

5. Various relevant aspects

5.1 Guidelines for public policy in wrongful life actions

Brownlie,²⁰⁴ when considering the element of wrongfulness, rightly declares that there exist precious little guidelines that can be taken from South African court decisions whereby public policy principles concerning the wrongful life issue can be laid down. He expresses doubt whether traditional factors²⁰⁵ will be effective in clarifying guidelines to wrongfulness in these cases. He mentions six additional and relevant factors that he subtracted from foreign court decisions in this respect:

5.1.1 The immeasurable value and sanctity of human life

Brownlie²⁰⁶ submits that there is a trend in American law suggesting that life is not under all circumstances preferable to non-existence.²⁰⁷ Brownlie assumes that the South African position on this matter will, however, be similar to that of the English law laid down in *McKay v Essex Health Authority*,²⁰⁸ since the previous South African abortion legislation and its English counterpart was substantially the same.²⁰⁹

The birth of a physically challenged child seen as "damage".²¹⁰

"The crisp question is, is birth with injury (not being born being the relevant *status quo ante*) damage in law, capable of pecuniary assessment? Put another way, can any form of life be loss, or on the more metaphysical level, does your cause of action *per se* undercut the basis of your claim (by averring a preference of death, is your *locus*

²⁰⁴ *op cit* p 21.

²⁰⁵ as introduced in the judgment of *Coronation Brick v Strachan* 1982 (4) 371 (D), namely: the extent of the loss involved; the relationship between the parties; the social consequences of the imputation of liability; the means available to avert the loss *etc.*

²⁰⁶ *op cit* p 22.

²⁰⁷ *Turpin v Sortini; Harbeson v Parke-Davis, Inc. and Superintendent of Belchertown v Saibewicz* 370 N.E. 2d 417 (1977).

²⁰⁸ (1982) 2 WLR 890, CA.

²⁰⁹ it is submitted that this viewpoint will be altered because of the new South African **Choice on Termination of Pregnancy Act**, No. 9 of 1996.

²¹⁰ although damage is a separate element of delict and should be constantly discussed separate from wrongfulness, it seems as if public policy has been the decisive factor in wrongful life actions in deciding whether defective birth may be termed as legal damage.

standi thereby removed?)²¹¹

He reports²¹² on the position in England and concludes that damage might indeed be legally recognized in wrongful life litigation. As authority for this premise he quotes the viewpoint expressed by the Pearson Commission:²¹³

"Nor would it be easy to assess damages on any logical basis, for it would be difficult to establish a norm with which the plaintiff in his disabled state could be compared. He never had a chance of being born other than disabled... We have not, we think, been unduly influenced by those considerations of logic. Law is an artefact, and, if social justice requires that there should be a remedy given for a wrong, then logic should not stand in the way. A measure of damages could be artificially constructed."²¹⁴

Brownlie comments:²¹⁵

"What the above extract purports to illustrate is that 'impossibility' of fixing a damages quantum does not *per se* exclude the possibility that the defective birth may be regarded as damage. On the contrary, the report would appear to assume that damage is in fact present, for which social justice may require damages to be artificially constructed."

With regards to the American position Brownlie writes that many courts²¹⁶ have in the past found that damage in these cases is not recognisable at law. In *Turpin v Sortini*,²¹⁷ however, the court criticised the inconsistency of previous judgments in dismissing an impaired birth as a legal injury on one hand, while allowing special damages on the same cause of action on the

²¹¹ Brownlie *op cit* p 25.

²¹² *ibid.*

²¹³ Royal Commission on Civil Liability and Compensation for Personal Injury, Report vol 1 (1978)(7054-1) - this Commission had to inquire whether wrongful life actions were to be allowed in England or not.

²¹⁴ it remains uncertain what is exactly meant by "artificially constructed damages" - a court should either find that damage was suffered or that no damage was suffered.

²¹⁵ *op cit* p 26.

²¹⁶ *Gleitman v Cosgrove, Dumer v St. Michaels Hospital.*

²¹⁷ 182 Cal. Rptr. 337 (1982).

other hand. Also in **Harbeson v Parke-Davis**²¹⁸ damage was proved. Brownlie²¹⁹ therefore concludes that although damage was initially rejected *in toto*, recent cases recognize by implication that there has been legally cognizable injuries suffered. He personally believes that a defective birth may be regarded as *damnum* and bases his argument on the following challenging assumption of the Gleitman court:

"But for the doctor's negligence, the conditions of impaired life would not have come to fruition, and having now matured, such condition necessitates pecuniary expense, which in the event of non-existence would not have had to be incurred... Moreover, it would surely follow logically from the proposition that death may be preferable to defective life that in cases in which this holds true, and in which the preference for the plaintiff's non-existence did not mature, the resulting defective life would be an injury?"

5.1.2 Conceptual social and legal policy factors

Here Brownlie²²⁰ mentions that reluctance to recognize that a physician owed any duty to a child²²¹ has also prevented allowance of wrongful life actions. In answer to this question, the Turpin court stated:²²²

"Of course... the unborn child cannot personally make any choice as to the relative value of life or death. At that stage, however, just as in the case of an infant after birth, the law generally accords the parents the right to protect the child's interests...parents also presumptively consider the interests of their future child. Thus...(he) harms the potential child as well as the parents."

5.1.3 Social implications and consequences

In this regard, the first concern is the expected intolerable burden²²³ that liability in these cases would place on the medical profession. Brownlie²²⁴ answers this concern with the arguments that it is ultimately for parents to decide whether or not to have an abortion and secondly that physicians making use of advanced medical technology should be able to make accurate inquiries into possible deformity of a foetus.

²¹⁸ 98 Wash, 656 P. 2d 483 (1983).

²¹⁹ *op cit* p 27.

²²⁰ *op cit* p 28.

²²¹ reasons for this reluctance are the facts that the foetus/ child cannot make its own decisions and is unable to act on the physician's advice.

²²² *op cit* p 345.

²²³ this burden includes subconscious pressures to advise abortions in instances where it objectively is not necessary or not usually recommended.

²²⁴ *op cit* p 29.

The second social reservation mentioned here is the uncertainty of determining which plaintiffs would be allowed to claim. It is namely a difficult task to lay down a minimum level of deformity which must be proven before a plaintiff is allowed to institute an action. Brownlie believes that this question should be answered in relation to the mother's assertion that, but for the physician's negligence, she would have aborted the foetus.²²⁵

5.1.4 The protection of the integrity of the courts

Both in American²²⁶ and English²²⁷ cases courts have objected against judicial intervention and responsibility in this emotive and morally complex issue. It is suggested²²⁸ that a legislative solution should rather be found. Brownlie contends that although legislative direction could be helpful in these cases, the integrity of the courts will be further undermined if all difficult questions were to be handed over to the legislative sphere to be solved.

5.1.5 Ideals of compensatory justice

It has been said that there should be a remedy for every wrong committed.²²⁹ Brownlie argues²³⁰ therefore that every time a wrongful life action is rejected, this honourable principle is violated.

Spier²³¹ submits that the principle of "full compensation" is often regarded as one of the fundamentals of modern tort law".

In conclusion to the issue of wrongfulness, Brownlie²³² submits that it is both feasible and desirable that the conduct of a physician in these cases should be labelled as wrongful. He further suggests that traditional judicial caution should be applied less stringently because of the novel character of wrongful life actions and taking into account the American precedent

225 reference is made to the previous South African **Abortion and Sterilisation Act No 2 (1975)** and it is suggested that the same grounds for abortion set in the act should guide one in determining which cases are serious enough for wrongful life litigation.

226 **Zepeda v Zepeda.**

227 **McKay v Essex Health Authority.**

228 *op cit* p 30.

229 **Turpin v Sortini.**

230 *ibid.*

231 1995. **The Limits of Liability. Keeping the Floodgate Shut.** Kluwer Law International, 2.

232 *op cit* p 21.

which has considerable persuasive value.

6. Legal basis

6.1 Basic tort principles

It is obvious that all legal requirements must be proved before a claim²³³ will be successful. Hughes²³⁴ refers to American law and names the four required elements for a claim based on negligence: a legal duty; breach of this duty; proximate cause and damage.²³⁵

A *legal duty* based on typical wrongful life facts could be established in the following manner: The parents act as agents or representatives of the unborn child.²³⁶ Through this relationship with the physician, a legal duty of care between the physician and the unborn child is constructed.²³⁷ It is submitted²³⁸ that a duty can also be directly related and owed to the unborn child.²³⁹

Breach of duty is established by comparing the conduct of the defendant-physician with the general level of professional proficiency administered by the reasonable physician with the same level of knowledge and experience. An unreasonable deviation from this level of

²³³ on whichever basis (delict, contract, misrepresentation *ect.*) - see *infra* and ch 2.

²³⁴ 1987. Recognition of Wrongful Life Actions: Trend or aberration? *Tort & Insurance Law Journal* (22), 583.

²³⁵ South African law knows five elements of delict that has to be proved: conduct, wrongfulness, fault, causation and damage - 1992 *Deliktereg* Butterworths (2de uitgawe).

²³⁶ Hughes *op cit* p 583.

²³⁷ as previously established in the right-to-life decisions of *In re Quinlan* 70 N.J. 10, 355 A2d 647 (1978); *Superintendent of Belchertown v Saibewicz* 370 N.E. 2d 417 (1977).

²³⁸ Hughes *ibid*: "A finding of such a direct duty to the unborn child follows the same reasoning which allows an infant to sue for injuries, *in utero*, caused by the physician's negligence."

²³⁹ Fain *op cit* p 589 is of the opinion that a duty can be proved when a wrongful life plaintiff argues that the existence of their physician-patient relationship (between the physician and the parents of the plaintiff) created a duty on the physician towards the parents and the child.

professional competence will result in a breach of duty.²⁴⁰ Fain²⁴¹ believes that the physician's deviation from the applicable standard of care²⁴² only constitutes breach of his duty in the wrongful life field of application when genetic counselling and prenatal testing were specifically and clearly indicated by a patient's particular²⁴³ circumstances.²⁴⁴

It is suggested that *proximate cause* is proven by the fact that the plaintiff would not have been born was it not for the negligent conduct of the defendant.²⁴⁵ A detailed informative discussion and informed medical treatment consent is relevant in this regard, since the parents of the plaintiff would not have conceived or (in the alternative) would have aborted the handicapped foetus, if they were given timely warnings.²⁴⁶ According to Fain²⁴⁷ the plaintiff needs to prove that the physician's failure to test; failure to warn; or mis-diagnosis caused its parents either to forego an abortion or to conceive, resulting in his impaired existence.

Hughes²⁴⁸ states that the proof of *damage* is the most difficult task of all.²⁴⁹ The comparison between handicapped life and a condition of non-existence is virtually impossible. Courts have tried to solve this problem by only awarding damages for those heads of damage that are possible to calculate, for example special damages for hospital and medical costs. General damages such as pain and suffering have not yet been awarded because of the abovementioned problem of comparison. Hughes²⁵⁰ believes that in exceptional cases of

²⁴⁰ Strauss, 1991, *op cit* p 3 - see also ch 4.

²⁴¹ *ibid.*

²⁴² eg failure to test for abnormalities in foetal development.

²⁴³ evidence of increased risk would be eg the mother's advanced age; family history; exposure to certain drugs etc - *Turpin v Sortini* involving a mis-diagnosis of deafness in the plaintiff's older siblings.

²⁴⁴ *op cit* p 590.

²⁴⁵ *ibid.*

²⁴⁶ see ch 5 a detailed discussion of informed consent.

²⁴⁷ *ibid.*

²⁴⁸ *op cit* p 584.

²⁴⁹ Fain *op cit* p 590 agrees that the damage issue is the most controversial. He writes that in compensating a plaintiff we must attempt to return the plaintiff to his position before the occurrence of the tort. Because this is obviously not possible, public policy should guide courts in giving just compensatory awards. He shows that courts who have allowed damages have restricted their awards to special compensatory damages - see discussion *infra*.

²⁵⁰ *op cit* p 584.

severe disablement or genetic disease it should be contemplated that non-existence could be preferable to handicapped life - under these circumstances, it is submitted, a calculation of general damage must be made by means of estimation.²⁵¹

6.2 Liability based on breach of contract²⁵²

According to Berenson,²⁵³ the *Pitre v Opelousas General Hospital*²⁵⁴ court correctly applied the analogous rules of liability for damages in *breach of contract*. In cases where the plaintiff can prove that his parents have reached consensus with the physician for a particular result²⁵⁵ they should have a valid claim against the obligor-physician who has breached the terms of their agreement by failing to perform the desired result, as specified in the contract.²⁵⁶ It is submitted that in the absence of an actual agreement, but where the physician was indeed aware of the patient's intentions and volition to conclude such a specific term, the physician's failure to deliver the desired result²⁵⁷ should also be seen as a breach of contract.

A significant question with regards to the limit of a physician's contractual liability²⁵⁸ in these cases, is whether an adequate causal link existed between the negligent surgery or test on one hand and the defective birth on the other hand.

"An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made."²⁵⁹

He writes²⁶⁰ that a plea of detrimental reliance upon the conduct or impression made by the physician could also be applicable in this context, as the Louisiana Civil Code (contextually

²⁵¹ *op cit* p 585.

²⁵² see ch 2.

²⁵³ *op cit* p 913.

²⁵⁴ 530 So. 2d 1151 La. (1988) - discussed further *infra*.

²⁵⁵ such as a successful sterilization or a guarantee for the birth of a healthy child.

²⁵⁶ see ch 4 on the contractual relationship between physician and patient (take note of the distinction made in French law, between the *obligation de resultat* and the *obligations des moyens*).

²⁵⁷ Berenson believes *op cit* p 914.

²⁵⁸ as opposed to the theory of *delictual* causation used in the *Pitre* court.

²⁵⁹ LA. Civ. Code ANN. art. 1996.

²⁶⁰ *ibid*.

modified) declares.²⁶¹

"a physician may be obligated by a promise when he knew... that the promise would induce the patient to rely on it to his detriment and the patient was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the patient's reliance on the promise."

An obligation to act in a certain way could therefore also arise when a patient reasonably relies on the doctor's expressed or implied promise that the procedure will have a certain effect.²⁶² Note, however, that claims of liability arising from an implied contractual obligation for medical services have been made impossible in Louisiana by means of a statutory prohibition.²⁶³

Hol²⁶⁴ believes that the wrongful life plaintiff can be included in the contractual relationship between mother and physician. The duty of care towards the mother as patient could also encompass a duty of care towards the unborn child and is directed by the question whether this protection falls under specific legal norms.²⁶⁵ He writes that one should take a third party's interests into account, once one is aware of such a person - this seems to be the case in wrongful life, although the damage issue remains an illusive challenge:²⁶⁶

Berenson²⁶⁷ is of the opinion that these *ex contractu* claims accrue only to the parents²⁶⁸ and not to the children.²⁶⁹ The reason for this is that the child has no reasonable argument that a

²⁶¹ *op cit* art 1967.

²⁶² such as prevent future pregnancies in the case of a sterilization.

²⁶³ LA. Rev. Stat. Ann. § 40:1299.41 (C) (West 1977) The same statute limits all professional malpractice claims to an amount of \$500 000.

²⁶⁴ *op cit* p 276.

²⁶⁵ "Men zou ook kunnen aanhaken bij de contractuele relatie die tussen moeder en de arts bestond. Omvat die relatie - naast de zorg voor het welzijn van de moeder - niet tevens een zorgplicht van de arts ten aanzien van het welzijn van het kind? We stuiten hier op het probleem van relativiteit. Daarbij draait het om de vraag welke belangen onder de bescherming van een bepaalde rechte vallen." *ibid*.

²⁶⁶ "Of men dus rekening moet houden met het welzijn van derden hangt af van de vraag of men op de aanwezigheid van "een derde" bedacht diende te zijn... Kortom: in het geval van Marleen is er wel een rechtgrond te bedenken voor een vordering tegenover de arts, er is alleen geen sprake van schade die op het conto van de tekortkoming van de arts kan worden geschreven."

²⁶⁷ *op cit* p 915.

²⁶⁸ a possible wrongful birth action.

²⁶⁹ therefore excluding wrongful life actions.

contractual relationship existed between himself and his parent's physician prior to his own conception or birth.

6.3 Damage issues

Gevers²⁷⁰ discusses the question of damages in wrongful life actions. He states that the function of damages in wrongful life is not based on the premise that the plaintiff wants to hypothetically correct his circumstances,²⁷¹ but rather to alleviate his current suffering and acquire adequate medical treatment and assistance.²⁷²

An alternative proposed²⁷³ to the award of damages is a sustenance award which would aid the plaintiff in becoming self-supporting. Additionally, the proponent of this alternative would allow recovery of damages which could be specially proved.²⁷⁴

Berenson²⁷⁵ reports that many courts have disallowed wrongful life claims for a variety of reasons,²⁷⁶ the majority of which state that damages are impossible to ascertain.²⁷⁷

270 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. **Verslag: Vereniging voor Gezondheidsrecht** (10 April), 25.

271 that he did not wish to be born.

272 he believes that a wrongful life plaintiff would in any event be principally entitled to a claim for satisfaction.

273 Kohnen, D.A. and Zoellner, R.M. 1986. Wrongful Life: Existence v. Nonexistence - Is Life Always Preferable? **Federation of Insurance & Corporate Council Quarterly** (63), 243.

274 it is suggested that a reasonable person test would be applied.

275 *op cit* p 901.

276 The states whose courts have denied wrongful life claims include:
Alabama: **Elliott v Brown** 361 So. 2d 546 Alabama (1978);
Florida: **Moore v Lucas** 405 So. 2d 1022 Fla. Dist. Ct. App. (1981);
Idaho: **Blake v Cruz** 108 Idaho 253, 698 P.2d 315 (1984);
Illinois: **Siemieniec v Lutheran Gen. Hosp.** 117 Ill. 2d 230, 512 N.E.2d 691 (1987);
Kansas: **Bruggeman v Schimke** 239 Kan. 245, 718 P.2d 635 (1986);
Louisiana: **Pitre v Opelousas Gen. Hosp.** 517 So. 2d 1019 La. Ct. App. 3d Cir (1987), *aff'd in part, rev'd in part on other grounds*, 530 So.2d 1151 La. (1988);
Michigan: **Strohmaier v Associates in Obstetrics & Gynecology** 122 Mich. App. 116, 332 N.W.2d 432 (1982);
New Hampshire: **Smith v Cote** 128 N.H. 231, 513 A.2d 341 (1986);
New York: **Becker v Schwartz** 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); North Carolina: **Azzolino v Dingfelder** 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986);
Pennsylvania: **Ellis v Sherman** 512 Pa. 14, 515 A.2d 1327 (1986);
Texas: **Nelson v Krusen** 678 S.W.2d 918 Tex. (1984); and
Wisconsin: **Dumer v St. Michael's Hosp.** 69 Wis. 2d 766, 233 N.W.2d 372

In *Pitre v Opelousas General Hospital*²⁷⁸ it was stated:

"When a physician knows or should know of the existence of an unreasonable risk that a child will be born with a birth defect, he owes a duty to the unconceived child as well as to its parents to exercise reasonable care in warning the potential parents and in assisting them to avoid the conception of the deformed child."²⁷⁹

Berenson²⁸⁰ believes that by "limiting liability for injuries in wrongful life cases to the parents' interest "not only places a manageable boundary on the defendant's exposure but also provides the plaintiff with some remedy for a clearly actionable tort that cannot be distinguished from any other recognized tort."

He writes:²⁸¹

"The more difficult argument, and the humane and legally progressive position, insists that the impaired child should not bear the burden of proving damages based on an obviously impossible comparison between its actual condition and nonexistence. Rather, the plaintiff should have to prove only that his impaired condition exists, and that his existence is the result of the defendant's negligence. No more should be required. In *Turpin*, the California Supreme Court understood the human, if not legal, need to respond to an obvious wrong and chose to extend the law to provide for the extraordinary costs of a defective child."

Berenson²⁸² identifies three identifiable factors, however, apparently interact to inhibit the judiciary's acceptance of such claims and their approval of general damage awards in claims for wrongful life.²⁸³

(1975).

²⁷⁷ *Lininger v Eisenbaum* 764 P. 2d 1202, 1210 n.10 Colo. (1988).

²⁷⁸ 517 So. 2d 1019 La. Ct. App. 3d Cir (1987), 530 So.2d 1151 La. (1988).

²⁷⁹ at 1157.

²⁸⁰ 1990. *The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be"*. *Tulane Law Review* (64), 914.

²⁸¹ *op cit* p 915.

²⁸² 1990. *The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be"*. *Tulane Law Review* (64), 916.

²⁸³ first (an probably most significant) is the courts' inability to quantify the child's damages; secondly, the courts' sensitivity to the issue of tort reform and the limitations of medical liability; and finally, the abortion question.

Berenson²⁸⁴ writes:

"The unfortunate reality is that many courts refuse to recognize wrongful life claims for artificial reasons, reasons the most certainly would not suffice in cases of more measurable injury."

Foutz²⁸⁵ also documents that most courts disallow wrongful life actions based on the failure to prove damage. Two questions are often asked: has the plaintiff-child suffered any legally cognizable injury? - and if so; is it possible to measure harm? He mentions that at the heart of these two questions lie two pressing and imminent concerns:²⁸⁶

6.3.1 Loss of legal standing

Firstly, that the plaintiff loses his legal standing when he claims that his life should not have been.²⁸⁷ Foutz²⁸⁸ finds this *lack of standing* argument unsound, "as a single act may at once confer both a benefit and a detriment."

He gives the following examples to illustrate his point: What if a physician performs a lifesaving amputation on an infected leg of a patient. The patient subsequently learns of less extreme treatment that would have been equally successful without the need for an amputation. In such a case a patient would principally²⁸⁹ be able to institute an action even though this very²⁹⁰ lifesaving operation gave him the opportunity to litigate! Therefore one must admit that courts principally recognize that an act may at once confer a benefit and a detriment to a person. This fact is also true and very relevant in wrongful life actions.²⁹¹

One must, however, be consequent in the use of examples, as the same principles should be

²⁸⁴ 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". *Tulane Law Review* (64), 916.

²⁸⁵ *op cit* p 493.

²⁸⁶ namely: legal standing of the plaintiff and establishment of damage.

²⁸⁷ this viewpoint argues that a plaintiff cuts under himself by "wishing away" his life on one hand, while litigating for financial benefits for that very same unwanted life on the other hand.

²⁸⁸ *op cit* p 494.

²⁸⁹ if we agree for argument sake that all elements of tort are present and no ground of justification (such as necessity) exist.

²⁹⁰ on which the action for medical malpractice is based.

²⁹¹ where the plaintiff is conferred the blessing of an opportunity to live, while having to bear the agony and hardships of a debilitating genetic disease.

applied in every case. There seems to be a fundamental difference between the lifesaving amputation example and the basic wrongful life cause of action:

If, in the amputation-example, the physician *improperly*²⁹² performs the procedure within the same set of facts given by the example, the result is an impaired life or life without a limb.²⁹³ In a wrongful life case, where a physician acts improperly, the result is the preservation of life of which the consequence is believed to be *per se* something of value and benefit.²⁹⁴

It is reported²⁹⁵ that in other cases where public policy concerning the comparison of existence versus non-existence have been considered, no uniform decision was adopted that life is always preferred over non-existence.²⁹⁶

6.3.2 Establishing damage

Secondly, Foutz²⁹⁷ suggests that in order to evaluate a child's position, relative values must be assigned to each possible condition of every wrongful life plaintiff.²⁹⁸ In this way, the more severe a defect or hereditary disease, the less defensible the argument becomes that deformed or impaired life has a greater value than non-existence. If a plaintiff suffers only from mild physical or psychological affliction the scale is once again tilted in favour of life and it becomes difficult to prove that non-existence would be preferred.

To give structure to an evaluation of life, Foutz²⁹⁹ suggests that a value assignment system be introduced whereby one would be able to calculate whether a specific plaintiff's life is in fact worth living or not. It is suggested that a normal life be allotted a plus value (+1); that non-

²⁹² by unjustifiably implementing too drastic a measure.

²⁹³ *ie* a reprehensible consequence.

²⁹⁴ although, it should be noted, this argument ignores the fact that the physician's conduct did not produce the *preferred* result, namely non-existence.

²⁹⁵ *op cit* p 495.

²⁹⁶ *Eg* in *Superintendent of Belchertown State School v Saikewitz*, it was found that treatment for a severely retarded adult suffering from leukemia without prospects of recovery, would only produce temporary remission with serious adverse side effects. The court found that in this case treatment would not be in the best interest of the patient and that to prolong life would be cruel and inhumane. It is submitted that such acknowledgements by courts that life is not always to be preferred, creates a precedent for wrongful life actions.

²⁹⁷ *op cit* p 496.

²⁹⁸ *ie* handicapped life on one hand and a state of non-existence on the other.

²⁹⁹ *op cit* p 497.

existence be allotted a zero or unknown value (0); and that life with serious defects or sickness be allocated a minus value (-1). By applying this formula one can through a very simple and uncomplicated calculation reach a verdict as to the value of a particular plaintiff's life. In summary: to live a normal life is beneficial;³⁰⁰ to live life with a serious handicap or congenital disease is prejudicial and therefore a wrongful life litigant can quite easily prove harm, since non-existence³⁰¹ has an unknown or zero value.

It is submitted that this value assignment system, however, is ignorant of basic wrongful life litigation facts. Since the deformed child never had the opportunity to be born normal, it seems illogical to discuss this option in the given formula. A more appropriate test might be one where the various *relevant* aspects are balanced in reference to each other. It was stated earlier that a single conduct can cause both advantageous and detrimental consequences. The **second Restatement**³⁰² states that the value of any benefit conferred on the plaintiff by the damage causing event should be considered as limitation of damages, when equitable.³⁰³

When applying the abovementioned alternative test, non-existence should be assigned a neutral or unknown value (0). Life with defects could be calculated with reference to a value reflecting the benefits of life, minus the gravity and seriousness of the deformity or sickness.³⁰⁴ For this purpose a court or jury would have to consider the severity of each defect.³⁰⁵ It is suggested that in this way a court can grant fair recovery while still recognising that life with defects does have benefits.

6.4 Damage through case law

Silverman³⁰⁶ reports that no state in America has ever allowed general damages for wrongful

³⁰⁰ but unfortunately not an option for wrongful life litigants.

³⁰¹ the plaintiff's preferred choice.

³⁰² § 920 (1979) - see discussion of benefit rule *infra*.

³⁰³ the wrongful life defendant-physician could therefore demand that balancing of the positive and negative results from his negligent conduct should take place, based on this provision.

³⁰⁴ of the life in question.

³⁰⁵ the more severe a handicap is found to be, the less beneficial the child's existence is and the greater the damage award and *visa versa*.

³⁰⁶ 1993. Constitutional Law: Pennsylvania's Wrongful birth statute's impact on abortion rights: state action and undue burden - Edmonds v Western Pennsylvania Hospital Radiology

life actions in the past.

"To date, no states permit *general damages* for this controversial cause of action. This is due in part to the philosophical difficulties involved in determining whether the plaintiff would have been better off had he never been born, as well as the conceptual problems involved in calculating damages in order to return the plaintiff to the position he would have occupied absent the misfeasance."³⁰⁷

6.4.1 Approaches of five jurisdictions

Berenson³⁰⁸ looks at judgments of five American states regarding damage awards to see whether it is possible to establish a pattern of thought implemented by courts in solving common wrongful life obstacles related to the question of damage.

6.4.1.1 California

Curlender v Bio-Science Laboratories and Turpin v Sortini - In these two cases only special damages were allowed, as the courts found that the absence of "any legally cognizable injury" was fatal to the claim for general damages, although not fatal to the claim for special damages.³⁰⁹

6.4.1.2 Washington

In **Harbeson v Parke-Davis Inc.** the court structured its analysis according to conventional damage principles and found that compensation for special damages were appropriate, although general damages were impossible to ascertain.

6.4.1.3 North Carolina

In **Azzolino v Dingfelder**,³¹⁰ the plaintiff's claim was based on the fact that her physician acted in a negligent manner by failing to inform her of the availability of an amniocentesis. The judge disallowed the action and found that the injury complained of was not "cognizable at law" in North Carolina, without clear legislative guidance to the contrary.³¹¹

Assoc. Temple Law Quarterly (66:4), 1087.

³⁰⁷ *op cit* p 1089 ft. 27.

³⁰⁸ *op cit* p 901.

³⁰⁹ this viewpoint is difficult to understand - if no cognizable injury could be found then no claim *should* be allowed and therefore no damages *whatsoever* should principally be awarded.

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

³¹¹ see suggestions in ch 12.

6.4.1.4 Colorado

The court in **Lininger v Eisenbaum**³¹² concluded that the value of non-existence is impossible to perceive and accordingly found that plaintiff's claim did not establish a legally cognizable injury. The court came to this judgment after reviewing the decisions of **Turpin, Procanik** and **Harbeson** who all disallowed general damages, while nonetheless awarding special damages. The **Lininger** court found that the life of the plaintiff, even in an impaired state, cannot be seen as a detriment.³¹³

6.4.1.5 Louisiana

In the case of **Pitre v Opelousas General Hospital**³¹⁴ a surgeon was aware of the fact that he acted negligently because he had not ligated the fallopian tubes of his patient as he was supposed to do. He did not inform her of this surgical omission and the patient later gave birth to an albino child. In addressing the claim, the court pointed out two common law theories of causation; that of foreseeable risk³¹⁵ and direct consequences³¹⁶ should be used to limit liability. The court concluded that foreseeable risk is the determining factor in medical negligence claims in Louisiana state. The court emphasized the fact that although wrongful *birth* actions have previously been allowed in that state, wrongful *life* actions have not. Therefore a physician has a *duty of care* towards the child before conception and birth, but no duty to the unconceived child to protect it from the risk of being born with albinism.

The court did not become involved in discussions over non-existence but rather focussed on whether the physician was reasonably responsible for the child's defective condition. Only once the court was satisfied that the physician could reasonably have foreseen the defective birth could the question of injury be addressed. The court exclaimed that the civilian tradition in law requires a codal basis for the development of legal analysis in cases of first impression. It is suggested that this decision implied that professional malpractice is not a new basis of litigation and that it could still be further extended to accommodate wrongful life actions.

³¹² 764 P. 2d 1202 Colo. (1988).

³¹³ Berenson *op cit* p 909 comments that this viewpoint is self serving for someone who can see and hear. It is suggested that though it might be understandable to deny compensation on grounds of legal or public policy grounds, it is unacceptably presumptuous for a court to base a decision on its own subjective conclusion that a severely handicapped person would choose impaired life rather than non-existence.

³¹⁴ 530 So. 2d 1151 La. (1988).

³¹⁵ the theory of foreseeable risk supposes that the scope of liability should ordinarily extend to, but not go beyond, risks that are reasonably foreseeable - see ch 2.

³¹⁶ the theory of direct consequences provides that the scope of liability should ordinarily extend to, but not venture beyond, all direct consequence or those indirect consequences that are foreseeable.

Welborne³¹⁷ reports on the Pitre case and comments:³¹⁸

"The Pitre court erred when it failed to consider the circumstances surrounding the sterilisation procedure. Many courts have inquired into the reasons behind the sterilisation procedure in determining whether child-rearing costs should be awarded. Under this analysis, the interest harmed by the negligence must be the same as the interest the parents sought to protect in order for the plaintiff to be entitled to damages."

6.4.2 Conclusion

Reporting on a more recent case, Butler³¹⁹ makes reference to the case of **Cowe by Cowe v Forum Group Inc.**³²⁰ reports that damages for wrongful life are not cognizable under Indiana law. She³²¹ conveys that courts rejecting wrongful life have realized the difficulty in defining a standard of "a perfect birth and thus the line of demarcation from the resulting breach of duty."

Andrews³²² summarises that the current³²³ trend in American courts decisions is to allow both wrongful life and wrongful birth actions, but to only allocate additional costs, medical expenses and a special resource fund for the plaintiff or impaired child in question. General damages, such as basic child-rearing expenses until majority, are usually not allowed.

³¹⁷ 1989. Wrongful Life and Wrongful Conception Actions in Louisiana. **Tulane Law Review** (63), 1216.

³¹⁸ *op cit* p 1221.

³¹⁹ 1992. Cowe by Cowe v Forum Group Inc.: Wrongful life and the Dilemma of Comparing Impaired Existence with Nonexistence. **Memphis State University Law Review** (22:4), 881.

³²⁰ 575 N.E. 2d 630 Ind. (1991).

³²¹ Butler *op cit* p 883.

³²² 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 149.

³²³ commentary was written in 1992.

7. Legal position in the United States of America

7.1 Historical analysis of cases

7.1.1 Initial "status" actions

*Zepeda v Zepeda*³²⁴ was the first case in which the term "wrongful life" was used. This case, however, was no wrongful life action in the true legal technical sense of the word but rather a "wrongful status claim".³²⁵ The facts were that the plaintiff's unmarried natural father promised his mother that he would marry her if she would engage in a sexual relation with him. He subsequently failed to marry her and instead left her pregnant.³²⁶ The plaintiff instituted a "wrongful life action" on the ground that he was born an illegitimate child and had to live his life with all the social prejudices and discrimination associated therewith. The court refused the action on the grounds that illegitimacy can not be regarded as damage in law and also expressed concerns about the momentous proportions such a claim could have resulting in a possible floodgate of claims.

7.1.1.1 *A distinction*

Topham³²⁷ makes a clear distinction between true wrongful life actions and illegitimacy cases. He shows that they are different in several ways: First, the defect suffered in physical/ mental impairment cases is more severe than the "stigma of illegitimacy". Second, in impairment actions the plaintiff claims that the physician's negligence caused life but not the defect. In contrast, defendant-fathers in illegitimacy cases are responsible for both the child's status (defect) and for its life. Wrongful birth, however, is based on the child's condition rather than his birth. Finally, a defective child's action comply with the requisite elements of traditional medical malpractice tort claims: "A physician has breached his duty to fully inform his patient and his negligence has resulted in the birth of a [defective child]".³²⁸

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

³²⁵ The "dissatisfied life" claim generally. In a "wrongful status action" specifically the plaintiff complains that he must live under unacceptable stigmatisation or prejudice because of specific adverse circumstances or set of facts relevant to his situation - see discussion in ch 2 and also thoughts of Haavi Morreim in ch 9 concerning "minimum standard of living", arguing that these plaintiffs should have an action for status harms (these actions are presently not allowed because of a fear for multiplicity of actions and the so-called "floodgate theory").

³²⁶ with the plaintiff.

³²⁷ 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.

³²⁸ *op cit* p 837.

A similar case came before the courts in **Williams v State**³²⁹ where a mentally retarded woman was raped whilst under protective custody of a state clinic. The child born from this wrongful conduct sued the institution for their negligent care of his mother. The injury complained of was the unfavourable circumstances of his existence,³³⁰ including his status as an illegitimate child. The court dismissed the claim instituted by the plaintiff on the basis that there existed no right that entitled a child to be born free from adversity. The plaintiff therefore had to accept the circumstances under which he was born.

7.1.2 Course of events

The first true wrongful life action³³¹ was instituted in New Jersey in the case of **Gleitman v Cosgrove**³³². Here a child was born with serious sensual disability caused by the fact that its mother suffered from German measles during pregnancy.³³³ The court refused to grant the plaintiff a claim for damages. The court rejected the contention of the plaintiff that the physician failed to give his patient³³⁴ sufficient warning as to the dangers involved with this disease during pregnancy. The court summarised its judgement in the following statements: legally there were no damage suffered; comparison for purposes of calculating damages is impossible; public policy is against the granting of the action.

The next wrongful life case was **Stewart v Long Island College Hospital**.³³⁵ Once again a child suffered from the devastating effects of *rubella syndrome* because of a physician's failure to inform his pregnant patient about the dangers of German measles during the first trimester of pregnancy. The seriously handicapped plaintiff in the **Stewart** case sued the responsible hospital authority on grounds of the fact that he was not aborted.³³⁶ In its decision the court relied heavily on the findings of the **Gleitman**-court and accordingly refused the action, but on the following grounds: the hospital did not cause the condition of disability; the plaintiff-child's abnormalities could not have been prevented by the hospital; *in casu* no legally recognisable

³²⁹ 46 Misc. 2d 824, 223 N.E. 2d 343 N.Y. (1966).

³³⁰ "dissatisfied life" claim.

³³¹ see also wrongful birth ch 7, as this case is authority for both wrongful life and wrongful birth actions.

³³² 49 N.J. 22, 227 A. 2d 689 (1967).

³³³ "*rubella syndrome*" - see the discussion on the medical implications and risks of this disease during pregnancy in ch 11.

³³⁴ the plaintiff's mother.

³³⁵ 58 Misc.2d 452, 296 N.Y.S. 2d 41 (1970).

³³⁶ or rather that his mother was deprived the right to informed medical treatment and accordingly also the opportunity to make a decision regarding an abortion.

damage was suffered;

abortion on demand was still illegal at the time of this case and accordingly a wrongful life action was not desirable; and that the final decision in this matter was to be made by the legislator.³³⁷

In **Park v Chessin**³³⁸ an action for wrongful life was allowed for the first time. The facts were that a mother gave birth to a child suffering from a debilitating genetic anomaly namely *polycystic kidney disease*.³³⁹ In order to prevent a tragic recurrence of this disease, Mrs. Park consulted a physician to inquire about the chances of a second child also being affected. Dr. Chessin assured her that there were no indications that suggested a higher than normal risk of future children having the same hereditary disease. Acting on this assurance of the doctor, Mrs. Park once again became pregnant and to her shock and trauma learned that her second sibling also suffered from the same hereditary disease.

The court carefully looked at previous judgments of similar cases of which have all denied the action. In reaching a different conclusion the court declared that it is the nature of the law to adjust to changing circumstances and developments in areas of scientific, economical and social norms. The court further stated that public policy allows for and encourages couples to make responsible decisions regarding family planning. This is especially true of recent cases where medical science is able to predict genetic anomalies in advance.

The court found that the physician *in casu* breached his duty to properly inform and advise his patients, which constituted an action for the plaintiff-child based on delict. The physician was directly held responsible to the child for the pain and suffering caused by the physician's negligent conduct. As foundation for this novel claim the court established a new right namely a right of each child to be born as "a complete and functional human being." As main reason for its decision the court advanced the argument that changes in public policy were necessitated by a changing society. Two important principles are derived from this judgment:

- the court handled the calculation of damages for this wrongful life case in the same manner as any other delictual claim for pain and suffering;
- the court recognized the legal basis of the claim.

³³⁷ see thoughts propagating legislative guidance in ch 12.

³³⁸ 60 A.D. 2d 80, 400 N.Y.S. 2d 110 A.D. (1977).

³³⁹ a disease that primarily affects the kidneys, covering it with growths - see ch 11.

On appeal, the case of **Park v Chessin** was combined with the case of **Becker v Schwartz**³⁴⁰ and both the claims were rejected. The Appeal Court of New York gave the following reasons:

- no legally recognized damaged was suffered by the plaintiff since no child has the right to be born as a whole and functional human being;
- damage is not calculable;
- no causal link necessary for accountability was established in either case.

In **Becker v Schwartz**, therefore, the court reverted back to the traditional point of view that no action for wrongful life exists.³⁴¹ *In casu* an action was instituted against a physician who allegedly failed to warn a 37 year old woman of the increased risks involved with a pregnancy at such an advanced age. The general practice at that time in cases where an elderly woman continued with a pregnancy was to make use of an amniocentesis test³⁴² to ensure normal development of the foetus. Such a test was neither performed on Mrs. Becker, nor was she informed of the existence of such a test and as a result she only became aware of the fact that her child suffered from *Down's syndrome*³⁴³ at its birth. An action for wrongful life was instituted on behalf of the child. In refusing the claim the court stated emphatically that calculating damages was impossible since a condition of non-life was unknown to man and therefore could not be used as a comparison to an impaired life.³⁴⁴

In a similar case a year later, **Berman v Allen**,³⁴⁵ basically the same facts resulted in another wrongful life action. Once again the action was dismissed, this time on grounds of policy considerations. The court stated that life, as protected in the American constitution,³⁴⁶ is always more precious than non-existence even when affected by serious shortcomings and disability.

The first case since the **Park** ruling in which a wrongful life action was recognized, was

³⁴⁰ 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).

³⁴¹ the court stated that this action could only succeed if the Legislator would create a right to be born whole and functional.

³⁴² a test where a sample of the amniotic fluid of a pregnant woman is collected and tested for possible abnormalities in the foetus - see discussion in ch 11.

³⁴³ discussed in ch 11.

³⁴⁴ the court did in fact recognize an action for wrongful birth, which was simultaneously instituted in this instance the court allowed damages for the expenses related to the caring and treatment of the afflicted child.

³⁴⁵ 80 N.J. 421, 404 A. 2d 8 (1979).

³⁴⁶ U.S. Constitution, Amendment V, XIV.

Curlender v Bio-Science Laboratories.³⁴⁷ The facts were that the plaintiff's parents made use of the services of a genetic laboratory to run tests in order to be sure that they would be genetically compatible and suitable parents. In spite of these pro-active precautionary measures and subsequent approval of the genetic laboratory, a child was conceived who suffered from the genetically transmitted disease of *Tay-Sachs*.³⁴⁸ The plaintiff alleged that the defendant's conduct was negligent because the laboratory knew that their test results *in casu* were inaccurate, but failed to inform their clients of this fact.

The court found that the laboratory had a duty of care in cases of genetic testing which entailed a duty to correctly communicate the relevant information and test results. This duty is necessary to ensure that parents will be able to make certain informed decisions regarding family planning matters. The damage suffered was the birth of a abnormal child due to the furnishing of incorrect genetic advice. The court based its decision on the factual breach of duty that took place and the reality of the pain and expenses suffered due to this breach: "The reality of the wrongful life claim is that such a plaintiff exists and suffers due to the negligence of others."³⁴⁹

The court limited the award of damages to the pain and suffering experienced by the plaintiff during its short lifespan³⁵⁰ and in addition allowed all special expenses incurred due to the hereditary disease.³⁵¹

The ruling in **Eisbrenner v Stanley**³⁵² reverted back to previous decisions and rejected the wrongful life action instituted by a plaintiff suffering from various birth defects due to the fact that a physician failed to diagnose its pregnant mother with German measles. The physician accordingly failed to warn Mrs. Eisbrenner of the dangers associated with this disease during pregnancy. The court's decision was founded on the fact that the resultant genetic aberrations could not be prevented once it had occurred, except for the possibility of an abortion. The court

³⁴⁷ 106 Cal. App. 3d 811, 165 Cal. Rptr 477 Cal. Dist. Ct. App. (1980).

³⁴⁸ a form of familial spastic paralysis associated with mental retardation, due to genetic damage, commencing in childhood and affecting first the lower limbs, partial blindness occurs during the course of the disease and finally becomes total - see ch 11 for a further discussion.

³⁴⁹ *op cit* p 479.

³⁵⁰ the court decided that the plaintiff's right to damages must be based on her mental and physical condition at birth and her anticipated condition during the predicted life span of four years.

³⁵¹ punitive damages were also justified.

³⁵² 106 Mich. App. 351, 308 N.W. 2d 209 Mich. Ct. App. (1981).

rejected the finding of the Curlender court and declared that the assessment of damages was impossible.

In **Turpin v Sortini**³⁵³ a wrongful life action succeeded once again. In this case a child was born deaf due to the negligent advice given by a physician.³⁵⁴ The plaintiff's older sister also was born deaf but this fact was only established after the birth of the plaintiff who suffered from the same hereditary impairment³⁵⁵ In its finding the court relied on common law principles and declared that these type of actions should be approached like any other malpractice suit. The damage award was limited to extraordinary expenses and medical costs during the plaintiff's lifespan. General damages were rejected on two grounds: plaintiff did not suffer an injury by being born deaf as opposed to not being born at all; even if an injury was perceived, it would be impossible to assess general damages in a fair, unspeculative manner.

Saltz³⁵⁶ writes that **Turpin** decision agreed with the damages formula used in **Harbeson**,³⁵⁷ rejecting the argument that the recognition of the tort disavows the sanctity of human life.

"The child's need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority. Rather than saddling the parents or the state with these expenses, the court placed the burden 'on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training'.³⁵⁸

In **Harbeson v Parke-Davis Inc.**³⁵⁹ Mrs. Harbeson was under medication for epilepsy and therefore used the drug *Dilatin*. In order to make a responsible procreative decision she consulted with three different doctors for advice on the possible effects the drug might have on her planned pregnancy. She was assured that the continuation of her medication would not

³⁵³ 31 Cal. 3d 220, 643 P. 2d 954, 182 Cal. Rptr. 337 (1982).

³⁵⁴ the physician of the plaintiff's parents failed to diagnose deafness in her older sister and accordingly misadvised plaintiff's parents not to have any concerns for possible deafness in future children.

³⁵⁵ various tests were previously done on the older sister, but the physician could not establish with certainty that the child was indeed deaf and gave incorrect advice that the child wasn't deaf, he gave the go ahead for the second child to be conceived without higher risk of deafness.

³⁵⁶ 1986. Better off never born? *American Bar Association Journal* (72), 46.

³⁵⁷ *ie* medical and educational expenses, but no general damages.

³⁵⁸ *op cit* p 47.

³⁵⁹ 98 Wash. 2d 460, 656 P. 2d 483 (1983).

lead to any serious additional risks in the pregnancy. She was however informed of a small possibility of temporary, insignificant anomalies in the children due to the use of the drug during pregnancy. Mrs. Harbeson, acting on the reassuring expert advice given her by the physicians, continued with the pregnancy. *Ex post facto* she learned that both her children suffered from *fetal hydantoin syndrome*³⁶⁰ caused by the use of *Dilatin* during pregnancy.³⁶¹ The court made use of the traditional elements of delict and allowed the action. Damages were limited to extraordinary expenses such as medical bills *et cetera* and no award was made for general damages because of the impossibility of comparing no-existence with handicapped life.

Van der Hoef³⁶² writes on the **Harbeson** case and comments:

"The court approached the question from a concept of duty: that is, the court found the injury to be a product of a breach of duty. In essence, the court found that the parents had the right to avoid the birth of a deformed child, and a breach of the duty to protect that right led to the injury, which was the birth of a deformed child. But this reasoning puts the cart before the horse. 'Duty' is shorthand for the conclusion that the defendant has a legal obligation to protect the plaintiff from any of the defendant's actions that risk injury to the plaintiff. Thus, crucial to the concept of duty is the prior determination that the defendant's actions risk injury to the plaintiff."³⁶³

Van der Hoef³⁶⁴ offers two reasons why he is of the opinion that damages in wrongful birth claims lack the certainty of damages in claims for the death or injury of an existing child: impossibility of establishing damages by means of comparison; and the uncertainty in the measure of damages in wrongful birth claims.

Again in **Procanik v Cillo**³⁶⁵ the wrongful life action succeeded. The facts, very similar to those in the **Gleitman** case, were that a physician acted negligently in respect of a pregnant patient with German measles. The court approached the facts with a perspective that was most

³⁶⁰ at 486: "This resulted in their experiencing mild to moderate growth deficiencies, developmental retardation, wide-set eyes, later ptosis (drooping eyelids), *hypoplasia* of the fingers, small nails, low-set hairline, broad nasal ridge and other physical and developmental defects." - see ch 11.

³⁶¹ a substantially more serious condition than ever expected by Mrs. Harbeson, based on prior medical advice.

³⁶² 1983. Washington Recognizes Wrongful Birth and Wrongful Life - A Critical Analysis - Harbeson v. Parke-Davis. *Washington Law Review* (58), 649.

³⁶³ *op cit* p 660.

³⁶⁴ *op cit* p 661.

³⁶⁵ 97 N.J. 339, 478 A. 2d 755 (1984).

beneficial to the interests of the child and found negligent conduct on the side of the physician by solely looking at the birth of the physically impaired plaintiff.³⁶⁶ The court assumed that the parents would have obtained an abortion if they were timely notified of the expected complications. Special damages were awarded to both the child in its wrongful life action and the parents in their wrongful birth action.³⁶⁷

Fain³⁶⁸ reports that the **Procanik** court explained that its decision to allow recovery for extraordinary medical expenses was based on the needs of the living in bearing the burden of their condition, not on a belief that non-existence is preferable to an impaired life. The court rejected the minor's claim for general damages for pain and suffering because the minor plaintiff "never had a chance of being born as a normal, healthy child."³⁶⁹

The final American wrongful life case that will be discussed in this study is that of **Azzolino v Dingfelder**.³⁷⁰ In this case a woman of 36 years became pregnant without any advise from her physician as to the increased risks associated with foetal development at such an advanced age. No suggestions were made to her for an amniocentesis tests to be carried out. The parents learned with shock of their child being born with *Down's syndrome*. They persisted that they would have obtained an abortion if they knew about the abnormality. Taking into account the judgments of **Turpin**, **Harbeson** and **Procanik**, the court awarded special damages for extraordinary costs related to the genetic impairment.

³⁶⁶ *res ipsa loquitur*.

³⁶⁷ in the wrongful birth action all additional medical expenses until the child's age of majority were compensated - the child's damage award was extended beyond its age of majority.

³⁶⁸ 1987. Wrongful Life: Legal and Medical Aspects. *Kentucky Law Journal* (75), 585.

³⁶⁹ the court at 764 indicated that: "the award of extraordinary medical costs to the child or the parents when combined with the right of the parents to assert a claim for their own emotional distress, comes closer to filling the dual objectives of the tort system; the compensation of injured persons and the deterrence of future wrongful conduct."

³⁷⁰ 322 S.E. 2d 567 N.C. App. (1984).