Notre Dame Law Review

Volume 54 | Issue 4 Article 5

4-1-1979

Physician's Liability for Pre-Conception Torts

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NOTES

Physician's Liability for Pre-Conception Torts

For whenever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued.[1]

I. Introduction

Although in the past genetic disorders were considered an act of God,[2] recent advances in the study of human reproduction and genetics have made it increasingly possible to calculate the risk that parents will have genetically deformed children. Additionally, the development of techniques by which the genetic makeup of offspring may be determined *in utero* and the corresponding availability of eugenic abortions have given some couples the option to terminate a pregnancy when the child will be genetically defective.[3]

These medical advances have resulted in an expanding number of lawsuits instituted against physicians whose patients gave birth to deformed children. As a result, a new theory of tort liability has evolved that permits recovery for torts committed prior to the conception of a child.

Historically, an unborn child was deemed to have no inherent right under a theory of tort to recover for injuries suffered prior to birth.[4] As scientific understanding of the human reproductive process matured, however, so also did the law regarding the right of the unborn to recover for prenatally inflicted injuries. Sanctioning a cause of action to those who are injured by negligence that occurred prior to conception is a logical step in the evolutionary development of the tort rights of the unborn.

Pre-conception torts may be broadly classified into two categories: (1) torts caused by an affirmative, negligent act of a physician committed against the mother of the deformed child, denominated for purposes of this note as a "pre-

1 3 W. BLACKSTONE, COMMENTARIES * 123.

2 SHAW, *Genetically Defective Children: Emerging Legal Considerations*, 3 AM. J.L. & MED. 333 (1977).

3 The most widely recognized new technique for *in utero* determination of genetic makeup is amniocentesis. In amniocentesis, at approximately the sixteenth week of pregnancy, a large-bore hypodermic needle is inserted into the uterus and a few milliliters of amniotic fluid are withdrawn. The amniotic fluid contains sloughed-off fetal cells which may then be analyzed to determine the fetus' genetic makeup. P. REILLY, GENETICS, LAW AND SOCIAL POLICY, 23 (1977).

This note does not consider the question of a physician's duty to disclose genetic information to his patients during the period of gestation. The decisions in this area are mixed. Many cases have denied a cause of action to any plaintiff. *See, e.g.*, Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). The trend, however, appears to be toward permitting a cause of action to parents who allege that they would have terminated the pregnancy had they been properly advised. *See, e.g.*, Becker v. Schwartz, No. 559 (N.Y. Ct. App., filed Dec. 27, 1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hospital, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

4 *See, e.g.*, Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940).

conception injury," and (2) those actions which are characterized by the passive negligence of the physician, namely, failure to disclose to prospective parents the risks of genetic deformity in their offspring. This second category may be divided further into actions for (a) "wrongful conception" and (b) "wrongful life."

In the course of this note two recent cases, *Park v. Chessin*[5] and *Renslow v. Mennonite Hospital*,[6] which exemplify the developing trend of the law in this area, will be examined in detail. On the basis of this discussion the note will suggest where the law is or should be going and the ramifications which the expansion of this nascent doctrine will have for the legal and medical communities.

II. The Nature and Predictability of Genetic Disease

An individual's characteristics are determined in part by his unique genetic makeup.[7] The genes of a human being are arranged linearly on forty-six chromosomes which in turn are carried in pairs.[8] Twenty-two of these pairs are autosomes; the remaining pair are the sex-linked chromosomes.[9] In addition to its array of normal genes, however, every individual "carries" two to six lethal genes and many more non-lethal genes that cause deleterious hereditary defects.[10]

Genetic diseases are usually classified according to the number of genes involved and by inheritance pattern when this is known.[11] Genetic disorders can

5 No. 560 (N.Y. Ct. App., filed Dec. 27, 1978). The opinion in Park v. Chessin applied also to a companion case, Becker v. Schwartz. *Id. Becker*, however, was based on a wholly different set of facts and it is difficult to understand why the court decided them together. In *Becker*, the plaintiff-mother, who was 37 years old, gave birth to a Down's syndrome child. Unlike the Parks, she made no inquiry of her physician about possible genetic defects in the fetus. She, nevertheless, alleged that the physician had negligently failed to disclose the risks of Down's syndrome occurring in a fetus of any woman who conceives after age 35. Had she been informed of the risk and understood the availability of diagnostic techniques to determine the genetic makeup of the fetus, she would have undergone the tests and aborted, if necessary. Although facially similar, the two cases differ in several ways: (1) the child in *Becker* was conceived prior to any consultation with the physician (*see* text accompanying notes 68-71 *infra*), (2) no inquiry concerning genetic effects was made of the physician under the *Becker* facts, and (3) *Becker* assumes that all prospective mothers over 35 should have the fetus they carry diagnostically tested for genetic defect. A discussion of these differences, however, extends beyond the scope of this note.

6 67 Ill.2d 348, 10 Ill. Dec. 484, 367 N.E.2d 1250 (1977).

7 *See generally* M. LEVITAN & A. MONTAGA, TEXTBOOK ON HUMAN GENETICS (1971). Both DNA (deoxyribonucleic acid) and RNA (ribonucleic acid) are linear sequences of nucleotides (in DNA or RNA), which encode the genetic information that specifies a single gene product. Annas & Coyne, *"Fitness" for Birth and Reproduction: Legal Implications of Genetic Screening*, 9 FAM. L. Q. 463, 464 n.1 (1975). Thus, by selective gene repression and activation the patterned array of cells that make up the tissues and organs of the human body is constructed. *Id.* at 465.

8 P. REILLY, *supra* note 3, at 7.

9 *Id.* A female has two X chromosomes; a male has an X and a Y chromosome. Alternative forms of a particular gene are known as alleles. At every gene locus, on every pair of chromosomes, a person may have identical alleles (homozygous) or different ones (heterozygous). A gene located on either the X or Y chromosome is considered sex-linked. For reasons not yet deciphered, it is believed that the Y chromosome, unlike the X chromosome, carries only a few genes and that these primarily control the sexual differentiation of males. Sex-linked disorders are caused by genes carried on the X chromosome. *Id.* at 10.

10 Shaw, *supra* note 2, at 334.

11 P. REILLY, *supra* note 3, at 7. The inheritance pattern is the manner in which the gene causing a deformity is passed to the child. One example of an inheritance pattern is the Mendelian inheritance pattern. For a discussion of inheritance patterns, see P. REILLY, *supra* note 3, at 7-15.

be broadly classified as 1. monogenic abnormalities,[12] 2. polygenic or multifactorial diseases,[13] 3. immunologic materno-fetal incompatibility,[14] and 4. gross chromosomal aberrations.[15] Monogenic abnormalities follow the strict Mendelian rules of inheritance.[16] Most other genetic diseases do not. Thus, although the probability of giving birth to a deformed child with a monogenic abnormality may be calculated precisely; accurate risk estimates of the other diseases cannot be made.

Scientists have identified more than 2,000 genetic diseases and at least 100 new genetic defects are discovered each year.[17] It is estimated that 200,000 babies are born in America each year with genetic defects[18] and that at least twelve million Americans suffer from diseases or disabilities caused, in whole or in part, by genetic factors.[19]

Some gene-determined disorders have been treated successfully with traditional therapeutic methods.[20] Treatments for other genetic maladies have resulted from advances in the search for a way to control genetic diseases. These therapeutic measures, however, while extending the lives of some who in the past would have died, can do no more than alleviate the symptoms of the gene-related disorder.[21] Generally, no conventional cure for genetic disease exists. The only effective method of controlling genetic disease is to prevent the birth of children who otherwise would be born genetically defective.

The costs experienced by the family of a genetically deformed child far

12 B. HILTON, D. CALLAHAN, M. HARRIS, P. CONDLIFFE & B. BERKELY, ETHICAL ISSUES IN HUMAN GENETICS, 59 (1973) [hereinafter cited as B. HILTON].

Monogenic (or single gene) abnormalities may be transmitted as autosomal dominant, autosomal recessive, X-linked recessive or X-linked dominant traits. *Id.* As of 1975, more than 2000 of these traits, not all of which are debilitating—but including such serious disorders as hemophilia, Tay-Sachs disease, sickle cell anemia and Duchenne-type muscular dystrophy—had at least been tentatively identified. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling,* 87 YALE L.J. 1488, 1491 n.16 (1978).

13 Polygenic disorders are caused by an unknown number of largely undefined genetic factors interacting with a similar quantity of metabolic factors. Generally, scientists are unaware of the etiology of most of these disorders. Middle-age ailments such as diabetes, arteriosclerosis and hypertension are examples of polygenic disorders. B. HILTON, *supra* note 12, at 59.

14 Immunologic materno-fetal incompatibility is a genetically conditioned incompatibility between the mother and the fetus. In this condition, the fetus is adversely affected by the very environment in which he is surrounded. Rh-disease of the newborn is an example of this type of disorder. *Id.*

15 Gross chromosomal aberrations are characterized by the addition of extra genetic material, trisomy, or the absence of needed genetic material, monosomy. The most common example of this type of disorder is Down's syndrome, Trisomy 21. P. REILLY, *supra* note 3, at 12.

16 *Id.* Under the Mendelian rules of inheritance if two heterozygous persons marry, there is a 25% chance that a child of their union will be affected by the disorder for which both parents are heterozygous for the abnormal allele, a 25% chance that the child will be completely normal and a 50% chance that the child, like both of its parents, will be heterozygous. P. REILLY, *supra* note 3, at 9.

17 *See* 87 YALE L.J., *supra* note 12, at 1491 n.16.

18 Annas & Coyne, *supra* note 7, at 463.

19 Shaw, *supra* note 2, at 334.

20 P. REILLY, *supra* note 3, at 21. For example, patients with phenylketonuria (PKU), a mentally retarding disease, suffer an inability to metabolize the amino acid, phenylalanine, which leads to toxic accumulation in the tissues and inexorably to retardation. To treat this disorder a special diet has been devised which reduces the intake of phenylalanine. Affected persons, therefore, do not accumulate it and the retardation process is suspended. This treatment has had dramatic success in preventing mental retardation. *Id.*

21 Waltz & Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues,* 68 Nw.U. L. REV. 696, 698 (1974).

exceed the costs of raising a normal, healthy child. The emotional hurt and suffering which affect every member of the nuclear family are very difficult to quantify. Moreover, rising health care costs steadily increase the weight of the economic burden which, either directly or indirectly, parents and siblings must bear. Thus, genetic disease has become a national health care problem.

Screening for genetic defects was, until about 10 years ago, at best inexact.[22] Predicting the occurrence of a particular genetic trait was based principally on the history of that trait occurring in the family.[23]

Today, by analyzing a sample of blood, a determination whether an individual is a carrier of a gene for certain diseases can be made.[24] Further, having determined the manner by which a significant number of genetic defects are inherited, prospective parents can be advised, in many cases prior to conception, of the precise genetic risks attendant to conception and childbirth.[25]

III. Pre-conception, Affirmative Acts of Negligence

The first category of pre-conception torts has been denominated for purposes of this note "pre-conception injury." A "pre-conception injury" is characterized by an affirmative negligent act committed against the mother which results in injury to a child not yet conceived. To date, in only one case, *Renslow v. Mennonite Hospital,* has such a cause of action been recognized against a physician. *Renslow,* therefore, merits a detailed examination in light of the historical genesis of the recognition of a cause of action for injuries incurred by an unborn child.

A. *Genesis of Recovery for Injuries to the Unborn*

In 1884, the Supreme Court of Massachusetts decided *Dietrich v. Inhabitants of Northampton.*[26] In this landmark decision denying a cause of action for the wrongful death of a prenatally injured child, Mr. Justice Holmes enunciated the common law doctrine that a fetus was not entitled to a cause of action because "an unborn child was a part of the mother at the time of injury . . . [and] any damage to it . . . was recoverable by her . . ."[27]

Many courts followed the rationale of *Dietrich,* including the Supreme Court of Illinois in *Allaire v. St. Luke's Hospital.*[28] In *Allaire,* however, a strong dissent was voiced by Justice Boggs who concluded:

> The law should . . . be that whenever a child *in utero* is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes

22 *See generally* P. REILLY, *supra* note 3; Shaw, *supra* note 2; Waltz & Thigpen, *supra* note 21.
23 Waltz & Thigpen, *supra* note 21, at 700.
24 *Id.*
25 87 YALE L.J., *supra* note 12, at 1492.
26 138 Mass. 14, 52 Am. Rep. 242 (1884).
27 *Id.* at 17, 52 Am. Rep. at 245.
28 184 Ill. 359, 56 N.E. 638 (1900).

> a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother.[29]

Notwithstanding the dissent of Justice Boggs, the *Dietrich* rule was applied for forty-six additional years. Finally, in *Bonbrest v. Kotz,*[30] the District Court for the District of Columbia, relying extensively on the theory of the Boggs dissent, recognized a common law right of action for prenatal injuries. The *Bonbrest* court ruled that an infant has a separate legal existence from its mother at such time as it is capable of sustaining life separate from her. Thus, viability at the time of injury became the test of an infant's right of recovery.

Another fourteen years elapsed before the viability standard was first discarded. In *Smith v. Brennan*[31] an action was brought on behalf of an infant who was injured *in utero* in an auto accident at an early stage of its mother's pregnancy. The New Jersey Supreme Court held that a cause of action vests in a prenatally injured plaintiff irrespective of the time of injury. The *Smith* court reasoned that since no jurisdiction which had approved recovery for an injury to a viable fetus had later denied recovery to a child who survived a *pre-viability* injury, there was no reason to deny recovery in this case. Further justifying this conclusion, said the court, was the practical acknowledgement that the viability rule is impossible to apply because no one knows when viability actually occurs.[32]

In Illinois, however, the viability rule remained a fixture of state law even though it had been tempered by allowing a cause of action for the wrongful death of a viable child injured *in utero* and thereafter born dead.[33] Thus, at the time of *Renslow* the "viability test" of *Bonbrest* was still a doctrine which in Illinois would preclude a cause of action for injuries inflicted prior to birth.

B. Renslow v. Mennonite Hospital

In *Renslow v. Mennonite Hospital,* the Illinois Supreme Court became the first court of last resort to recognize a cause of action by an infant plaintiff injured by the pre-conception negligence of a physician.

The mother of Leah Anne Renslow brought a cause of action for negligence for herself, individually, and on behalf of her minor daughter. The complaint

29 *Id.* at 374, 56 N.E. at 642.

30 65 F. Supp. 138 (D.D.C. 1946). State courts soon followed the lead of the *Bonbrest* court. *See, e.g.,* Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

31 31 N.J. 353, 157 A.2d 497 (1960); *accord,* Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, 93 S.E.2d 727 (1956).

32 In Roe v. Wade, the Supreme Court's dicta indicated that viability occurs at the point at which the fetus is capable of meaningful life outside the mother's womb. Clearly, under this construction viability does not occur at the time of conception but at some indeterminate time during the pregnancy. 410 U.S. 113 (1973).

33 In Amann v. Faidy, the Illinois Supreme Court overruled *Allaire* which had followed the rule derived in *Dietrich.* In *Amann,* the court held that there is a right of action for the wrongful death of a viable child, injured *in utero,* who is born alive but later dies. 415 Ill. 422, 114 N.E.2d 412 (1953). Thereafter, in Chrisafogeorgis v. Brandenberg, the court extended its rationale to permit a cause of action where the child is born dead. 55 Ill. 2d 368, 304 N.E.2d 88 (1973).

alleged that in October 1965, when the mother was 13 years of age, the defendant physicians on two occasions negligently transfused her with 500 ccs of Rh-positive blood. The mother's Rh-negative blood was incompatible with and ultimately sensitized[34] by the Rh-positive blood. The plaintiff mother was unaware of adverse reactions from the transfusions and knew neither that she had been improperly transfused nor that her blood had been sensitized. Defendants, although aware of the error, at no time notified the mother or her family.

In December 1973, during the course of a routine blood screening, incident to the plaintiffs' prenatal care, the mother's condition was discovered. The sensitization of the mother's blood caused prenatal damage to the hemolytic processes[35] of the infant, necessitated induced premature birth and resulted in the infant's affliction with hyperbilirubinemia.[36] Additionally, the infant suffered from permanent damage to various organs, her brain, and her nervous system.

The trial court dismissed the infant's action because she had not been conceived at the time of the alleged injury and thus her complaint failed to state a cause of action. The appellate court, stressing the foreseeability of the injury, reversed. The question posed to the Illinois Supreme Court was, "Does a child not conceived at the time negligent acts were committed against its mother, have a cause of action for its injuries resulting from [a physician's] conduct?"[37]

When the *Renslow* appeal reached the Illinois Supreme Court, the first question addressed was the propriety of the viability rule. Noting that this rule had been widely criticized, the court held that viability at the time of injury is not a prerequisite to a cause of action. Thus, under the court's holding, an injury inflicted *even at the very moment of conception* gives rise to a legally cognizable injury and a corresponding cause of action.

The Renslow facts, however, involved an injury inflicted not merely prenatally but pre-conceptionally, as well. Thus, taking the next logical step, the *Renslow* court held that a cause of action accrues to an infant plaintiff injured by the pre-conception negligent acts of a physician.

The court's treatment of the pre-conception injury issue centered upon finding a duty on the part of the physician toward the yet-to-be conceived child. Although noting that the concept of duty is not "sacrosanct,"[38] and that foreseeability is not its sole determinant, the Renslow court, nevertheless, concluded that duty is the cornerstone of negligence and that foreseeability is the touchstone

34 Sensitization results from the introduction of incompatible blood into the bloodstream. The Rh-factor foreign to the negative individual is an antigen, an element capable of contributing to definite changes because of its presence. These antigens can cause the destruction of red blood cells. 4 B R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 304.14 (3d ed. 1978).

35 Hemolysis is the alteration, dissolution, or destruction of red blood cells in such a way that hemoglobin is liberated into the medium in which cells are suspended. Hemolysis may be caused, for example, by specific complement-fixing antibodies, toxins, various chemical agents, tonicity, and freezing and thawing. STEDMAN'S MEDICAL DICTIONARY, *Fourth Unabridged Lawyer's Edition* 632 (1976) [hereinafter cited as STEDMAN'S].

36 Hyperbilirubinemia is an abnormally large amount of bilirubin in the circulating blood, resulting in clinically apparent jaundice when the concentration is sufficient. STEDMAN'S at 668. Bilirubin is a red pigment formed from hemoglobin during normal and abnormal destruction of red corpuscles by the reticuloendothelial system. STEDMAN'S at 172.

37 67 Ill.2d at 349, 367 N.E.2d at 1251.

38 *Id.* at 356, 367 N.E.2d at 1254.

of duty. Thus, although it facially acknowledged the critiques of commentators,[39] the court analyzed the situation as though duty and foreseeability were equal in scope.

Amplifying the rights of the unborn (prenatally injured) to include a cause of action for a pre-conception injury was easily achieved by the court. Reflecting on the evolution of the right of recovery of an infant for prenatal injuries, including the right to recover for a previability injury, the majority reasoned:

> The cases allowing relief to an individual for injuries incurred in its previable state make it clear that a defendant may be held liable to a person whose existence was not apparent at the time of his act. We, therefore, find it illogical to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child, unbeknownst to him, been conceived prior to his act. We believe that there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother.[40]

The court's reasoning and conclusion are clearly proper in light of the *Renslow* facts.[41] The infant plaintiff in *Renslow,* as found by the court, was foreseeably injured by the defendant. As the *Renslow* court stated, "Logic and sound policy require a finding of legal duty . . ."[42] and a corresponding right of action in such a case.

The *Renslow* court found support for its position in two additional cases dealing with pre-conception torts, *Park v. Chessin*[43] and *Jorgensen v. Meade Johnson Laboratories.*[44] In both cases the courts concluded that it is not necessary that a legal duty be owed to one in existence at the time of the negligent act in order to give rise to a cause of action.

Additionally, the *Renslow* court acknowledged the interdependency of scientific advancement and common law growth. As medical techniques and capabilities advance at a rapid pace, the common law must adapt to meet the needs of modern society. Thus, "sound social policy,"[45] said the court, mandates

39 *Id.* Duty, say these commentators, is the expression of the sum total of policy considerations which lead the law to say a plaintiff is entitled to protection. *Id.*

40 *Id.* at 357, 367 N.E.2d at 1255.

41 The absurdity of denying a cause of action for pre-conception injury while permitting one for a prenatal injury is best illustrated by the following example. Assume that Mrs. R. is 21 years old and in need of a transfusion. Her blood is Rh-negative. It can be proved that Mrs. R. and her husband conceived a baby girl on the previous night. Mrs. R.'s doctor negligently transfuses her with Rh-positive blood. As a result of the transfusion, prenatal damage to the infant is incurred. A cause of action for injuries arises in favor of the child in this example. If, however, Mr. and Mrs. R. conceived the child after the negligent transfusion, in the past a cause of action would have been denied, notwithstanding the fact that the very same injuries were suffered.

42 67 Ill. 2d at 359, 367 N.E.2d at 1255.

43 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *aff'd,* No. 560 (N.Y. Ct. App., filed Dec. 27, 1978) (reversed in part on the issue of a cause of action for "wrongful life"). *See* text accompanying notes 77-94 *infra.*

44 483 F.2d 237 (10th Cir. 1973). In *Jorgensen,* the plaintiff claimed that the defendant drug company negligently manufactured birth control pills. The plaintiff took the pills for several months, stopped, became pregnant, and gave birth to Down's syndrome twins. The complaint alleged that the pills had altered the chromosome structure of the wife and that, as a result, a Down's syndrome deformity was created within the fetuses.

45 67 Ill. 2d at 358, 367 N.E.2d at 1255.

the recognition of a cause of action for the infant injured by the pre-conception negligence of a physician.

The defendants objected that the court's holding would impose perpetual liability upon the negligent physician. The court weakly parried, asserting that the future courts in their judicial wisdom would draw the limit between compensable and noncompensable injuries. The court, however, rather than espousing a general rule of potentially unlimited liability based on the *Renslow* facts, might have suggested boundaries to limit its holding.

C. *Limiting the* Renslow *Holding*

When a plaintiff is injured by a genetic defect which is removed by more than one generation from the negligent act, the proximate cause might still be the physician's negligence.[46] Foreseeability attributable to the physician, however, is reduced significantly. Foreseeability is not *per se* a mathematical concept. One cannot simply deduce a statistical computation of what is or is not foreseeable. Thus, if the court's holding is to be limited, as it necessarily must to avoid indefinite liability, an arbitrary line must be drawn.

A reasonable limitation of the cause of action for "pre-conception injury" would be to bar recovery to all generations except that immediately following the generation which was the subject of the negligence. This limitation, although arbitrary, has the benefit of permitting a cause of action to the most likely victim of the negligence while containing physician liability to acceptable levels.

Although the law has long recognized that not all injuries are compensable, in cases such as pre-conception injury "where a party's negligence is directly [and foreseeably] responsible for physical injury to another, there is no question that the injured party may [and should] recover . . ."[47] The *Renslow* court determined only that a cause of action arises on behalf of the infant for a "pre-conception injury." To recover, the infant like any other litigant must bear the burden of establishing the elements of a traditional tort action, namely duty, breach, proximate cause, and injury.

In *Renslow,* the only issue appealed to the Illinois Supreme Court was the dismissal of the child's cause of action. Thus, the court did not address the questions (1) whether the parents have a cause of action against the physician for the financial injury caused as a result of the child being deformed and (2) whether a cause of action exists for mental suffering and emotional trauma. The following discussion answers both of these questions in the affirmative when a physician has negligently failed to disclose genetic information to prospective parents. In the more egregious instance of an affirmative act of

46 The defendants in *Renslow,* according to the court, raised "the specter of successive generations of plaintiffs complaining against a single defendant for harm caused by genetic damage done to an ancestor in a nuclear accident." 65 Ill. 2d at 358, 367 N.E.2d at 1255. The court claimed that the damage done by defendant's act would not be self-perpetuating as nuclear accidents are. If, however, the only sure way to control the occurrence of genetic defects is to avoid conception, then genetic defects which result from a physician's affirmative negligence will in fact be self-perpetuating. *See generally* P. REILLY, *supra* note 3.

47 Howard v. Lecher, 42 N.Y.2d 109, 111, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 364 (1977).

negligence, as previously discussed, a similar right of recovery should exist.

Scientific advancements have made it possible today to advise parents of the genetic risks attendant to bearing a child before conception occurs. This note now addresses the liability of a physician for another pre-conception tort, failure to disclose genetic information.

IV. Failure to Disclose: Negligent Omission Is Also Tortious

A. *Wrongful Conception*

1. Definition

The term "wrongful conception" has been defined by some as a cause of action for the unplanned birth of a normal, healthy child caused by a negligent sterilization.[48] For the purposes of this note, however, "wrongful conception" will also refer to the occasion when the physician negligently conveys or fails to disclose genetic information critical to a parent's decision whether to conceive a child.

As noted previously, the only absolute way to avoid the occurrence of incurable genetic disease in a child is to prevent the birth of such a child.[49] For prospective parents, especially those who have already experienced the trauma of giving birth to genetically defective offspring, accurate genetic risk information is a necessity if they are to make an informed decision whether to conceive a child. Prospective parents attempting to exercise their constitutionally protected right[50] to determine whether to conceive a child have neither the means nor the requisite knowledge to garner this information on their own.[51] Thus, it is the duty of the expert, the physician, to furnish the needed genetic information.

Failure to fulfill this duty by negligently conveying or failing to disclose genetic information increasingly results in suits against the physician after a genetically deformed child is born, particularly when, had the parents been informed of the inherent risks, they would not have conceived a child. The stage

48 No. 560, slip op. at 6 (N.Y. Ct. App., filed Dec. 27, 1978).

49 P. REILLY, *supra* note 3, at 22.

50 Recent constitutional developments have raised the right to choose not to procreate to the level of a constitutionally protected right. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (striking down a law limiting the advertisement and sale of contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (sustaining the limited right of an individual to elective abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognition of contraception as an individual right).

51 The risk of a genetic defect occurring in a child must be detected, if at all, by medical experts. Generally, however, prospective parents rely on private physicians as their first and sole source of genetic knowledge. 87 YALE L.J., *supra* note 12. The modern general practitioner or "family doctor" cannot possibly know all of the increasingly sophisticated scope of medical knowledge regarding genetics. B. HILTON, *supra* note 12, at 28. Physicians, however, are required to remain abreast of recent developments especially those within their field of expertise. Moreover, the standard of due care for physicians may require in certain circumstances that the prudent and careful practitioner consult with other medical practitioners. A. HOLDER, MEDICAL MALPRACTICE LAW 49 (1978). Clearly, in an area as volatile as genetics, the general practitioner, when faced with a couple seeking genetic counselling prior to making a decision to conceive a child, would be well-advised to consider referring the couple to a specialist.

for these legal battles has been set by the convergence of three factors: (1) the physician's accurate, elaborate, and growing arsenal of detecting persons who are "at risk" for developing or transmitting genetic diseases,[52] (2) prospective parents' newly awakened awareness of their legal right to avoid conceiving a child,[53] and (3) the overwhelming increase in medical malpractice suits and related litigation.[54]

2. The "Wrongful Conception" Cause of Action

In cases of "wrongful conception" the courts have had little difficulty in finding that the physician, by virtue of the doctor-patient relationship, has a duty to the parents of the deformed child.[55] The physician is obligated to stay abreast of new developments in his field and to diagnose the diseases and injuries of the patient with due care.[56] Thus, in the instance of prospective parents, the physician has a duty to advise them of their genetic fitness for giving birth.

Causation, while slightly more troublesome, has in some cases been routinely disposed of by the court's acceptance of the plaintiff-parents' allegation that but for the physician's failure to properly advise them, the child would not have been born.[57] Other courts, however, rather than assuming causation, have reasoned to the same conclusion by analyzing the key facts which characterize every "wrongful conception" case.[58]

In *Custodio v. Bauer*,[59] the defendants maintained that, rather than a negligent sterilization, the intervening sexual acts of the plaintiffs were the proximate cause of the subsequent unplanned birth. Discarding this argument, the California appellate court noted that to find causation it is only necessary

52 A. MILUNSKY & G. ANNAS, GENETICS AND THE LAW 139 (1976).

53 *See* note 50 *supra*.

54 The incidence of medical malpractice cases in this country rises steadily each year. Different states, however, vary in the number of malpractice claims filed. Two reasons help to explain these differences: (1) where medicine is still practiced on a "small town" basis there is a much more personal and continuing relationship between the physician and patient, and (2) in a small city there is a much more personal relationship between the attorneys and physicians. Attorneys, therefore, are more reluctant to bring suit. A. HOLDER, *supra* note 51, at 398-99.

55 *See, e.g.*, 483 F.2d 237 (10th Cir. 1973); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, —— Minn. ——, 260 N.W. 2d 169 (Minn. 1977); Karlson v. Guerinot, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). For cases denying a cause of action for "wrongful conception," *see, e.g.*, Lapointe v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976). Coleman v. Garrison, 349 A.2d 8 (Del. Super. Ct. 1975); Stewart v. Long Island College Hospital, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970) *appeal dismissed*, 27 N.Y.2d 805, 264 N.E.2d 354, 315 N.Y.S.2d 863 (1971); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 421 U.S. 927 (1974).

56 A. HOLDER, *supra* note 51, at 52.

57 *See, e.g.*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Park v. Chessin, No. 560 (N.Y. Ct. App., filed Dec. 27, 1978).

58 *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); *cf.* Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S. 2d 265 (1974) (diagnosing pregnancy in time to permit termination).

59 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). In *Custodio*, plaintiff brought an action to recover medical expenses, damages for pain, and suffering and the cost of raising an unwanted but normal child which resulted from a negligent sterilization of the plaintiff-mother. The court held that the parents were entitled to bring an action. In so doing, it noted, "On the . . . record it is clear that if successful on the issue of liability they have established a right to more than nominal damages." *Id.* at 325, 59 Cal. Rptr. at 477.

that "the negligence in question be *a* proximate cause of the injury . . ."[60] not the sole cause and that it would be "difficult to conceive how the very act the consequences of which the operation was designed to forestall can be considered unforeseeable."[61] The application of this principle to a negligent failure to disclose genetic information is axiomatic. Although courts readily have found duty, breach, and causation in cases of wrongful conception, damages is an area of uncertainty and controversy.

The principal contention of those who advocate denial of a cause of action for "wrongful conception" is that even if one accepts the fact that the physician was negligent, it is impossible to measure the damages. Thus, damages cannot be justly awarded and no cause of action should exist. This basic proposition was espoused in *Gleitman v. Cosgrove.*[62]

In *Gleitman,* the plaintiff, who was two months pregnant, was examined by the defendant. She informed the doctor that one month earlier she had had an illness diagnosed as *rubella.*[63] Mrs. Gleitman inquired about the possible effect of the disease on the unborn child and was told that there would be no effect. Thereafter, Mrs. Gleitman gave birth to a baby with substantial defects in sight, hearing, and speech. In their complaint the plaintiffs alleged that had they been properly advised by defendant they would have terminated the pregnancy.

In denying the Gleitmans' cause of action, the New Jersey Supreme Court noted that tort damages are compensatory. The measure of such damages is the difference between the condition in which the plaintiff would have been had the defendant not acted negligently, and plaintiff's impaired condition as a result of the negligence. The court stated, however, that to determine compensatory damages it

> would have to evaluate the denial to the [parents] of the intangible, immeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries . . . . When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child.[64]

60 *Id.* at 316, 59 Cal. Rptr. at 472 (quoting Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 393, 212 P. 913, 914 (1923)).

61 *Id.* at 316-17, 59 Cal. Rptr. at 472.

62 49 N.J. 22, 227 A.2d 689 (1967).

63 *Rubella* is more commonly known as German or three-day measles. It is an acute exanthematous disease caused by an RNA virus, and marked by enlargement of lymph nodes, but usually, with little fever or constitutional reaction. When *rubella* occurs during the first several months of fetal life there is a high instance of infant abnormalities such as retardation. STEDMAN'S, *supra* note 35, at 1243. Viruses, such as those causing *rubella,* however, are only a few of the environmental agents that can cause serious harm to the developing fetus. 87 YALE L.J., *supra* note 12, at 1488n.2.

64 49 N.J. at 29-30, 227 A.2d at 693. The *Gleitman* court assumes that a healthy child always confers an overriding benefit. Many courts which have permitted a cause of action for "wrongful conception" have invoked the "benefit rule." *See, e.g.,* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); 31 Mich. App. 240, 187 N.W.2d 511 (1971); 136 N.J. Super. 69, 344 A.2d 336 (1975); 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977). The Restatement of Torts declares: "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." RESTATEMENT OF TORTS § 920 (1939).

Thus, the court concluded that since the birth of a child confers an overriding emotional benefit on the parents and since it is impossible to calculate damages based on the nonlife of a person, the parents' complaint was properly dismissed by the lower court.

In sharp contrast to the *Gleitman* court, the Supreme Court of the United States has explained the theory of damages in the following way:

> The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount.
>
> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.[65]

Thus, difficulty in determining the amount of damages is an insufficient basis to deny a cause of action to parents for "wrongful conception."

In *Jacobs v. Theimer,*[66] a case factually similar to *Gleitman,* the Texas Supreme Court also dispelled the damages theory of the *Gleitman* court. The *Jacobs* court concluded that the economic burden which is related solely to the physical defects of the child is free from the objection that damages cannot be calculated. The extraordinary expenses of raising a deformed child, said the court, are precisely the type of damages which courts are accustomed to determining in personal injury actions.

The Wisconsin Supreme Court, in another *rubella* case, reached the same conclusion in *Dumer v. St. Michael's Hospital.*[67] The *Dumer* court concluded that the attending physician had a duty to inform the prospective mother of the probable effects of *rubella* upon the fetus. When the physician has breached this duty the court said that a cause of action accrues to the parents of the deformed child for all damages which they have reasonably and necessarily suffered as a result of the child's defect.

The most recent case of "wrongful conception" is *Park v. Chessin.*[68] In *Park,* the plaintiff, Hetty Park, gave birth in June 1969, to a baby who was afflicted with polycystic kidney disease,[69] a fatal hereditary disease of such a

65 Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563 (1931).
66 519 S.W.2d 846 (Tex. 1975).
67 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
68 No. 560 (N.Y. Ct. App., filed Dec. 27, 1978).
69 Polycystic kidney disease is characterized by numerous cysts (of varying sizes) scattered diffusely throughout the kidneys, sometimes resulting in organs that tend to resemble grapelike clusters of cysts. The disease is congenital, may be transmitted by either parent, and probably represents the result of a dominant gene. STEDMAN'S, *supra* note 35, at 745.

nature that there exists a substantial probability that any future baby of the same parents will be born with it. Concerned with a reoccurrence of this disease, the Parks consulted the defendants, obstetricians who treated Mrs. Park during her first pregnancy, to determine the likelihood of reoccurrence.

In the complaint the Parks alleged that defendants responded to their inquiry with the medically inaccurate advice that the chances of having any future baby with the disease were "practically nil"[70] because the disease is not hereditary. Thereafter, in reliance on defendants' advice, the Parks made a conscious choice to conceive another child. The plaintiff-parent became pregnant and in July 1970, gave birth to a child, Lara, who also suffered from polycystic kidney disease. Unlike the first child, however, Lara survived for two and one-half years before succumbing to the disease.

Alleging that had they been correctly advised of the true risk of reoccurrence of the disease, they would not have chosen to conceive, the parents brought a cause of action on their own behalf and on behalf of the infant for "wrongful life." Plaintiff-parents' complaint sought damages for, among other things, the expense borne by them for the care and treatment of the child.

Relying on *Jacobs* and *Dumer,* the *Park* court readily allowed that the damages alleged by the plaintiff-parents were ascertainable and that the parents stated a cause of action in their own right. That right, said the court, is predicated upon a breach of duty owed to the parents themselves, resulting in damage for which compensation may readily be fixed.

Unlike the sterilization cases, in cases such as *Park* in which the parents made a conscious decision to conceive, no injury would result if the child were born normal.[71] When, however, the parents would not have conceived a child had they been given accurate genetic information, they are economically injured when forced to bear the burden of raising a deformed child. Once it has been determined that an injury has been incurred, the difficulty of estimating damages does not warrant the total dismissal of the cause of action.

Like the *Jacobs* court, however, the New York Court of Appeals limited the extend to which plaintiff-parents could recover to the sum expended for the extraordinary care and treatment of the child necessitated by the physical deformity. Thus, a final question, unrelated to whether a cause of action exists, is whether the *Park* court's limitation is a proper measure of damages.

In *Park,* the parents alleged that had they been properly advised they would not have had the child. Therefore, the proper measure of damages would seemingly be the total cost of raising the child and not the extraordinary expenses of raising a deformed child.

Actions for the total cost of raising a child generally have arisen in cases

70 No. 560, slip op. at 4 (N.Y. Ct. App., filed Dec. 27, 1978).

71 The cardinal principle of damages in Anglo-American law is that of *compensation* for injury caused to plaintiff by defendant's breach of duty. F. HARPER & F. JAMES, THE LAW OF TORTS 1299 (1956). Compensation is intended to repair plaintiff's injury or make him whole as nearly as that may be done with an award of money. The remedy should be commensurate to the injury sustained. *Id.* at 1301.

of negligent sterilization.[72] Few courts, however, have recognized any cause of action when a normal, healthy child was born[73] and those courts which have, generally, limited recovery by invoking the "benefit rule."[74] As previously noted, in *Park,* had the child been born normal, no injury would have been incurred and as a result no cause of action would have accrued. Thus, the *Park* court may have reasoned that since the parents would have been uninjured by the birth of a normal child, the extent of their injury by having a deformed child is not the financial difference between having no child and a deformed child, but rather, the difference between having a healthy child and a deformed child. Such a rationale, however, denies the simple facts of the case, that had the parents been properly advised, no child would have been born and, therefore, no costs would have been incurred.

Alternatively, the court may have applied the "benefit rule" to reach the published result. It may have determined that the joy and happiness that even a deformed child brings to its parents will offset the normal costs of rearing a child. Thus, the only compensation necessary to reinstate the parents in the position in which they would have been but for the negligence, is the extraordinary costs of rearing. Such reasoning, however, assumes that any child born necessarily brings happiness into the life of its parents. As the *Custodio* court said, however, there is a trend of change in social ethics with respect to the family establishment so that "the birth of a child may be something less than [a] blessed event . . . ."[75]

A more likely, if not more logical, reason for the court's limitation of the right of recovery is simply that it wished to limit the physician's liability. The court, according to some commentators,[76] was taking a quantum leap forward in the law of torts. Thus, to mitigate the impact of its decision, the court, in effect, invoked its equitable powers to determine to what extent the parents were equitably entitled relief. The net result of the court's unexplained limitation is to grant a legal cause of action to the injured party but to deny that party full compensation for his injury. This denial of compensation for a direct injury applies also to damages for emotional and mental injury. A discussion of the cause of action for mental injury appears later in this note.

Notwithstanding the court's arbitrary restriction on recovery, the *Park* decision represents another step in the direction of protecting the rights of those who are injured by the pre-conception negligence of a physician.

B. *Wrongful Life*

In addition to seeking relief in their own right, the parents in *Park* also

72 *See, e.g.,* 409 F.Supp. 118 (W.D. Tex. 1976); 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); 349 A.2d 8 (Del. Super. Ct. 1975); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976); 496 S.W.2d 124 (Tex. Civ. App. 1973). *Cf.* 31 Mich. App. 240, 187 N.W. 2d 511 (1971 (pharmacist negligently filled birth control pill prescription).

73 *See, e.g.,* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); 136 N.J. Super. 69, 344 A.2d 336 (1975). *Cf.* 31 Mich. App. 240, 187 N.W.2d 511 (1971) (pharmacist negligently filled birth control pill prescription).

74 *See* note 64 *supra.*

75 251 Cal. App. at 321, 59 Cal. Rptr. at 475.

76 *See, e.g.,* Altman, *Birth Defect Suits Worry Doctors,* N.Y. Times, Jan. 30, 1979, § C at 1.

brought an action on behalf of the physically deformed infant for "wrongful life." Although the cause of action for "wrongful life" has been defined in various ways,[77] generally it is understood to refer to cases in which an infant-plaintiff seeks to recover for having been wrongfully brought into the world[78] because, due to his deformity, life is one of constant travail. Thus, the plaintiff in these cases alleges that he would have been better off not living and that he is entitled to damages for being born.

A cause of action for "wrongful life" has generally been denied by courts which have addressed the issue.[79] This action, unlike those for "pre-conception injury" and "wrongful conception" is imbued with logical inconsistencies and conflicting policy considerations. As the court in *Park* forewarned,

> Even as a pure question of law, unencumbered by unresolved issues of fact, weighing of the validity of a cause of action seeking compensation for the wrongful causation of life itself casts an almost Orwellian shadow premised as it is upon concepts of genetic predictability once foreign to the evolutionary process. It borders on the absurdly obvious to observe that resolution of this question transcends the mechanical application of legal principles.[80]

Courts refusing to recognize the "wrongful life" action generally rely on three propositions for such refusal: (1) it does not fit into any legal concept with which the court is experienced, (2) damages are impossible to calculate, and (3) there is no cognizable legal injury.[81]

Some commentators, disputing the assertion that "wrongful life" does not fit into any traditional legal theory, have suggested that the cause of action be recognized precisely because it meets all the traditional elements of recovery in tort.[82] Without addressing for the moment the question whether all traditional elements are satisfied, the courts' first reason for denying "wrongful life" recovery warrants further discussion.

As noted previously, parents, injured by the negligent transmission of medical information, have been allowed a cause of action for receiving the extraordinary expense of raising a deformed child.[83] This right arose where one apparently had not existed previously because of the close interplay between the

77 *See, e.g.,* Park v. Chessin, No. 560 (N.Y. Ct. App., filed Dec. 27, 1978). The *Park* court viewed the term "wrongful life" as "a broad umbrella under which plaintiffs alleging factually divergent wrongs have sought judicial recognition of their claims." No. 560, Slip op. at 6 (N.Y. Ct. App., filed Dec. 27, 1978).

78 *See, e.g.,* 49 N.J. 22, 227. A.2d 689 (1967).

79 Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975): 49 N.J. 22, 227 A.2d 689 (1967); Park v. Chessin, No. 560 (N.Y. Ct. App., filed Dec. 27, 1978); Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 364 N.E.2d 134, 396 N.Y.S.2d 647 (1977); 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977); Greenberg v. Kliot, 47 App. Div. 2d 765, 367 N.Y.S.2d 966, *appeal denied,* 37 N.Y.2d 707, 337 N.E.2d 618 (1975); 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970); 27 N.Y.2d 805, 264 N.E.2d 354, 315 N.Y.S.2d 863 (1971); 69 Wis. 2d 766, 233 N.W.2d 372 (1975). The foregoing omits those cases by illegitimate children for "wrongful life" since these cases are beyond the scope of the present discussion.

80 No. 560, slip op. at 5 (N.Y. Ct. App., filed Dec. 27, 1978).

81 *See, e.g.,* 392 F. Supp. 654 (N.D. Ohio 1975); 49 N.J. 22, 227 A.2d 689 (1967); 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977).

82 *See, e.g.,* Capron, *Informed Decisionmaking in Genetic Counselling: A Dissent to the "Wrongful Life" Debate,* 48 IND. L.J. 581 (1973); Kashi, *The Case of the Unwanted Blessing: Wrongful Life,* 31 MIAMI L. REV. 1409 (1977); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis],* 55 MINN. L. REV. 58 (1970).

83 *See* text accompanying notes 48-76 *supra.*

maturation of scientific theories of genetics and legal theory. Thus, it would be inconsistent to deny an action on behalf of an infant who is born genetically deformed *solely* because the theory of "wrongful life" is not encompassed within a recognized tort classification, such as wrongful death. A denial of recovery should not be based on such faulty reasoning. To condemn this approach is not to say, however, that "wrongful life" actions should be permitted. To the contrary, the two additional reasons present solid and substantive objections to the cause of action and form a sufficient foundation for a reasoned denial of a "wrongful life" cause of action.

The weaker of the two arguments is that in a "wrongful life" action the precise calculation of damages is impossible. As demonstrated previously, this position becomes less tenable by simple comparison with recovery for intangible damages such as pain and suffering, damages which courts regularly compute. In the instance of "wrongful life," however, this reason is more creditable and merits further analysis.

The measure of damages in tort law is compensatory.[84] Damages are limited to that remuneration which is necessary to restore the individual to the place he would have occupied were it not for the negligence.[85] When an infant-plaintiff claims that he should not have been born at all, no base line exists from which to appraise the damages. No manner exists in which to determine the place the plaintiff would have occupied but for the negligence.

A cause of action for "wrongful life," said the *Park* court, "demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence."[86] Although one commentator has postulated a measure of the value of damages where nonlife is preferred,[87] in fact, man—who knows nothing of death or nothingness—is incapable of placing a value on the *supposed* benefit of nonbeing[88] and thus establishing the requisite base line from which damages can be appraised.

The most compelling reason for denial of a cause of action for wrongful life is the absence of a legally cognizable injury. Unlike parental recovery of the extraordinary expenses of raising a deformed child, the infant in a "wrongful life" case can show neither a commission nor an omission on the part of the physician which would have reduced the likelihood of being harmed, *i.e.*, being born.

Although a cardinal principle of tort law is that a person who is injured by the negligence of another should be recompensed, it is unclear in cases of "wrongful life" that life with deformities as compared to nonlife constitutes an injury.[89] The court in *Park* treated this issue extensively. Reversing the Appellate

84 F. HARPER & F. JAMES, *supra* note 71, at 1299.
85 *Id.* at 1301. *See* note 71 *supra.*
86 No. 560, slip op. at 10 (N.Y. Ct. App., filed Dec. 27, 1978).
87 55 MINN. L. REV., *supra* note 72, at 62-67.
88 49 N.J. 22, 63, 227 A.2d 689, 711 (1967) (Weintraub, J. dissenting in part).
89 One commentator has expressed the rationale which courts have relied upon in denying the existence of a cognizable legal injury in this way: "no comparison [between life in a deformed body and nonlife] is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage." Tedeschi, *"On Tort Liability for 'Wrongful Life,'"* 1 ISRAEL L. REV. 513, 529 (1966).

Division which had recognized "the fundamental right of a child to be born as a whole, functional human being,"[90] the New York high court concluded that "whether it is better never to have been born at all than to have been born with gross deficiencies is a mystery more properly to be left to the philosophers and theologians."[91]

Unable to discern any value in nothingness, the *Park* court, emphasizing the high value traditionally placed on human life by law and society[92] assumed an inherent overriding value of *any* life over the "utter void of nonexistence."[93] Thus, since no injury cognizable at law has occurred, a requisite element for a cause of action in tort is lost and the *Park* court, like many others, properly dismissed the "wrongful life" cause of action.[94]

V. Mental Suffering and Emotional Distress

Although granting a right of recovery for the extraordinary expenses of treatment for a deformed child, the *Park* court denied a cause of action for the emotional injury and mental suffering of the parents. Relying on *Howard v. Lecher,*[95] the court concluded that recovery for such damages must necessarily be circumscribed.

The court's denial of a cause of action for emotional injury is predicated almost wholly on a policy decision to limit the liability which a physician may incur for giving negligent genetic advice. No other reason could explain the artificial reasoning that the court applied to reach its decision.

Quoting *Howard,* the *Park* court observed that to permit recovery would "inevitably [lead] to the drawing of artificial and arbitrary boundaries."[96] The court attempted to distinguish *Johnson v. State*[97] by positing that any injury incurred by the Parks was indirect. The court continued by arguing that although the parents of a deformed infant suffer anguish which only parents can endure, that anguish is nevertheless offset by the love parents experience. Thus, the

90 60 App. Div. 2d at 88, 400 N.Y.S.2d 110 (1977).

91 No. 560, slip op. at 9 (N.Y. Ct. App., filed Dec. 27, 1978).

92 *See, e.g.,* 49 N.J. 22, 227 A.2d 689 (1967); 69 Wis. 2d 766, 233 N.W.2d 372 (1975); *But cf.* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (birth of a child may be less than a blessed event); 31 Mich. App. 240, 187 N.W.2d 511 (1971) (birth of a child not always an overriding benefit).

93 49 N.J. at 28, 227 A.2d at 692.

94 It is important to distinguish between a "pre-conception injury" and a "wrongful life" action. A "pre-conception injury" is the result of an affirmative act of negligence on the part of the physician which adversely affects the mother's genetic makeup and is in turn transmitted to the injured party at conception. This gives rise to a conditional prospective liability. Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 10 Ill. Dec. 484, 367 N.W.2d 1250 (1977). A "wrongful life" action is based on the negligent failure of the physician to provide the parents with necessary genetic information. Unlike "pre-conception injury," damages are not clearly defined nor can the infant show that the physician's negligence caused the genetic defects of which he complains. *See* text accompanying notes 77-93 *supra.*

95 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977). In *Howard,* the plaintiffs alleged that the defendant, aware that plaintiffs were East European Jews, negligently failed to advise them that the fetus might suffer from Tay-Sachs disease. The question before the court of appeals, however, was only whether the parents were entitled to recover for the alleged trauma caused by the birth, degeneration and death of their child.

96 42 N.Y. 2d at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 365.

97 37 N.Y. 2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). In *Johnson* plaintiff daughter was the recipient of an incorrect notice that her mother had died. The court allowed recovery of damages for emotional distress.

court retreated to the very argument, namely, the incalculability of damages, that it was forced to ignore in reaching its decision to allow the cause of action for economic harm. Moreover, the *Park* court stated that the "calculation of damages for plaintiff's emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves."[98] By relying on this rationale, the court undercut its prior reasoning that recovery is barred by the indirectness of the injury.

The *Park* court addressed the issue of emotional distress and mental suffering only in the context of a parental action for "wrongful conception." Arguably, in this posture one could assume the "mere bystander" rationale applied to the parents of *Howard*[99] and conclude that the injury to the parents was indirect and therefore noncompensable. In *Renslow,* however, such an argument could not be advanced because the child was unquestionably directly injured. Thus, the infant, in the absence of some other valid judicial reason, would be entitled to recover for the mental suffering incurred by reason of his deformity.

From the *Park* court's arguments, clearly the denial of the cause of action for mental suffering and emotional distress is premised on policy considerations. Principal among these concerns is a fear of overextending recovery to others than those directly involved. This fear, however, is without basis because the recovery involved is, in fact, by those who have been directly injured.[100] The mental anguish suffered by parents of a deformed child, and in a *Renslow* situation, by the child himself, is a direct injury flowing from the defendant's breach of duty and the consequent liability of the physician is therefore constrained.

Moreover, to argue that the calculation of damages is speculative is to ignore the reality that courts have traditionally determined compensation for pain and suffering and other amorphous injuries. "Surely a judicial system that daily evaluates such matters as pain and suffering, which have admittedly 'no known dimensions, mathematical or financial' should be able to evaluate the harm which proximately"[101] results from a breach of duty.

Although few courts have recognized a cause of action for mental suffering and emotional distress in "wrongful conception" cases the denial of this right is unfounded. Damages for emotional injury have been recognized in a variety of torts and the courts which have refused to grant a cause of action for them in cases of wrongful conception have yet to identify any unique problems in genetic cases that do not occur elsewhere. It may therefore be expected that once the *Park* decision is accepted by other state judiciaries, the logical extension to acceptance of a cause of action for mental suffering will soon follow.

98 No. 560, slip op. at 13 (N.Y. Ct. App., filed Dec. 27, 1978).

99 The *Howard* court reasoned that the parents were made to bear no physical or mental injury other than the anguish of observing their child suffer. Thus, the court concluded the parents were mere bystanders and are not entitled to a cause of action for mental distress unless they can establish a direct injury to themselves.

100 *See* 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977). Decided two weeks prior to *Howard, Karlson* sustained a cause of action for damages for mental suffering. The *Howard* decision is nevertheless controlling.

101 49 N.J. at 50, 227 A.2d at 704 (Jacobs, J. dissenting) (quoting Botta v. Brunner, 26 N.J. 82, 95, 138 A.2d 713, 720 (1958)).

VI. Mitigation of Damages

When a determination of negligence and attendant liability has been made, one further issue must be resolved. Before damages may be assessed it must be decided to what extent the plaintiff is required to mitigate damages. For example, in *Park,* the plaintiff-parents claimed that they would not have conceived the child were it not for the negligent advice of the defendant. In order to recover, should they have been required to terminate the pregnancy when it was discovered that the child would be genetically defective?

The problem of mitigation of damages was discussed at length in *Troppi v. Scarf.*[102] *Troppi* involved an action brought by the parents of an unplanned, healthy child against a pharmacist who negligently filled a birth control pill prescription. The parents sought to recover the expenses of raising the child to maturity but the defendant countered by asserting that the parents should have mitigated the damages by either aborting the fetus or placing the child for adoption.

The court discarded the defendant's contention noting that the doctrine which requires an injured plaintiff to minimize the financial consequences of defendant's negligence requires only that reasonable measures be taken. Thus, the majority held that while reasonableness of mitigation is normally a question of fact, as a matter of law no mother could reasonably be requested to abort in order to mitigate damages.[103] The court reinforced its holding in dictum stating,

> The law has long recognized the desirability of permitting a child to be reared by his natural parents. . . . If the negligence of a tortfeasor results in conception of a child by a woman whose emotional and mental makeup is inconsistent with . . . placing the child for adoption . . . then . . . the tortfeasor takes the injured party as he finds him. . . .[104]

Thus, when the foregoing is combined with the general policy favoring life over nonlife, no prospective mother should be required to abort a fetus in order to mitigate the losses of a negligent physician.

VII. Conclusion

In recent years, the body of law surrounding the rights of the unborn and their parents to recover for the negligence of a physician that results in genetic deformity has developed rapidly. The recent decisions of two state high courts, *Park v. Chessin*[105] and *Renslow v. Mennonite Hospital,*[106] are a forward-looking step in the growth of the common law in an area which is inextricably tied to advances in scientific knowledge and technology. The *Renslow* decision makes clear

102 31 Mich. App. 240, 187 N.W.2d 511 (1971).
103 *Id.* at 260, 187 N.W.2d at 520. *Accord,* —— Minn. ——, 260 N.W. 2d 169 (1977); 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974). The *Park* court declined to treat the issue of mitigation stating that particular elements of expense or loss should await resolution at the trial level.
104 31 Mich. App. at 259, 187 N.W.2d at 520.
105 No. 560 (N.Y. Ct. App., filed Dec. 27, 1978).
106 67 Ill. 2d 348, 10 Ill. Dec. 484, 367 N.E.2d 1250 (1977).

that the time at which an affirmative act of negligence is committed is of no consequence to the determination of whether a cause of action exists in both the parents and the child. A physician has a duty to both the prospective parent and the yet-to-be conceived child. Any affirmative breach of that duty which results in injury to the child is compensable and will give rise to a cause of action on behalf of the child.

The child's cause of action, however, must arise out of an affirmative act of negligence by the physician. The situation must be such that were it not for the defendant's negligence the child would have been born without any genetic defects. Thus, "wrongful life" actions continue to be precluded. On the strength of precedent, if a cause of action is to be recognized for "wrongful life," clearly it must, as suggested by the *Park* court, await legislative sanction.[107]

Finally, a cause of action for extraordinary expenses has been recognized on behalf of the parents of a deformed child conceived as the result of the negligent withholding of genetic information by a physician. This conclusion, while laudable, is just the first step in the recognition of the rights of parents to be accurately informed before making the decision whether to conceive. Cases in the near future will certainly take the next short step and permit a cause of action for all damages which are the direct result of the physician's negligence, including mental suffering.

It may be anticipated that in the future an increasing number of state courts will recognize "pre-conception injuries" and "wrongful conception" as establishing causes of action. Arguments against such recognition might stress increased economic burden on patients as a result of additional diagnostic testing and malpractice insurance premiums. These excuses, however, are made by physicians who seek to escape responsibility for their professional behavior which inalterably injures the lives of their patients. The skillful practitioner should have no fear. He will find no greater liability imposed by recognition of a cause of action for pre-conception torts than he now bears for setting a broken leg.

> *The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.*[108]

Timothy J. Carey

107 No. 560, slip op. at 10 (N.Y. Ct. App., filed Dec. 27, 1978).
108 O. HOLMES, THE COMMON LAW 1 (1881).