To Be, Perchance to Sue

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1. Introduction

To prevail successfully in a tort action for negligence, the plaintiff must demonstrate, at a preponderance of the evidence, that the defendant was duty bound to the plaintiff; that the defendant breached the duty owed; that the breach altered the plaintiff's position, state, or status; and finally, that the change suffered by the plaintiff constitutes an injury. The plaintiff's failure to demonstrate any of the above-noted provisions will result in a decision in favor of the defendant. The provisions, therefore, are individually necessary and jointly sufficient for the plaintiff's case.[1]

Tort actions for negligence cover most medical malpractice suits.[2] However, perhaps nowhere have tort actions for negligence raised more legal and logical problems than in the area of wrongful birth and wrongful life suits. In the former type of suit, parents sue physicians, hospitals, and testing institutions for negligence resulting in injury to themselves by virtue of harm to the child. In the latter suit, the resultant child sues the same party defendants for experiencing the defective state. Neither suit endeavors to show that the responsible medical sector caused the child's affliction.[3]

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[1] Joseph W. Glannon, *The Law of Torts*, 2nd ed. (New York: Aspen Publishers, 2000), chap. 2. See also *Prosser and Keeton on Torts*, 5th ed. (St. Paul, MN: West Publishing Co., 1984), chap. 5.

[2] Few malpractice suits are brought in tort under battery; see *Mohr v. Williams*, 104 N.W. 12 (MN 1905). Fewer still are brought in under the intentional tort of causing emotional distress; see *Rockhill v. Pollard*, 485 P. 2d 28 (OR 1970). There are classic malpractice cases brought in contract law; see *Hawkins v. McGee*, 146 A. 641 (NH 1967).

[3] Marcia M. Boumil and Clifford E. Elias, *The Law of Medical Liability* (St. Paul, MN: West Publishing Co., 1995), chap. 5; B. R. Furrow, et al, *Health Law* 2nd ed. (St. Paul, MN: West Publishing Co., 2000), chap. 17. Contrast cases where the physician, through negligence, is the actual cause of the unborn's affliction or where the health care provider fails to warn the pregnant woman of the untoward effects a given drug

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Rather, in both types of suits the plaintiffs argue that each is harmed because the child would not have *suffered* his or her abnormality but for the remiss behavior of the health care provider that resulted in the child being born alive. With regard to the class of child plaintiffs, the vast majority of jurisdictions have been unsympathetic to such suits and for essentially one major reason.

The purpose of this article is the investigation of the nature of wrongful life suits and the problems raised by such suits. Section 2 introduces the paradigmatic wrongful birth suit, while Section 3 discusses the general structure of a wrongful life suit. Section 4 covers various problems raised by wrongful life suits, and Section 5 deals with the problem of assessing damages in such suits. Section 6 presents an analogy for such an assessment. Section 7 poses one untoward ramification of finding such suits actionable.

2. Wrongful Birth Suits

In 1967, the New Jersey Supreme Court reviewed a case, *Gleitman* v. *Cosgrove*,[4] in which the plaintiff-parents argued that the defendant-physician had breached his duty to inform the plaintiffs that suffering German measles during the first trimester of pregnancy will, in 20-50% of the pregnancies, produce newborns afflicted with defects. With the birth of a defective child, the plaintiffs argued that the defendant knew or should have known the effect of German measles during pregnancy and that the defendant suffered a duty to inform them of same. The plaintiffs contended that the defendant failed to disclose said information and that by such failure, their defective child was born and that, by such birth, they suffered economic and emotional injury.

The New Jersey Supreme Court noted that the plaintiffs were correct in most of their contentions in the "wrongful birth" suit. The defendant was duty bound to disclose the information deemed material to the parents' decision to continue the pregnancy. The physician breached the duty owed the parents. Finally, the parents argued that "but for" the remiss behavior on the part of the physician, they would have aborted the fetus causally altered by the German measles.[5] Nevertheless, the Court did not find that the parents had been injured.

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might have upon the unborn; see *Morgan v. Christman*, 1990 WL 137405 (KS 1990); *Velazquez* v. *Portadin*, 751 A. 2d 102 (NJ 2000).

[4] *Gleitman v. Cosgrove*, 227 A. 2d 689 (NJ 1967).

[5] It would appear odd that notwithstanding the illegality of abortion in New Jersey at the time of the case, the New Jersey Supreme Court nevertheless rendered a decision. Unless the New Jersey exceptions to the abortion proscription could be construed to cover this case, the plaintiffs were arguing a case that failed for want of actual causation. That is, informing the patient of the harmful effect of German measles upon

Generally, damages due to negligence are calculated by comparing what the plaintiff's state would have been without the defendant's negligence with the plaintiff's caused state by the breach. Since the parents in this case had anticipated certain monetary expenditures usually associated with raising a normal child, they sued for the excess or extraordinary costs associated with raising a child so afflicted, for the same period. The parents also sued for the emotional distress associated with having a defective child, that is, the difference between the joy of having a normal child or the disappointment of having no child against the distress associated with having to care for a defective child.

The Court, however, "found" that the benefit bestowed upon parents suffering a defective child outweighed the emotional distress and the excess medical expenses.[6] If the plaintiffs were benefited beyond being injured, then the breach of the duty notwithstanding, the parents were not harmed, that is, they suffered no compensable damage. Subsequent wrongful birth suits in New Jersey and in other states, however, have resulted in favorable verdicts for the plaintiffs. In these cases, some courts have awarded only emotional damages to the parents, while others only permitted recovery for economic damages.[7]

3. Wrongful Life Suits

Also raised in *Gleitman v. Cosgrove* was the contention that not only had the parents been injured by virtue of the physician's negligence but so too had the newborn child.

The plaintiff-child argued that by virtue of the physician's breach of the duty owed, the child had been harmed, that is, had been forced to endure his affliction by not being aborted. It was not contended that the physician's negligence caused the child's problems nor was it contended that physicians must now guarantee perfect children. All that is required is that the at-risk parents be notified of said risk. If there is no evidence of risk or no medical procedure capable of determining the risk, then there is no breach of duty,

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the fetus would not alter the state of the parents or the resultant child. The child did not suffer the alleged harm "but for" the failure to inform.

[6] The court noted that abortion was proscribed and that it was unseemly to allow parents to profit from their loss of opportunity to eliminate their child.

[7] *Berman v. Allan*, 404 A. 2d 8 (NJ 1979); *Becker v. Schwartz*, 386 N. E. 2d 807 (1987), respectively. See also *Park v. Chessin* (companion case with *Becker*); *Speck v. Finegold*, 408 A. 2d 496 (PA 1979). But see *Keel v. Banach*, 624 SO. 2d 1022 (AL 1993) allowing both types of damages. See also *Bader v. Johnson*, 732 N. E. 2d 1212 (IN 2000), recognizing both types of damages.

since the duty is to disclose risks that were known or should have been known. Thus, the plaintiff was alleging that the defendant-physician suffered a duty to the parents to disclose the known or should–have-been-known risk, the defendant did not do so, and that but for the breach, the plaintiff's parents would have aborted the fetus and the child would not have had to suffer a "fate worse than death."

4. Problems with Wrongful Life Suits

The suit in question involves a claim by a newborn that the health care provider was negligent and that but for the provider's negligence, the child would not have life the experience of which constitutes an actionable harm to the newborn. But such a suit is plagued with problems from the start. For instance, one defense to an action for negligence is that there is no duty owed the plaintiff. That there is a duty suffered by the physician to the plaintiffs in the wrongful birth suit seems obvious. However, in the wrongful life suit the physician's alleged negligence occurs prior to the birth and frequently prior to the conception of the defective child. To whom is the duty owed? Even if it would make sense to talk of a physician or anyone else owing a duty to a fetus or to an otherwise foreseeable fetus it would still leave the nature of the duty owed unclear. Would the health care provider owe the fetus or foreseeable fetus the same duty owed the mother? If so, how might the duty be satisfied? The plausible answer to the considered questions is at least hinted at in *Renslow v. Mennonite Hospital*.[8]

The issue before the Court was whether the physicians could be held liable for erythroblastosis fetalis (i.e., either Rh incompatibility disease or ABO incompatibility disease) suffered by a child due to the negligent transfusion of the mother nine years prior to the child's conception. The court noted that the harm from the negligence did not evaporate after its commission, but rather continued. Moreover, the plaintiff-child was a foreseeable victim of the negligence. Additionally, pursuant to the *Restatement (Second) of Torts*, "One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results to the other, or to such third persons as the actor should expect to be put in peril by action taken."[9]

Though convoluted, the claim that the third party referred to in the *Restatement* may become a third party *through* the very breach of the duty to inform the agent of the foreseeable third party does not render the third party

[8] *Renslow v. Mennonite Hospital*, 367 N. E. 2d 1250 (IL 1977).

[9] *Restatement (Second) of Torts*, §311 (1) a-b (1965).

any less an injured third party. The duty of the health care provider to the mother, the breach of which results in the existence of a party injured by the existence, does not render the injured party any less an injured third party by virtue of the breach.

That a duty might be owed contingently to the unborn would not seem so very untoward when it appears clear that the nature of the duty so described is derivative both as to its existence and its nature. That is, the duty owed by the health care professional to the unborn is contingent upon the parents' decision freely to have a child. The nature of the duty to the child is derived from the duty owed to the parents and is satisfied or not by the health care practitioner's actions toward the parents in the light of the duty owed. Arguably, therefore, the health care provider, in satisfying or breaching the duty owed the parents, does likewise with the derivative duty owed to the principal (child) through the agents (parents).

Another problem rests with the issue of damages. If the duty to the parents is breached, the breach is the actual and proximate cause of the parents' altered state, and that altered state is both different from and worse than the state the parents would have experienced without the breach, then the parents experience injury. But such a comparison of states for the defective child would yield a comparison between life in a defective state with the state of nonexistence. Recognition of compensable damages would be cognizable if but only if the former state really were a state worse than the latter state.

Yet it has been argued that such a comparison of states is not just difficult, but completely unintelligible. To be sure, in other contexts, objections might be raised about awarding money damages for emotional distress. How much, it might be asked, is extreme disappointment worth compared with extreme joy? Nevertheless, no matter how arbitrary the attachment of a certain economic sum to an emotional state might seem, the comparison of the plaintiff's extreme disappointment with the plaintiff's extreme joy is at least *intelligible*. But how can the court compare the harm of the child's existing in a circumventable but defective state with the "harm" of the child's nonexistence? The required comparison seems not merely difficult to make but *unintelligible*. It is maintained that it is impossible to compare the harm of existence in a defective state with the supposed harm of nonexistence because we have no cognitive access to the latter state.[10] Therefore, awarding damages where damages can never be calculated, would (on this view) be absurd.

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[10] George Annas, "Righting the Wrong of Wrongful Life," *Hastings Center Report* 10, no. 6 (December 1980), p. 8; Barry Furrow, "The Causes of 'Wrongful Life' Suits: Ruminations on the Diffusion of Medical Technologies," *Law, Medicine, and Health Care* 10, no. 1 (February 1982), p. 11; Barry Furrow, "Diminished Life and Malpractice: Courts Stalled in Transition," *Law, Medicine and Health Care* 10, no. 3 (June 1982), p. 100.

5. Assessing Damages

Are the defective child's pleadings in such suits really such a travesty? There are three general responses that might be considered in answering this question. First, as one court has held, it might be thought that "... meditation on the mysteries of life ..."[11] is unnecessary and that attention can be focused instead on the resulting condition of the child. Such an approach, however, is not a solution for or resolution of the problem of the impossible comparison, but a simple rejection of it. As such, the court will take any defect as actionable so long as the plaintiff demonstrates that the defendant breached the duty to inform the plaintiff's parent(s). This approach arguably eliminates the oddity of wrongful life suits by ignoring the traditional method of assessing damages in negligence. This approach saves the defective newborn's cause of action by eliminating a *sine qua non* of the action itself.

A second approach is to note that the favorable findings in the parent's suit (i.e., wrongful birth) entails the intelligibility and favorable finding for the plaintiff-child in the wrongful life suit. If, that is, the child's defect is an injury to the parents, how could such a defect be anything less than an injury for the child who suffers the defect? Conversely, if the child's defect is not an injury to the child, how could it be an injury to the parents who do not suffer the defect? For example, if, on the one hand, a defect D is an injury to parent P, how could D be anything but an injury to child C who actually suffers D? If, on the other hand, D is not an injury to C who actually suffers D, how might D constitute an injury to P who does not actually have D? It might, therefore, be concluded that wrongful births suits are intelligible only if wrongful life suits are. Thus, two courts have held that it is unreasonable to award damages to the parents for the medical expenses of their child through the child's minority and yet deny compensation to the child for the resultant medical expenses incurred during majority.[12]

As cogent as such reasoning may initially appear, it arguably conflates the child's defect with the civil law damage to the child by virtue of negligence. The argument overlooks the necessity of comparing the plaintiff's states due to negligence with the plaintiff's alternative state in determining damages. The parents' state without negligence is quite different from the defective newborn's state without negligence. It is this comparison

[11] *Curlender* v. *Bio-Science Laboratories*, 165 Cal. Rpts, 477 (CA 1980).

[12] *Harbeson* v. *Parke-Davis*, 656 P. 2d 483 (WA 1983); *Procanik* v. *Cillo*, 478 A. 2d 755 (NJ 1984), on remand, 502 A. 2d 94 (NJ 1985). Bonnie Steinbock, "The Logical Case for Wrongful Life," *Hastings Center Report* 16, no. 2 (1986), p. 15.

and the required reference to the parent's state without negligence, in the wrongful birth suit, that allows the parents to claim extraordinary medical expenses and/or emotional distress as damages. Without negligence the parents would not experience the distress of a defective child nor would they suffer the extraordinary medical costs of rearing such a child.[13]

It would seem possible that a defect might constitute an injury due to the alternate state afforded by the law to the parents. However, it is also possible for a child actually to suffer the defect yet the defect not constitute an actionable injury because the empirically alternate state for the child is arguably much worse than the experience of the defect. A newborn's severe mental retardation may constitute a harm to the parents charged with the care of the newborn in terms of extra medical costs and emotional disappointment. The suffering of those harms by the parents, if due to provider negligence, may be covered in a negligence action because the parent's state without the negligence would not be as financially and/or emotionally injurious as their state brought about by the negligence.

Yet, by the same reasoning, it would seem quite possible that C might be denied recovery for the negligent suffering of D because suffering D was not a state deemed a greater harm than the state C would have experienced but for the negligence. Thus, a child's severe mental retardation, experienced by the newborn through the provider's negligence, may not prove a state more harmful to the newborn than the newborn's alternative of nonexistence. In a phrase, the plaintiff cannot recover damages for a state brought about through the negligence of the defendant if the plaintiff is benefited rather than injured by the defendant's breach.

6. An Analogy for Assessing Damages

If the above is correct, two arguments for the intelligibility of wrongful life suits seem suspect. It might, however, be suggested that the comparison of the harm of existing in a defective state with the harm of nonexistence not only may be made but is actually made in many decisions involving the withholding or withdrawing of life support.[14] It is recognized that both the competent and incompetent enjoy the right to refuse medical intervention, even that medical intervention determined to be essential for the patient's life. This right of liberty to refuse necessary medical intervention is

[13] Indeed, since the health care provider did not cause the newborn's defect but rather only the parents' suffering the manifestation of the defect through negligence, it is arguable that the provider might well be liable for all of the medical cost of rearing such a child if the parents would not have conceived or would have aborted the defective newborn otherwise.

[14] *In Re Quinlan*, 355 A. 2d 647 (NJ 1976).

protected by the United States Constitution's Fifth and Fourteenth Amendments.[15]

But, it will be countered, such protected patient and surrogate acts are directly or indirectly, respectively, expressions of patients' autonomy. But such patient or surrogate acts are not necessarily the expressions of the weighing of the harm of continued existence against the harm of existence. Moreover, even if the patients' or surrogates' actions are the result of weighing harms, it need not be the sort that is commensurate with the weighing of harms necessary for showing damages in a wrongful life action. In the case of rejecting or refusing life-sustaining medical intervention as an expression of patient self-governance, the focus is the patient's personal interests, irrespective of whether those interests accord with what is in the patient's best medical interests. But it is the weighing of best medical interests, not the weighing of personal interests, that is required for determining appropriate damages in a wrongful life suit. The argument that the comparison of the harm of nonexistence cannot be compared with the harm of continued existence in a defective state is not a denial that any given patient might not prefer one state to another. It is a remark that neither choice can be known to accord with an objective balance of harms. That an autonomous patient may directly or indirectly through a surrogate, prefer nonexistence to continued existence in a defective state and may act upon such a preference in no way demonstrates that such a choice evidences that the weighing of the material harms of each state is possible.

Nevertheless, personal autonomy is not the only standard state legislatures and state courts reference when discussing removal or withholding of necessary, life-sustaining medical intervention.[16] Consider, for instance, the case of *Superintendent of Belchertown State School v. Saikewicz*.[17] In said case, Joseph Saikewicz had been institutionalized all of his life. He had an I.Q. of ten. At sixty-seven years of age, he was diagnosed as suffering from a terminal form of leukemia. Chemotherapy would be painful for the patient and offer only a 50% chance, at best, of prolonging his suffering for another six months. The Massachusetts Supreme Court ruled that the patient could refuse the necessary medical intervention. The court noted that were Saikewicz a competent and rational person who could view the entire medical situation to which he was subjected, he would reject

[15] *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261 (1990).

[16] *In Re Conroy*, 486 A. 2d 1209 (NJ 1985).

[17] *Superintendent of Belchertown State School* v. *Saikewicz*, 370 N.E. 2d 417 (MA 1977); see also *Strunk v. Strunk*, 445 S.W 2d 145 (KY 1969) .

treatment. But for a presently incompetent patient to make a decision about withholding or withdrawing necessary life support as an expression of the patient's competent interests, the patient must, of necessity, have enjoyed a previous state of competency. Saikewicz had been denied required previous state. It would take a prodigious act of casuistry to allow Saikewicz to make a decision on the basis of his expression of competent interests. Indeed, it might very well be argued that the use of the model of making Saikewicz a reasonable, prudent, and competent person is just to weigh, objectively, the respective burdens of continued life against the harm of nonexistence. The comparison, after all, could not have been made on the basis of competent, subjective interests, as Saikewicz never had any such interests.

If the above is right, then in some cases of withholding or withdrawing necessary life support, comparisons may indeed be made between the harm of existing in a defective state and the harm of nonexistence. If such a comparison of harms is intelligible for such patients, why is it not also intelligible in the case of defective newborns? Likewise, if the comparison of harms is unintelligible in wrongful life suits, it should likewise prove unintelligible (not merely difficult) in cases of withholding or withdrawing extraordinary life support.[18]

If, as has been argued above, there is some *prima facie* reason for suspecting that the requisite comparison of harms may be intelligible in wrongful life suits, it would not mean that every defect experienced by the plaintiff-child would be compensated. There is a vast difference between the harm of moderate retardation associated with trisomy 21 and the harm associated with Tay-Sachs Disease.[19] It might well prove that the latter condition is a harm that is worse than nonexistence yet the former condition, while not desirable, is not a harm that is worse than the harm of nonexistence.[20] As difficult as such a comparison might prove, it is not, given the above, unintelligible. Moreover, given the intelligibility of the

[18] *Anderson v. Saint Francis, Saint George*, 671 N.E. 2d 225 (OH 1996) (plaintiff argued that hospital's failure to follow a "No Code" was wrongful life).

[19] Trisomy is the "presence of an additional (third) chromosome"; trisomy 21 is Down's Syndrome. See *Dorland's Medical Dictionary,* 26th ed., p. 860. Tay-Sachs Disease is characterized by a child who appears normal at birth and, due to a deficiency of hexosamindase A, experiences increasing physical and mental deterioration. The condition is fatal; there is no cure and death occurs within five years; see *Professional Guide to Diseases* (1982), pp. 62-64 (on trisomy) and pp. 51-52 (on Tay-Sachs).

[20] But see *Turpin* v. *Sortini*, 643 P. 2d 954 (CA 1982); *Harbeson* v. *Park-Davis Inc*., 656 P. 2d 483 (WA. 1983).

comparison of such harms, the difficulty with such a comparison should not prove more difficult than the calculation of emotional damages.

7. Actionability and Wrongful Life Suits

Even if the requisite comparison of harms is logically possible, there is at least one ramification of allowing such suits that may render the suits undesirable. Although it constituted dictum, the California Supreme Court has noted that a child born with a defect the experience of which is deemed a greater harm to the child than the harm of nonexistence, may bring a cause of action against the person who knowingly fails to avail herself of the necessary and available means to circumvent the child's harm.[21] That is, it might well be possible for the defendant in a wrongful life suit to be the biological mother of the child or perhaps the gestational carrier of the child.

Some scholars have argued that the plaintiff-child in a wrongful life suit against a health care provider could not also bring such a suit against the mother of the plaintiff-child. The wrong of wrongful life is the wrong of being denied the opportunity of choice between existence in an objective state and nonexistence. But that *choice* may only be made by the mother and guardian of the child.[22]

This argument, while telling against the health care provider in a wrongful birth suit, is not clearly successful at eliminating the mother from potential liability in a wrongful life suit. The duty to inform is one suffered by the health care practitioner to the mother but is not equally suffered by the mother of the newborn to the newborn. Rather, a mother incurs not only an obligation not to harm her child but, within reason, not to allow harm to befall her child. If a pregnant woman decides to give birth after it is determined and she is informed that she is carrying a fetus afflicted with a problem, the experience of which is a harm greater than the harm of nonexistence, then it might reasonably be argued that the defective child would not have suffered his existence "but for" the mother's remiss behavior. Knowingly and intentionally bringing a defective child into the world where the defect is a harm in excess of the harm of nonexistence, might constitute a violation of the parental obligation not to allow harm to befall the child. If the basis of a wrongful life suit is that the defective child has been harmed through the remiss behavior of those parties duty bound to him, then given parental obligations, the mother might be argued to be duty bound to prevent an

[21] *Curlender*; see note 11.

[22] See, for example, Alexander Capron, "The Wrong of 'Wrongful Life,'" in *Genetics and the Law*, vol. 2, ed. Aubrey Milumsky and George Annas (New York: Plenum Publishing, 1980), p. 81.

actionable harm from occurring to the newborn by acting appropriately to the information the medical sector is duty bound to disclose. Thus, the carrier may be obligated to act on the information that she is at risk for having or actually carrying an actionably harmed child. The possibility of the mother being sued by her actionably harmed child for not aborting the child is an actual risk anticipated by certain state legislatures.[23]

Notwithstanding the preceding possibility, the duty that parents generally suffer to their children, the duty to protect the ward from harm, is one suffered within reason. That is, these are limits to the affirmative duty guardians suffer to those in their care. Self-sacrificing, heroic guardian action on a ward's behalf, while laudable and to be encouraged, is not required in order to satisfy the duty.

It is arguable that the bodily invasion required by an abortion would be deemed an act not required by the duty of the guardian to protect the ward from a harm in excess of the harm of nonexistence.[24] The biological parent of a child, while possibly subject to moral castigation, would not be deemed in violation of her duty to protect her child by refusing bodily invasion necessary to save the child from the harm of nonexistence. While, for the sake of argument, the harm appropriate for wrongful life is greater than the harm of nonexistence, it would not necessarily require a greater than reasonable sacrifice on the part of the duty bound party. Thus, a mother would arguably never be an appropriate defendant in a wrongful birth suit for not terminating the pregnancy.

It would seem reasonable to surmise that the progenitor's knowledge of the risk of passing a genetic problem on to progeny would not be sufficient to require the progenitor to refrain from conceiving. Unlike the issue of bodily invasion necessary in the case of abortion, refraining from conceiving does not clearly indicate the sort of invasion that could not be more easily justified. Nevertheless, it would be extremely difficult to justify a duty not to conceive because of the uncertainty of the transference of the defect. That is, with only a risk of transmitting a defect to a child the experience of which would be a greater harm to the child than the harm of nonexistence, the taking of the risk by conceiving the child is not likely to constitute a violation of a duty not to allow the manifestation of the greater harm, notwithstanding the

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[23] California Civil Code §46.6 (1984). The statute prohibits only those suits brought by children against their parents for wrongful life.

[24] *McFall* v. *Shimp*, 10 PA D & C. 3d 90 (PA 1978); *In Re A. C.* 573 A. 2d 1235 (DC 1990); *In Re Baby Doe, A Fetus*, 632 N. E. 2d 326 (IL 1994); *Rochin* v. *California*, 342 U.S. 165 (1952). But see, *Jefferson* v. *Griffin Spalding County Hospital Authority*, 274 S. E. 2d 457 (GA 1981) and *Buck* v. *Bell*, 274 U.S. 200 (1927).

absence of bodily invasion involved in not conceiving. Moreover, the potential parent would always have the option of aborting the afflicted fetus.

The more troubling situation is where the progenitor is informed of the significant risk to the child but takes the risk by conceiving and the risk is materialized and the progenitor then refuses to abort. Would the potential parent have an obligation to abort the fetus if the conception were intentional, in the face of the known risks and both the harm of the defect were greater than the harm of nonexistence and could have been prevented by an abortion? One simple argument would reconsider the two above arguments and conclude that no suit could prevail against the mother. If there is no duty not to conceive and there is no duty to endure bodily invasion under the reasonable duty not to allow harm to befall the child, then the conjunction of the two would yield a negative answer to the question of reasonable duty under the scenario.

But, it might be reasonably argued that the circumstance where a progenitor knowingly took the risk of creating a being with a defect which would exceed the harm of nonexistence, and knowingly continued the pregnancy to birth, would be naturally different from either the progenitor who knowingly took the risk, or the carrier who continued the pregnancy to birth without having knowingly assumed the risk at conception.

Whatever the difference, it is not clear that such a situation would render the mother liable for not aborting the sufficiently defective fetus. The reason the above scenario might appear to suggest otherwise is the possible conflation between the knowing creation of a being with sufficient problems and the knowing creation of sufficient problems for a being. A mother who caused a sufficiently serious defect in a fetus is different from one who knowingly conceived and carried a sufficiently defective fetus to term. There is a material difference between causing a problem and causing a being with its own problems. In the former case, liability may obtain if sufficiently remedial measures are not engaged. In the latter case, it is again suspect that a harm has been caused. Rather a harm has been allowed and the affirmative duty to prevent it, if such a duty obtains, would again not entail the duty to abort. If there is no duty to abort, there can be no liability for the failure to do so.

If the above considerations are correct, then the specter of wrongful life suits, while intelligible, enjoy a narrow scope of applicability and entail a narrow scope of defendants.[25] There is no need legislatively to disallow such

[25] It perhaps goes without argument that the government, state or federal, are inappropriate candidates for defendants in a wrongful life suit. It may be correct that a mother may not be in a position to abort a sufficiently defective fetus due to state and federal restrictions on funding abortions (see, e.g., *Maher v. Roe*, 432 U.S. 464 [1977] and *Harris v. McRae*, 448 U.S. 297 [1980]). The argument proffers as to why the government may restrict funding that abortion is a liberty right and the government is

suits altogether because of the parade of horribles thought to follow from recognizing such a suit.

not responsible for the mother's indigency or the pregnancy. Moreover, the government is not charging the carrier for the abortion; a third private party is. This same set of considerations might prove sufficient to eliminate the government as a defendant in a wrongful life suit where the mother would abort but for sufficient funds. But, of course, the government, especially the state government, is the ultimate guardian of the child (see *In Re Sampson*, 317 N. Y. S. 2d 641 [NY 1970]) and thus suffers an affirmative duty, like that of the mother to prevent harm from befalling the ultimate ward of the state. That this consideration has been taken seriously, see MN. Stat. Ann 145-424, S. D. Codified Laws Ann. 21-55-1, Utah Code Ann 78-11-23.