

CHAPTER 10

Legislative Relevance

A. Wrongful birth statutes

1. What are wrongful birth statutes?

Wrongful birth statutes are legislative measures taken by either state or central government to prohibit, restrict or regulate litigation deriving from a variety of birth related medical negligence cases. Both actions¹ instituted by parents for the birth of either an unexpected healthy child² or the birth of a handicapped offspring³ are commonly regulated by these statutes and especially the action of the impaired child itself⁴ is frequently moderated by the legislator. It is uncertain why the exclusive term “wrongful birth” statutes is commonly used to refer to these restrictions,⁵ but for the sake of clarity and uniformity this term will also be used in this study. It is submitted that this specific term is used to refer to “actions arising from the birth of a child”, which would encompass all three classes of actions.

1.1 Relevance to thesis

Wrongful birth statutes could be seen as a reaction from the legislator to intervene and assist in the difficult issues raised by novel medical negligence actions that have evolved because of advances in the modern science of genetics. These actions are recurrently surrounded by a cloud of uncertainty⁶ and burdened by complex moral, social, religious and legal questions.

¹ *ie* wrongful life and wrongful birth actions.

² wrongful conception actions: *eg* Maine Statute - Title 24§ 2931 (2) - discussed *infra*.

³ wrongful birth actions: *eg* Pennsylvania Consolidated Statutes §8305 (a) - discussed *infra*.

⁴ wrongful life actions: *eg* North Dakota Central Code §32-03-43 - discussed *infra*.

⁵ A possible reason could be that much statutory guidance is needed for wrongful birth, as wrongful conception actions are usually less complicated in terms of moral and ethical issues and generally so commonly recognized that special legislative curtailment might seem unnecessary - see ch 6. In contrast, wrongful life actions are so progressive that the vast majority of courts have rejected its cause of action and therefore restrictions by means of statute could also be perceived to be superfluous - see ch 8.

⁶ as conflicting court decisions are given with regular interval.

Often there are no instant or obvious solutions to the questions arising from such new litigation. Courts regularly decline to make judgments because of ever changing public policy considerations and frequently refer the issue to the legislator for guidance.⁷ Jackson⁸ emphasizes the importance of clear guidelines to address the wrongful life phenomenon: "Actions for wrongful life, wrongful pregnancy and wrongful birth have been settled on a piecemeal basis, leading to inconsistent and unjust results."⁹

1.2 Method and objectives of discussion

In order to discuss the phenomenon of wrongful birth statutes an exemplary statute enacted in Pennsylvania will be studied. A most important facet of this study is the reaction from the judicial sphere to this enactment. In this regard two court cases instituted in Pennsylvania questioning the constitutionality of this state's wrongful birth statute will be analysed. In conclusion arguments of wrongful birth statutes supporters will be listed and other exemplary wrongful birth statutes¹⁰ will be considered as a possible basis for a comprehensive legislative solution to common wrongful life litigation challenges.¹¹

⁷ as was the case in **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967): "...To recognize a right not to be born is to enter an area in which no one can find his way..." and also in **Elliot v Brown** 361 So. 2d 546 Ala. (1978): "...We decline to pronounce judgment in the imponderable area of nonexistence..." and then in **Becker v Schwartz** 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978): "...Whether it is better to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians..."

⁸ 1995. Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England. **Loyola of Los Angeles International and Comparative Law Journal** (17:2), 535.

⁹ *op cit* p 610.

¹⁰ namely that of Maine; Utah; California; Idaho; Minnesota and South Dakota.

¹¹ student will consider the application of statutory guidance as solution to the South African wrongful life debate in the final reflection, ch 12.

2. Introductory discussion

2.1 History of wrongful birth statutes

Since the *Roe v Wade*¹² decision partially legalised¹³ abortions in America, anti-abortion groups have fought to restrict this right to abortion by various legislative means.¹⁴ Many state legislators have now in accordance with this move enacted statutes prohibiting wrongful birth actions.¹⁵ Such action was deemed necessary, as virtually every court¹⁶ after *Roe* that

¹² 410 U.S. 113 (1973) - There is only one reported wrongful birth action *prior* to *Roe* (which was unsuccessful), namely that of *Gleitman v Cosgrove*. The New Jersey court judged that the plaintiff failed to state a claim mainly because of countervailing public policy supporting the preciousness of human life. *Roe* shifted the balance so that now policy supports and not militates a woman's right to abortion.

¹³ see discussion on abortion in the United States of America in ch 3.

¹⁴ Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. *Harvard Law Review* (100), 2017.

¹⁵ by 1995, because of pressure from anti-abortion groups, 21 states have introduced and 9 have enacted legislation prohibiting wrongful birth and/ or wrongful life actions:

wrongful birth and wrongful life actions barred:

Idaho Code § 5-334 (1986), Minn. Stat. § 145. 424 (1)(2) (1993), Mo. Rev. Stat. § 188, 130 (1992), N.C. Gen. Stat. § 14.45.1(e) (1993), 42 Pa. Constitutional. Stat. § 8305 (1993) and Utah Code Ann. § 78-11-24 (1993)

wrongful life action barred:

Ind. Code Ann. § 34-1-1-11 (1993), N.D. Cent. Code § 32-03-43 (1993)

wrongful conception, wrongful birth and wrongful life action barred:
S.D. Codified Laws Ann. §§ 21-55-1 & 21-55-2 (1987)

Kowitz. J.F. 1995. Not your garden variety tort reform: Statutes barring claims for Wrongful Life and Wrongful Birth are unconstitutional under The Purpose Prong of *Planned Parenthood v. Casey*. *Brooklyn Law Review* (61), writes that in only 4 of the 9 states that bar wrongful life and wrongful birth claims the statutes have ever been constitutionally challenged.

¹⁶ Faircloth. R.C. 1994. *Keel v Banach*: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? *Cumberland Law Review* (24:3), 557 reports that in addition to statutory bans, 4 states have rejected wrongful birth by judicial decree:

Obstetrics and Gynaecology Group v Abelson 398 S.E. 2d 557, 563 Ga.

(1990); ***Wilson v Kuenzi*** 751 S.W. 2d 741, 746 Mo, *cert denied*, 488 U.S. 893 (1988);

Azzolino v Dingfelder 337 S.E. 2d 528, 537 N.C. (1985), *cert denied*, 475 U.S. 835 (1986); and ***Spence v Seikel*** 742 P. 2d 1126, 1127 Okla. (1987).

considered the validity of the wrongful birth cause of action, has upheld it.¹⁷¹⁸

Silverman¹⁹ supports this observation and conveys that these efforts include the enactment of statutes containing regulations to control access to abortions through state requirements²⁰ such as: mandatory waiting periods; spousal notification requirements; and fiscal control forbidding the use of state funds for abortion services or counselling.²¹

Kowitz²² is similarly concerned about this trend to enact wrongful birth statutes. She agrees with the viewpoint that judicial recognition of wrongful birth and wrongful life suits prompted pro-life organizations to lobby for legislation barring these claims. She seriously questions state legislators²³ true motives for enacting these restrictions, as he believes they are not enacted to achieve mere tort reform, but rather designed to substantially obstruct women from seeking abortions.

Berenson²⁴ also reports on the increasing prevalence of statutory limitations of abortions and mentions that the Idaho wrongful birth statute,²⁵ for example, distinguishes between claims based on the negligent prevention of an abortion and claims based on negligence that results in an unwanted conception. Thus, an action for a negligently performed sterilization procedure

¹⁷ courts interpreting laws of at least 17 states have recognized wrongful birth actions - see list of states and judgments allowing wrongful birth actions in ch 7 (only **Azzolino v Dingfelder** found the action invalid *post Roe*).

¹⁸ wrongful life actions have not been that successful as only 4 states in the United States of America and two other countries have recognized this cause of action - see list of states and judgments allowing wrongful life actions in ch 8.

¹⁹ 1993. Constitutional Law: Pennsylvania's Wrongful birth statute's impact on abortion rights: State action and undue burden - **Edmonds v Western Pennsylvania Hospital Radiology Assocs. Temple Law Quarterly** (66:4), 1087.

²⁰ the South African state legislators do not have legislative sovereignty in similar matters of public health policy and it is therefore suggested that central government will continue to dictate these policies - see ch 3 where the new South African abortion act is discussed (note that this act does not require any conditions such as mandatory waiting periods, spousal notification or obligatory counselling).

²¹ for more detail on these restrictions, see ch 3.

²² *op cit* p 235.

²³ such as Pennsylvania.

²⁴ 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". **Tulane Law Review** (64), 895.

²⁵ see *infra*.

is permitted, while a claim based on the negligent interpretation of an amniocentesis²⁶ is not.

Finally, the same convention is reported by Topham:²⁷

"In an apparent effort to stem any future flow of wrongful birth/ life actions into its state courts, the Utah legislator recently enacted a statute that will influence the maintenance of actions claiming life as an injury."²⁸

2.2 Statute under discussion

A real concern arising from such restrictive measures is the fact that even state laws that do not directly regulate access to abortion could still influence a woman in her decision to choose an abortion or could ultimately prohibit her from actually obtaining an abortion. An example of this type of legislation is title 42, section 8305(a) of the **Pennsylvania Consolidated Statutes Annotated** originally enacted in 1988, which denies a previously recognized common law cause of action for wrongful birth.²⁹

Pa. Const. Stat. § 8305 (1992)

(a) **Wrongful birth.** - There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages of wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defence against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practices Act of 1985, or any other act regulating the professional practices of health care practitioners.

²⁶ which situation can only be rectified through obtaining an abortion.

²⁷ 1984. *Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater*. *Utah Law Review* (1), 833.

²⁸ *op cit* p 834 - an interesting attribute to the Utah wrongful life act is that wrongful conception actions are in effect recognized by a provision of the act which precludes defendants from raising the failure to obtain an abortion or to use contraceptives as a defence in any action.

²⁹ in *Speck v Finegold* 439 A.2d 110, 114 Pa. (1981) a wrongful birth action was allowed - see ch 7.

(b) **Wrongful life.** - There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

(c) **Conception.** - A person shall be deemed to be conceived at the moment of fertilization.

Silverman³⁰ criticises the effects of this statute:

"By eliminating wrongful birth claims, section 8305(a) allows medical care providers negligently or intentionally to misrepresent information to a pregnant woman regarding the health and status of her fetus without fear of tort liability. Such misinformation may, in some circumstances, effectively prevent a pregnant woman from being able to make an informed decision regarding abortion. Thus, while Pennsylvania's wrongful birth statute does not directly limit access to abortion, it may indirectly impact on a woman's ability to make an informed choice regarding her pregnancy."³¹

3. Criticism

3.1 Cases against wrongful birth statutes

Concerning the historical background of wrongful birth legislation in Pennsylvania, the following: In 1981 the Pennsylvania Supreme Court recognized the wrongful birth and wrongful conception cause of action in the case of **Speck v Finegold**.³² Subsequent judgements from both Pennsylvania's Supreme Court and Superior Court upheld the pronounced principles

³⁰ *op cit* p 1087.

³¹ the argument that non-recognition of wrongful conception, wrongful birth and wrongful life actions would inevitably result in the lowering of medical standards, have been raised consistently.

³² Silverman, *op cit* p 1090 believes that the court was concerned that to deny recovery in cases of wrongful conception and wrongful birth would undermine the fundamental rights articulated in **Roe**. It is my submission that this judgment is fundamentally correct - see ch 7 where this case is discussed in more detail. If a right to full medical information (including reproductive issues) exists and also a right to abortion, it would be legally unacceptable not to enforce these rights by allowing wrongful birth and wrongful conception actions.

established in **Speck**.³³

In reaction to these decisions, section 8305 was enacted to prohibit all causes of action for wrongful life³⁴ (regardless of whether the misconduct occurred before or after conception). In **Edmonds v Western Pennsylvania Hospital Radiology Assocs.**³⁵ the Superior Court of Pennsylvania had to decide whether this statute represented an impermissible state regulation of abortion.³⁶ The facts were the following:

Plaintiff was a teenager who fell pregnant and subsequently received medical care and a sonogram from Dr. Cooper, a physician at the hospital in question. Plaintiff alleged that although the sonogram clearly indicated that her foetus suffered from *quadrigeminal arachnoid cysts* and *hydrocephalus*,³⁷ defendant neglected to inform her of the abnormality in time to obtain an abortion. Because of section 8305, plaintiff's wrongful birth and her child's wrongful life action was barred.

Kowitz³⁸ discusses another case instituted in Pennsylvania a few months later, based on a virtually identical cause of action. In **Sejpal v Carson**³⁹ the facts show of extreme medical negligence that occurred in spite of advanced genetic science and so-called "reliable modern health services". Ms. Julie Sejpal at age 36 gave birth to a daughter suffering from *Down's*

³³ A.H.S. 1983. Torts. *Journal of Family Law* (21:1) reports on p 169 that in the *Finegold* judgment, four varying opinions followed a Superior Court order: "In extending the duty of care owed by the physicians to the parents, the lead opinion rejected the physicians' contention that a wrongful birth cause of action contravenes legislatively declared policy favouring birth over abortion. The opinion stated three reasons for its rejection. First, a wrongful birth cause of action neither advances nor impedes the ability to have an abortion. Instead, it provides equal protection to persons injured by negligently performed medical procedures, including vasectomies and abortions. Second, a remedy for negligently performed abortions must be provided to give substance to the constitutional right articulated in *Roe v. Wade*. Finally a duty must be imposed upon the physicians in order to compensate the victim, deter negligence and encourage due care. Usual common law principles of damages should be applied. Furthermore, mental distress damages should be recoverable since the distress was foreseeable.

³⁴ in the broad sense of the word, therefore including wrongful conception and wrongful birth actions.

³⁵ 607 A.2d 1083 Pa. Super. Ct. (1992).

³⁶ and whether it accordingly would be unconstitutional and void.

³⁷ see ch 11 where these conditions are discussed.

³⁸ *op cit* p 235.

³⁹ no. 1991-2288-A Pa. Ct. Comm. Plaintiff. Mar. 4, (1992) *aff'd* 627 A.2d 210 Pa. Super. Ct. (1993).

syndrome.⁴⁰ Having some knowledge of disabled children, she expressed concern throughout her pregnancy of her advanced age and increased risk of foetal anomalies. Her obstetrician discouraged her to undergo an amniocentesis and assured her that this would only be necessary if other prenatal tests suggested a problem. Ironically, a routine prenatal blood test indeed showed that she faced a greater than normal risk of giving birth to a child with *Down's syndrome* and the laboratory result specifically warned that the patient should be advised about amniocentesis and genetic counselling. Defendant did neither.

In addition to this negligent conduct, one of the obstetricians, when a sonogram indicated that the pregnancy was not progressing normally, misinformed the plaintiff that the unusually small size of the foetus suggested that her pregnancy was less advanced than they had thought and assured her that it was unnecessary that the blood test should be repeated.

The baby was eventually delivered by Cesarean section and immediately taken to an oxygen tent, without plaintiff properly seeing her newborn. The personnel told plaintiff and her husband that the baby was fine and never alerted them of its condition before proceeding with a sterilization procedure on the plaintiff which she consented to a week before. Plaintiff instituted a wrongful birth action⁴¹ as well as a wrongful life action on behalf of her impaired child.⁴² Because of the Pennsylvania wrongful birth statute, both claims were dismissed. The Sejpal's asserted that the statutes violated their Fourteenth Amendment right to privacy, which encompassed the right to choose abortion as established in *Roe*.

3.2 Is it constitutional?

Kowitz⁴³ reports that whether and to what degree the Fourteenth Amendment prevents a state from restricting the right to choose abortion became an issue of American national debate soon after the *Sejpal* case, as the landmark case of *Planned Parenthood of Southeastern*

⁴⁰ see ch 11.

⁴¹ Plaintiff asserted that she would have obtained the necessary information which would have entitled her to make an informed decision was it not for the defendant's conduct. It was further stated that if she had known of the abnormality, she would have obtain an abortion and would not have consented to a sterilization.

⁴² One cannot but feel aggrieved when misconduct of this proportion is committed without any intervention from the law. It is submitted that in cases similar to these (which occur every day in hospitals around the world), justice is not served without full and proper compensation awarded to the victims of such serious negligence and misconduct - see ch 2 where compensation theories are discussed. In cases like these, it is submitted, compensation is secondarily required to fulfill society's sense of justice.

⁴³ *op cit* p 237.

Pennsylvania v Casey⁴⁴ was heard two months later. The court affirmed “the essential holding of *Roe*” while upholding considerable restrictions⁴⁵ on a woman's right to terminate her pregnancy. Most significantly, Kowitz writes,⁴⁶ the *Casey* plurality altered abortion jurisprudence radically with its ruling that restrictions on a woman's right to choose abortion were no longer subject to “strict scrutiny”, but instead to a newly-minded and less stringent “undue burden” standard of review.⁴⁷ It is reported that while relaxing the standard of state legislation review,⁴⁸ the *Casey* court at the same time expanded the scope of legislation that would be subject to that review. He explains:

“The joint opinion defined an undue burden as ‘a state regulation [that] has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. This disjunctive language -‘*purpose or effect*’- provides two alternative and independent bases for review of legislation affecting reproductive choice. Prior to *Casey*, purpose was not an independent inquiry. After *Casey*, legislation affecting abortion rights is unconstitutional if it is passed with either the purpose of substantially obstructing women seeking abortions or when the legislation has that effect.”⁴⁹

This expanded scope of legislative review is extremely important to critics of wrongful birth statutes, since a statute that has the effect⁵⁰ of limiting a legal right can also be struck down as unconstitutional. It is important to appreciate in what respects the new “purpose test” introduced by the *Casey* judgment effects legislation that influences abortion rights. When applying the effect analysis, one has to prove that a specific piece of legislation causes a *substantial* obstacle which constitutes an undue burden.

Courts, therefore, have to firstly ascertain if an obstacle exists and then estimate the “size” of the obstacle. Then the effect of a restriction has to be considered and be found an undue

⁴⁴ 112 S.Ct. 2791 (1992).

⁴⁵ to note - that women seeking an abortion have to consent to being provided with certain information, that facilities providing abortions must comply with prescribed reporting requirements and that parental consent had to be obtained in cases where the mother seeking abortion is a minor.

⁴⁶ *op cit* p 238.

⁴⁷ see the discussion of this issue *infra* and also in ch 3.

⁴⁸ and thereby making it more difficult to find wrongful birth statutes unconstitutional.

⁴⁹ *op cit* p 238 - Kowitz believes that Pennsylvania has passed their wrongful birth statutes with the exact purpose disallowed in *Casey*.

⁵⁰ irrespective of the legislator's purpose with the statute.

burden,⁵¹ in order to find it unconstitutional. Kowitz⁵² declares that this calculation becomes increasingly difficult if the challenged law is not an abortion regulation, but still affects the right to choose abortion indirectly. He also warns that the effect analysis relies on highly case specific factors,⁵³ which may vary the outcome of the analysis from state to state.

It is submitted⁵⁴ that another difficulty in using the "effect argument" against restrictive legislation is that actual harm has to be proven or specific future harm predicted. Purpose based challenges do not require a litigant to prove or predict harm and legislation can be challenged immediately. Furthermore, an analysis of the legislative purpose of a statute could resolve the state action problem that can arise under an effect analysis. Since state laws may only regulate the interaction between private individuals, a legislative measure with the purpose to, for example impact abortion rights will no longer regulate individual conduct alone and would therefore be seen as state action.

When a purpose analysis is used to question the constitutionality of restrictive legislation and it is found that a states' purpose with the legislation surpasses mere encouragement of a specific issue⁵⁵ and reaches the intent to substantially obstruct individuals from exercising their rights, the legislation becomes unconstitutional. For example, a statute barring wrongful birth and wrongful life actions could have the permissible purpose⁵⁶ of prohibiting a cause of action against physicians, while having an underlying purpose of placing a substantial obstacle in the path of a woman seeking an abortion. Kowitz⁵⁷ is of the opinion that with regards to Pa. Const. Stat. § 8305 (1992), Pennsylvania's legislative history exposes and exemplifies such an impermissible legislative intent.

3.3 Bases of constitutionality

Courts that have judged that wrongful birth statutes do withstand constitutional scrutiny have

⁵¹ to find a certain restriction a "particular burden" would not be sufficient.

⁵² *op cit* p 260.

⁵³ possible factors include the number of abortion facilities in a state, the accessibility of public transport and the cost of the procedure.

⁵⁴ Kowitz *op cit* p 238.

⁵⁵ such an attempt of a state to discourage abortions to further its interest in potential life.

⁵⁶ standard tort reform.

⁵⁷ *op cit* p 248.

- because the statute's bar does not affect the right to terminate pregnancy; or
- because the statute's effect does not constitute state action.⁵⁸

Kowitz⁶⁰ is of the opinion that the issue in all these cases is whether the wrongful birth statute infringes the guarantees of the Fourteenth Amendment. He reminds us, however, that a plaintiff cannot seek this protection unless the claim involves state action. Individuals are therefore only protected against action taken by the states, not against action taken by private parties. Concerning private conduct that causes injury,⁶¹ the Due Process and Equal Protection clauses provide redress, but only in limited circumstances. Under these circumstances the state normally has no responsibility unless it has encouraged the behaviour or exercised coercive power sufficient to render the act essentially an act of the state.⁶²

3.3.1 State infringement

In turning to the issue of state involvement the **Edmonds** court used two criteria for finding the necessary state action:⁶³

- whether the statute regulates or directly affects rights protected by the Fourteenth Amendment; or
- whether the statute sufficiently encourages action by private individuals so as to make the individual's action effectively that of the state.⁶⁴

The court concluded that because section 8305(a) permits administrative sanctions to remain intact, Pennsylvania's wrongful birth statute did not encourage medical practitioners

⁵⁸ Kowitz *op cit* p 257.

⁵⁹ as in the **Edmonds case** *supra*.

⁶⁰ *ibid*.

⁶¹ Silverman, p 1091: commenting on the *Civil Rights Cases* 109 U.S. 3, 11 (1883) referring to the Due Process and Equal Protection clauses: "The Court concluded that actions by private parties are not subject to Fourteenth Amendment restrictions, and persons injured by such private actors must resort to state law for redress of their complaints."

⁶² the question could be asked whether the Pennsylvania Legislator did not encourage physicians to act negligently with regards to genetic counselling by removing the possibility of possible malpractice claims.

⁶³ in order to establish a 14th Amendment violation.

⁶⁴ *in casu* this was the contention of the plaintiff.

intentionally to misrepresent information to their patients.⁶⁵

Silverman⁶⁶ is of the opinion that the Superior Court of Pennsylvania erred in its conclusion that the facts of the **Edmonds** case did not fulfill the state action requirement of the Fourteenth Amendment. He explains that the question presented by a state action analysis of section 8305(a), is whether state legislation eliminating a formerly recognized common law cause of action qualifies as state action under the Fourteenth Amendment. It is, after all, commonly accepted that statutory provisions enacted by a state's legislator are one of the most fundamental forms of state action. It is further similarly well established that a state court administering state common law is also state action.

It is reported⁶⁷ that the court found the facts of the case did not constitute "state conduct"⁶⁸ because the actions of the doctors could not directly be attributed to the state. Accordingly the court found the fourteenth amendment of the United States constitution inapplicable and upheld the constitutionality of section 8305(a).

Silverman⁶⁹ criticises the court's approach and states that they never engaged in a substantive constitutional analysis of the statute. He furthermore criticises the **Edmonds** judgment because of the fact that the United States Supreme Court firmly established the state action doctrine in the so-called "Civil Rights Cases".⁷⁰ In **New York Times v Sullivan**,⁷¹ the Supreme Court made a landmark pronouncement concerning state involvement. The test for state action, the court said, is not the form in which a state applies its power but rather whether such power has in fact been exercised. Once a given factual scenario has met the state action requirement, a court should proceed to confront the underlying substantive constitutional

⁶⁵ see, however, various critics' views *infra* and also ch 4 and 9 where the effectiveness of administrative sanctions (of professional bodies) to keep medical professionals in line and accountable for their actions is seriously questioned.

⁶⁶ *op cit* p 1095.

⁶⁷ *op cit* p 1098.

⁶⁸ as would be necessary to find an unacceptable infringement of her right to an abortion.

⁶⁹ *ibid*.

⁷⁰ 109 U.S. 3, 11 (1883) (Due Process and Equal Protection Clauses of Fourteenth Amendment applicable solely to action undertaken by states); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). The Court concluded that actions by private parties are not subject to Fourteenth Amendment restrictions and persons injured by such private actors must resort to state law for redress of their complaints.

⁷¹ 376 U.S. 254 (1964).

issues.⁷²

3.3.2 Wrongful birth statutes infringe constitutional principles

The constitutional inquiry into wrongful birth statutes does not end with a finding that state action was involved. Once state action is established, it must be determined whether the relevant statute infringes a constitutional right.⁷³

Roe established a trimester framework for the examination of abortion rights.⁷⁴ As the foetus approaches independent viability the state's interest in the potential new life becomes more compelling and if any state infringement of this right should take place, it has to withstand "strict scrutiny" in order to be classified as constitutional. It is suggested that section 8305 was not placed under strict scrutiny in terms of infringing state action in the *Edmonds* case, as should have been the case.⁷⁵ Silverman⁷⁶ thus believes that by enacting section 8305, the state of Pennsylvania has infringed the fundamental right to abortion.

The *Roe* trimester system has proved controversial as many questions continue to arise when and how states may regulate abortions. In an effort to resolve the controversy the Supreme Court gave important guidance in the judgment of *Casey*.⁷⁷ Here the Supreme Court examined the constitutionality of a Pennsylvania statute requiring certain measures⁷⁸ be taken before a woman could obtain an abortion. The Court upheld all of the statute's provisions except the spousal notification requirement.⁷⁹ The Court reaffirmed what it determined to be the three essential holdings of *Roe*:

⁷² Silverman *op cit* p 1099.

⁷³ *in casu*, the right to abortion set out in *Roe* and clarified in *Casey*.

⁷⁴ see the discussion on abortion in America in ch 3.

⁷⁵ remember that the *Casey* judgment, wherein the new "undue burden" standard was introduced, was only given after the *Edmonds* decision, therefore the "strict scrutiny" was the correct standard of application.

⁷⁶ *op cit* p 1094.

⁷⁷ 112 S.Ct. 2791 (1992).

⁷⁸ they were the following: the woman had to ...

- give her informed consent prior to the procedure and obtain parental consent if still a minor;
- be provided with certain information about the procedure and the status of the foetus;
- observe a twenty-four hour waiting period between first consultation and the performance of the abortion;
- if married, notify their husbands of their decision to obtain an abortion.

⁷⁹ see previous fn..

- a woman has the right to choose abortion prior to foetal viability and to obtain such an abortion *without undue interference from state*,⁸⁰
- the state has the authority to restrict abortions *after foetal viability*,⁸¹ provided the state makes exceptions for the health and life of the pregnant woman;
- the state has a legitimate interest in protecting the health of the pregnant woman and the unborn child.

It is reported⁸² that the majority of the court expressly overruled the "strict" trimester analysis and effectively replaced it with a new constitutional standard of "undue burden".⁸³ In its judgement the court found the first three requirements⁸⁴ of the statute enhanced the woman's ability to an informed decision and accordingly these withstood the test of constitutionality. Concerning the spousal notification requirement, however, the court decided that while the husband's interests concerning pregnancy is considerable they are outweighed by the woman's rights to be free from possible risk of domestic violence and coercion. Therefore it was held that this requirement unduly burdened a woman's right to choose abortion and as such was unconstitutional.

3.4 Casey's new approach

Kowitz⁸⁵ explains that most courts having already dealt with the state action issue and in considering the merits of challenges to the statutes, have held that they do not affect abortion rights. He believes that the reason for this is that the courts have used the analysis developed in *Roe* whereby only legislation that *directly* impacts on abortion rights are for this reason unconstitutional.⁸⁶ He shows that analysis of these statutes under the undue burden test developed in *Casey* yields a significant different result.

⁸⁰ this was the *crux* of the matter in the *Edmonds* case: plaintiff argued that by withholding vital information on the health of her unborn foetus the defendant-physician infringed her right to abortion and the state assisted in this infringement by barring her route to legal redress, and therefore the state of Pennsylvania unduly interfered with her decision to obtain an abortion.

⁸¹ in the *Edmonds* case the plaintiff could have enforced her right to abortion *before* foetal viability, if she timely received the necessary information.

⁸² Silverman *op cit* p 1095.

⁸³ replacing the more severe "strict scrutiny" requirement established in *Roe*.

⁸⁴ see *supra*.

⁸⁵ *op cit* p 259.

⁸⁶ statutes therefore barring wrongful birth and wrongful life actions are upheld because such statutes do not regulate or affect abortion *directly*.

In the **Edmonds** and **Sejpal** cases it was alleged that Pennsylvania's wrongful birth statute interferes with a woman's constitutionally protected right to choose an abortion by allowing a physician to withhold information that *directly* impacts on a woman's ability to make an informed decision. This contention involved both the due process and equal protection clauses of the fourteenth amendment of the United States constitution.⁸⁷ Important principles in this regard are:

- legislative enactments enjoy a strong presumption of constitutionality;
- those who challenge such statutes on constitutional grounds bear the burden of rebutting that presumption.

Basically two main constitutionally arguments could be raised against the legality of wrongful birth statutes, namely that they violate the due process clause and that they deny equal protection of the law.⁸⁸

3.4.1 Effect on constitutional rights

3.4.1.1 *Wrongful birth statutes violate the due process clause*

State legislators may not impermissibly interfere with rights protected in the United States constitution.⁸⁹ In addition to this fact, thirty six state constitutions contain a remedy clause that guarantees every person a remedy for any *legally recognized wrong*. Remedies clauses may bar the state from withdrawing a cause of action once the underlying right has been recognized by the courts, thus in states where wrongful birth actions have already been successful,⁹⁰ state constitutions as well as the federal constitution may bar legislative elimination of the cause of action. It is argued:⁹¹

"Wrongful birth statutes violate the due process clause of the 14th amendment because they burden a constitutionally protected privacy right and are not justified by a compelling state interest."

It could thus be argued that wrongful birth statutes allow physicians to withhold legally required information to their patients, which intrudes into the physician-patient relationship regarding

⁸⁷ discussed *infra*.

⁸⁸ Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. *Harvard Law Review* (100), 2023.

⁸⁹ *Munn v Illinois* 94 U.S. 113, 134 (1877).

⁹⁰ as in *Pennsylvania*, recognizing a wrongful birth action in *Speck v Finegold*.

⁹¹ Anon. *op cit* p 2025.

consultation and undermines the essential relationship of trust and reliance. In *City of Akron v Akron Centre for Reproductive Health Inc.*⁹² it is reported⁹³ that the Supreme Court invalidated an Ohio abortion ordinance that specified certain information that the physician had to recite to each woman seeking an abortion as an obstacle placed in the path of the physician. In the same way wrongful birth statutes interfere with the normal functioning between physician and patient and should thus also be invalidated.

Wrongful birth statutes significantly limit the physician's legal duty to inform a woman regarding pregnancy as in accordance to accepted standards of medical practice. Supporters of wrongful birth statutes argue along the same line as supporters of legislation restricting abortion, whom say that such regulation merely embodies the state's decision not to facilitate and fund abortion although a woman could still freely obtain it.⁹⁴

Because wrongful birth statutes infringe upon fundamental rights they must be justified by a *compelling state interest*.⁹⁵ Courts have found only two state interests sufficiently compelling to justify interference with choice of abortion, namely: protecting the health of the mother; protecting potential life.⁹⁶

It is suggested⁹⁷ that wrongful birth statutes can also not be justified by concerns for material health, since by lowering the enforceable standard of care wrongful birth statutes actually increase health risks to pregnant woman.

⁹² 462 U.S. 416 (1983)

⁹³ Anon. *op cit* p 2024.

⁹⁴ Wrongful birth statutes supporters rely on *Maher v Roe* 432 U.S. 464 (1977) and *Harris v McRae* 448 U.S. 297 (1980), two Supreme Court cases holding that a state's refusal to fund abortions does not infringe the exercise of a fundamental right, since such a government did not place any obstacles in the way of a woman and it need not remove (financial) obstacles not of its own creation. It is, however, my belief that these judgments have no real relevance *in casu*, as the lack of relevant and reliable medical information precludes an informed choice altogether and therefore *do* place a significant obstacle to an abortion.

⁹⁵ *Roe v Wade, Shapiro v Thompson* 394 U.S. 618, 634 (1969).

⁹⁶ Under *Roe* each of these interests becomes compelling at a specific time during the pregnancy - see ch 3. The state's interest in protecting maternal health becomes compelling at the end of the 1st trimester and its interest in safeguarding potential life becomes compelling only at viability. An obvious result of this fact is that because no compelling state interest arises until end of 1st trimester, wrongful birth statutes that affect 1st trimester abortions should be invalid (on the same account it should be admitted that wrongful birth statutes that affect post-viability abortions might be justified as protecting potential life).

⁹⁷ Anon. *op cit* p 2027.

3.4.1.2 *Wrongful birth statutes deny equal protection of the law*

This statement can be made because wrongful birth statutes firstly rely on classifications that burden a “fundamental interest” and secondly are not justified by a “compelling state interest”.

It is reported⁹⁸ that the classification employed by wrongful birth statutes burden a fundamental interest: Wrongful birth statutes generally apply to groups that are selected upon unfair bases as only parents who would have chosen abortion after conception has taken place are usually precluded from suing. For example, if a physician is negligent in performing a sterilization procedure and this interferes with the parent’s choice not to conceive,⁹⁹ such negligence is still actionable under most wrongful birth statutes. But if a physician’s negligent or intentional conduct in the provision of information or testing *after* conception interferes with the patient’s decision to abort, wrongful birth statutes usually prohibit these actions. Therefore one can conclude that some wrongful birth statutes allow recovery for the infringement of a right to prevent a child from being conceived, but prohibit recovery where parents want to prevent the birth after conception. Thus by creating such a classification, wrongful birth laws burden fundamental interests in procreative decision making.

Also with regards to the relevance of classification in wrongful birth statutes, the following:¹⁰⁰ Although it is uncertain how many woman will actually be prejudicially affected by these statutes¹⁰¹ there is little doubt that to the women who will in fact be prevented from choosing abortion as a result of statutes such as section 8305(a), it clearly stands as an absolute bar to their ability to choose abortion.¹⁰²

Silverman¹⁰³ argues that even if one argues that only a very small percentage of women will actually be exposed to and influenced by improper information, **Casey** shows it is nevertheless relevant:

“[t]he proper focus of constitutional inquiry is the group for whom the law is a

⁹⁸ *op cit* p 2028.

⁹⁹ wrongful conception actions.

¹⁰⁰ Anon. *op cit* p 2029.

¹⁰¹ wrongful birth statutes could have the indirect effect of causing health care providers to increasingly misrepresent information to their patients, thereby preventing the patients from making an informed decision.

¹⁰² and accordingly infringes on their constitutional right to an abortion.

¹⁰³ *op cit* p 1103.

restriction, not the group for whom the law is irrelevant."¹⁰⁴

In explaining this concept, Silverman¹⁰⁵ refers to the example given by the court concerning the spousal notification requirement. While ninety-nine percent of married women were likely to notify their spouses regardless of the statute, proper analysis must focus on the one percent of woman forced to notify their husbands against their will. The relevant group¹⁰⁶ is those for whom the statute is an "actual rather than an irrelevant restriction." Women fearing spousal violence and coercion would be presented with a substantial obstacle to choosing abortion. The court stated that: "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to choosing abortion" and therefore the spousal notification requirement was deemed to be unconstitutional. Similarly, Silverman argues the consequential effect of barring wrongful birth would detriment women who have not received proper genetic information:¹⁰⁷

"As the frequency of misinformation increases, the likelihood that women will be prevented from exercising their abortion rights also increases."

Classification employed are not rationally related to a legitimate governmental interest: Even if courts find that the classifications mentioned above do not burden fundamental interests, the statutes still could not survive equal protection analysis as wrongful birth statutes do not encourage the making of a decision in favour of childbirth, but they rather prevent the making of an informed decision altogether.

¹⁰⁴ *ibid* - quoted from the case of **Planned Parenthood of Southeastern Pennsylvania v Casey**.

¹⁰⁵ *op cit* p 1104.

¹⁰⁶ Silverman discusses the **Casey** court's viewpoint on obstacles prohibiting people from enjoying their rights and states that: "[a] particular burden is not of necessity a substantial obstacle." This will only be the case if a "large fraction" of the relevant group is detrimentally affected, eg the staggering consequences that a 24-hour waiting period required by law before an abortion may be legally performed could have. For most this restriction is irrelevant, but for others this could be an absolute obstacle, especially for poor women living in rural parts where the nearest medical services may be many hours away. In such instances a woman who could not afford an overnight stay in a hotel room or who could not take the required time off from work would effectively be prevented from acquiring an abortion. In the United States only a small percentage of women is affected to such an extent and accordingly the Court in **Casey** wasn't persuaded to strike down this requirement as unconstitutional.

In South Africa, however, this scenario is much more likely and would probably affect a large enough percentage of women to establish that if similar restrictions would be placed on the availability of medical services, it would probably be unconstitutional on the basis that a substantial obstacle is placed between women and their right to abort.

¹⁰⁷ *ibid*.

3.4.2 Direct or indirect infringement

In the Supreme Court judgment of **Casey** the court made it very clear that a law that has the purpose or effect of preventing a woman from making a decision on abortion is an undue burden and therefore unconstitutional. The **Edmonds** court, however, judged that section 8305(a) does not *directly* regulate a woman's access to abortion.¹⁰⁸

An important question then remains: Does the statute have the *indirect* effect of causing health care providers to misrepresent information to their patients and thereby prevent the patients from making an informed decision? The court answered this question in the negative.¹⁰⁹

3.4.3 Effectiveness of administrative sanctions

Topham¹¹⁰ believes in the value of wrongful birth and wrongful life actions in that they further the fundamental tort goals of deterrence and compensation:

"The threat of liability provides a strong incentive to avoid tortious acts, and potential liability in the wrongful birth context would similarly influence health practitioners to exercise proper care when performing sterilizations or abortions and when advising and counselling patients."

Silverman¹¹¹ agrees that tort damages are awarded against a tortfeasor, in part, to dissuade other potential tortfeasors from engaging in the same wrongful behaviour.¹¹² He also mentions the possible application of punitive damages¹¹³ to punish particularly egregious wrongs. Section 8305(a) has the effect that these deterrents are taken away,¹¹⁴ which may result in the

¹⁰⁸ remember that one of the consequences of the **Casey** decision was that even indirect conduct could still cause a statute to be unconstitutional (be that as it may, the **Edmonds** decision was given prior to this development).

¹⁰⁹ Silverman *op cit* p 1105 feels that although this might possibly be the correct conclusion, their inquiry was incomplete as to the indirect consequences of the statute.

¹¹⁰ *op cit* p 853.

¹¹¹ *op cit* p 1101.

¹¹² see in this regard the various compensation theories in ch 2.

¹¹³ in the United States of America - punitive damages are not recognized in South Africa: see, however, next fn.

¹¹⁴ although administrative sanctions might present some degree of deterrence against misrepresentation, this form of regulation and peer review have often been criticized as ineffective.

lowering of informative standards and eventually in the burdening of abortion patients. In his own words:

"Section 8305(a) extinguishes a previously recognized common law cause of action, thereby terminating a system of state-sanctioned disincentives formerly applied against a particular kind of negligent and intentional misconduct. The logical conclusion, therefore, is that section 8305(a) will, at least to some degree, increase the occurrence of negligent or intentional misrepresentation."

Kowitz¹¹⁵ writes:

"Wrongful life and wrongful birth claims are tort claims. A basic tenet of tort law is that liability deters behaviour society wants to discourage. Both compensatory and punitive damages aim, to varying degrees, to dissuade the tortfeasor from repeating undesirable behaviour, and to deter others from similar action. The risk of medical malpractice actions, therefore, functions as a deterrent to poor medical practices."

Others¹¹⁶ have similar concerns of the negative effects wrongful birth statutes may have on the standard of medical services, however one should concede that the vast majority of physician will continue to practice medicine on a high level of proficiency even without the prospect of possible malpractice claims:

"In the presence of such statutes, many doctors will of course continue to exercise proper medical judgment in accordance with accepted standards of care; but others, relieved of the threat of malpractice suits, will not. Granting a physician immunity for failure to impart information that is medically indicated interferes even more with the abortion right than does a requirement that he impart information that is not medically indicated. The latter may be confusing and detrimental to a woman's well-being; the former directly prevents a woman from making an informed choice."¹¹⁷

Courts upholding wrongful birth statutes usually insist that although the fear for possible malpractice liability is done away with, administrative sanctions¹¹⁸ are still intact to discipline medical practitioners who make themselves guilty of negligent conduct. Although these sanctions do present some degree of deterrence, administrative regulation and peer review

¹¹⁵ *op cit* p 262.

¹¹⁶ Anon. 1987, *op cit* p 2024.

¹¹⁷ *op cit* p 2025.

¹¹⁸ incl license suspension or revocation, disciplinary warnings, fines and/or other penalties.

have often been criticised as ineffective.¹¹⁹ Problems facing administrative sanctions are:

- the perception that state and hospital review boards and disciplinary committees have a “captured agency” drawback, since they are composed primarily of physicians who are reluctant to discipline members of their own profession; and
- the inability of administrative boards to award damages to injured patients resulting in a reluctance to pursue administrative sanction.

3.4.4 Conclusion

One can argue in conclusion that wrongful birth actions are necessary to protect societal interests in procreative autonomy, meaningful physician-patient relationships and quality prenatal care. Statutory attempts to prohibit these actions are very dangerous as they license physicians to disregard patients' rights and values and to inject their own moral convictions into patient decision making. In so doing wrongful birth statutes violate the Due Process and Equal Protection clauses of the Fourteenth Amendment.

4. Support

4.1 Arguments for wrongful birth statutes

Topham¹²⁰ reports that proponents of wrongful birth statutes assert that such legislation is vital to prevent unnecessary eugenic screening tests. He writes that many believe that if wrongful birth and wrongful life actions would be recognized, a legal duty would be created for doctors to recommend or perform and for mothers to undergo prenatal tests and abortions. It is reported¹²¹ that wrongful birth statute supporters argue that these statutes are further beneficial to/ assist in:

- preserving the value of life;¹²²

119 Wecht, C.H. 1992. The Impact of Peer Review on the Practice of Medicine and the Relationship Between Patients, Hospital and Third Parties. *Trauma* (5:6), 34.

120 *op cit* p 857.

121 *op cit* p 858.

122 in answer to this supposition one can state that wrongful birth actions do not demean the value of life, as the injury results from the denial of the right to choose and it enhances the dignity and comfort of the handicapped child.

- protecting the conscience of the physician;¹²³
- discouraging the practice of unnecessary defensive medicine;¹²⁴
- restricting a cause of action that threatens to expand unacceptably.¹²⁵

4.2 Wrongful birth statutes are constitutional

Faircloth¹²⁶ questions the premise that statutory prohibition of wrongful birth is unconstitutional as he doubts whether the interest protected by **Roe** is the same as that claimed in wrongful birth actions.¹²⁷

It is further reported¹²⁸ that wrongful birth litigants do not challenge government action, but rather inaction of private citizens.¹²⁹ “The required state action is missing in judicial prohibition, and the United States Supreme Court has indicated that states may prefer live births over abortions.”¹³⁰

The same viewpoint has been held in a number of judgments. In **Hickman v Group Health Plan**,¹³¹ for example, the Minnesota Supreme Court held that a statutory ban on wrongful birth actions does not violate **Roe**.

¹²³ (especially those physicians who are morally or religiously opposed to encouraging or performing non therapeutic abortions) - however, it is contended that wrongful birth actions do not affect in any way the right of a physician to refuse performance of an abortion, although he still has as a duty to inform his patient-mother of any increased risk of bearing an abnormal child.

¹²⁴ wrongful birth actions do not more encourage physicians to practice defensive medicine than any other malpractice claim.

¹²⁵ wrongful birth actions, as all malpractice claims, are limited to instances where there was a violation of a duty by a physician to provide medical care on an accepted standard - if a violation does occur, liability should logically follow.

¹²⁶ *op cit* p 545.

¹²⁷ Arguing that neither court rejection nor legislative prohibition of wrongful birth therefore violates the interests protected by **Roe**, since different interests are involved. It is mentioned that **Roe** does not compel a state to remove obstacles to abortion that were not created by the state, thus wrongful birth statutes: 1) do not involve state action 2) which affirmatively creates an obstacle to abortion that did not already exist 3) while the state may freely exercise a value judgment in favour of live births.

¹²⁸ *op cit* p 557.

¹²⁹ medical practitioners *etc.*

¹³⁰ *ibid* - see **Harris v McRae** 448 U.S. 297, 316 (1980) and **Maher v Roe** 432 U.S. 464, 479 (1977) further discussed in ch 3.

¹³¹ 396 N.W. 2d 10 Minn. (1986).

4.3 Regulatory advantages of wrongful birth statutes

Researcher in principle supports legislative instruction of wrongful life litigation since much uncertainty as to specific matters still remains in many areas, which invariably leads to unjust results and unnecessary litigation. It should, however, be noted that obtrusive denial of these actions by means of statutory ban is not the answer. It is my belief that a just resolve could be found and workable legislation implemented that would clarify the whole wrongful life debate and in the process insure sound medical practice, while protecting the individual's fundamental human rights.

In the past, various voices have gone up in favour of legislative recognition of wrongful life actions. One such example is found in *Azzolino v Dinfelder*¹³² it was held that wrongful birth claims will not be recognized absent a clear legislative mandate.

Student agrees with the viewpoint that most "wrongful birth statutes" infringe on fundamental rights in that the basic right of all people to detailed and accurate information concerning medical decisions will be compromised if physicians were not sufficiently deterred from giving misinformation by threat of malpractice litigation. As a consequence insurmountable obstacles could be created for women regarding their right to abortion.

In spite of the all the possible negative consequences associated with the so-called "wrongful birth statutes" in the United States of America and England, researcher remains convinced that there are many advantages¹³³ to legislatively regulate the phenomena of wrongful life actions that causes so much legal uncertainty and unnecessary litigation.

Stolker¹³⁴ submits that the purpose of legislative guidance is to protect and strengthen the legal position of the patient through a general guideline wherein the rights and duties of both the patient and medical professional is established:

*"Het doel is de rechtspositie van de patiënt te versterken door het scheppen van een algemene civielrechtelijke regeling waarin de rechten en plichten van hulpverlener."*¹³⁵

¹³² 315 N.C. 103, 337 S.E.2d 528 (1985).

¹³³ see discussion in final reflections, ch 12.

¹³⁴ 1994. De nieuwe Wetgeneeskundige behandelingsovereenkomst en het juridische belang van de Modelregeling arts-patiënt. *Nederlands Tijdschrift voor Bureerlijk Recht* (11:1), 115.

¹³⁵ *ibid.*

5. Exemplary legislation

5.1 Maine statute

A good example of legislative guidance in wrongful life matters is the Maine Statute, which legislatively recognizes the wrongful birth cause of action.

Maine Statute - Title 24§ 2931:

1. Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child. [1985, c. 804, §§ 16, 22 (new)]

2. Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilisation procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilisation procedure and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy. [1985, c. 804, §§ 16, 22 (new)]

3. Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child. [1985, c. 804, §§ 16, 22 (new)]¹³⁶

4. Other causes of action. This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred or handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual. [1985, c. 804, §§ 16, 22 (new)]¹³⁷

From subsection one and two it is obvious that the wrongful conception action is statutorily limited in Maine. Although plaintiffs are barred from suing for general child-rearing expenses, parents whom have been prejudiced by the negligent performance of a sterilization procedure

¹³⁶ *ie* recognition of wrongful birth, allowing limited damages.

¹³⁷ *eg* if physician prescribes harmful drug to pregnant patient *etc.*

do have some relief, as they may receive awards of damages for the hospital and medical expenses incurred for the sterilization procedure and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

Although author personally believes that wrongful conception plaintiffs should be able to receive full compensation,¹³⁸ at least the parents do have an action and the courts have clear guidelines as to the extent of awards they are allowed to give.

In subsection three the Maine statute legislatively awards recognition to the wrongful birth cause of action, although the heads of damages are restricted to expenses relating to the handicap, defect or genetic disease suffered by the child. As there is no limit placed on the extent of such expenses an award might well be considerable.

Student believes that this is the most reasonable and just solution to wrongful birth. The Maine legislator has correctly understood the basis of the claim, in that these parents were expecting a child and were prepared to foot the bill of ordinary child-rearing costs. The additional expenses resulting from a disability or disease, however, was not expected and therefore these expenses should be compensated.

Subsection four deals with so-called "traditional medical negligence torts", whereby an injury is inflicted upon either a mother or child because of negligent conduct by a physician-defendant. It also includes instances where a handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, but for the negligent conduct of a physician. These cause of actions are left unrestricted.

A conceivable point of criticism against this statute is the fact that the position of wrongful life actions are not addressed. Wrongful life actions are undoubtedly the most troublesome of the actions mentioned and it is of vital importance that legislative recognition, albeit with limitations or alternatively obtrusive dismissal should be prevalent from such legislation. By ignoring the troublesome question of wrongful life, courts are still left in the dark as to how they should solve these novel, but al too real dilemma.

5.2 Utah statute

Another example of state legislation directed at establishing sound and certain principles

¹³⁸

full compensation would include all child-rearing costs - it is submitted that damage awards might be limited in this instance due to a misperception of the true basis of a wrongful conception claim (it is namely not the child itself that is complained of, but rather the real additional expenses necessitated by an unplanned child).

regulating wrongful life litigation, is the Utah Wrongful Life Act.

Utah Code Ann. §§ 78-11-23 to -25 (Supp. 1983)

78-11-23 The legislator finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, condition or dependency, including all handicapped persons and all unborn persons.

78-11-24 A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

78-11-25 The failure or refusal of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action.

It is interesting to compare the content and effect of various states' wrongful birth statutes. Note, for example, that the legislator in Utah has chosen to bar the recovery of both wrongful life and wrongful birth actions, while in effect recognising the action for wrongful conception.¹³⁹ The analogous statute of Maine, however, dictates that wrongful conception actions have been restricted to instances of failed sterilization and also with regard to specific heads of damages. The Maine statute also differs in the sense that legislative recognition of wrongful birth actions is given. Each states' unique policies and goals become clear as different actions are either barred, restricted or recognized.

Topham¹⁴⁰ comments on the **Utah Code Ann. §§ 78-11-23 to -25 (Supp. 1983)**. He is not convinced that the state's purpose with the statute, namely to encourage respect for the value of life of impaired persons, will be achieved. He fears that it will rather isolate health practitioners from liability for negligence that will result in unwanted births and in the process infringe on abortion rights.

He suggests¹⁴¹ various approaches whereby wrongful life/ wrongful birth plaintiffs in Utah could

¹³⁹ **Subsec 78-11-25** effectively does away with the main defence of a wrongful conception defendant. In researcher's opinion this is an example of the least liberal type of wrongful birth statutes, in that wrongful conception actions are so commonly recognized that it almost seems superfluous to give it legislative acknowledgment as well.

¹⁴⁰ *op cit* p 856.

¹⁴¹ Topham *op cit* p 585.

“functionally eviscerate” the abovementioned statute, while remaining within the contours of the statutory language. He writes that wrongful birth/ wrongful life actions may arise in at least five contexts, including:

- negligent prenatal counselling;¹⁴²
- negligent genetic testing;¹⁴³
- unsuccessful abortions;¹⁴⁴
- negligent dispensing contraceptives;¹⁴⁵ and
- unsuccessful sterilizations.¹⁴⁶

Of the five, only the first three appear to contain the requisite nexus with abortion. Therefore, a narrow construction of the Utah Act would allow wrongful birth actions alleging the last two causes of action. Unfortunately, the Act would still deny a cause of action to the vast majority of impaired plaintiffs.

Secondly, Topham suggests¹⁴⁷ that plaintiffs could ground their actions on alternative bases.¹⁴⁸ Actions based on breach of contract or warranty could bypass the application of the Act. An advantage of claiming on breach of contract is a usually longer statute of limitation period. Disadvantages, however, are a lack of insurance coverage, problems of proof and the common use of preoperative consent forms invalidating prior oral guarantees of success. Another disadvantage is that while it is generally held that a postoperative warranty must be supported by separate consideration, some courts have extended that rule to hold that preoperative warranties must also be based on new consideration. This requirement will usually bar contract or warranty actions for unwanted births because patients rarely make additional payments to physicians in return for guarantees of success. Additionally, in Utah, a warrantee must also be “a written, express contract, signed by the provider or his agent”. He then continues:

“Finally, the scope of the Act may be circumvented by plaintiff’s claiming injuries other

¹⁴² **Gleitman v Cosgrove** 49 N.J. 22,227 A.2d 689 (1967).

¹⁴³ **Curlender v Bio-Science Labs.** 106, Cal. App.3d 811, 175 Cal. Rptr. (1980).

¹⁴⁴ **Speck v Finegold** 497 Pa. 77, 439 A. 2d 110 (1981).

¹⁴⁵ **Troppe v Scarf** 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

¹⁴⁶ **Herrera v Roessing** 533 P.2d 60 Colo. Ct. App. (1975).

¹⁴⁷ *op cit* p 859.

¹⁴⁸ in case of intentional misstatement of a physician, a plaintiff could base a claim on fraud, deceit or misrepresentation.

than those resulting from the inability to undergo an abortion. An example of such an injury is the deprivation of the mother's right to make an informed procreative choice. A claim of damage by loss of choice would appear to be valid under the Act because such deprivation is an injury distinct from and unrelated to whether abortion would have been actually undergone had the true facts been known."¹⁴⁹

5.3 North Carolina statute

The North Carolina Supreme Court also supports legislative guidance and stated in **Azzolino v Dingfelder** that wrongful birth issues were better left to the legislator which "can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit."¹⁵⁰

5.4 California statute

Bey-Berkson¹⁵¹ summarises some further existing legislation governing wrongful life matters.¹⁵² These existing examples of wrongful life and wrongful birth statutes can be used as a starting-point when attempting to draft a comprehensive act whereby the entire wrongful life phenomenon as well as associated intricacies would be covered. By examining existing statutes that regulate wrongful life litigation, one can establish the various interests that are sought to be protected and regulated. The **California Civil Code**¹⁵³ provides that:

"No cause of action arises against a parent on the claim that the child should not have been conceived or born alive. The refusal of a parent to prevent the live birth of his child shall not be a defense in an action against a third party or be conceived in awarding damages."¹⁵⁴

It is obvious from the Californian wrongful life statute that the main thrust of the legislator was to protect the parent's position as party to wrongful life litigation. In the first instance it is very interesting that the legislator ensures that actions may not be instituted by children against their

¹⁴⁹ *op cit* p 862.

¹⁵⁰ Faircloth *op cit* p 558.

¹⁵¹ 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 63.

¹⁵² of various American states.

¹⁵³ § 43.6 (enacted in 1982).

¹⁵⁴ *op cit* p 90.

parents. It is suggested that such type of litigation would be seen as *contra bonos mores* under South African law, however, no harm can be done by explicitly prohibiting such litigation.

The second aspect that is dealt with in the Californian statute is the implied *de facto* approval of the wrongful life cause of action. A wrongful life or wrongful birth action can therefore be instituted against a third party physician without any legislative bar or hindrance. In this regard, however, the parents' position is once again protected. Their procreative decisions may not in any way be drawn into the litigation. It is suggested that this line of reasoning is correct and in accordance with current constitutional protection of procreative choices and the right to individual family panning. This protection afforded to parents should surely be included in a comprehensive model statute.

5.5 Idaho statute

The Idaho Code¹⁵⁵ prohibits a cause of action on behalf of any person based on a claim that, but for the conduct of another, a person would have been aborted. The statute does not preclude causes of action based on claims that, but for a wrongful conduct fertilisation would not have occurred, maternal death would not have occurred or handicap or disease of an individual prior to birth would have been prevented or cured in a manner that preserved life of the affected individual. The Idaho Code 5-334 (1990), provides:

"A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."¹⁵⁶

The first important consequence of this statute is that wrongful life and wrongful birth actions are effectively barred, as the general view of commentators dictates that both these actions rely heavily on the parents' right to have the disabled or diseased child aborted.¹⁵⁷ On the other hand the statute gives specific recognition to the wrongful conception cause of action. Also recognized by this statute are the so-called "traditional" pre-natal tort based actions in the sphere of physician negligence and professional liability.¹⁵⁸

¹⁵⁵ § 5-334.

¹⁵⁶ at 5-334 (1).

¹⁵⁷ see ch 7 and 8 where alternative opinions are raised, stating that the right to abortion is not essential for a successful wrongful life action.

¹⁵⁸ where the unlawful conduct of a third party causes a pre-natal injury, see ch 4.

It would seem as if the Idaho legislator intended to place limits on the scope of litigation involving the birth of children with regards to the more troublesome actions,¹⁵⁹ while still allowing the more traditional and generally accepted causes of action.¹⁶⁰ It would be difficult to predict the exact reasons for this viewpoint, but it is suggested that official state policy and public sentiments in a particular state on issues such as family planning, abortion, adoption and physician liability are important in this respect.

Careful consideration should therefore be taken as to a country's specific viewpoints on important social and political issues before a legal solution can be sought through the enactment of a regulatory and prescriptive statute with the purpose of creating legal certainty in a particular sphere of law.¹⁶¹

5.6 Minnesota statute

Minnesota¹⁶² has taken a similar stance as Idaho and has also barred wrongful life and wrongful birth, while upholding wrongful conception actions.¹⁶³ The wording of the clause making provision for wrongful conception states that a cause of action does exist for malpractice for failure of a contraceptive method or sterilization. The **Minn. Stat. Ann 145.424 (West 1989)**, provides:

"Wrongful birth actions are prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, (a child) would have been aborted."¹⁶⁴

¹⁵⁹ *ie* wrongful life and wrongful birth actions. It would be fair to assess these actions as more troublesome (than wrongful conception), as they involve a wider scope of philosophical, ethical and religious challenges and question such as possible discrimination against the handicapped society and also abortion issues.

¹⁶⁰ *eg* cases where the foetus is injured by a physician in a medical examination or negatively affected by incorrect medication.

¹⁶¹ *eg* if abortion on demand is not acceptable on either religious or moral or even legal grounds in a specific community, it would be inappropriate for a legislator to give legal recognition to the wrongful life cause of action.

¹⁶² § 145.424.

¹⁶³ note *supra*, where it is recorded that Minnesota's wrongful birth statute has been found to be constitutional in the case of **Hickman**.

¹⁶⁴ at 145.424 (2).

5.7 South Dakota statute

One must carefully read the words of the South Dakota statute¹⁶⁵ in order to establish what may and what may not.¹⁶⁶ This statute prohibits a cause of action on behalf of any person based on the claim of that person that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been born alive. It also prohibits a cause of action based on the claim that, but for the conduct of another, a person would not have been permitted to be born. The **S.D. Codified Laws Ann 21-55-2 (Rev. 1987)**, provides:

"There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive."

The first portion of the statute is directed to prohibit wrongful life actions, as the words "based on the claim of that person" are used. The second prohibition is more generally directed and it is vague precisely what is meant by the legislator in this instance. It is submitted that both wrongful birth and wrongful conception actions are encompassed herein as both these actions are aimed at the prevention of the birth of a child and both are instituted by the parents, while no distinction or exception is made as to the possible recognition of wrongful conception actions.

5.8 Further statutes

Grobe¹⁶⁷ also comments on a variety of state statutes and quotes relevant portions:

Ind. Code 34-1-1-11 (Burns 1986 & Supp. 1991), provides: "No person shall maintain a cause of action or receive an award of damages on (his behalf) based on the claim that but for the negligent conduct of another (he) would have been aborted."

Mo. Ann. Stat. 188.130 (Vernon 1988 & Supp. 1992), provides: "No person shall maintain a cause of action or receive an award of damages based on the claim that

¹⁶⁵ § 21-55-1 to 21-55-4.

¹⁶⁶ it is suggested that special attention should be given to the choice of words when a statute is compiled - it is advisable that generally understandable wording be used in simply constructed sentences to improve the comprehension and effectiveness of the act.

¹⁶⁷ 1992. The future of the "wrongful birth" cause of action. *Pace Law Review* (12:3), 738.

but for the negligent conduct of another, a child would have been aborted."

42 Pa. Stat. Constitutional. Ann. 8305 (1989 & Supp. 1991), provides: "Wrongful birth - there shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born."

Me. Rev. Stat. Ann. Tit. 24, 2931 (West 1990), provides: "Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as a result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child."¹⁶⁸

6. Conclusion

Student believes that a clear legislative guidance based on a true understanding of the difficult issues involved in each specialised action, could solve the wrongful life puzzle once and for all. Every central or state legislator will have to consider its own public policy considerations and decide on its own values concerning the religious, moral and ethical spheres when enacting these statutes.

Hondius¹⁶⁹ is similarly a sturdy proponent of the value and effectiveness of legislative regulation of patients' rights through medical treatment agreements:

*"De rechtspositie van de patiënt heeft zich de afgelopen jaren flink gewijzigd. Nederland is een van de weinige landen waar deze wijzigingen wettelijk zijn vasgelegd. Hoewel de keuze voor een bijzondere overeenkomst als wettelijk raam voor een regeling van patiëntenrechten enige nadelen heeft, is zij, gelet op de betekenis die hiermee aan de autonomie van de patiënt wordt gegeven, verantwoord. Sterker: het is een goede keuze geweest, die gerust aan andere landen tot voorbeeld mag strekken."*¹⁷⁰

¹⁶⁸ at 2931(3).

¹⁶⁹ 1995. De privaatrechtelijke positie van de patiënt in Europees perspectief. *Tijdschrift voor Privaatrecht* (32:4), 1709.

¹⁷⁰ a paraphrased summary of this quotation is: "The legal position of the patient has dramatically changed in the Netherlands over the past few years, being one of the few countries which have adopted legislative measures to stipulate patient rights. Although this choice in favour of legislative modification of patient rights has presented certain challenges, the vast improvement of patient autonomy that has been achieved by it is overwhelming. It was therefore a good decision that could similarly be followed in other countries" - it is suggested that this very advise be



The benefit of such statutory guidance would be legal certainty for both the plaintiff and defendant alike and would ultimately save much unnecessary litigation.

6. Conclusion

followed in solving the wrongful life debate, see final reflections.