CHAPTER 8

Wrongful Life Actions

1. Introduction

In this chapter wrongful life actions are discussed in detail.[1] All the relevant aspects relating to this specific type of action are placed under scrutiny. Note that various difficulties concerning this action are identified, solutions are suggested and references are made to court judgments concerning specific aspects. The varying legal positions obtaining in the United States of America, England, Israel, the Netherlands and South Africa regarding this cause of action are considered.

De Vries and Rifkin[2] mention that although parents' claims[3] have been recognised, the action of children[4] have been almost unanimously rejected in the past. According to them, a unique challenge often found when dealing with wrongful life claims, is the general inability of judges and legal commentators to differentiate between pre-conception and post-conception negligence.

Although four states[5] in the United States of America, Israel and France have already recognised wrongful life actions, the vast majority of courts, scholars and legal critics condemn this action on various different grounds.[6]

2. Background

2.1 Typical wrongful life events

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1 see research proposal for a definition of wrongful life.

2 1985. Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the birth-related torts. **The Forum**, 211.

3 *ie* wrongful birth actions and wrongful conception actions.

4 *ie* wrongful life actions.

5 California, Washington, New Jersey and Colorado (North Carolina) - see *infra*.

6 in **Gildiner v Thomas Jefferson University Hospital**, 451 F. Supp. 692 (1978), the court renounced the basis of the claim as a: "Fascist-Orwellian Societal attitude of genetic purity", whilst another strongly worded rejection was formulated in **Dumer v St. Michael'sHospital**, 69 Wis. 2d 766 (1975): "Hitlerian elimination of the unfit".

Stolker[7] mentions various types of factual circumstances that in recent years have induced wrongful life litigation in the United States of America:

- a negligent medical procedure or treatment performed on the mother *before* conception;[8]
- negligent genetic/ reproductive advise by a physician or genetic counsellor *before* conception;[9]
- negligent genetic or reproductive advise by a physician or genetic counsellor *during* pregnancy;[10]
- an unsuccessful sterilization operation on a patient desiring to avert the birth of a handicapped child;[11]
- careless prescription of incorrect medication during pregnancy;[12]
- other careless and/ or negligent conduct during or before pregnancy.[13]

It is clear that Collins[14] agrees only in part with the exposition of Stolker and classifies the different types of wrongful life causes of action in the following way:

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7 1994. Wrongful Life: The Limits of Liability and Beyond. **International and Comparative Law Quarterly** (43), 521.

8 **Renslow v Mennonite Hospital** 67 Ill. 2d 348, 367 N.E. 2d 1250 (1977), where a faulty blood transfusion was given the mother nine years before conception and **Albala v City of New York** 54 N.Y. 2d 269, 445 N.Y.S. 2d 108, 429 N.E. 2d 786 (1981), where a woman's uterus was negligently perforated four years before conception.

9 **Park v Chessin** 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977) where the patient suffered from a kidney disease and **Moores v Lucas** Fla. App. 405 So. 2d 1022 (1981) where a child suffering from *Larsen's syndrome* was born - for a discussion on this disease see ch 11.

10 **Procanic v Cillo** 97 N.J. 339, 478 A. 2d 755 (1984) where the plaintiff suffered from *rubella syndrome* and **Berman v Allan** 80 N.J. 421, 404 A. 2d 8 (1979) where the child suffered from *Down's syndrome* - see ch 11 for medical conditions.

11 in **Speck v Finegold** 497 Pa. 77, 439 A. 2d 110 (1981), the plaintiff was eventually born after a failed abortion and suffered from *neorofibromatosis* - see ch 11 for a discussion of this condition.

12 **Grodin v Grodin** 102 Mich. App. 396, 301 N.W. 2d 869 (1980) where a child was born with brown teeth due to its mother's intake of a specific medicine during pregnancy.

13 **Bergstreser v Mitchell** 577 F. 2d 22 (1978) where a carelessly performed Caesarean section was performed.

14 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

- so-called "dissatisfied life" cases;[15]
- improper sterilization procedures;[16]
- unsuccessful abortions;[17]
- alternative forms of pre-conception negligence, such as where parents are denied the opportunity to obtain information on the possibilities of bearing a deformed child;[18]
- post-conception negligence whereby parents are denied the prerogative of avoiding their child's birth.[19]

Berenson[20]agrees that the negligent conduct of a physician in these instances may have

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15 **Zepeda v Zepeda** 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963); **Slawek v Stroh** 62, Wis. 2d 295, 215 N.W. 2d 9 (1974); **Pinkney v Pinkney** 198 So. 2d 52 Fla. Dist. Ct. App. (1967); **Williams v State** 18 NY 2d 481,276 NYS 2d 885, 223 NE 2d 343 (1966) - see further discussion on dissatisfied life cases *infra*.

16 **White v United States** 510 F. Supp. 146, 149 D.Kan. (1981); **Speck v Finegold**; **LaPoint v Shirley** 409 F. Supp. 118 Tex. (1976); **Elliott v Brown** 361 So. 2d 546 Ala. (1978); **Bowman v Davis** 48 Ohio 2d 41, 356 N.E. 2d 496 (1976); **Beardsley v Wierdsma** 650 P. 2d 288 Wyo. (1982); **Clegg v Chase** 89 Misc. 2d 510, 391 N.Y.S. 2d 966 (1977).

17 **Speck v Finegold**; **Stills v Gratton** 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 Cal. Ct. App. (1976).

18 **Turpin v Sortini** 182 Cal. Rptr. 337 (1982); **Park v Chessin** 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977); **Becker v Schwartz** 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978); **Curlender v Bio-Science Laboratories** 106 Cal. App. 3d 811 (1980); **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983).

19 **Eisbrenner v Stanley** 106 Mich. App. 351, 308 N.W. 2d 209 Mich Ct. App. (1981); **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967); **Berman v Allan**; **Becker v Schwartz**; **Greenberg v Kliot** 47 A.D. 2d 765, 367 N.Y.S. 2d 966 (1975). 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978); **Johnson v Yeshiva Univ.** 396 N.Y. 2d 818, 364 N.E. 2d 1340, N.Y.S. 2d 647 (1977); **Karlsons v Guerinot** 57 App. Div. 2d 73, 394 N.Y.S. 2d 933 (1977); **Greenberg v Kliot** 47 A.D. 2d 765, 367 N.Y.S. 2d 966 (1975); **Gildiner v Thomas Jefferson University Hospital** 451 F. Supp. 692 Pa. (1978); **Smith v United States** 392 F. Supp. 654 N.D. Ohio (1975); **Phillips v United States** 508 F. Supp. 544 D.S.C. (1981); **Nelson v Krusen** 678 S.W. 2d 918 Tex. (1984); **Dumer v St Michael's Hospital** 69 Wis. 2d 766, 233 NW 2d 372 (1975), because of a lack of information.

20 1990. The Wrongful Life Claim - The legal dilemma of existence versus non-existence: "To be or not to be" **Tulane Law Review** (64), 895.

occurred either before[21] or after[22] conception.[23] He believes that wrongful life actions can be further divided into two general categories, namely:

- where a physician was actually aware of a reasonable prospect of a congenital disorder because of specific prior knowledge of the patient or the family's medical history of the patient,[24] but failed to warn or inform[25] his patient;
- where elements of a potential congenital disorder are present but not diagnosed, either because the physician did not appropriately use diagnostic techniques or failed to properly interpret the tests.[26]

According to Berenson[27] cases of impaired births *following sterilization operations* basically fall into two categories. This classification deals with the main reason or motivation for parents' decision to refrain from having children:

- cases where a sterilization procedure is performed merely as a convenience to parents for reasons such as to limit the size of their family, personal, religious, financial or health reasons, *et cetera* (these parents generally have no reason to suspect any prospect of a defective child);[28]
- sterilization because of actual knowledge or a suspicion of a possible defective or

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21 a failed sterilization operation in concurrency with other factors can also be part of a wrongful life action - *eg* where genetically high risk parents decide not to have any children in order to cancel out the possibility of bearing affected offspring.

22 *eg* where parents, aware of the fact that their unborn child inherited a dangerous family disease decides to abort the affected foetus and the subsequent abortion is unsuccessful due to negligent conduct of a physician.

23 a general form of negligence often found in these cases is where a physician, before or after conception, fails to properly inform his patients of the possible risks of hereditary disease or of available genetic tests and/ or the options of sterilization and abortion.

24 reasonable foresee-ability of the birth defect.

25 of possible genetic tests.

26 it is reported ibid: geneticists estimate that even with proper prenatal diagnosis, 2-4% of all children will still be born with serious birth defects.

27 *op cit* p 897.

28 there are two types of abortion procedures: an "therapeutic" abortion is to prevent the birth of a deformed or handicapped child, thus to prevent harm to the child and in the child's best interests; a "eugenic" abortion is performed to prevent the birth of a child, healthy or not, in preventing harm to the mother and therefore in the interest of the mother's health or her freedom of choice.

impaired birth.[29]

Berenson[30] shows some points of similarity between litigation based on wrongful conception and wrongful life with regard to sterilization. One similarity is that statutory provisions regulate both these actions. Many states have statutes that limit or prohibit either or both of these actions[31]. Berenson believes that inconsequent application of legal premises and unsound regulations in many of these statutes cause a great deal of uncertainty and often have unjust consequences. Idaho state,[32] for example, prohibits any claims based on the negligent prevention of an abortion but does not bar claims based on negligence that results in an unwanted conception. Therefore an action based on a negligently performed sterilization procedure is permitted,[33] but a claim for the negligent interpretation of an amniocentesis is not.[34]

Fain[35]states that wrongful life is basically founded on the same factual circumstances leading to wrongful birth litigation, with the difference that the unwanted child itself is the plaintiff. The injury complained of is being born to parents who did not want impaired children and accordingly lack the necessary commitment and love, usually expected from parents.

Another author[36] argues convincingly that wrongful life and birth actions are a logical and necessary development in tort law designed to protect the constitutional rights of parents.[37] It is reported that these claims also protect the individual's interests in quality health care, since possible liability ensures that physicians exercise due care in prenatal counselling and provide parents with the information necessary to make informed procreative decisions.[38]

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29 *ie* a therapeutic abortion.

30 *op cit* p 900.

31 see ch 10 dealing with these so-called "wrongful birth statutes".

32 **Idaho Code** § 5-334 (Supp. 1989).

33 *ie* a typical wrongful conception action.

34 *ie* a typical wrongful life action.

35 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 588.

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

37 *ie* the right to make procreative decisions - see ch 3 and 9.

38 *op cit* p 2022.

2.2 Medical advances

Fain[39] agrees with many others[40] that advances in medical science lie at the heart of wrongful life litigation. Advanced knowledge improves the physician's ability to detect problems with foetal development and the application of various techniques[41] accordingly lead to ever broadening fields of speciality in genetic counselling.[42] De Vries and Rifkin[43] also believe that the well known **Roe**[44] decision, together with advances in medical science have led to a flood of new litigants. Faircloth[45] writes that most commentators[46] would only credit technology with giving rise to the wrongful life and wrongful birth causes of action because they both predicate liability on the failure to diagnose genetic defects using genetic testing and prognostication devices, while wrongful pregnancy or wrongful conception actions involve somewhat more basic medical knowledge.

2.3 Duty to Inform

There lies a legal duty on all physicians and medical officers to fully inform their patients about the nature and extent of any medical procedure planned for the specific patient, in order for the

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39 *op cit* p 585.

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- Teff, H. 1985. The Action for Wrongful Life in England and The United States. **International and Comparative Law Quarterly** (34), 423.
- Collins, E. F. 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.
- **Park v Chessin**, 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (A.D. 1977).
- Blackbeard, M. 1991. Die Aksie vir Wrongful Life: To be or not to be. **THRHR** (54), 57.
- Brownlie, S.1985. Wrongful Life: Is it a viable cause of action in South Africa? **Responsa Meridiana** 18.
- Strauss, S. A. 1991. **Doctor, patient and the law** JL van Schaik (3rd edition).
- Andrews, L.B. 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 149.

41 such as amniocentesis and ultrasonography - see ch 11 for a detailed discussion on these procedures.

42 the more medical scientists know about genetic diseases, the more comprehensive patients should be informed.

43 *op cit* p 207.

44 **Roe v Wade** 410 U.S. 113 (1973) - see discussed *infra* and ch 3.

45 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 545.

46 see *supra.*

patient to make a rational choice on the matter and give the required informed consent.[47] The duty to inform is extremely relevant to most wrongful life actions and has significance for other forms of related actions as well.[48]
Teff [49] declares:

> "...the true rationale of 'wrongful life' ability is the parents' right to make a properly informed decision."

It should be remembered that in a typical wrongful life action a disabled or genetically impaired child does not assert that the physician-defendant's medical negligence *caused* his detrimental condition. The plaintiff rather alleges that the defendant breached a duty to properly inform its parents (in due time)[50] of the existing genetic defect in their child, or of a greater than normal risk of abnormality in their pregnancy. Since it can be generally assumed that parents would act in their child's best interests,[51] the plaintiff suggests that upon receiving this legally required information from the defendant its parents would have prevented[52] the pregnancy or would have ended the pregnancy by obtaining an abortion. Thus, had the defendant not breached his duty to inform, the handicapped child would not have been born and would not have to suffer from impairments until the end of its often short and painful life.

Collins[53] argues that a presumption that parents generally act in the best interests of their child should allow courts to view the informed consent of the parents[54] as the consent of the child.[55]

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47 see ch 5.

48 Informed consent is also relevant to wrongful conception and wrongful birth actions - see ch 6 and 7.

49 1985. The Action for Wrongful Life in England and The United States. **International and Comparative Law Quarterly** (34), 423.

50 *ie* while a legal abortion may still be procured - see ch 3 for abortion regulations in the various jurisdictions.

51 Collins *op cit* p 685: "The presumption that parents act in the best interests of their child would allow courts to view the consent of the parents as the consent of the child".

52 by implementing contraceptive measures *eg* sterilization.

53 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 685.

54 for medical intervention in a foetus, such as in-uterine treatment or genetic engineering.

55 in obtaining an abortion.

It is therefore of vital importance that physicians fully inform their patients of the medical procedures intended by them, the results of tests that have been done and also any other relevant facts concerning the health or reproductive plans[56] of patients, in order to escape liability.

2.4 Support for liability

Teff[57] mentions that there is growing support from the public for physician accountability and compensation in cases of medical malpractice. A possible reason for this phenomenon is the ever increasing awareness under the public of the advances in genetic technology and the subsequent realistic possibilities of performing timely and successful medical procedures:

> "We are no longer content to view as fate abnormalities preventable by modern screening techniques."[58]

De Vries and Rifkin[59] suggest that wrongful life actions should be based on the theory that an unborn foetus has legally recognized rights. According to them the acceptance of such a revolutionary right is still not widely acknowledged[60] in legal circles, since similar rights did not exist[61] in common law.[62] The first court in the United States of America that was prepared to acknowledge the existence of foetal rights was **Bonbrest v Kotz**.[63]

3. Nature of plaintiff's right

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56 such as dangerous genetic genes detected in the patient or known hereditary diseases in the patient's family history.

57 *op cit* p 424.

58 *ibid.*

59 *op cit* p 212.

60 **Turpin v Sortini; Gleitman v Cosgrove.**

61 it is submitted that such progressive rights did not exist in common law because medical science and genetic science were still in its infancy - it is my submission that legal development should keep pace with scientific growth.

62 according to common law legal personality started at birth - see ch 3.

63 65 F. Supp. 138 (D.D.C. 1946): "The law is presumed to keep pace with the sciences...".

3.1 Plaintiff's legal standing[64]

Bodgan[65] reports that in wrongful life actions the plaintiff is a child who, through a guardian or a curator *ad litem* sues either a physician, hospital or laboratory for negligently causing the plaintiff child to be born with defects.

In South African law an unborn child does not have any legal rights on which to base an action for a delict committed against it while still in its mother's womb.[66] The application of the nasciturus fiction,[67] however, does propose a solution, as discussed by Davel and Jordaan:[68]

> "...in certain circumstances, interests or potential interests are kept open, dependant on the live birth of the child involved. This fiction thus takes cognizance of the fact that the nasciturus will be a legal subject after birth. By using the fiction, the interests of the potential legal subject are kept in abeyance. As soon as the nasciturus is born alive, the benefit concerned is then allocated to him or her."[69]

In spite of the initial application of the nasciturus fiction in the law of succession only, the application has been broadened by the South African courts to also include delictual matters.[70]

3.1.1 Alternative to fictions

Joubert[71] argues that the normal principles of the law of delict should be applied to each set of facts. When applied to wrongful life circumstances, one can argue that because the wrongful and culpable conduct of a tortfeasor is separated from the resultant harmful consequence by time and space, one could further reason that once a plaintiff is born and

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64 see ch 3 concerning the beginning of legal subjectivity.

65 1983. Wrongful Birth: Who Owes What to Whom and Why? **Washington and Lee Law Review** (40), 123.

66 Lind, C. 1992 **The South African Law Journal**, 440.

67 *"nasciturus pro iam nato habetur quotiens de commodo eius agitur"*.

68 1995. **Law of Persons**, 12.

69 the "benefit" spoken off in this quotation in reference to the wrongful life debate, will be the right to litigate based on wrongful conduct that occurred before its birth.

70 **Chisholm v East Rand Proprietary Mines Ltd** 1909 TH 297 (2), 301; **Pinchin v Santam Insurance Co Ltd** 1963 (2) SA 254 (W) (3); and **Christian League of Southern Africa v Rall** 1981 (2) SA 821 (O), 4.

71 1963. THRHR, 295.

receives legal personality he only then is actually injured. Although the infliction of the damage causing event took place while still a foetus, the plaintiff only as a person with legal subjectivity, is in the position to suffer injury and accordingly institute an action to rectify the situation.

It is submitted that this solution of Joubert for the problems relating to the lack of legal subjectivity of a foetus injured before birth, makes perfect sense. It has the benefit of not requiring support from a fiction. An additional advantage of this reasoning is that *any* unlawful conduct can be accommodated,[72] whereas the application of the nasciturus rule or fiction is restricted to wrongful conduct that occurred only *after* conception.[73]

3.2 Development of prenatal torts[74]

Collins[75] writes on the interesting development of the history of prenatal torts in the United States of America. As early as 1884 the prenatal injury case of **Dietrich v Inhabitants of Northampton**[76] came before the courts in which a claim for *wrongful death*[77] was denied because a foetus was found not to be a "separate legal entity" when the injury occurred. Much legal development concerning prenatal rights took place in the years following this decision.

Collins[78] reports that **Bonbrest v Kotz**[79] is generally considered to be a pivotal American case

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72 incl conduct that took place *before* conception (when viewing prenatal torts in this light it does not matter when the injury was inflicted, as the moment all elements of delict are present an action arises).

73 see ch 3.

74 in the United States of America (where the bulk of wrongful life litigation occurs) - indicative of a global trend towards recognition of foetal rights.

75 *op cit* p 678.

76 138 Mass. 14 (1884).

77 wrongful life and wrongful death cases (such as **Verkennes v Corniea** 229 Minn. 365, 38 N.W. 2d 838 (1949), which was the first court to allow a wrongful death action of a viable, but stillborn foetus) have an interesting touching-point in this regard - in both discussions it is of vital importance whether foetal rights are recognized and to what extent the interests of unborn children are protected.

78 *op cit* p 679.

79 65 F. Supp. 138 D.D.C. (1946).

in prenatal tort law. Here the court introduced *viability* of the foetus as a decisive factor in determining whether an injury was in fact incurred when dealing with prenatal tort claims. It is conveyed[80] that many later courts, however, in reaction to this criterion found that viability was not only difficult to determine, but also an irrelevant fact to prove in terms of the establishment of causation. The first court to reject this premise was **Kelly v Gregory**,[81] where it was judged that a child is a biological entity separate from it's mother from the moment of conception.

Collins discloses[82] that by 1984, of the 36 jurisdictions that actually allowed a cause of action for prenatal torts, 17 did not any longer require a plaintiff to be viable at the time of injury.[83] She notes that it seems as if the recent trend is to, at least in principle, grant an action to prenatally injured plaintiffs.[84]

Further development in prenatal torts took place when courts allowed even *pre-conception* actions.[85] The first court that entertained this radical concept was **Renslow v Mennonite Hospital**,[86] where a mother received blood from an improper blood type during a transfusion years before conception which resulted in the eventual birth of a handicapped child some time later.

It is submitted that challenges associated with pre-conception actions[87] are very similar to obstacles that are often experienced with wrongful life litigation in general.[88] It would seem as

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80 *ibid.*

81 282 A.D. 542, 125 N.Y.S. 2d 696 N.Y. App. Div. (1953).

82 *op cit* p 680.

83 if a court demands that a foetus be viable at the time of injury, a foetus therefore has to be developed up to the stage of viability in order to be eligible for recovery.

84 that is 'traditional prenatal injuries' - according to Collins *ibid* nearly all jurisdictions disallow wrongful life actions.

85 where it is acknowledged that a damage causing event could happen even before the plaintiff's conception - other courts support a "right to be born as a whole functional human being", such as the court in **Turpin v Sortini**, also discussed in **Speck v Finegold**; **Park v Chessin**; **Becker v Schwartz**; **Curlender v Bio-Science Laboratories**; **Smith v Brennan** 31 N.J. 353, 364 (1960); **Sylvia v Gobeille** 220 A. 2d 222, 224 (1966).

86 67 Ill. 2d 348, 367 N.E. 2d 1250 (1977).

87 some of the most prominent fears are concerns of fraudulent actions, seemingly unlimited liability, ever increasing litigation *etc.*

88 see *infra* typical obstacles encountered in wrongful life actions.

if one could derive from the abovementioned judgments that there is principally a right to sue for any wrongful negligent act committed before or after conception.

It should be remembered that no all consider the wrongful life plaintiff to have suffered an injury. Bey-Berkson[89] writes that judicial recognition that a disabled life is an injury would harm the interests of the handicapped and it is suggested that a determination of injury in such cases hinges upon personal views of the intangible value of life.[90]

3.2.1 Injury free formation

Collins[91] believes that courts in their quest to find an acceptable legal foundation for wrongful life actions, have overlooked the option of granting a child the right to an injury free formation.[92] Based on this supposition all requirements of prenatal and pre-conception injury are dealt with, but without the need of support from a somewhat unfounded right "to be born free from reasonably foreseeable defects."[93] This right as proposed by Collins should vest only at birth[94] and any recovery by the child-plaintiff claimed for injury resulting from a breach of this right should depend on the child's ability to prove whether its formation was wrongfully altered by another's conduct or not.[95] A foreseeable problem with this approach, is that there apparently is no action for a child with a naturally occurring defect.[96]

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89 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 69.

90 see points of criticism raised against wrongful life *infra.*

91 *op cit* p 690.

92 this entails that all human life should have a right to develop unfettered from the stage of plantation/ conception until birth.

93 see discussion *infra.*

94 at the stage, when according to traditional law of persons-principles, an individual receives legal subjectivity.

95 by changing the natural course of the child's formation.

96 It is submitted that, although a person could suffer from a naturally occurring defect, wrongful life or birth liability could still follow. This would be the case where parents knew of a possible genetic disorder that might affect their future offspring and specifically did tests to learn whether this was the case or not. If a physician negligently performs such tests and the parents continue with their family with the result that a handicapped child is born, the physician should be held accountable for wrongful birth and/ or wrongful life, even though the disorder occurred "naturally".

Collins[97] therefore propagates the "right to injury free formation"[98] to serve as an alternative basis for wrongful life and even wrongful death cases, as opposed to current inconsistent and often indefensible solutions used to explain liability in these specific prenatal injury cases. In all these claims[99] courts grant relief on the basis that parents have a right to make their own reproductive decisions and accordingly also the right to determine the form of the child to whom they give birth.[100]

According to Collins[101] all *wrongful formation* causes of action are principally based on the following factual situations: improper sterilization procedures; unsuccessful contraceptive precautions; unsuccessful abortions; or situations where physicians negligently fail to provide parents with information which would allow them the option to avoid conception or terminate pregnancy.[102]

3.2.2 Recovery for wrongful formation

With regard to damage awards in wrongful formation cases, Collins writes[103] that recovery can be limited by legal doctrines such as contributory negligence; comparative negligence; and public policy considerations. She believes that the following public policy factors should be taken into account before finally determining the scope of recovery to parents-plaintiffs:

- encouraging an attitude of reverence for human life;
- holding parents responsible for the care of their children;
- improving quality of human existence;
- protecting procreative rights of individuals;
- holding tortfeasors liable for proximately caused damage; and
- encouraging competent medical care for all.

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97 *op cit* p 691.

98 in a general sense the term "wrongful formation" covers cases in which an individual seeks to assert his or her right to prevent the formation of a child, to terminate the formation of a child, or to alter the formation of a child - an action in wrongful formation, therefore, will lie for a violation of an individual's procreative rights (see ch 2).

99 basically all prenatal claims.

100 with regard to wrongful life actions where the plaintiff is the injured child itself, however, it is submitted that this premise will only be true if one believes that the plaintiff-child derives its rights from the parents' rights to reproduction.

101 *op cit* p 693.

102 identical to that of wrongful life actions.

103 *op cit* p 695.

Three possible approaches that could be used when awarding damages in *wrongful formation* actions are identified:[104]

- application of traditional tort principles in conjunction with the benefit rule;[105]
- the traditional viewpoint of awarding all suffered damage;[106]
- damages limited to certain heads of damage.

3.3 Rights of the newborn

She reports that although most courts agree on the fact that a child can not state its wrongful life cause of action based on its status at birth, they disagree on whether a child can sue because of its rights in existence and form. Basically four types of rights are identified[107] that can be granted to a newborn in order to provide it with an interest in its existence and form. A prenatal life can be given the:

- right to unfettered development;[108]
- right to an injury free formation;[109]
- right to be born as a whole functional human being;[110]
- possible future right to be born free from defects which, with reasonable care, could have been treated and rectified before the child's conception or birth.[111]

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104 Collins *op cit* p 696.

105 whereby any benefits derived from the damage causing event is taken into account when calculating damages - according to Collins the "benefit rule" is fundamentally rather a public policy doctrine than a rule of damages, she writes that courts have devised a case-by-case system of assessing damages: "Under benefit-offset rule the courts acknowledge an individual's procreative rights, but they limit an individual's recovery." *op cit* p 697 - see *infra* a detailed discussion on the benefit rule.

106 followers of this viewpoint often consider the benefit rule as an improper application of the **2nd Restatement of Torts** § 920 (1979).

107 *op cit* p 704.

108 subject to ruling of **Roe v Wade** - allowing abortion up to the second trimester of development, therefore from the 3rd trimester onwards.

109 as supported by Collins *ibid* - see *supra.*

110 as proposed by the **Turpin v Sortini**, see also the cases of **Speck v Finegold** and **Park v Chessin**.

111 these prenatal operations and treatments will be made possible by (not so distant) future advances in foetal medicine - see ch 11.

In addition to the right to an injury free formation, Collins[112] supports the viewpoint that courts should recognize a cause of action for *wrongful impairment*.[113] In order to succeed with such a claim, a plaintiff will have to prove that:

- an impairment now exists because of an alteration in the natural course of a child's prenatal development; or
- an impairment now exists because specific conduct denied a child's parents the opportunity to treat the child for curable defects before its birth;
- a physically or psychologically impaired child exists because a certain wrongful conduct denied the parents an opportunity either not to conceive or to terminate the foetal development of their handicapped child through abortion.[114]

She[115] believes that the courts are likely to recognize a child's rights because the quality of the child's form is at issue and not the sanctity of life, and because damages can be measured in terms of treatment versus non-treatment rather than in terms of existence versus non-existence.

> "Once the courts grant a child the right to be born free from reasonably treatable, prenatal defects, the actions for wrongful form and for wrongful alteration can be dealt with under the single cause of action of wrongful impairment."

In conclusion, Collins[116] suggests that courts should consider the following suggestions:

- they should recognize a cause of action for wrongful impairment;
- courts should recognize a child's right to develop from implantation until birth;
- finally, courts should recognize a wrongful formation cause of action which would cover in-uterine treatment cases as well as cases presently heard under wrongful conception, wrongful pregnancy and wrongful birth.

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112 *op cit* p 707.

113 he prefers to use this collective term which is broad enough to include pre-conception torts, pre-natal torts, wrongful life cases and even futuristic in-uterine treatment cases.

114 the child's action would be based on it's right to be born free from negligently inflicted injuries (of reasonably treatable defects), or to be born whole and functional.

115 Collins *ibid.*

116 *op cit* p 708.

3.4 A right to be born healthy?

Although the recognition of legal rights of unborn children is a step in the right direction for wrongful life success, Teff[117] argues that courts still have to go further and recognize a right "to be born without the handicap of a readily preventable defect".[118] He believes this to be true since the basic premise of wrongful life actions is to prefer a condition of non-existence to a life as a handicapped or genetically crippled person. It should be remembered that the plaintiff in a wrongful life action does not ask for the remedy of specific performance in the failed genetic analysis contract and subsequent abortion procedure.[119] The plaintiff rather seeks compensation for the damages resulting from the relevant breach of contract or delict.[120] Teff[121] believes that at least three courts[122] in the United States of America that have already recognized this right.

3.5 A right not to be born?

Steinbock and Ron McClamrock[123] remarks that "wrongful life suits do not claim merely that the infant plaintiff was harmed before birth. They claim that the child was harmed by being born, implying an interest in not having been brought into existence. Someone can be said to have an interest in not being born if his or her existence is inexorably and irreparably such that life is not worth living."[124]

Steinbock and Ron McClamrock[125] believes that the right not to be born is "a compendious way of referring to the plausible moral requirement that no child be brought into the world unless

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117 *op cit* p 424.

118 note the similarity with Collin's proposed right to an injury free formation.

119 *ie* death.

120 *ie* handicapped life.

121 *ibid.*

122 **Park v Chessin** "the fundamental right of a child to be born as a whole, functional human being."; **Curlender v Bio-Science Laboratories**; **Turpin v Sortini**.

123 1994. When is birth unfair to the child? **Hastings Center Report** (24:6), 15.

124 *ibid.*

125 1994. When is birth unfair to the child? **Hastings Center Report** (24:6), 15.

certain very minimal conditions of well-being are assured."[126]

3.5.1 In a tort framework

Foutz[127] believes that a successful claim for wrongful life could fall within the ambit of the traditional tort framework.[128] With special reference to the case of **Park v Chessin**[129] and the subsequent case of **Becker v Schwartz**,[130] the author specifically looks at the most troublesome elements of *duty* and *causation*. He explores various theories that could be implemented for holding a physician liable under wrongful life[131] and illustrates the basis of wrongful life as "the right not to be born."[132] Only the two most challenging elements of are tort considered:

3.5.1.1 Duty

The proof of the existence of a legal duty of care towards the wrongful life plaintiff is a prerequisite for the success of the ensuing action and should, according to Foutz, be derived from plaintiff's right to an informed decision.[133] Foutz,[134] in adapting the doctrine of informed consent to found the child's claim for wrongful life, proposes two different approaches in which this application is possible:

Firstly, that there is an individual and separate duty owed to the plaintiff-child itself.[135] A

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126 *ibid.*

127 1980. Wrongful Life: The Right not to be born. **Tulane Law Review** (54), 480.

128 the American traditional tort framework is briefly discussed with reference to wrongful conception actions in ch 6 - contrary to the opinion of the **Gleitman** court, Foutz feels that a wrongful life action can be allowed within the traditional tort framework and without subverting public policy in favour of human life.

129 which was the first court of appeal to recognize a wrongful life action.

130 where the court found that the plaintiff failed to state a cause of action.

131 in addition to the discussion of these tort elements, he also mentions other questions that often arise: did the child actually suffer a legally cognizable injury, can damages be legitimately measured and what public policy concerns are mentioned when these actions are allowed.

132 *op cit* p 488.

133 if a defendant does not act in accordance with a legal duty his conduct could be marked as wrongful.

134 *op cit* p 489.

135 it is submitted that the occurrence of a wrongful act against an unconceived plaintiff is no barrier, as the right to sue for the breach of a duty to the unborn foetus was established in **Bonbrest v Kotz**.

physician therefore owes a duty to the child similar to but separate from the duty that is owed to its parents.[136] Secondly, that a derivative duty towards the plaintiff-child exists which is construed from the physician's primary duty of care towards his patients, which are the parents of the plaintiff. The duty of care primarily owed to the parents is thus adapted and subsequently projected to the child.[137]

3.5.1.2 Causation

Although the element of causation sometimes causes concern with courts dealing with wrongful life actions, Foutz[138] believes that if one could accept the premise that the injury complained of is not the condition of deformity *per se*, but rather an unwanted birth and life, then the question of a proximate cause would present little or no obstacle to recovery.[139]

A valid question raised by Foutz[140] concerning causality is whether an objective or a subjective standard should be applied in determining whether parents would indeed have avoided conception or terminated pregnancy had they been timely and properly informed by their physician of complications. Generally speaking informed consent circumstances require a physician to only disclose information that a reasonable person would have deemed relevant in considering a proposed treatment or medical condition, thus an objective standard.[141]

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136 A real difficulty experienced with this "separate duty" approach is defining the nature of the duty owed to the child in an acceptable manner. It could namely be argued that a duty to inform a foetus is not really achievable and indeed factually impossible. Foutz *ibid* reasons that the only way to bridge this obstacle and to prevent breach of this duty would be with the assistance of a third person such as a mother who acts in the best interests of her child. A physician would in this way fulfill his duty of informing and possibly warning prospective parents. Foutz believes that although the fetus cannot determine its own future or even influence the decisions directing its existence, the law should not preclude a duty to the child merely because of its fetal state and inability to act upon information disclosure.

137 this approach is based on the second **Restatement of Torts** § 920 (1979), which prescribes that if a person negligently gives false information to another and this person should, because of reliance thereon act with the result of harm to such a person/ other persons, the negligent informer could expect to be held accountable for the action taken - such a "derivative duty" approach was adopted in **Park v Chessin**.

138 *op cit* p 491.

139 it is suggested that in this way courts would not have to feel that they are stretching too far the bounds of liability for holding a physician liable for the handicapped condition of a child - their task should rather be to find legal causality between a wrongful act and its reasonably foreseeable consequence namely a deprived and unwanted life.

140 *ibid.*

141 see ch 5.

Foutz[142] fears that the application of this viewpoint might give the physician too much room for use of his own discretion in determining whether a patient would consider information to be important or not. For example, if a physician does not inform a Catholic patient[143] of the availability of an amniocentesis (using an objective standard) it might objectively be seen as reasonable conduct.[144] The possibilities for abuse and improper application of the objective standard in these cases have led Foutz to believe that a subjective test is to be preferred.[145] When a subjective standard is applied, parents must be able to prove that *they* specifically would have prevented the birth of a handicapped child. It would therefore not be sufficient to establish that the reasonable parent would have obtained an abortion under similar circumstances.[146]

3.6 An alternative approach

Lind[147] gives an interesting alternative to the wrongful life plaintiff's difficult task of proving a right to be born healthy and comparing life to non-existence:

> "This does not give the child a right to be born healthy, but merely an alternative right for our refusal to give him the right, through his parents, to make a choice favouring death at a stage when that choice can be made. This remedy would not call for a comparative valuation of non-life and life in a defective condition. It would merely ask the judge to hypothesize the extent of damages needed to make the child comfortable enough not to want to seek death as a means of escaping his misery. And to that end, there will always be experts to advise a judge."[148]

3.7 Wrongful death

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142 *op cit* p 492.

143 if the physician had knowledge of the fact that his patient is a Catholic and was aware that Catholics generally refuse abortions on religious grounds.

144 Foutz *ibid* illustrates the reality of his concern by recording that, in spite of this seemingly logic and acceptable supposition, one survey showed that a large percentage of Catholic people would rather abort than carry a deformed child to term in spite of strict religious prohibition of eugenic abortions.

145 according to the subjective standard a physician would be required to disclose comprehensive information about any genetic risk that is required by each specific patient without any regard for his own personal assessment of the patient's needs and ultimate decision.

146 as would be sufficient under an objective assessment.

147 1992. Wrongful Birth and Wrongful Life Actions. **South African Law Journal**, 428.

148 *op cit* p 445.

Concerning the relevance of wrongful death cases in this discussion, Collins[149] writes the following: Because of the **Bonbrest** decision, seemingly every court is prepared to grant a wrongful death cause of action if a live birth was eventually recorded. In the case of a stillborn foetus, however, there is much disagreement. The **Verkennes v Corniea** case[150] was the first to allow recovery for a once viable - but eventually stillborn foetus. To decide whether or not to allow recovery in these cases, courts have created several methods of assessing liability.

One criteria used by courts, is to ascertain a victim's stage of development at the time the injury was inflicted and allow recovery only if he/ she has reached an acceptably advanced stage of development or in the alternative, on the occurrence of a live birth.

Collins believes that the general division between victims under these circumstances, who have an action and those who do not, will widen as more courts adopt *conception* as the guidepost for prenatal causes of action, while they retain *viability* or *live birth* as the standard in wrongful death cases. Collins is convinced that the general, standardised application of a right to injury free formation, would have more equitable and fair results.

Clark[151] draws an interesting correlation between wrongful life and wrongful death cases. She is of the opinion that in both instances plaintiffs suffers real injuries without having a legal remedy:

> "When a plaintiff concludes a suit on personal injuries that later cause death, surviving wrongful death beneficiaries generally meet with a complete denial of recovery despite the very real injuries that they have suffered through the loss of a relative. This inequity may become more commonplace as life support techniques increasingly prolong life well beyond final judgements in personal injury suits. Fearing excessive recovery by wrongful death beneficiaries, courts may continue to respond with wholesale exclusion of damages, thus undermining the principles that produced wrongful death acts."

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149 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

150 229 Minn. 365, 38 N.W. 2d 838 (1949).

151 1993. Impacts of modern life support techniques on Wrongful Death Actions brought after final personal injury judgements. **University of Puget Sound Law Review** (16:2), 711.

It is suggested[152] that collateral estoppel[153] can minimize risks of excessive recovery without violating principles of res judicata and the principles that underlie wrongful death actions, which could possibly also be applied to wrongful life.

4. To be, or not to be?

4.1 Arguments against wrongful life

Lehr and Hirsh[154] list some of the concerns expressed by courts regarding recognition of wrongful life actions. It would seem as if the elements of causation, damage and wrongfulness are the main causes of difficulties.

- it is reported[155] that a legal causal *nexus*[156] between the negligent conduct of the physician and the consequential damage or loss is not easily proven;[157]
- damage is extremely difficult to ascertain;
- there are precious little previous decisions which can be used as guidelines in calculating quantum;
- the judiciary has a moral duty to prevent and restrict possible fraudulent actions from reaching the courts of justice, as well as an obligation to the health sector to minimize malpractice litigation;
- public policy is not in favour of abortion as an alternative to contraception;
- many courts judge that any form of life, no matter how physically or psychologically

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152 Clark *op cit* p 738.

153 "The interests in properly construing wrongful death statutes and in serving their compensatory objectives justifies the burdens that might follow from reliance on collateral estoppel, special verdicts, periodic payments, and other procedural and legislative devices." *ibid.*

154 1983. Wrongful Conception, Birth and Life: A question of viability. **Medicine $ Law** (2), 199.

155 Lehr and Hirsh *op cit* p 200.

156 for a further discussion on causality, see ch 2.

157 it is suggested that a possible reason for this is the fact that the physician did not physically cause the handicap or genetic disease - courts, such as in **Kosberg v Washington Hospital Center** 394 F 2d 947, 949 D.C. Cir. (1978), often find that the eventual damage is too far removed from the initial negligent conduct and that liability could therefore not be imputed to the defendant.

restrictive or genetically impaired, is preferable to a condition of non-existence.

Blackbeard[158] is of the opinion that the main objection to the recognition of the action is the legal system's unwillingness to accept life as "damage". Public opinion is the most important factor in deciding whether handicapped life is more acceptable or favourable than no-existence. Although it is very difficult[159] to make a rational judgement in this respect, it remains vital for wrongful life litigation that an assessment is made of the quality of a plaintiff's life. She mentions common difficulties experienced by courts in this regard:

- it is reported[160] that the main objection raised many courts when considering wrongful life actions is finding that life as such is an injury;[161]
- difficulties are experienced in the assessment of damages;[162]
- uncertainty and divergent ideas concerning the precise nature and content of the duty owed by the physician towards the plaintiff-child;[163]
- fears are expressed by courts concerning physicians possibly placing pressure on parents to abort handicapped foetuses, even in cases where the possibility of deformity is extremely remote, in order to escape wrongful life liability;[164]
- to declare that a physician has a duty to prevent a handicapped child from being born necessitates a corresponding right[165] of a child to be born as "a whole and functional

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158 *op cit* p 66.

159 if not impossible: as all of us are living beings, none can therefore make a true judgement on non-existence.

160 *ibid.*

161 according to this perspective public policy dictates that human life is too valuable and precious to be noted as a cause of action.

162 according to Blackbeard *op cit* p 67 most courts find it impossible to calculate damages altogether - while some courts allow only special damages, other jurisdictions try to solve the problem by weighing the benefits and detriments caused by the defendant's conduct (thereby first determining the seriousness of the disability and then weighing any benefits derived from the life against that estimate), see *infra.*

163 *op cit* p 68 it is reported that in America there seems to be a duty on physicians to take care towards foetuses from their third trimester of development and onwards - Blackbeard suggests that this duty of care does not exist before the third trimester, as legal abortions can still be performed until such time.

164 the opinion is raised *ibid* that if parents knowingly advance with a pregnancy, against the advise of their physician, their conduct could be noted a *novus actus interveniens* - I do not agree with this supposition, as I have serious reservations whether courts will objectively require parents to obtain an abortion under these circumstances.

165 for every duty there is a corresponding right and *visa versa*.

human being".[166]

4.1.1 Additional grounds of rejection

In summarising the American legal literature and decisions Stolker[167] finds that the overwhelming majority of courts disallow wrongful life actions. In addition to the abovementioned grounds of objection the following concerns are also listed:

- the acceptance of wrongful life actions could be seen as a disqualification of handicapped people in a so-called "normal" society.[168]
- a comparison between handicapped life and life as a normal person is impossible.[169]
- courts are concerned about the possible emergence of ethical problems related to the expedient conclusion of court decisions.[170]
- in Becker v Schwartz the judge proclaimed that the entire wrongful life debate is: "...a mystery more properly to be left to the philosophers and the theologians."[171]
- an expected danger in the increase of abortions that would result if wrongful life actions were allowed.[172]
- fears that successful wrongful life actions against physicians will evolve to actions against parents as well, which would be morally unacceptable.[173]

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166 Blackbeard *ibid* explains that such an assessment is based on empirical observations which relate to the highly personal nature of the individual's experience of life - because each person would experience life in a different way and because there could be many interpretations as to what exactly is "whole and functional", Blackbeard suggests that it would be impossible to guarantee such a right.

167 1994. Wrongful Life: The Limits of Liability and Beyond. **International and Comparative Law Quarterly** (43), 532.

168 it is feared that the disabled community might be offended by these actions and that acceptance might damage their cause.

169 it is, however, contended by Stolker that such a comparison is not relevant to wrongful life actions, **Gleitman v Cosgrove** - I agree: the relevant comparison, according to the traditional damage formula, would be a allegory of non-existence with handicapped life.

170 there are concerns that wrongful life actions would take courts longer to decide than other cases because of the inherent difficulties associated with these actions - Stolker *op cit* p 533 suggests therefore that the matter be referred to the legislator: "Such a fear, it is said, would cause a court of law to choose a simpler route, since the court normally has to reach an opinion in a brief space of time as compared to the years available to State commissions and politicians."

171 it is thus suggested that wrongful life is not exclusively a legal matter.

172 according to the Pearson Commission.

173 as was the case in **Zepeda v Zepeda**.

4.1.2 Policy reasons against physician liability

Stolker[174] lists considerations relevant to the limitation of physician-accountability against medical malpractice litigation in general, but also very important in wrongful life litigation:

- the fact that a physician's work, duties and moral obligations are specifically directed towards the healing of patients;[175]
- parties involved in litigation based on medical malpractice are often well known to each other;[176]
- it is mentioned[177] that another factor that should be taken into account is the very real fact that the physician makes his mistake and suffers the consequences of his misjudgement in direct fulfilment of his professional duties;[178]
- a general fear exists that if physicians are excessively exposed to malpractice litigation, medical insurance premiums and general medical costs would rise;
- another possible result could be the implementation of so-called "defensive medicine"[179] by doctors.

4.1.3 Floodgate

Schoonenberg[180] conveys: concerns that have been raised against wrongful life litigation include the fear that children might sue their parents. She writes that under Dutch law, although a child can be represented by a special *curator* in terms of sec 1:250 (BW) of the Civil Code to institute action on behalf of such a child, inter-familial immunity would be raised in

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174 *op cit* p 524.

175 medical mistakes are therefore not made by doctors acting entirely in their own interest, but rather with the main goal of curing or assisting patients.

176 the physician-patient relationship requires a certain amount of trust between the parties - it is submitted that this relationship of trust and confidence is necessarily broken if the physician does not properly fulfill his mandate, such as the duty to inform *etc.*

177 *ibid.*

178 a claim for malpractice is often seen as a direct attack on his personal professional capabilities as well as his integrity and honour.

179 If defensive medicine is practised, physician's solely direct their professional conduct to an the goal of escaping any possible malpractice litigation. The results of this phenomena are that totally unnecessary or excessively pre-cautioning) tests are performed on patients. Nonessential precautions are take redundant additional opinions are gathered and super medication is prescribed. Risks are inflated and exaggerated.

180 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 73.

defence of an action against parents.[181] It is also suggested that in cases where parents are insured against civil liability, this argument should not prohibit the recognition of wrongful life actions. Schoonenberg[182] reports that no such actions of children against parents have been successful in the Netherlands, although there is no absolute restriction for such actions. It is further reported[183] that parents have a moral and also a social duty towards the health and well-being of their unborn children:

> *"Leenen gaat er van uit dat op de ouders een morele en maatschappelijke verplichting rust om voor de gezondheidstoestand van het ongeboren kind te waken."*

Hol[184] considers a possible action of a wrongful life plaintiff against parents. He reports that a legal base for such an action could be found in section 6:162, as one could argue that there has been conduct contrary to social acceptance. A further connection-point with unlawful conduct by parents in wrongful life cases, is to be found in section 1:245, where a statutory duty is placed on parents to care for and educate their children.[185]

Hol[186] concludes that the law, as a general rule keeps its distance from family life and parents' care and education of their children. There could, however, be instances where the judiciary will intervene and hold parents liable towards their children.[187]

It is concluded[188] that wrongful life actions of children against their parents, although it should

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181 individuals in a family relationship are expected to endure more from family members than from others ans should be more excepting and forgiving towards them.

182 *op cit* p 74.

183 *ibid.*

184 *ibid.*

185 *"Voorzover men hier zoekt naar een rechtgrond zou men zich kunnen baseren op de regeling van de onrechtmatige daad (artikel 6:162). Men zou kunnen stellen dat er sprake is van een handelen in strijd met de maatschappelijke betamelijkheid. Aanknopingspunt voor de onrechtmatigheid zou ook kunnen zijn het handelen in strijd met de verplichting die wettelijk is neergelegd in artikel 1:245 lid 2 BW. Hier wordt gesproken over de verplichting van ouders om hun kinderen op te voeden en te verzorgen."*

186 *op cit* p 277.

187 *"Om privacy-redenen en om ruimte te scheppen voor de eigen opvoedkundige inzichten van de ouders houdt het recht afstand ten opzichte van de gezinssituatie. Niettemin zijn er gevallen waarin de rechter aansprakelijkheid van ouders jegens de kinderen aanneemt." ibid.*

188 *ibid.*

not be a regular occurrence,[189] should not be totally excluded.[190]

4.2 Arguments in favour of wrongful life

Berenson[191] believes that damages awarded in wrongful life actions will be an incentive for physicians to exercise more care in future. He thereby supports the premise that an underlying purpose of damage awards[192] is to deter future injurious conduct and to assist in preventing negligent medical practice. He argues that a humane and legally progressive viewpoint would be that the impaired child should not have to bear the burden of proving damages based on an obviously impossible comparison between its actual condition and that of non-existence. The plaintiff should rather only have to prove that its impaired condition exists and that its existence is the result of the defendant's negligence. In a harsh reaction to courts disallowing wrongful life, Berenson proclaims:[193]

> "Apparently, the psychological frailty of judges occasionally outweighs their judicial objectivity. In cases that demand extraordinary metaphysical insight, the intellectual inability to deal with the unknown prevents the application of the most rudimentary rule of tort law: when the necessary elements of negligence are proved, the injury of the victim should be compensated."

In spite of all the difficulties encountered in determining the true extent of injury suffered the courts continue to use the traditional tort analyses to determine liability. According to Berenson three basic factors inhibit the judiciary's acceptance of such claims and restrain their approval of general damage awards in wrongful life actions:

- the inability of courts to quantify damages;[194]

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189 Schoonenberg submits that this should be allowed only in extreme cases of parental neglect.

190 this concept of parental responsibility is also supported by others - see ch 9 and opinion of van Wamelen.

191 1990. The Wrongful Life Claim - The legal dilemma of existence versus non-existence: "To be or not to be" **Tulane Law Review** (64), 895.

192 see discussion on the theories behind compensation in ch 2.

193 *op cit* p 916.

194 even though Berenson believes that this problem arises from the court's self-imposed theory of calculation

- a collective reluctance of courts to award general damages;[195]
- the abortion debate.[196]

Schoonenberg[197] explains that legal recognition of wrongful life actions[198] necessitates a certain broadening of medical professional liability. She believes, however, that this new legal developments are necessary to keep up with rapidly advancing (bio)medical science. She discusses especially two public policy aspects that should be considered in view of such broadening liability: the implication on insurance and a possible floodgate of actions.

LaCroix[199] gives a powerful address in favour of recognition of wrongful life actions and in defence of special damages in these cases:

> "To deter medical malpractice in this area, the judicial system should require negligent physicians to compensate injured plaintiffs. The courts need not play God in an attempt to determine whether non-existence is better than an impaired life. As the *Procanik* court correctly stated, recovery of extraordinary medical expenses is "predicated on the needs of the living. Damages for extraordinary medical expenses are narrowly tailored to the wrong and, therefore, are the proper form of recovery. An award of special damages does not reject the preciousness of human life but rather affirms the concept that a handicapped life is as valuable as a non-handicapped life. Helping a deformed child bear the burden of her affliction demonstrates that life in general is important - not the life that may or may not have been, but the life that is."[200]

4.2.1 *Right to die* influence

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195 Berenson *ibid* states that this reflects the sensitivity of tort reform in this regard and is accentuated by the limitations of medical liability - he believes that this reflects the public policy sentiment held by the courts on this issue.

196 By leaving the administration and protection of abortion rights to the states the Supreme Court increased the difficulty of the wrongful life plaintiff. Because of this, not only does the plaintiff's action depend on the forum state's statutes and jurisprudence permitting or denying such claims in the first place, but his claim is also subject to a possible anti-abortion statute, which could effectively bar all post-conception negligence claims altogether.

197 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 73.

198 and also wrongful birth actions.

199 1993. Wrongful life - a birth defective child born prior to Roe v Wade does not have a valid cause of action in Wrongful life against the physician who failed to inform it's mother of the option of an abortion. **Seton Hall Law Review** (23:3), 1876.

200 LaCroix *op cit* p 1909.

Foutz[201] reaches the conclusion that in light of recent right to die cases, courts have set a precedent for acknowledgement that life under certain circumstances is not always preferred. He believes that courts should allow wrongful life actions and thereby advance objectives of tort recovery. He mentions that this would also invariably result in the raising of medical standards and ensure adequate genetic counselling.

Kelly[202] has a similar view and believes that neither policy nor doctrine need interfere with the child's recovery, as courts have overcome their concern for the sanctity of life in the context of right-to-die cases.

Fain

In spite of all these arguments against the recognition of wrongful life actions, the author feels that (conditional) recognition would be a step in the right direction. He feels that a comparison between non-existence and handicapped life can be made, and is in fact often made in cases where patients would expire unless they receive medical life support and in cases which a vegetative patient's life might be prolonged, but life support treatment is withheld or discontinued. In these cases, the individual's life is presumed more harmful and disadvantageous than allowing the person to die. This decision is made in the patient's best interests, so there does seem to be a comparison between the harm of existence in an impaired state and the harm of non-existence! Joys of life are emotional in nature- but joy, however great, can't speak to the plaintiff child's financial condition.

Butler[203] summarises the need for wrongful life liability from her perspective:

> "There are public policy considerations that compel recognition of a separate cause of action for wrongful life. First, under general tort principles, the party that causes a harm should bear the cost. Requiring the innocent child to bear the cost of his infliction would be unjust and inconsistent with general tort principles, because he had done nothing to cause the injury. Second, the medical profession is in a better position than the individual to bear the burden of some of the cost through medical malpractice insurance. Finally, the recognition of a separate tort for wrongful life would deter physicians and others in the medical profession from negligent conduct."

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201 *op cit* p 499.

202 1991. The Rightful Position in "Wrongful Life" Actions. **The Hastings Law Journal** (42:1), 589.

203 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), 886.