] And yet, the injury suffered by parents in permissible wrongful pregnancy cases appears to be identical—the birth of an unwanted child. Nearly every case rejecting a cause of action for wrongful birth is supported in large part by the reasoning that life should not be considered an injury,

14. Fulton-DeKalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 654 (1984).

but not one explains how this problem is avoided in wrongful pregnancy. Thus, the injury justification so commonly used to prohibit wrongful birth claims seems equally applicable to wrongful pregnancy.[15]

A second objection regarding the elements of negligence argues that causation cannot be proven in wrongful birth actions. This argument applies exclusively to wrongful birth, not wrongful pregnancy claims, but fails on other grounds. Some courts, including the Missouri Supreme Court, have identified the child's disability as the relevant injury, and argue that in no way can the supposedly negligent physician have been said to have caused the injury. "The heart of the problem . . . is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. In addition it is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition."[16] While logically consistent, this argument is unsound because the injury in question is *not* the child's disability. The parents are not injured by the child's disability, nor are they necessarily injured by the birth of the child, as argued in footnote 15. Rather, the "the injury that is alleged is deprivation of the parents'option of making a meaningful decision," a direct injury to the parent's independent rights of reproductive choice.[17]

The second legal argument in favor of wrongful birth legislation is that entitlement to monetary damages because of another's negligence is not a fundamental right.[18] States taking this position argue that they should be permitted to limit tort claims for

15. Of course, some academics, myself included, subscribe to the view that, in fact, the birth of the child is not the injury in question wrongful birth actions. Rather, the injury is the offense to the parents' freedom of medical decision-making. While the birth may result from this injury (and the parents may be compensated for it), there is a subtle distinction between the direct injury and the result. However, courts and legislatures rarely acknowledge this view, which, in any case, could not be used as a justification for prohibiting wrongful birth actions exclusively.

16. Wilson v. Kuenzi, 751 S.W.2d 741, 745 (Mo. 1988).

17. Geler v. Akawie, 358 N.J. Super. 437, 818 A.2d 402 (App. Div. 2003).

18. Dansby v. Thomas Jefferson University Hosp., 424 Pa. Super. 549, 623 A.2d 816, 821 (1993).

monetary relief in whatever ways they see fit. Regardless of the merits of this position, it seems clear that it could just as easily serve to justify a ban on wrongful pregnancy action; this argument alone does not serve to distinguish wrongful birth and wrongful pregnancy claims.

However, a few jurisdictions have elaborated on the above argument in such a way as to justify differential treatment of the two torts. Michigan, Pennsylvania, and a few other states have held that wrongful birth legislation is simply an extension of the state's affirmative power to favor childbirth over abortion.[19] "Because the state has no obligation to affirmatively aid a woman in obtaining an abortion by paying for it, the state similarly 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/eugenic abortion."[20] In fact, wrongful birth claims are most commonly brought in the post-conception (abortion) context, while wrongful pregnancy claims are more commonly brought in terms of pre-conception negligence (failed sterilization, etc.) This suggests possible grounds for limiting damages for physician liability in wrongful birth claims, but not wrongful pregnancy claims. Of course, the fit of this argument is imperfect, as some wrongful birth actions arise from negligent pre-conception counseling, and some wrongful pregnancy actions arise from failed abortion procedures.

However, even if applied consistently—prohibiting both post-conception wrongful birth claims and wrongful pregnancy claims resulting from failed abortions—the above argument would be subject to constitutional criticism. I would argue that limiting recovery for medical negligence to claims not involving abortion is unconscionable and impermissibly burdens the right to choose. However, it seems safe to say that, inasmuch as wrongful birth actions are more closely tied to abortion than wrongful pregnancy actions, states wishing to take a stand against abortion may limit wrongful birth claims as long as they acknowledge that the fit between abortion and wrongful birth is imperfect.

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19. See, for example, Dansby v. Thomas Jefferson University Hosp., 424 Pa. Super. 549, 623 A.2d 816, 819 (1993).

20. Taylor v. Kurapati, 236 Mich. App. 315, 600 N.W.2d 670, 687 (1999).

POLICY JUSTIFICATIONS

While most policy arguments presented in favor of wrongful birth legislation are just as applicable to wrongful pregnancy cases, few (if any) states rely on such arguments to justify a prohibition of only one type of claim. These policy arguments do, however, highlight a few differences between the two claims—namely, that wrongful birth actions revolve around the physician's role as provider of information and are more subject to fraudulent claims, and that wrongful pregnancy actions are not brought as commonly in situations where a child is born disabled.

A few states, including Pennsylvania, have argued that wrongful birth legislation supports the state goal of limiting malpractice litigation and lowering insurance costs for OB/GYNs.[21] For example, the Georgia Supreme Court in *Atlanta Obstetrics and Gynecology Group v. Abelson* asserted that recognizing a cause of action for wrongful birth "will give rise to increased medical malpractice litigation, with obstetricians'liability exposure being so broad as to inhibit the practice of obstetrics and thereby damage the public good."[22] The court supported its argument by calling attention to a recent General Assembly statute establishing a gubernatorial commission in an effort to investigate the state's "obstetrical crisis."[23] However, few states have attempted to explain why a malpractice insurance crisis serves to justify prohibition of wrongful birth actions, where wrongful pregnancy claims are still permitted. Only North Carolina has identified a reason for distinguishing wrongful birth from wrongful pregnancy in a statewide effort to limit malpractice litigation. According to the North Carolina Supreme Court in *Azzolino v. Dingfelder*, "the tort of wrongful birth will be peculiarly subject to fraudulent claims" because it is entirely dependent on the parents' testimony that, had they been informed of the child's disability sooner, they would have chosen to abort.[24]

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21. Dansby v. Thomas Jefferson University Hosp., 424 Pa. Super. 549, 623 A.2d 816, 820 (1993).

22. Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711, 398 S.E.2d 557, 560 (1990).

23. Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711, 398 S.E.2d 557, 560 (1990).

24. Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528, 535 (1985).

In wrongful pregnancy cases, on the other hand, the parents' intentions are made clear by their requests for contraception, sterilization, or abortion, and cannot be questioned post facto. While it is unclear whether North Carolina's prediction of a wave of parents "invent[ing] such a prior desire to abort" is realistic, this factual distinction between wrongful birth and wrongful pregnancy seems sufficient to justify differential treatment.

A second policy argument commonly put forth in favor of wrongful birth legislation argues that permitting actions for wrongful birth would unduly interfere with the practice of medicine. Many states, including Utah, suggest that imposing liability in cases such as these is overly burdensome, considering that medical negligence is already regulated by professional disciplinary boards. They point out that abortion-averse physicians withholding information from pregnant patients "are not completely immunized from suit. Other causes of action are still available."[25] While the validity of this line of reasoning is questionable,[26] it is significant to note that such arguments identify no distinction between physician liability for wrongful pregnancy and wrongful birth.

Minnesota has bolstered the above argument by asserting that "doctors must be returned some leeway in exercising judgment affecting the treatment of their patients without the fear of legal sanction."[27] While physicians certainly need to be protected from frivolous suits, it is possible to argue that medical providers in both wrongful birth and wrongful pregnancy actions are very rarely in a position to exercise "judgment" that would result in legal sanction. There are clear medical standards for performing sterilization procedures, interpreting amniocentesis results, and calculating the probability of inheriting genetic traits; little leeway exists within these activities for creative interpretation.

North Carolina, however, has taken issue with the above characterization, arguing that medical providers in wrongful birth cases are in fact required to make some judgment calls. Unlike physicians in wrongful pregnancy cases, whose negligence arises in the context of procedures like surgical sterilization or abortion, the defendants in wrongful birth actions are typically charged with errors in the provision of information. While standards for surgical procedures are clear, the *Azzolino* court argues that informational standards are less obvious and may require the exercise of professional judgment. "As medical science advances in its capability to detect genetic imperfections in a fetus, physicians in jurisdictions recognizing claims for wrongful birth will be forced to carry an increasingly 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."[28] The court goes on to link this phenomenon with pressures to practice defensive abortion; but the relevant aspect of its argument is the distinction between the informational responsibilities of some medical providers in wrongful birth cases, and the strictly clinical responsibilities of those charged with wrongful pregnancy. This difference may serve to justify differential treatment of providers in the two cases.

Along similar lines, some states argue that allowing plaintiffs to pursue wrongful birth claims will result in unjust discrimination by, in effect, giving parents the right to determine what kind of information they should be provided in the context of prenatal care. In other words, parents will have the last word in deciding which characteristics are important in their decision to conceive or abort a child. Many states prohibit wrongful birth actions because they are reluctant to facilitate selective abortion on some grounds considered relevant by parents—for example, sex, race, or disability—and are concerned about stigmatization of the disabled.[29] Rather than letting parents or individual judges decide what characteristics are relevant to the abortion decision, some courts have argued that the legislature should be making the

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25. Wood v. University of Utah Medical Center, 2002 UT 134, 67 P.3d 436 (Utah 2002), cert. denied, 540 U.S. 946, 124 S. Ct. 388, 157 L. Ed. 2d 276 (2003).

26. See the discussion above regarding tort liability.

27. Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 14 (Minn. 1986).

28. Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528, 535 (1985).

29. See, for example, Wood v. University of Utah Medical Center, 2002 UT 134, 67 P.3d 436 (Utah 2002), cert. denied, 540 U.S. 946, 124 S. Ct. 388, 157 L. Ed. 2d 276 (2003); Hatter v. Landsberg, Hatter v. Landsberg, 386 Pa. Super. 438, 563 A.2d 146, 149 (1989); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528, 535 (1985).

highly-charged decision of "whether a life with birth defects has a greater or lesser value than no life at all."[30]

While I would question whether the legislature is in any better position than parents, physicians, or judges to decide this issue, Michigan's claim, even if valid, does little to distinguish treatment of wrongful birth and wrongful pregnancy claims. While the informational aspect, as above, is limited to wrongful birth cases, the fear of stigmatizing the disabled is applicable across both claims. Whereas in wrongful birth a parent may decide to conceive or abort a child based on misinformation about its chances of disability, parents seeking sterilization, contraception, or abortion in wrongful pregnancy cases may be doing so for similar reasons.

Concerns about stigmatizing the disabled seem equally relevant in cases like *Speck v. Feingold* and *Williams v. University of Chicago*, where a parent seeks sterilization in an effort to avoid conceiving a child that may be born with a disability.[31] Granted, wrongful birth cases by their very nature involve a child's disability (while wrongful pregnancy cases do so only occasionally), and to this extent concerns about eugenics and discrimination against the disabled may be more relevant in wrongful birth cases. While the link to disability may be a valuable heuristic, it is unlikely to justify the distinction between wrongful birth and wrongful pregnancy in all cases.

IDENTIFYING THE DIFFERENCES BETWEEN WRONGFUL BIRTH AND WRONGFUL PREGNANCY

In examining the definitions of the two claims, the goals of tort law, and arguments put forth by states to justify prohibitions on wrongful birth actions, it is clear that wrongful birth and wrongful pregnancy are indeed similar. However, the above analysis has identified a few differences that can ground differential treatment of the two claims. First, policy arguments surrounding abortion are implicated far more often in wrongful birth cases than in wrongful pregnancy cases. Likewise, wrongful birth more often deals with disability and issues relating to information that

30. Taylor v. Kurapati, 236 Mich. App. 315, 600 N.W.2d 670 (1999).

31. Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981); Neurofibromatosis; Williams v. University of Chicago, Attention Deficit Disorder.

may be relevant to parents. Finally, due to the nature of wrongful birth actions, which depend largely on parental testimony, it seems reasonable to argue that they are more subject to fraudulent claims than are wrongful pregnancy actions.

However, the above analysis has failed to identify one more important distinction between wrongful birth and wrongful pregnancy. While the definitions of the two claims outlined above may seem similar, wrongful birth is very different in kind from most traditional malpractice claims. At heart, an action for wrongful birth is an informed consent action, claiming that a physician's failure to disclose full information resulted in an injury to the patient (here, the parents). On the other hand, wrongful pregnancy, which involves the negligent performance of sterilization, abortion, or negligent prescription of contraceptives, is a more traditional claim that a physician breached his duty of care in the performance of a medical procedure. Because it deals with the physician's role as provider of information, the tort of wrongful birth is governed by traditional informed consent doctrine, which requires an actual physical harm for recovery. In informed consent actions, "patient remedies are limited by the fact that courts use a traditional negligence standard for failure to provide informed consent cases: although you may have suffered a serious injury to your right to control your own body and life, you have no legal claim unless the undisclosed risk actually materializes."[32]

Informed consent claims are brought most often by patients who did not consent to an invasive surgical procedure or treatment. However, in a wrongful birth action, the information in question is necessary for the mother to make a decision about treatment; if she is bringing a wrongful birth suit, the decision the mother ultimately made was not to undergo an invasive treatment (abortion). Since she has not been harmed by unwanted treatment, she can show no injury. The physician's omission in providing information, "however unpardonable, is legally without consequence."[33] While the mother would have preferred not to continue with her pregnancy, the natural progression of a

32. Sylvia A. Law, "Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions," 21 N.Y.U Rev. L. & Soc. Change 279, 307 (1994).

33. Law, 21 N.Y.U Rev. L. & Soc. Change at 307.

pregnancy that she initiated voluntarily does not constitute an actionable harm. If, for example, a mother chose abortion based on her physician's incorrect assertion that the child would be born with a severe disability, she could bring an informed consent suit. But in the reverse situation, a mother who decides to go through with a pregnancy cannot hold her physician liable for misinforming her. This key difference, centering on the physician's role as provider of information in what is essentially an informed consent case, serves to justify differential treatment of wrongful birth and wrongful pregnancy. While this is by far the most significant distinction between wrongful pregnancy and wrongful birth, states for some reason have not used it to justify differential treatment of the two claims.

After reviewing the similarities and differences between wrongful birth and wrongful pregnancy claims, it is possible to achieve a better understanding of what kind of reasoning is justifiable for prohibiting wrongful birth while at the same time allowing wrongful conception.

IT IS NOT ALWAYS INCONSISTENT FOR A STATE TO PROHIBIT WRONGFUL BIRTH ACTIONS WHILE PERMITTING WRONGFUL CONCEPTION ACTIONS

Of states that have established case law or legislation regarding both wrongful birth and wrongful pregnancy, the majority are consistent in their holdings—most states permit both causes of action, and Michigan prohibits both. Six states, however, have expressly prohibited wrongful birth suits while allowing wrongful pregnancy claims to go forth. While such an approach may initially seem counterintuitive, a careful examination of each state's justifications reveals that, in some cases, the laws are consistent and permissibly grounded in morally relevant distinctions. Of these six states, Missouri appears to offer the most consistent justification for its position; on the other hand, the reasoning presented by Pennsylvania, Utah, and Georgia seems to have been inconsistently applied.

MISSOURI

Since 1982, Missouri has recognized a cause of action for wrongful conception as a basic form of malpractice, rather than

as identifying it as a "novel cause of action."[34] Parents bringing wrongful pregnancy claims are allowed to recover compensatory damages, including prenatal and postnatal medical expenses, pain and suffering, loss of consortium, and the cost of a second sterilization procedure. However, recovery of the cost of raising an unwanted child is prohibited on the grounds that such recovery would violate respect for the dignity of life.[35] Furthermore, in wrongful pregnancy cases where the unexpected child is born with a disability, parents are barred from recovering extraordinary damages related to the disability; Missouri justifies this by asserting there is an insufficient causal link between the physician's negligence and the child's disability.

Wrongful birth and wrongful life actions are barred by Mo. Rev. Stat. § 188.130, which prohibits causes of action based on the claim that "but for the negligent conduct of another, a child would have been aborted." Even before this statute was adopted in 1986, however, Missouri prohibited wrongful birth claims. As explained by the Missouri Supreme Court in *Wilson v. Kuenzi*, "the real underlying problem in these cases stems from the fact that the courts have either closed their eyes to traditional tort causation, or have leaped over causation."[36] Because the negligent physician in a wrongful birth claim cannot be said to have caused the birth defect, and because of the aforementioned respect for life that is violated when abortion is implicitly condoned, parents may not recover the ordinary or extraordinary costs of raising a disabled child. However, according to *Shelton v. St. Anthony's*, parents suing for wrongful birth *may* recover emotional damages resulting from the physician's negligence under a traditional malpractice claim.[37] The court explained that such damages do not fall under the purview of § 188.130 because "emotional damages are readily separable from damages arising from the possibility that but for the negligent conduct of defendants, the child would have been aborted, and are attributable to defendants'negligence regardless of whether plaintiff would have had an abortion." While no court has addressed the question of

34. Miller v. Duhart, 637 S.W.2d 183, 188 (Mo. Ct. App. E.D. 1982).

35. Girdley v. Coats, 825 S.W.2d 295, 297 (Mo. 1992).

36. Wilson v. Kuenzi, 751 S.W.2d 741, 744 (Mo. 1988).

37. Shelton v. St. Anthony's Medical Center, 781 S.W.2d 48 (Mo. 1989).

whether the statute could also be used to prohibit wrongful pregnancy cases arising from failed abortion, the phrasing of the law suggests that this is the case.

Based on the underlying justifications presented by the Missouri courts, it appears that Missouri law is consistent in distinguishing between wrongful birth and wrongful conception; a distinction based on the connection with abortion is permissible as long as it is consistently applied. Childrearing damages in both cases are prohibited based on respect for life, and other damages are prohibited in wrongful birth actions because of the link with abortion. Finally, emotional damages can be recovered in both cases; the court correctly recognizes that the parents' emotional distress resulting from the physician's negligence is unrelated to a claim that the child would have been aborted. Missouri's moral reasoning seems consistent.

MINNESOTA

Minnesota's acceptance of a cause of action for wrongful pregnancy stems from the 1977 *Sherlock v. Stillwater Clinic* decision, in which the court allowed a plaintiff to recover compensatory damages (pre- and post-natal medical expenses, mother's pain and suffering, loss of consortium) as well as all reasonable costs of rearing the child subject to the benefits rule.[38] The Minnesota Supreme Court considered this to be an appropriate balance between reinforcing the physician's duty of care and recognizing that a child brings benefits to its family. This rule of damages was qualified by a requirement of "strict judicial scrutiny of verdicts to prevent excessive awards."[39]

As a result of the *Sherlock* ruling, the Minnesota legislature enacted section 145.424, which prohibits wrongful life and wrongful birth suits, and recognizes wrongful conception suits in the context of medical malpractice actions. The statute is explicitly grounded in the state's policy against abortion: "No person shall bring a claim . . . that but for the negligence of another, a child

38. Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (rejected by, Szekeres by Szekeres v. Robinson, 102 Nev. 93, 715 P.2d 1076 (1986)).

39. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977) (rejected by, Szekeres by Szekeres v. Robinson, 102 Nev. 93, 715 P.2d 1076 (1986)).

would have been aborted."[40] While the statute's constitutionality was upheld in *Hickman v. Group Health Plan*, the court has not yet resolved whether the statute could also be used to prohibit wrongful pregnancy cases arising from failed abortion. Given the wording of the law, however, this seems likely.

Minnesota's statutory prohibition on wrongful birth actions is explicitly aimed at the connection with abortion; likewise, the common law doctrine makes clear that abortion is viewed very differently from non-conception. Particularly if § 145.424 also prohibits wrongful pregnancy actions based on negligent abortions (and has no effect on pre-conception wrongful birth actions), the law seems to be a justifiable basis for differential treatment of these claims. Likewise, allowing parents in wrongful pregnancy actions to recover childrearing costs subject to the benefits rule strikes a good balance between enforcing a policy against abortion and respecting the fact that some parents may be injured by the birth of a child. Since Minnesota did not justify its position by claiming that life should not be an injury, there is no inconsistency. However, it is nonetheless possible to argue that some damages sought by parents in wrongful birth actions (such as, for example, the emotional distress arising from not being informed of the child's disability until birth) are not directly related to the claim that the child would have been aborted. If emotional damages in a wrongful birth action can be tied directly to issues of informed consent without touching the abortion issue, Minnesota should acknowledge these as permissible damages.

NORTH CAROLINA

In *Jackson v. Bumgardner*, North Carolina first acknowledged a cause of action for wrongful pregnancy as indistinguishable from a claim of medical malpractice.[41] The court held that parents can recover medical expenses, pain and suffering, lost wages, and emotional distress; however, childrearing costs were not granted because of the practical difficulty in assigning a value to the child's life. "Who, indeed, can strike a pecuniary balance between the triumphs, the failures, the ambitions, the disap-

40. Minn. Stat. Ann. § 154.424

41. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

pointments, the joys, the sorrows, the pride, the shame, the redeeming hope that the child may bring to those who love him?"[42]

Since 1967, North Carolina has had a statute permitting physicians to refuse to "perform or participate in medical procedures which result in an abortion" and excluding them from any liability based on such a refusal.[43] In 1985, the North Carolina Supreme Court in *Azzolino v. Dingfelder* interpreted this statute as a prohibition of post-conception wrongful birth actions. The court in *Azzolino* brought up a host of objections to the tort of wrongful birth, most primary among them the refusal to accept the "entirely untraditional analysis" that life can constitute an injury, the lack of precedent for damages, the potential for fraudulent claims, and the potential for eugenic discrimination against the disabled.[44] Of these, the potential for fraudulent damages certainly serves to distinguish between wrongful birth and wrongful pregnancy; the link with abortion and disability is a slightly weaker justification.

Later North Carolina cases, however, have limited the tort of wrongful birth to post-conception informational negligence. *McAllister v. Ha* held that a physician's pre-conception misinterpretation of parental blood tests (ultimately leading to the conception of a disabled child) was a wrongful conception action and thus was subject to the same guidelines as the wrongful pregnancy in *Jackson*.[45] While most states would consider such a situation to be a wrongful birth action because it is grounded in informational negligence rather than a failed contraceptive or abortive procedure, North Carolina uses the fact that it is a pre-conception tort to place it in the same category as failed sterilization. Courts have not yet decided the issue of whether a cause of action stemming from a failed abortion would be barred by § 14-45.1.

North Carolina's express goal of protecting physicians opposed to abortion from tort liability does seem to be a logical justification for prohibiting post-conception wrongful birth actions but allowing others.[46] After all, abortion is not implicated in pre-conception torts, and a physician whose wrongful pregnancy liability stems from a failed abortion clearly does not fall into the protected class of those who "state an objection to abortion on moral, ethical, or religious grounds."[47] Grounding the law in this distinction seems more justifiable than grounding it in the policy arguments presented in *Azzolino*, which on their own are not enough to differentiate between North Carolina's versions of wrongful birth and wrongful pregnancy. While states grounding their law in the refusal to view life as an injury often have trouble justifying grants of emotional and general damages only in cases of wrongful pregnancy, North Carolina avoids this problem by relying on the language of § 14-45.1.

42. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743, 750 (1986).

43. N.C. Gen. Stat. § 14-45.1(e).

44. Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528, 534-535 (1985).

45. McAllister v. Ha, 347 N.C. 638, 496 S.E.2d 577 (1998).

UTAH

Utah's Right to Life Act holds that there shall be no cause of action "based on the claim that but for the act or omission of another, a person . . . would have been aborted."[48] According to *C.S. v. Neilson*, this statute does not bar wrongful pregnancy claims, even those arising from failed abortions, as they are essentially a form of medical malpractice.[49] Parents suing for wrongful pregnancy may recover the mother's medical expenses, pain and suffering, and lost wages; but costs of childrearing are not recoverable because they are too speculative.

Wrongful birth claims based on physician failure to provide information leading to abortion, on the other hand, are expressly prohibited by § 78-11-24. *Wood v. University of Utah Medical Center*, which upheld the constitutionality of the Right to Life Act, held that even Marie Wood's claim of emotional distress was barred because it could not be maintained without arguing that, "but for the act or omission of the Medical Center, Marie would

46. This, of course, depends on the assumption that a physician who negligently fails to inform parents of their child's birth defect does so because he anticipates that informing them would "result in abortion." While it is questionable whether this is always the case (and while many would argue that withholding of such information should be impermissible), North Carolina's argument is logically consistent.

47. N.C. Gen. Stat. § 14-45.1(e).

48. U.C.A. § 78-11-24.

49. C.S. v. Nielson, 767 P.2d 504 (Utah 1988).

have chosen to abort Mary Lorraine."[50] The court does not delve deeply into the reasoning behind the Right to Life Act, but simply accepts its stated purpose of encouraging "all persons to respect the right to life of all other persons . . . including all persons with a disability and all unborn persons."

Though Utah claims to distinguish between wrongful birth and wrongful pregnancy based on wrongful birth's link to abortion and the right to life, its real-life application of the law undermines this distinction. While the refusal to grant childrearing costs in either case is consistent with respect for life, it is unclear how Utah can justify granting general damages to parents injured by the birth of a child in wrongful pregnancy while at the same time asserting that respect for life bars a claim for wrongful birth.

GEORGIA

Under Georgia common law, parents bringing wrongful pregnancy claims are allowed to recover limited damages, including the costs of pregnancy, the mother's pain and suffering, and lost wages. However, Georgia has prohibited recovery of basic childrearing costs on the grounds that respect for human life prohibits such damages. In *Fulton-DeKalb Hospital Authority v. Graves*, the Georgia Supreme Court held, "We instinctively recoil from the notion that parents may suffer a compensable injury on the birth of a child."[51] While acknowledging that other courts have come to different conclusions, Georgia has refused to acknowledge that "human life and the state of parenthood are compensable losses."[52]

In 1990, Georgia first addressed the tort of wrongful birth in *Atlanta Obstetrics & Gynecology Group v. Abelson*. The court held that, in spite of widespread recognition by other jurisdictions that wrongful birth is a simple malpractice claim, "and, in fact,

50. Wood v. University of Utah Medical Center, 2002 UT 134, 67 P.3d 436 (Utah 2002), cert. denied, 540 U.S. 946, 124 S. Ct. 388, 157 L. Ed. 2d 276 (2003).

51. Fulton-DeKalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 655 (1984).

52. Fulton-DeKalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 655 (1984).

because of that recognition and the confusion which has followed in its wake," Georgia should not recognize wrongful birth actions without a clear legislative mandate.[53] In essence, the Georgia Supreme Court used inconsistencies across other states' common law as a justification for passing its decision onto the legislature, and performed very little analysis of its own. The court reaffirmed its *Fulton-DeKalb* refusal to view life as an injury, stressed that the child's disability was in no way caused by physician negligence, and cited an obstetrical malpractice crisis. As discussed previously, none of these three claims serve to justify differential treatment of wrongful birth and wrongful pregnancy.

In *Atlanta Obstetrics*, the Georgia Supreme Court also explicitly distinguished *Fulton-DeKalb* on the grounds that the parents in that case only sought the costs of pregnancy and delivery, and did not recover the costs of childrearing. While the court did not follow through fully on this line of reasoning, I presume their implication was that, in a wrongful birth case such as *Atlanta Obstetrics*, the parents conceived the child voluntarily and so were anticipating the costs of childbirth. And yet, the Georgia Supreme Court itself acknowledged that some wrongful pregnancy actions stem from failed abortions, which necessary happen after conception.[54] Given this fact, it seems somewhat disingenuous for the court to presume that even parents with a firm plan to abort an unhealthy child should be responsible for the costs of delivery in wrongful birth actions on the grounds that they had planned for the cost. Likewise, *Etkind v. Suarez* distinguishes the two claims by asserting that, while the Etkinds wanted a child "but allege that they would have elected an abortion rather than become parents of an impaired child," the parents in a wrongful pregnancy action "never wanted to become parents" in the first place. In fact, it is entirely possible that a plaintiff in a wrongful pregnancy action chose to abort for the very same reasons Mrs. Etkind planned to do so. It is unclear why Georgia considers a wrongful pregnancy claim in the context of a failed abortion to be an action based upon the "occurrence of . . . pregnancy," while Mrs. Etkind's wrongful birth action "is not

53. Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711, 398 S.E.2d 557, 560 (1990)

54. Fulton-DeKalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 654 (1984).

based upon the occurrence of [the] pregnancy, but upon its unwanted result."[55]

Inasmuch as respect for life and a refusal to identify life as an injury leads to a prohibition on emotional damages and childrearing costs under both causes of action, Georgia's law is consistent. However, the Georgia Supreme Court has not sufficiently explained why only parents in wrongful pregnancy actions can recover the costs of pregnancy and childbirth, particularly when the desire to avoid childbirth may be just as strong in a wrongful birth action.

PENNSYLVANIA

Pennsylvania common law permits parents to bring wrongful conception actions as a form of basic medical malpractice. Recovery is limited to medical expenses, pain and suffering, lost wages, and emotional distress. Like most states, Pennsylvania prohibits the recovery of childrearing costs, because "the benefits of joy, companionship, and affection which a normal, healthy child can provide must be deemed as a matter of law to outweigh the costs of raising that child."[56]

In 1988, the Pennsylvania legislature passed the Wrongful Life Statute, which prohibits actions "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."[57] According to the legislative history, the primary goals of this statute were "to stop a court-engendered policy which views the birth of a child . . . [as] a damaging event for which someone should be punished, . . . to prevent this quality of life ethic from becoming so persuasive that a handicapped child is routinely considered better off dead . . . and to prevent the practice of medicine . . . from becoming coerced into accepting eugenic abortion." The inclusion of the key phrase "once conceived" thus limits the statute to post-conception wrongful birth cases, and presumably still holds medical providers liable for providing misinformation prior to conception. While the appellants in *Hatter v. Landsberg* argued

55. Etkind v. Suarez, 271 Ga. 352, 519 S.E.2d 210, 213 (1999).

56. Butler v. Rolling Hill Hosp., 400 Pa. Super. 141, 582 A.2d 1384, 1385 (1990).

57. 42 Pa. Cons. Stat. § 8305.

that the statute likewise prohibits wrongful pregnancy suits based on the "negligent performance of an abortion," Pennsylvania has not yet decided this issue.[58]

If, indeed, § 8305 prohibits both wrongful birth and wrongful pregnancy in cases of abortion, then Pennsylvania's law initially seems consistent. In such a case, the law would, in effect, distinguish between abortion and failure to conceive, rather than "wrongful birth" and "wrongful pregnancy" (a more tenuous distinction). However, in light of Pennsylvania's concern about life being viewed as an injury, one could still argue that awarding damages to parents who conceive a child due to physician negligence is a contradictory position. While Pennsylvania is consistent in prohibiting childrearing costs in all cases, the recovery of emotional damages in conception cases suggests that the parents were indeed injured in some way by the unwanted conception and birth of a child.

Even if, on the other hand, § 8305 is meant to apply only to wrongful birth cases where a physician's negligence precludes parents from aborting, the statute faces similar problems. The Superior Court in *Bianchini v. NKDS Associates Ltd.* explicitly held that even recovery of emotional damages in such a case is precluded by § 8305.[59] This interpretation of the Wrongful Life Statute effectively holds that Pennsylvania refuses to view the life of a child as an injury when it is born as a result of post-conception misinformation, but grants that parents can be injured by the birth of a child in all other cases of physician negligence.

Pennsylvania law is consistent only in that its refusal to identify life as an injury results in a prohibition on childrearing costs under all causes of action. And while it is possible that § 8305 means to draw on a distinction between conception- and abortion-related torts, Pennsylvania's interpretation of life as an injury is nonetheless inconsistent as applied to emotional damages.

CONCLUSION

While, at first glance, it may seem inconsistent for a state to

58. Hatter v. Landsberg, 386 Pa. Super. 438, 563 A.2d 146, 149 (1989).

59. Bianchini v. N.K.D.S. Associates Ltd., 420 Pa. Super. 294, 616 A.2d 700, 705 (1992).

permit wrongful pregnancy actions while prohibiting wrongful birth actions, analysis of the reasoning behind this position suggests this is not always the case. As long as a state justifies its differential treatment of the two claims on permissible moral differences—such as the link to informed consent, the potential for fraud, and the distinction between abortion and non-conception—it may consistently hold such a position without offending traditional tort law principles.

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