Pay Me Now or Pay me Later?: The Question of Prospective Damage Claims For Genetic Injury in Wrongful Life Cases

Melanie Meredith, a profoundly retarded adult lacking any muscle control, became pregnant as the result of being raped by another patient of Riverview nursing home where she resided.[1] Her condition remained undetected for approximately five months.[2] During this time, she received no prenatal care and remained on a regular regimen of the drug Dilantin.[3] She gave birth to a son, Jacob.[4]

In August of 1989, Jacob became the first person in Indiana to successfully state a claim for wrongful life.[5] Wrongful life actions are brought by, or on behalf of, a child who suffers some impairment associated with his life. The child alleges that the defendant's negligence led to his birth. Generally, children bringing wrongful life actions suffer severe congenital defects.[6] The suits typically name a health care provider who negligently fails to inform or misinforms a prospective parent of the risks associated with bearing the child.[7] For example, a doctor

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1. Cowe by Cowe v. Forum Group Assoc., 541 N.E.2d 962, 964 (Ind. Ct. App. 1989).

2. *Id.* at 967.

3. *Id.* When taken during pregnancy, Dilantin, an antispasmodic, induces changes in the fetal genetic structure resulting in a variety of birth defects including both physical deformities and mental deficiencies. This is known as Fetal Hydantoin Syndrome. *See* Hunson & Smith, *The Fetal Hydantoin Syndrome*, 87 J. PEDIATRICS 285 (1975).

4. *Id.* at 964.

5. Initially, the tort of wrongful life must be differentiated from the closely related torts of "wrongful conception," "wrongful pregnancy" and "wrongful birth." Both "wrongful conception" and "wrongful pregnancy" claims are brought after a negligently performed sterilization or failed contraceptive leads to the birth of an unplanned, but healthy child. This action belongs to the parents who can recover damages to compensate for the costs associated with pregnancy and delivery of the child. *See, e.g.*, Garrison v. Foye, 486 N.E.2d 5, 7 (Ind. Ct. App. 1985).

6. *See, e.g.*, Harbeson v. Parke-Davis, 98 Wash. 2d 460, 656 P.2d 483 (1983) (Fetal Hydantoin Syndrome); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (total deafness); Procanik by Procanik v. Cillo, 97 N.J. 339, 487 A.2d 755 (1984) (Congenital Rubella Syndrome); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 872, 413 N.Y.S.2d 895 (1978); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987) (children born with Down's syndrome); Goldberg v. Ruskin, 113 Ill. 2d 482, 499 N.E.2d 406 (1986) (Tay-Sachs disease); Speck v. Finegold, 286 Pa. Super. 342, 408 A.2d. 496 (1979); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (polycystic kidney disease); Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986) (Trisomy 9); Bruggeman v. Shimke, 239 Kan. 245, 718 P.2d 635 (1986) (multiple congenital abnormalities).

7. *See supra* note 6.

tells a woman that her first trimester bout with rubella will not harm the fetus,[8] or a laboratory negligently performs a test for Tay-Sachs disease which leads a couple to proceed with conception, resulting in the birth of a child afflicted with the disorder.[9] The claimant seeks compensation for those costs associated with his disorder. Wrongful birth is the equivalent action for the parents who may also seek to recover the special costs associated with bearing and rearing the affected child.

Although wrongful birth claims have received some acceptance, the child's claim is most often rejected.[10] Frequently, courts denying a wrongful life action express a reluctance to determine that a severely, or even fatally, impaired child has been damaged by his birth. This rationale makes the *Cowe* decision remarkable because Jacob, unlike most other wrongful life plaintiffs, is currently in perfect health.[11]

In his suit against Forum Group Associates, the owners of Riverview nursing home, Jacob sought "medical attention, care, support, maintenance and education until he reached the age of twenty-one,"[12] based on claims of imputed paternity, wrongful life, negligence, and prenatal tort.[13] Although the trial court dismissed the case for failure to state a claim,[14] the Indiana Court of Appeals, in a brief majority opinion, determined that a wrongful life claim is a valid cause of action in Indiana.

The decision is based on two novel rationales. First, the court expanded the definition of wrongful life to "include a situation where, as in Jacob's case, both parents are so severely mentally or physically impaired as to render them incapable of affirmatively deciding to have

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

9. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

10. Only seven states have recognized a cause of action for wrongful life: California (Andalon v. Superior Court (Plowman), 208 Cal. Rptr. 899, 162 Cal. App. 3d 600 (1984)); Colorado (Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384 (Co. Ct. App. 1985)); Illinois (Goldberg v. Ruskin, 113 Ill. 2d 482, 499 N.E.2d 406 (1986)); Indiana (Cowe by Cowe v. Forum Group Assoc., 541 N.E.2d 962 (Ind. Ct. App. 1989)); New Jersey (Procanik by Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755, (1984)); North Carolina (Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987)); Washington (Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983)).

11. *Cowe*, 541 N.E.2d at 973 (Ratliff, C.J., dissenting).

12. *Id.* at 965. The court limited any potential recovery to costs incurred during the period of time prior to Jacob's adoption by the Cowe family (approximately ten months). Under IND. CODE ANN. § 31-3-1-9 (Burns Supp. 1989) the adoptive parents assume all responsibility, including financial, upon adoption.

13. *Cowe*, 541 N.E.2d at 965.

14. *Id.* at 964.

a child . . . and where but for the custodian's negligent care of both parents, the child would not have been conceived."[15] The defendant's negligence caused a child to be born without a parent to support him. Allowing the child some form of recovery, the majority stated, responds to "the needs of the living."[16]

Second, the majority considered a medical inventory report, drafted prior to Jacob's birth, suggesting that "[Jacob] is at a 10% risk for Fetal Hydantoin Syndrome. This evidence is conclusive that Jacob has or had a chance of physical injury due directly to Forum's negligence in prescribing and administering the drug Dilantin to Melanie while Jacob was *in utero*."[17] However, at the time of the trial, Jacob displayed no physical injuries associated with the Syndrome.[18] Testimony suggested that the existence and extent of Jacob's injuries may be established by the time he reaches his fifth birthday.[19]

At first blush, the decision in *Cowe* may seem anomalous. In every successful wrongful life action to date, the claimant's disorders were both severe and obvious from the time of birth.[20] In contrast, Jacob's only injuries were his birth to "incapable" parents and a minimal chance of suffering some undeterminable effects of Fetal Hydantoin Syndrome.[21] However, the decision in *Cowe* should not be dismissed as merely an attempt to reach an equitable solution to peculiar circumstances. The decision raises important questions concerning the scope and purpose of the wrongful life cause of action, particularly regarding the type of injuries that should be compensated under the claim.

First, should a child be allowed to bring suit based on his family circumstances or legal status? Historically, wrongful life cases claiming the plaintiff's family or legal status as an injury have been uniformly rejected.[22] The possibility of allowing such an action is astounding. Any child dissatisfied with his family situation could bring suit: illegitimate children, children born to drug addicts, the eleventh child of a single welfare mother. Of course, the action could be limited to special circumstances, such as those in *Cowe*, but where will the lines be drawn?

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15. *Id.* at 968.
16. *Id.*
17. *Id.* at 967. *See supra* note 3 for a definition of Fetal Hydantoin Syndrome.
18. *Id.* at 973 (Ratliff, C.J., dissenting).
19. *Id.*
20. *See supra* note 6.
21. Cowe, 541 N.E.2d at 966.
22. *See infra* notes 117-23 and accompanying text for discussion of family status injuries.

Second, what role, if any, should prospective damages play in wrongful life claims?[23] Advances in preconceptive and prenatal diagnostic and care methods afford the parent the opportunity to make childbearing decisions with a more complete knowledge of the potential risks. Through pre-conceptive genetic counseling and procedures such as amniocentesis and chorionic villi sampling, a number of serious disorders can be predicted and/or measured.[24] These techniques, when used properly, can help prevent unnecessary pain—physical and emotional—as well as financial burden to both the parent and child. However, the negligent misuse or non-use of these diagnostic procedures may lead to the birth of a defective child.[25] Yet, a child seeking to recompense this wrong may never be fairly compensated.

The character of many of the congenital defects asserted in wrongful life claims creates a number of difficulties when seeking recovery. As with Jacob's claim of Fetal Hydantoin Syndrome, many of the disorders involve speculative and/or late manifesting complications. For example, while a child suffering from spina bifida is recognizable at birth, a child with neurofibromatosis[26] may exhibit no symptoms or only those as minor as small, flat spots on the skin. Benign tumors could also develop, or the patient may exhibit a proclivity to malignancies. The child may suffer from only one such manifestation, or from several in varying degrees. Finally, in some conditions, the disorder may never

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23. BLACK'S LAW DICTIONARY 206 (Abridged 5th ed. 1979), defines prospective damages as, "Damages which are expected to follow from the act or state of facts made the basis of a plaintiff's suit; damages which have not yet accrued, at the time of the trial, but which, in the nature of things, must necessarily, or most probably, result from the acts or facts complained of."

24. For helpful guides to the use variety of preconceptive and prenatal diagnostic techniques, see S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS & THE LAW (1987) [hereinafter ELIAS & ANNAS]. Currently, through techniques such as chorionic villi sampling, ultrasonography, amniocentesis and fetoscopy, a significant number of inherited and environmentally induced genetic traits are detectable. For example, approximately 142 inherited genetic traits are potentially diagnosable prenatally including Tay-Sachs, sickle cell disease, polycystic kidney disorders and myotonic dystrophy. *Id.* at 91. A substantial number of these are not readily apparent at birth. The tremendous impact of genetic technology is realized when considering that as many as forty percent of all childhood deaths may be attributable, at least in part, to genetic factors. Reilly, *Genetic Counseling: A Legal Prospective*, in COUNSELING IN GENETICS 311 (1979).

25. *See, e.g.*, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

26. SLOAN-DORLAND ANN. MEDICAL-LEGAL DICTIONARY 493 (1987), defines neurofibromatosis as: "[A] familial condition characterized by developing changes in the nervous system, muscles, bones and skin marked superficially by the formation of multiple penduculated soft tumors (neurofibromas) distributed over the entire body associated with areas of pigmentation. Also called von Ricklinghouse disease." The condition is popularly known as that which afflicted John Merrick, the Elephant Man.

materialize despite the presence of the necessary genetic coding. For example, only eighty percent of persons with the genetic structure for myotonic dystrophy ever experience any symptoms.[27]

The variance in severity and occurrence times of many congenital defects creates an obstacle to using the standard recovery procedure of bringing a single action seeking compensation for all damage. Currently, where the physical manifestations of an injury do not occur within the prescribed period of limitations, the plaintiff's chances of recovery are minimal. Yet, a plaintiff with a late manifesting disorder is as damaged as one whose affliction is immediately identifiable. It is incongruous to deny recovery to one of two plaintiffs where both were wronged in the identical manner simply because one's injuries do not manifest themselves until later.

Negligence of a health care provider subjects the provider to liability. But, how far should liability be extended where the question is one of prospective injury? At what point does speculation and educated guessing regarding the existence and amount of damages create an inequity to the health care provider or the plaintiff? The decision to award prospective damages to wrongful life claimants as compensation for costs associated with latent disorders must be made with an awareness of the procedural and equitable hurdles involved.

This Note will examine the issues of allowing a plaintiff claiming a family or legal status injury to bring suit as well as awards of prospective damages in wrongful life claims. First, the development of wrongful life claims will be outlined. The necessary elements of the tort—duty, breach, causation and damage—will then be discussed individually to assess the conclusions of the court in *Cowe*. This Note concludes that although family status injuries are unacceptable grounds for bringing a wrongful life action, prospective damages for latent injury can and should be awarded.

I. History

The claim of wrongful life has undergone a significant metamorphosis. The Illinois Court of Appeals first considered wrongful life in *Zepeda v. Zepeda*.[28] In *Zepeda*, an illegitimate child sought recovery

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27. Robbins, Pathological Basis Of Disease 1392 (4th Ed. 1989), defines myotonic dystrophy as a benign disorder leading to weakness and myotonia (difficulty in relaxing) of the distal muscles (e.g. feet and hands). A patient with myotonic dystrophy has difficulty relaxing contracted muscles in order to perform ordinary functions such as loosening a grip or changing position. Onset age ranges from infancy to middle age. The disorder is also often accompanied by cataracts, testicular atrophy and cardiac involvement. *Id.*

28. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

from his natural father for those disadvantages associated with his status.[29] The court denied recovery, saying that recognition of the plaintiff's claim meant the creation of a new tort. "The legal implications of such a tort are vast, the social impact could be staggering."[30]

Three years later, the New York Court of Appeals heard *Williams v. State*.[31] Like the plaintiff in *Zepeda*, the petitioner in *Williams* sought recovery based on her legal status. The infant was born out of wedlock to a patient in a state mental hospital as the result of a sexual assault.[32] The plaintiff alleged that the state's negligence in allowing her to be conceived "deprived her of property rights, a normal childhood and home life, proper parental care, support and rearing, and caused her to bear the stigma of illegitimacy."[33] Dismissing the claim, the court held that being born to one set of circumstances instead of another is not a cognizable wrong.[34]

An impaired child first sought relief in *Gleitman v. Cosgrove*.[35] Mrs. Gleitman contracted rubella very early during the first trimester of her pregnancy.[36] She informed her treating physician of this fact, but was assured that it would not affect the child.[37] The infant, Jeffery, appeared normal at birth.[38] Subsequently, he displayed severe defects in sight, hearing and speech.[39] Both Jeffery and his parents brought suit.[40] The Supreme Court of New Jersey dismissed Jeffery's claim, pointing to what it considered the impossibility of measuring damages based on the difference between "his life with defects and the utter void of nonexistence."[41] The court also denied the parents' claim for wrongful birth, saying that allowing the claim would be inapposite to public policy supporting the sanctity of human life.[42]

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29. *Id.* at 246, 190 N.E.2d at 849. The plaintiff complained of "being deprived of the normal home that might have been his," as well as for the loss of the love and affection that he would have had he been born a normal child. *Id.*
30. *Id.* at 259, 190 N.E.2d at 858.
31. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).
32. *Id.* at 482, 223 N.E.2d at 343, 276 N.Y.S.2d at 886.
33. *Id.*
34. *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 886.
35. 49 N.J. 22, 227 A.2d 689 (1967).
36. *Id.* at 24, 227 A.2d at 690.
37. *Id.*
38. *Id.*
39. *Id.* at 25, 227 A.2d at 690.
40. *Id.* at 26, 227 A.2d at 691.
41. *Id.* at 28, 227 A.2d at 692.
42. *Id.* at 30, 227 A.2d at 693. *But see* Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979) (child born with Down's Syndrome not allowed to recover, but parents granted award to cover the special costs associated with raising the child).

Park v. Chessin[43] represents the first attempt to claim wrongful life where the alleged negligence occurred prior to conception. Mrs. Park's first child died within an hour of birth from a hereditary kidney disorder.[44] Before conceiving again, the Parks sought the advice of a doctor regarding the possibility of a second child suffering the same condition. Relying on his incorrect advice, the Parks decided to have another child. Tragically, the child was born with the same disorder and lived only two and one half years. In recognizing a claim for both the Parks and their infant, the court commented that the law must mirror the changes in technology, economics, and social attitudes.[45] Where technology can predict with reasonable certainty that a child would be born deformed, the court said, "children have a right to be born whole, functional human beings."[46] This victory for wrongful life proponents was short lived. The next year in *Becker v. Schwartz*,[47] the court overturned *Park*, stating that it was incompetent to measure a life with deformities against a life without.[48]

The court in *Curlender v. Bio-Science Laboratories*[49] recognized the validity of a wrongful life claim. As with most watershed cases, the facts were compelling. The Curlenders sought genetic counseling to determine whether they carried the gene for Tay-Sachs disease.[50] Relying on faulty test results, the Curlender's conceived a child afflicted with the disease. The child sought damages for emotional distress as well as the deprivation of 72.6 years of life[51] and $3 million in punitive damages on the grounds that the defendants knew their testing procedures were likely to produce a substantially high number of false-negatives, and yet proceeded to use them "in conscious disregard of the health, safety and well-being of the plaintiff."[52] The court allowed both general and special damages, concluding that the infant has a

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43. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977).
44. *Id.* at 83, 400 N.Y.S.2d at 111.
45. *Id.* at 88, 400 N.Y.S.2d at 114.
46. *Id.*
47. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).
48. *Id.*
49. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).
50. *Id.* at 815 n.4, 165 Cal. Rptr. at 480 n.4. Tay-Sachs is a fatal progressive degenerative disease of the nervous system, characterized by partial or complete loss of vision, mental underdevelopment, softness of the muscles, and convulsions, which primarily afflicts the Eastern European Jewish population and their progeny. Only in the circumstance where both parents are carriers will there be a great likelihood of the presence of the disease in the offspring. The condition can be screened for through a relatively simple blood test. *Id.*
51. *Id.* at 818, 165 Cal. Rptr. at 481.
52. ELIAS & ANNAS, *supra* note 24, at 115.

right of action when it is born defective and its "painful existence is a direct and proximate result of negligence by others."[53] The decision also noted that children continue to sue for wrongful life because of the seriousness of the wrong, "understanding that the law reflects, perhaps later than sooner, basic changes in the way society views such matters."[54] Two years later, the California Supreme Court partially overruled *Curlender* in *Turpin v. Sortini*,[55] which held that a plaintiff could not recover general damages for wrongful life because of the impossibility of comparing the value of an impaired to a non-impaired life.

In the ten years between the *Curlender* and *Cowe* decisions, only three other states have allowed awards in wrongful life cases.[56] In the Washington case of *Harbeson v. Parke-Davis*, the plaintiff's mother was an epileptic on a regular regimen of Dilantin.[57] The Harbesons inquired as to the risks of birth defects associated with the drug, and were assured that it would cause no difficulty.[58] Subsequently, two children were born with congenital deafness and other physical and mental deformities resulting from *in utero* exposure to the drug.[59] The children recovered extraordinary expenses, such as medical and special educational costs, incurred during their lifetime as a result of the defects.[60] The court recognized that scientific advancements should be used to protect children.[61]

In *Procanik by Procanik v. Cillo*,[62] the Supreme Court of New Jersey reversed its earlier decision in *Gleitman v. Cosgrove*,[63] allowing

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53. *Curlender*, 106 Cal. App. 3d at 824, 165 Cal. Rptr. at 486.
54. *Id.* at 828, 165 Cal. Rptr. at 487.
55. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
56. The following states do not allow a cause of action for or otherwise recognize wrongful life: Florida (Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981)); Idaho (Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1985)); Kansas (Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986)); Louisiana (Pietre v. Opelousas Gen. Hosp., 517 So. 2d 1019 (La. 1987)); Michigan (Proffitt v. Bartolo, 162 Mich. App. 35, 412 N.W.2d 232 (1987)); New Hampshire (Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986)); New York (Alquijay v. St. Luke's-Roosevelt Hosp. Center, 63 N.Y.2d 978, 473 N.E.2d 244, 483 N.Y.S.2d 994 (1984)); Pennsylvania (Ellis v. Sherman, 330 Pa. Super. 42, 478 A.2d 1339 (1984), *aff'd*, 515 A.2d 1327 (1986)); Texas (Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984)); West Virginia (James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985)); Wisconsin (Dumer v. St. Michael Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975)).
57. 98 Wash. 2d 460, 656 P.2d 483 (1983).
58. *Id.* at 463, 656 P.2d at 483.
59. *Id.*
60. *Id.* at 483, 656 P.2d at 496-97.
61. *Id.* at 481, 656 P.2d at 496.
62. 97 N.J. 339, 478 A.2d 755 (1984).
63. 49 N.J. 22, 227 A.2d 689 (1967).

a child afflicted with congenital rubella syndrome to recover special costs associated with his disorder. The *Cowe* decision adds two new factors to the development of wrongful life cases: Under very limited circumstances, a child can recover for the injury of being born to a specified type of parent. He can also now recover for prospective injury.

II. The Wrongful Life Tort: The Elements of Negligence

To succeed on a claim of wrongful life, the plaintiff must present a standard prima facie showing of negligence. A legally recognizable duty must be owed to the plaintiff, the breach of which is the proximate cause of the plaintiff's injury.[64] These elements will be discussed individually; first to define their role in the wrongful life tort, and second to assess the result in *Cowe*.

A. Duty

Generally, duty in a wrongful life action is premised on the theory of informed consent[65] which imparts upon a physician the duty to disclose any facts "which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."[66] If a physician knows, or reasonably should know, of information regarding possible defects a child may possess, either immediately or in the future, this information must be made available to the parents.[67] Full disclosure affords the parents an opportunity to make an informed decision

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64. W. Keeton, Prosser and Keeton on The Law of Torts 164 (5th ed. 1984) [hereinafter Prosser & Keeton].

65. *See* Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983). *See also* Capron, *Informed Decision Making in Genetic Counseling: A Dissent to the Wrongful Life Debate*, 48 Ind. L.J. 581 (1973).

66. Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170, 181 (1957).

67. *See* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (physician has duty to make reasonable disclosure of diagnosis of maternal disease and subsequent risks of pregnancy); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified*, 35 A.D.2d 53, 313 N.Y.S.2d 502 (1970), *appeal dismissed*, 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863, *appeal granted*, 27 N.Y.2d 489, 267 N.E.2d 280, 318 N.Y.S.3d 1025 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (recognized obligation of physician to disclose to his patient serious or statistically frequent risks of a proposed procedure but denied recovery for wrongful life based on inability to award damages). *But see* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d. 689 (1967) (informed consent does not include duty on part of doctor to inform mother of possibility of birth defects resulting from rubella so that patient could obtain an abortion).

whether to conceive, or in some circumstances, abort the fetus.[68]

Decisions allowing recovery to parents in wrongful birth actions also recognize this duty to inform.[69] Where a health care practitioner negligently fails to fully disclose information regarding the child, his failure is considered a breach of duty to the parents.[70] Subsequent birth of an impaired child is an injury to the parents who can seek recovery from the practitioner.[71] Logically, an analogous duty to inform must exist to the child who bears the condition. The duty can be extended to the child under two different constructions. First, the health care provider could be considered to owe a separate but similar duty to both the parent and the child. Second, the duty to the child could be considered to arise because the child is a foreseeable victim of any breach of duty to the mother.

The first approach concludes that the doctor owes a duty directly to the child. Where either pre-conceptive genetic counseling or prenatal care is sought, the physician is treating both the parent and child (or prospective child), and thus owes a separate but similar duty to both.[72] The fact that the child is *in utero*, or possibly is not yet conceived, at the time of the negligent act presents no obstacle to determining that a duty to the child exists. *Bonbrest v. Kotz* established that a duty exists to a child *in utero*.[73] Precedent also exists for finding a duty to a child not yet conceived so long as that child is a "foreseeable plaintiff."[74]

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68. Shaw, *Conditional Prospective Rights of the Fetus,* 5 J. LEG. MED. 63, 109-10 (1984).

> The nondisclosure of potential suffering of the child, not the right to abort, is the reason that parents with genetically defective children bring wrongful birth and wrongful life suits. The mother has the right to abort with no genetic counseling. But she has been denied the right to act on behalf of her fetus so that it will not be born with severe defects. Her desire to abort comes from her wish to act in the best interest of her potential child by preventing its existence. It is not her desire to have abortion, per se. When faced with a diagnosis of Tay-Sachs disease or infantile polycystic kidney disease, parents are willing to sacrifice their own strong desires to have a child in order to prevent that future child from suffering. *Id.*

69. *See, e.g.,* Harbeson v. Parke-Davis, 98 Wash. 2d 460, 656 P.2d 483 (1983); Gildner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

70. *Harbeson*, 98 Wash. 2d at 492, 656 P.2d at 492.

71. *Id.*

72. *Curlender*, 106 Cal. App. 3d at 828, 165 Cal. Rptr. at 488-89. *See also* Note, *Wrongful Life: A Modern Claim Which Conforms To The Traditional Tort Framework*, 20 WM. & MARY L. REV. 125, 140 (1978) [hereinafter *Wrongful Life: A Modern Claim*].

73. 65 F. Supp. 138, 140 (D.D.C. 1946).

74. For example, in *Rennslowe v. Mennonite Hospital*, a thirteen year-old girl

The difficulty with concluding that the child is owed a "separate" duty is defining the nature of the duty. Arguably, the duty to inform owed to a parent should not exist independently to a fetus who is incapable of acting upon the information. Although this contention is logical, it is too narrow. The child must have the opportunity, vicariously through the parent, to determine whether a life with his associated condition is in his best interest.[75] Simply because the child must rely on a third party to act does not absolve the doctor of his duty to protect the fetus by making the necessary disclosure to the parents.[76] Consequently, the health care provider can be considered to owe a duty to inform to the parents as well as a separate, but similar duty to inform to the child.

Under the second theory, the duty owed to the parents to provide complete and correct information inures directly to the child. A health care provider treating a prospective mother owes a duty to communicate to her any possible risks associated with bearing a child. The patient will rely on the information supplied by the health care provider. It is foreseeable that the patient's reliance on incorrect information may lead to the birth of an impaired child. The Restatement (Second) of Torts section 311 provides that "one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results . . . to such persons as the actor should expect to be put in peril by the action taken."[77] In wrongful life cases, the child is

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received a transfusion of RH negative blood. The transfusion created the risk that any RH positive children she might carry could have a serious, or fatal, reaction to her RH negative blood. Subsequently, she had a child who, as a result of the transfusion, was born premature, jaundiced and suffering permanent damage to various organs, her brain and nervous system. The court allowed recovery saying that at the time of the negligent transfusion future children were foreseeable. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), *aff'd,* 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976). *See also* Jorgensen v. Meade-Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973) (Mongoloid children have claim against manufacturer of their mother's birth control pills for their mongoloid condition).

75. *See Wrongful Life: A Modern Claim, supra* note 72, at 140. *But see* Note, *Torts—Wrongful Life—No Cause of Action for Failure to Inform of Possible Birth Defects,* 13 WAYNE L. REV. 750 (1967) (author argues against recognition of a duty to the child).

76. *See* Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 70 (1970).

77. *See* RESTATEMENT (SECOND) OF TORTS § 311 (1965). Section 311 provides that:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.

the foreseeable victim of the negligent failure to communicate proper or complete information to the parents. Thus, the child has an action based on the injury that he received through the doctor's breach of duty to the parent. Under either theory, the health care provider's duty to disclose any information that he knows, or should know, regarding possible defects can be extended directly to the child.

When considering a wrongful life claim involving a plaintiff with a currently latent disorder, the duty analysis is exactly the same as any other wrongful life case. It matters little to the child whether the act of negligence occurred prior to conception or during the gestation period. Similarly, the child's concern is not so much when the injury manifests itself, but the fact that it does so at all.

The issues in *Cowe* are complicated by the fact that Jacob's birth mother, Melanie, functions at the mental level of an infant and was incapable of making any decisions for Jacob; however, this does not absolve Forum of its obligation to act in Jacob's best interests. Forum could be held to the standard wrongful life duty to disclose information of the child's possible condition. While Melanie herself could not have been informed of or acted upon the information, Forum should have communicated the information to Melanie's legal guardian. The guardian could then determine the necessary response considering the condition both of the child and of Melanie.

However, the court in *Cowe* adopted a broader definition. The holding creates a duty on the part of the health care provider to prevent conception to patients in their custody who are incapable of affirmatively deciding to have, or care for, a child. If read narrowly, the duty proscribed by the *Cowe* court exists only under the specific fact pattern of the case. However, the decision is subject to a wider and more encompassing interpretation.

A duty to prevent conception is owed to the parent/patient in the factual circumstances of *Cowe*. However, a determination that the duty to prevent life can be owed to the child created by the conception implies that simply achieving life is an injury. The attainment of life alone is not the injury that wrongful life claims compensate.[78] The harm to be

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(2) Such negligence may consist of failure to exercise reasonable care
(a) in ascertaining the accuracy of the information, or
(b) in the manner in which it is communicated.

The rule stated in this Section finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine. *Id.* comment b.

78. *See infra* notes 96-155 for discussion of damages.

avoided in wrongful life generally is life with a defect. To the extent the holding in *Cowe* finds that simply achieving life is a harm, it departs significantly from wrongful life precedent. Courts allow recovery for wrongful life in order to compensate for the undisclosed impairment accompanying the life.[79] Consequently, if *Cowe* is interpreted as consistent with existing precedent, Jacob would have to show that he suffered injuries other than simply his existence and that he would not have been born to endure those injuries had Forum fulfilled its duty.[80]

B. Breach

A health care provider is obligated to "exercise the same amount of care as a reasonable practitioner with the same skill and knowledge."[81] If, during the course of his association with a patient, he discovers, or should discover, the possibility of injury to the prospective or existing fetus, he must make that information available to the parents, thereby allowing them to make an informed decision regarding conceiving or carrying the child.[82] Failure to disclose this information is a breach of duty to both the parents and the child.[83] The breach becomes actionable if it leads to injury, regardless of whether that injury fails to manifest itself until sometime after the child's birth, so long as causation can be proven.

C. Causation

Breach of duty becomes actionable only if the defendant's actions or omissions are both the cause in fact and the proximate cause of the plaintiff's injury.[84] In a wrongful life action, the plaintiff does not claim that the negligence of the health care provider caused the defect from which the plaintiff suffers.[85] Instead, the claim is that by failing to provide the parents with pertinent information, the practitioner denied them the opportunity to make a knowledgeable decision regarding whether the child should or should not be born.[86] This denial leads to the birth

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79. *Id.*

80. The dissenting opinion in *Cowe* suggests recovery may have been appropriate had Jacob presented any physical injury. "More important in both *Procanick* and *Harbeson*, the birth defects were known, specific, articulable defects which clearly resulted from the medical conditions of which the doctors negligently failed to apprise the parents." 541 N.E.2d 962, 973 (Ratcliff, J., dissenting).

81. PROSSER & KEETON, *supra* note 64, at 185.

82. *See supra* notes 65-80 for discussion of duty.

83. Harbeson v. Parke-Davis, 656 P.2d 483, 490-91 (Wash. 1983).

84. *See* PROSSER & KEETON, *supra* note 64, at 165.

85. *E.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 693 (1967).

86. *Id.*

of the child—the "maturing of the harm."[87] But for the physician's negligence, the child would not have been born to suffer.

Defendants often assert that the child's inherited genetic make-up or maternal illness is the proximate cause of his injury.[88] They conclude that an intervening harm broke the chain of causation.[89] This rationale fails on two counts.[90] First, by definition, an intervening cause is one which "comes into active operation in producing the result, *after* the negligence of the defendant."[91] Where the doctor's negligent failure to inform occurs after the condition came into existence, the condition itself cannot be considered an intervening cause. The negligent act occurred after the illness. Second, where the failure to warn preceded conception and the occurrence of the alleged intervening cause, many courts hold that the defendant is not absolved of his duty if the intervening cause was foreseeable.[92] Where the effect of a potential genetic malformation is a foreseeable consequence, and the health care provider failed to detect and/or inform of this defect, he should be held liable for the resulting injury.[93]

The most prevalent limiting doctrine in determining the legal cause of an injury is foreseeability.[94] It is not unreasonable to assume that when a pregnant woman seeks prenatal care or preconceptive counseling she will rely upon the diagnosis. Should the diagnosis be incorrect, it would affect both the woman being treated and her child. The child, thus, is a foreseeable plaintiff.

To prove causation, the child must show that in the face of full disclosure, his parents would have decided not to conceive or to abort

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87. *See Wrongful Life: A Modern Tort*, *supra* note 72, at 144.

88. *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 55 S.C.L. REV. 713, 732-33 (1982).

89. *Id.*

90. *See Wrongful Life: A Modern Tort*, *supra* note 72, at 145.

91. PROSSER & KEETON, *supra* note 64, at 301 (emphasis in original).

92. *See* Park v. Chessin, 60 A.D.2d. 80, 400 N.Y.S.2d 110 (1977).

93. Two wrongful birth cases support this proposition. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). In a wrongful birth action resulting from a negligently performed sterilization operation, the California Court of Appeals held that upon a showing that the defendants breached a duty, there need only be proof that the negligence was the *proximate*, not the *sole*, cause of the damages.

> The general test of whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation is the foreseeability of that act. . . . It is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable.

Id. at 316, 59 Cal. Rptr. at 472 (citations omitted). *See also* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W. 551 (1971) (court could not say that pharmacist's failure to fill birth control prescription properly was not the proximate cause of the birth of the child).

94. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

thereby preventing his birth and his accompanying injury.[95] The defendant's failure to disclose may be deemed the proximate cause of the child's suffering, and he can be held liable for damages resulting from the plaintiff's injury.

D. Damage

Courts refusing to recognize wrongful life claims generally base their decisions on two policy considerations.[96] First, many opinions reflect a fear that allowing a wrongful life claim demands a determination that an impaired life is inherently less valuable than a non-impaired life.[97] "[H]uman life, no matter how burdened, is, as a matter of law, always preferable to nonlife."[98] The decisions conclude that the plaintiff suffered no legally cognizable injury by being born with a congenital or genetic defect.[99]

Second, there exists a perceived inability to [fairly] assess damages.[100] Traditional valuation techniques are unavailable in a wrongful life claim. Because of the nature of the child's injury, the only choice was to be born with the condition or not to be born at all. Many courts believe this compels them to perform the impossible task of measuring the value of an impaired life against non-existence in order to determine a damage amount.[101] They reason that because the plaintiff cannot be made whole again, any award is bound to be too speculative.[102] The metaphysical

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95. Of course, if in the face of a full and accurate disclosure, the parents continue the pregnancy, the physician must logically be relieved of liability. He fulfilled his duty. The difficulty of proving this last element of causation can act as a limiting factor on the number of successful wrongful life claims. If the plaintiff is required to show that a reasonable parent would have prevented the child's existence, only those cases in which the plaintiff's injuries are truly severe will succeed.

96. Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 697 (Ill. 1987).

97. *See, e.g., Siemieniec*, 512 N.E.2d at 697; *Azzolino*, 315 N.C. at 109, 337 S.E.2d at 533 (1985); Blake v. Cruz, 108 Idaho 253, 260, 698 P.2d 315, 322 (1984).

98. *Siemieniec*, 512 N.E.2d at 697.

99. *See id.*

100. *Id.*

101. Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 ("[This] cause of action . . . demands a calculation of damages dependant on a comparison between Hobson's choice of life in an impaired state and nonexistence. This the law is incapable of doing." (fn. omitted). *Id.* at 365, 408 A.2d at 508.

102. Interestingly, this rationale is adopted by several courts which allowed the wrongful life action but denied general damage awards. Turpin v. Sortini, 31 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346 (1982); Harbeson v. Parke-Davis Inc., 98 Wash. 2d 460, 482, 656 P.2d 483, 496-97 (1983); Procanik by Procanik v. Cillo, 97 N.J. 339, 353-54, 478 A.2d 755, 763 (1984).

task of determining the value of life, many jurists believe, is best left to philosophers and theologians, and not juries.[103]

Courts allowing awards to wrongful life claimants strike a balance between the apparent philosophical difficulties associated with making an award and the economic realities faced by an impaired child. The resolution hinges on the clarification of what the child's injury is and for what he is being compensated.

Curlender v. Bio-Science Laboratories first enunciated this compromise.[104] The court reasoned that the child was not damaged merely because he existed; rather, the injury was that he "existed and suffered."[105] Philosopher Joel Feinburg stated the theory more eloquently.[106] He proposed a "plausible moral requirement that no child be brought into the world unless certain very minimal conditions of well-being are assured."[107] If this basic minimum cannot be met, the child has been wronged by being born.[108] Feinburg argues that even though the child has not been "harmed" (since the child's initial condition was harmed, and the physician did not make it worse), the child can be wronged by being brought into existence in a condition to which any rational being would prefer non-existence.[109]

The failure of the health care provider to make full disclosure deprives the child of the opportunity to determine, vicariously through his parents, whether life in his condition is preferable to non-life. The deprivation of choice is the legal harm inflicted by the health care provider. As discussed earlier, it is a breach of the health care provider's duty. Where that breach leads to the birth of an impaired child, it becomes actionable in the form of wrongful life. The child's life with impairment is a consequence of the harm; it is the wrong suffered by the child. Thus, the child can recover the costs associated with those consequences.

Echoing *Curlender's* rationale, the majority in *Procanick by Procanick v. Cillo* stated:

> We need not become preoccupied, however, with these metaphysical considerations. Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call

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103. Becker v. Schwartz, 46 N.Y.2d 401, 411-12, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900-01 (1982).

104. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

105. *Id.* at 828, 165 Cal. Rptr. at 488.

106. J. Feinburg, Harm To Others 97-104 (1984).

107. *Id.*

108. *Id.*

109. *See also* Elias & Annas, *supra* note 24, at 118-20.

of the living for help in bearing the burden of their affliction.[110]

Plaintiffs bringing wrongful life claims generally incur tremendous costs associated with their conditions, such as ongoing medical care, pharmaceutical costs, and special education needs.[111] These costs can devastate a family financially as well as emotionally. Thus, the recovery allowed is accordingly aimed at alleviating these extraordinary expenses. General damages are still not available, however, because of the perceived impossibility in calculating the appropriate amount of damages.[112]

The court in *Cowe* found two possible areas of damage. First, the court recognized an injury based on Jacob's family situation. The majority decision expands the definition of wrongful life to "encompass Jacob's unusual situation."[113] The majority concludes that Forum had a duty to Jacob to prevent his conception. The court determined that Forum could be liable in the form of support from the time of Jacob's birth to his adoption.[114] Although merely dictum, the concurring opinion suggests that Jacob also should be allowed to recover "for his mental pain, suffering and anguish based on any diminished quality of life he may suffer from being the genetic off-spring of mentally deficient parents."[115] The second area of damages identified by the opinion is "compensation for physical injury." The court determined that because Jacob "has or had a chance of physical injury" due to Forum's administration of Dilantin to Melanie while Jacob was *in utero*, he could recover for any physical harms resulting from that exposure.[116]

1. The Family Status Injury.—Cowe's acceptance of Jacob's birth to incompetent parents as an injury compensable under wrongful life is a stark departure from precedent. Injuries based on family situation or

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110. Procanik by Procanik v. Cillo, 97 N.J. 339, 353, 478 A.2d 755, 763 (1984).

111. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling,* 87 YALE L. J. 1488, 1496 (1978). Genetic defects represent an increasingly large part of the overall national health care burden. A 1975 Congressional report estimated that at that time, cost of treatment for a hemophiliac ran $12,000 a year while it cost $20,000 to $40,000 a year to care for a Tay-Sachs infant until its death. The diet necessary during early childhood for a person with PKU to prevent severe mental retardation, a relatively minor intervention, costs from $8,000 to $10,000 a year. *Id.* at 1488 n.35 (quoting H.R. REP. No. 498, 94th Cong., 1st Sess. 18-19 (1975)), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 709, 726-27.

112. *See* Turpin v. Sortini, 31 Cal. 3d at 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. at 346 ("it would be impossible to assess [general] damages in any fair, non-speculative manner").

113. *Cowe*, 541 N.E.2d at 968.

114. *Id.* at 967.

115. *Id.* at 968 (Conover, J., concurring).

116. *Id.*

legal status have been rejected as foundations for wrongful life claims.[117]

As discussed previously, the wrongful life claim was originally brought by illegitimate children against their fathers for lack of both the social and financial status associated with their illegitimacy.[118] The court in *Zepeda v. Zepeda* noted that "[a] legitimate child has a natural right to be loved and cared for but cannot maintain an action against his own parents for lack of affection."[119] Similarly, "[a]n illegitimate child cannot be given rights superior to those of a legitimate child" and, thus, the illegitimate child has no cause of action.[120]

Courts have previously heard, and rejected, wrongful life claims by children in circumstances factually similar to Jacob's. In *Williams v. State*, the court held that "[b]eing born under one set of circumstance rather than another is not a suable wrong that is cognizable in court."[121] The California Court of Appeals in *Foy v. Greenblot* determined that a child whose only claimed injury was being born to an adjudicated incompetent in a mental health facility failed to state a claim for wrongful life.[122] The court suggests the possibility of a different result had the plaintiff suffered any "legally cognizable injury as a consequence of respondent's conduct."[123]

On its face, the *Cowe* decision purports to limit itself to the unusual facts of the case. In consideration of these facts, the decision seems equitable. However, family status injuries are not the type of injury addressed in wrongful life claims.

Awards are made to wrongful life plaintiffs who suffer some impairment associated with their lives. To recognize birth to a particular set of parents in any circumstance, even those as sympathetic as Jacob's, would require the court to determine that birth into a less than desirable family situation alone is a legal injury.

After recognizing birth to incompetent parents as a legally compensable injury, it will become logically difficult to deny the pleas of infants born into equally difficult circumstances. The court doors would need to be opened to any person unhappy with their family situation or social status. The logic of precedent on this question is solid; dissatisfaction with one's family situation alone cannot be considered acceptable grounds for stating a wrongful life claim.

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117. *See, e.g.,* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

118. *See supra* notes 28-34 and accompanying text.

119. 41 Ill. App. 2d at 255, 190 N.E.2d at 856 (1963).

120. *Id.*

121. Williams v. State 18 N.Y.2d 481, 484, 223 N.E.2d 343, 344, 276 N.Y.S.2d 885, 881 (1966).

122. 141 Cal. App. 3d 1, 14, 190 Cal. Rptr. 84, 93 (1983).

123. *Id.*

2. The Prospective Injury.—The second area of damage recognized by the *Cowe* court is Jacob's claim for potential physical harms resulting from his *in utero* exposure to Dilantin. The court considered a medical inventory which predicted that Jacob sustained a ten percent risk of experiencing Fetal Hydantoin Syndrome. Because Jacob exhibited no symptoms of the syndrome at the time of the trial, any award made to him would be considered prospective. In contrast to the court's holding regarding family status injury, allowing recovery for future injury does not represent a significant change to the tort of wrongful life. The logic of allowing prospective damage claims in a wrongful life action is supported by analogy to other torts, such as toxic tort claims, in which prospective damages are regularly awarded. The need for such claims is created by the character of the disorders themselves.

The types of congenital defects which give rise to wrongful life claims present a number of special obstacles to the plaintiff and the court due to their often unpredictable nature. Genetic disorders in particular often possess characteristics which create tremendous difficulty in determining when a plaintiff should bring an action and what, if any, time limitations should be placed on the right to institute a suit.

In a condition with delayed manifestations, the existence of the injury may not become known until long after the statute of limitations has run.[124] In a jurisdiction using a discovery rule, the plaintiff may not lose his right to bring suit; however, the damage may not become apparent until years, or even decades, later. Bringing a defendant to court as much as fifty years after the alleged negligence works the very type of inequity statutes of limitations are designed to prevent.[125]

Other genetic diseases exhibit traits known as decreased penetrance or multiple expressivity. In disorders with decreased penetrance, even though the altered genetic structure exists, the illness may never occur.[126] Multiple expressivity describes conditions, such as neurofibromatosis, which may cause the plaintiff to experience a variety of symptoms. These disorders can be unpredictable as to course and severity.

A plaintiff suffering from a defect with multiple expressivity may bring suit upon first becoming aware of her condition. Because of the difficulty in predicting the future course of the disorder, and consequently

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124. For example, the Indiana statute of limitations requires actions be brought within two years of the alleged negligent act. Minors under the age of six have until their eighth birthday to bring an action. IND. CODE § 16-9.5-3-1 (1988).

125. *See generally* PROSSER & KEETON, *supra* note 64, at 166.

126. For example, Martin-Bell Syndrome (also called x-linked mental retardation), characterized by large protruding ears and protruding chin and mild to moderate mental retardation, appears in only 80% of those males who carry the gene. M. THOMPSON, GENETICS AND MCCEDICINED 63-64 (4th Ed. 1986).

the proper damage amount, a court may choose to compensate for only those manifest symptoms. However, if the plaintiff later develops different, and much more severe symptoms, a second suit is barred by res judicata.

Toxic exposure cases, such as those resulting from asbestos[127] or DES[128] exposure, frequently present the same type of variable, slow manifesting injury. Toxic exposure claimants often seek not only compensation for any existing injury but also awards for "enhanced risk" of suffering other maladies associated with the particular variety of toxic exposure.[129] Courts hearing enhanced risk cases wrestle with both the qualitative and quantitative possibility that the plaintiff will indeed experience any future harm.[130] They must assess the reliability of scientific evidence and attempt to predict the course and severity of the injury.

Initially, the court must determine whether a plaintiff exposed to a toxic substance has one injury or multiple separate injuries. When the disease for which the plaintiff alleges increased risk is considered both a separate and distinct injury from that which he currently suffers, questions arise as to when the plaintiff should be allowed to recover. Should the plaintiff be able to seek an award at this time for both current and future harm or should the statute of limitations and the rule against claim splitting be waived in order for him to pursue a later claim if it becomes necessary?[131] Courts have devised a myriad of solutions to these questions. Decisions in the toxic exposure area provide a wealth of precedent for examining prospective damage claims and, by analogy, suggest possible adaptations which would allow a wrongful life claimant with prospective injuries to seek relief in court.

a. The threshold question: existence of present injury.

When seeking relief for enhanced risk, the plaintiff's threshold question is the existence of a current physical injury causally related to the

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127. Exposure to asbestos can lead to a form of lung disease (pneumoconiosis), marked by interstitial fibrosis of the lung ranging in extent from minor involvement of the basal area to extensive scarring associated with increased incidence of mesothelioma and bronchogenic carcinoma. "There is no correlation between the severity of asbestosis and the development of malignancy. Indeed, lung cancers have developed in the absence of interstitial pulmonary fibrosis and significantly there is a poor correlation between the intensity of the exposure and the predisposition to cancer." ROBBINS, *supra* note 27, at 479-82.

128. Women exposed to DES (diethylstilbestrol) while *in utero* show characteristic changes in the cervix and vagina and are subject to increased risk of vaginal or cervical carcinoma. Less than 14% of such DES exposed women develop adenocarcinoma tumors. ROBBINS, *supra* note 27, at 1138.

129. *See generally* Birnbaum and Wrubel, *Emerging Damage Issues in Toxic Tort Litigation*, in PREPARATION AND TRIAL OF A TOXIC TORT CASE 311 (1988).

130. *Id.* at 323.

131. *Id.*

enhanced risk injury.[132] Enhanced risk claimants lacking an existing physical injury are barred from recovery.[133] For example, although a plaintiff may have been "wronged" by exposure to a toxic substance, most courts would not consider the exposure without a demonstration of resulting physical harm a sufficient ground for a negligence claim.

For the wrongful life plaintiff whose condition is such that some physical symptoms of his disorder are currently displayed, this requirement is no obstacle. Where, however, there are no current demonstrable symptoms, the plaintiff fails to meet the threshold test unless the court accepts a liberal interpretation of injury or damage.[134]

For example, although a latent genetic condition may not be demonstrable through the introduction of existing symptoms, the plaintiff could still prove that he possesses the necessary genetic makeup.[135] From that point, he could make a case for damages based on his probability of suffering the symptoms associated with his condition.

Bradfford v. Susquehanna Corporation[136] demonstrates this theory. Defendants filed for summary judgment alleging heightened risk of cancer stemming from exposure to high levels of radiation. The court recited the general proposition that there can be no recovery in the absence of present physical injury, but did not dismiss the claim.[137] The plaintiffs, the court found, raised a question of fact with respect to the present physical injury requirement by alleging that "chromosomal damage is itself a present injury that can give rise to a claim for future risk of cancer."[138] The court went on to caution that its holding be narrowly

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132. Whitehead & Espel, *Damages for Speculative Toxic Tort Consequences?: Wait and See*, in PREPARATION AND TRIAL OF A TOXIC TORT CASE 446 (1988).

133. *See* Mink v. University of Chicago, 406 F. Supp. 713, 719 (N.D. Ill. 1978) (In a lawsuit brought by women who had ingested DES, plaintiffs sought damages for enhanced risk of cancer. The court held that the "mere fact of risk without accompanying physical injury is insufficient to state a claim for strict products liability.").

See also Morrissy v. Eli Lilly & Co., 76 Ill. App. 3d 735, 394 N.E.2d 1369 (1979) (DES exposure; heightened risk of contracting cancer insufficient to state claim); Ayers v. Township of Jackson, 189 N.J. Super. 561, 461 A.2d 184 (Super. Ct. Law Div. 1983), *aff'd in part, rev'd in part*, 202 N.J. Super. 106, 493 A.2d 1314 (N.J. Super. Ct. App. Div. 1985), *aff'd in part, rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987).

134. As discussed earlier, the legal injury to the plaintiff is the deprivation of choice resulting from the health care provider's negligent failure to make full disclosure of information regarding the child's possible condition. Thus, in cases of future harm in a wrongful life action, the plaintiff must prove not only the injury, the failure to disclose, but also its consequence: the condition from which he suffers. It is the cost associated with this condition that forms the basis of the damage award. *See supra* notes 96-116 and accompanying text for discussion of damage.

135. *See generally* ELIAS & ANNAS, *supra* note 24.

136. 586 F. Supp. 14 (D. Colo. 1984).

137. *Id.* at 17.

138. *Id.*

construed in light of the strength of expert testimony on the existence of present chromosomal damage resulting from the levels of radiation to which the plaintiffs were exposed.[139] Fear that the plaintiffs would not "get a second bite of the apple" also influenced the court's decision.[140] By allowing proof of genetic malformation as sufficient to constitute present injury, a wrongful life plaintiff could proceed to establish the likelihood of the alleged future damage by showing that the probability of the future injury occurring meets an accepted degree of certainty.

b. The standard of proof.

The possibility of prospective injury in an enhanced risk claim must be proven by a statistical analysis of the risk which shows a reasonable medical probability that the disease will, in fact, develop. Merely showing a possibility of the occurrence of injury is insufficient.[141] "A jury may not award damages on the basis of speculation or conjecture. Instead, the plaintiff must present competent evidence from which the jury can reasonably determine the probability of the future injury occurring and, accordingly, the amount of damages to be awarded."[142] The standard typically accepted by courts is proof of the risk as being more probable than not.[143]

Application of this standard to wrongful life cases would allow a plaintiff suffering from a disorder with a predictable result to bring suit immediately. The plaintiff would only need to demonstrate that he possesses the requisite genetic makeup and then present evidence addressing the condition's anticipated course and severity.

Where the condition's manifestations are both numerous and/or inherently unpredictable as to scope and character, procedural adaptations will be necessary. Typically, a plaintiff with this type of condition cannot anticipate, with sufficient legal certainty, the severity of his disorder. A deserving plaintiff may be denied any recovery due to his inability to

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139. *Id.* at 18.

140. *Id.*

141. Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088 (1985) (asbestosis worker denied award for enhanced risk of cancer for failure to show increased risk to sufficient probability).

142. *Id.* at 1094 n.5 (citation omitted).

143. *See* Hagerty v. L & L Marine Servs., 788 F.2d 315, 319 (5th Cir. 1986) ("a plaintiff can recover only where he can show that the toxic exposure more probably than not *will* lead to cancer") (emphasis in original). *See also* Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986) (failure to show injuries more probable than not); Herber v. Johnson-Manville Corp., 785 F.2d 79, 82 (3rd Cir. 1986) (plaintiff could not recover where medical witness not prepared to testify that plaintiff would, more likely than not, develop cancer).

bring his case within the proper statute of limitations period. The converse inequitable result is also possible: a plaintiff could make the necessary showing of probability to collect for the risk of developing the disorder, but may never suffer the disease and thereby collect a windfall.

Courts hearing toxic tort cases have attempted to devise procedural strategies to prevent either inequity. One frequently used method recognizes the enhanced risk injury as a separate and distinct injury from that which already exists.[144] A plaintiff may then await development of the effects of his disorder without losing his right to bring suit.[145] Allowing a later suit for the late developing injury circumvents the rule against claim splitting.[146] The rule requiring a plaintiff to bring one action to recover for all damages resulting from a single incident is designed to prevent vexatious litigation and a multiplicity of lawsuits.[147] Often, however, the greater injustice created by allowing only one suit outweighs the benefit gained in promoting the goals of judicial economy and finality.

In a toxic exposure case, a plaintiff's ability to split his claim depends upon the court's determination that the plaintiff may have multiple claims stemming from a single exposure.[148] In *Jackson v. Johns-Manville*

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144. *See supra* note 129, at 311.

145. *See, e.g.*, Hagerty v. L & L Marine Servs., 788 F.2d 315, 320 (5th Cir. 1986) ("A prior but distinct disease, though the tortfeasor may have paid reparations, should not affect the cause of action and damage for the subsequent disease."); Devlin v. Johns-Manville Corp., 202 N.J. Super. 556, 495 A.2d 495 (1985) (same rule); Adams v. Johns-Manville Sales Corp., 727 F.2d 533 (5th Cir. 1984) (same rule under Louisiana law); Wilson v. Johns-Manville Sales Corp, 684 F.2d 111 (D.C. Cir. 1982) (same rule under D.C. law).

146. *See* RESTATEMENT OF JUDGMENTS § 24-26 (1982).

147. *Id.*

148. *See, e.g.*, Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1231 (D. Mass. 1986) (Plaintiffs, who had ingested contaminated drinking water, brought suit seeking damages for increased risk of serious illnesses, including leukemia and other cancers. The court held the they could recover "their probable future costs and suffering due to ailments of the types they already suffered.").

> These diseases seem at least qualitatively different from the illnesses the plaintiffs have actually suffered. . . . If they are part of the same disease process, then plaintiffs may seek recovery for the future illness in this action by showing a reasonable probability they will occur. If, however, they are distinct diseases, then plaintiffs must wait until the disease has manifested itself to sue.

Id. (citation omitted). *See also* Devlin v. Johns-Manville Corp., 202 N.J. Super. 556, 495 A.2d 495, 502 (N.J. Super Ct. Law Div. 1985) ("Asbestosis and asbestos related cancer are separate and distinct disease processes. Each may exist apart from the other and may stem from the same exposure to asbestos. The cause of action for each disease may accrue on widely divergent dates since each disease has its own latency period between exposure and manifestation of disease."). Plaintiffs had no present right to sue, but could sue if they should develop cancer at later date. *Id.*

But see Joyce v. A.C. & S., Inc., 591 F. Supp. 449 (W.D. Va. 1984) (applying

Sales Corporation, an asbestos worker suffering from asbestosis brought suit for enhanced risk of cancer.[149] The Fifth Circuit determined that asbestosis and cancer are separate and distinct injuries, and that the plaintiff could not create a claim for the injury of cancer simply by showing that the exposure to asbestos fibers which led to asbestosis may also lead to cancer. "Logic and justice require that presently latent injuries must await their separate maturity."[150] The panel noted that there would be no harm to the plaintiff in requiring him to wait until the cancer manifested itself before bringing suit. Where a claim is split, the statute of limitations does not begin to run until such time as the second disease is or should reasonably be known to the plaintiff.[151]

Circumvention of the rule against claim splitting would allow a wrongful life plaintiff to bring suit immediately for his current symptoms and then, if necessary, bring a second suit for later manifestations stemming from the same condition. By allowing a plaintiff to await the development of his disorder before bringing suit, it is more likely that the award amount would be commensurate with the severity of the affliction.

In theory, use of these techniques in wrongful life cases is appealing. Their application to the situation in *Cowe*, however, demonstrates that the adaptations will not provide relief in every situation. As discussed earlier, Forum's negligence toward Jacob led to one legally compensable harm—the possibility of suffering Fetal Hydantoin Syndrome. If the court considers the effects of this illness to constitute one disease process, Jacob would be required to bring one claim for any effects of the Syndrome which he may suffer at the time of the suit, as well as the enhanced risk of suffering other complications in the future. Because the probability of Jacob's experiencing any consequences of the Syndrome is only ten percent, Jacob could not recover prospective damages.

However, suppose that the court considers exposure to Dilantin led to two separate injuries or disease processes: mental effects and physical

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Virginia law), *aff'd*, 785 F.2d 1200 (4th Cir. 1986) (court reasoned that once a cause of action accrues, the statute of limitations begins to run against all damages resulting from the wrongful act, even damages which may not arise until a future date. The court realized that while this may produce a harsh result, the court did not feel that it was at liberty to modify the Virginia rule).

149. 727 F.2d 506 (5th Cir. 1984) (applying Mississippi law), 750 F.2d 1314 (5th Cir. 1985) (en banc) (vacating panel opinion), 757 F.2d 614 (5th Cir. 1985) (certifying questions to Mississippi Supreme Court), 469 So. 2d 99 (Miss. 1985) (en banc) (declining certification), 781 F.2d 394 (5th Cir.) (applying Mississippi Law), *cert denied,* 106 S. Ct. 339 (1986) (asbestos worker who suffered from a mild case of asbestosis barred from recovery for future risk of contracting cancer where he failed to prove probability of contracting cancer).

150. 727 F.2d at 520.

151. *Id.*

effects. The physical effects are noticeable soon after the child's birth although the mental effects do not become apparent until the child's school years. Utilizing the practice of allowing separate claims would allow Jacob, who lacks any of the structural deformities associated with the syndrome, to bring a later suit if he were to develop any of the mental deficiencies associated with the exposure. The statute of limitations against Jacob's second cause of action would not begin to run until he reasonably should know of these mental deficiencies.

The tolling of the statute of limitations on subsequent suits presents one of the difficulties inherent in genetic injury suits. Although in Jacob's case all the effects of the disease should be discoverable by the time he is five, the situation would be different if he suffered instead from myotonic dystrophy.[152] This disorder possesses a characteristic known as decreased penetrance, meaning that even in someone with the requisite genetic structure, occurrence of associated symptoms is highly unpredictable.[153] The severity of the disorder is variable and the age of onset ranges from infancy to middle age.[154] A patient showing only that he has the necessary genetic structure could not succeed on a claim for prospective damage because he would most likely fail to prove the course of his disorder to an acceptable degree of certainty. Allowing him to wait and bring suit once some symptoms occur would provide more certainty in determining an award. However, this places a tremendous burden on the health care provider named in the suit. Unlike a corporation, it is not reasonable to subject a single practitioner to liability for an act which may have occurred a quarter to a half a century earlier.[155]

As with toxic exposure cases, determining the most equitable method to provide the necessary compensation to plaintiffs in wrongful life cases without imposing undue burdens upon the health care provider/defendant will require experimentation and tailoring. A solution is necessary, however, to further the objectives of encouraging utilization of technology to detect genetic impairments.

III. Conclusion

Reticence to accept the claim of wrongful life reflects deep personal beliefs about the value of human life. Seemingly inherent in any judgment

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152. *See supra* note 27 for definition of myotonic dystrophy.

153. *Id.*

154. *Id.*

155. A possible solution to this difficulty is the legislation of statutes of repose—ultimate limitations on a cause of action. *See generally* Prosser & Keeton, *supra* note 64, at 167.

allowing a child to state a claim based on the difficulties associated with his life is a need to place a value on that life. This flies in the face of the belief that life, even a less than perfect life, is always precious.

The impression that many have of an impaired child—the Tiny Tim character patiently smiling through his infirmity—is far from reality. "Impaired" frequently means more than handicapped or sickly. A genetically impaired child often endures a crippled, tortuous existence, wreaking a tremendous emotional and financial toll on the family as well as society. As medical technology advances, more and more plaintiffs will seek recovery based on injuries that they are fated to endure by their own genetic coding and on suffering which would not have been endured had the prospective parents been informed of its possibility.

We expect scientific advancements to lessen human suffering. Techniques to detect and treat genetic disorders are making dramatic strides toward meeting that goal. Simultaneously, however, we shudder at imposing standard liability on these types of diagnostic and treatment procedures. To do so requires the examination of questions of our own value and existence. Rather than addressing the difficult issues of our own mortality, we are often led astray by appeals to emotion such as arguments promoting the value of life. Although these arguments are of paramount importance, they often preclude consideration of the legal issue—the attachment of liability.

Yet, technology marches ahead with or without judicial recognition. Where this technology will affect human life, it becomes imperative that law and philosophy advance with it to determine its proper and improper uses, to impose limitations and, where necessary, grounds upon which relief can be sought when this technology goes astray. One step toward this objective is to recognize a limited claim for wrongful life.

Allowing recovery for wrongful life in any case, and particularly in cases where the injuries are prospective, demands careful examination and limitation. The alternative produces a Hobson's choice of denying recovery to deserving plaintiffs or opening the courts to every person dissatisfied with his life.

The fear of opening the floodgates of litigation is a viable concern. Consequently, the tort must remain limited to only those suffering serious injuries. As medical technology expands, what is serious today may not be serious tomorrow. As the ability to cure genetic illnesses develops, it is possible that claims will eventually be brought by plaintiffs for "dissatisfied life" rather than "wrongful life." However, the possibility of what we would currently consider a frivolous result provides no reason to deny the claim in truly deserving cases.

Recognizing the claim of wrongful life affirms the expansion of the health care provider's duty to utilize genetic technology conscientiously.

Encouraging the development and use of technology is a method of sparing physical, emotional, and economic costs associated with serious genetic injury. The necessity of imposing a duty upon those who provide such care or counseling is obvious. Like the duty governing all similar health care services, it is essential to ensuring accountability and a thorough, careful provision of services.

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