WRONGFUL ANALYSIS IN WRONGFUL LIFE JURISPRUDENCE

Deana A. Pollard*

INTRODUCTION

Wrongful life refers to a negligence claim asserted by a child who suffers from birth defects, such as painful and debilitating diseases resulting from a physician’s malpractice in failing to inform the mother of potential birth defects, either preconception or during pregnancy, and consequently, depriving her of the option of avoiding conception or terminating the pregnancy. Wrongful life claims are distinguishable from wrongful birth and wrongful pregnancy claims, which are pursued by the parents of the child to recover damages for expenses and emotional distress resulting from the birth of a disabled or unwanted child, respectively.

From its inception, wrongful life jurisprudence has relied on an inaccurate description of tort policy to deny recovery to children suffering unnecessarily as a direct result of medical malpractice. Wrongful life cases also depart from negligence jurisprudence by utilizing a unique damages analysis that finds no precedent in prior negligence cases and results in no remedy, despite enormous medical and other expenses and often severe pain, suffering, or other injury. In addition, wrongful life jurisprudence departs from the policy-based trend to create alternative theories of recovery where a strict adherence to common law doctrine would unjustly result in no rem-

---

* Visiting Professor, University of Denver (Associate Professor, Texas Southern University), B.A., 1986, University of Washington, Seattle, J.D., 1989, University of Southern California, LL.M., 1999, University of California, Berkeley. The author wishes to thank Arthur Best, Alfred Brophy, Erwin Chemerinsky, and Tom Klevan for their comments on an earlier draft of this Article. The author is grateful for the superb work done by the members of the Alabama Law Review.


3. Parents’ claims for damages resulting from the birth of a defective child, due to negligent genetic testing or disclosure, are pursued as wrongful birth claims. See Bruggeman v. Schimke, 718 P.2d 635, 638 (Kan. 1986).

edy to innocent victims. Loss-of-chance methodology and market share liability are examples of such judicially created alternatives to traditional negligence analysis. Rather than analyzing wrongful life cases consistent with fundamental tort law goals, standard negligence analysis, and the trend to focus on assuring compensation to innocent victims, most courts have constructed legal barriers to recovery that undermine tort policy, contemporary social values, and progress in fetal medicine.

Most courts in wrongful life cases hold that the child-plaintiff necessarily asserts that but for the malpractice, her mother would have chosen not to conceive or to have an abortion. Since the genetic defect usually pre-exists the malpractice, these courts find no causation between the malpractice and the defect. Rather, the “injury” or “damage” proximately caused by the doctor’s negligent failure to detect the genetic defect is the resulting painful or difficult life per se, with the attendant extraordinary expenses. Such injury or damages would allegedly have been avoided but for the malpractice. Thus, courts in wrongful life cases conclude that the child’s claim is that his life is wrongful, as the painful or defective life itself constitutes injury. Accordingly, the vast majority of courts have denied the wrongful life cause of action by focusing on the element of harm and holding that life itself cannot constitute injury. Such a holding assumes that life is always preferable to non-life and/or that it is impossible for a trier of fact to measure damages for the harm of life compared to the “utter void of non-

5. Galvez v. Fields, 107 Cal. Rptr. 2d 50, 57 (Cal. Ct. App. 2001) (“The essence of a wrongful life action is that ‘if defendants had performed their jobs properly, [plaintiff] . . . would not have been born at all.’” (alteration and omission in original)); Kassama v. Magat, 792 A.2d 1102, 1104 (Md. 2002) (explaining that wrongful life comprises actions brought by impaired children asserting that, as a result of the defendant’s negligence, their parents were precluded from making a decision to abort the pregnancy); Gleitman, 227 A.2d at 692 (“The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all . . . that his very life is ‘wrongful.’”).

6. Sometimes the defect occurs as a result of a medication taken by the mother during her pregnancy. Harbeson v. Parke-Davis, 656 P.2d 483, 486-97 (Wash. 1983) (alleging malpractice in prescribing Dilantin during pregnancy, which apparently caused birth defects). Usually, however, the defect results from the child’s genetic makeup that pre-exists the malpractice. See, e.g., Curleender, 165 Cal. Rptr. at 479. Indeed, in accordance with most definitions of wrongful life, Harbeson is not a wrongful life case at all, but a case of prenatal malpractice, because the child’s defects were caused by the mother’s ingestion of Dilantin, which was negligently prescribed by the doctors—not by a genetic defect that pre-existed the malpractice.

7. See Dobbs, supra note 2, § 291, at 791-92.

8. To the contrary, most jurisdictions have allowed the parents’ wrongful birth claim, which is generally based on essentially the same argument, i.e., that but for the doctor’s medical malpractice, the parents would have been informed about genetic defects and would have avoided conception or aborted the child. See Linnerg v. Eisenbaum, 764 P.2d 1202, 1208 n.9 (Colo. 1988); W. Page Keeton et al., Prosser and Keeton on the Law of Torts 372 (5th ed. 1984). However, some jurisdictions recognize neither wrongful birth nor wrongful life. See, e.g., Taylor v. Kurpati, 600 N.W.2d 670, 673, 691 (Mich. Ct. App. 1999). Siblings’ claims for damages resulting from the wrongful birth of a sibling have been uniformly rejected. E.g., Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985).

9. The element of harm is sometimes referred to as the “injury” or “damages” element. These terms are often used interchangeably, although “injury” is the term most frequently used in medical malpractice cases. See, e.g., Harbeson, 656 P.2d at 489 (stating that a malpractice claim is established upon proof of duty, breach, proximate cause, and “damages or injury”); see also discussion infra Part II.A.
existence.” The fact that the child’s impaired life results in enormous medical and other expenses, and that in some cases the child is born only to suffer then die, are largely ignored by these courts.

Currently, only three states recognize a cause of action for wrongful life. Other jurisdictions should reconsider their decisions to reject the cause of action for three reasons. First, consistent analysis in so-called wrongful life cases and other medical malpractice claims involving fetuses will become increasingly important as advancements in fetal medicine begin to blur the distinction between prenatal negligence and wrongful life. Juxtaposed to the majority rule in wrongful life cases is a universal rule that a child may state a claim for prenatal negligence causing injury to itself. The current analytical paradigms thus make a harsh distinction between prenatal harm to the fetus, resulting in injury, and failure to diagnose pre-existing defects, resulting in the birth of a child with disorders. The former is analyzed as general malpractice, whereas the latter is analyzed as a “wrongful life” action. The analytical distinction is based on the concept that but for the negligence in prenatal injury cases, no injury would have occurred to the fetus. Comparatively, in regards to wrongful life claims, the


11. See discussion infra Part II.


13. Some courts are returning to more traditional negligence analysis in medical malpractice cases involving the birth of unwanted children. For example, in 1991 the New Mexico Supreme Court applied traditional tort law principles in allowing parents to recover the costs of raising a normal child to adulthood based on the doctor’s negligent performance of a sterilization procedure. Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 609 (N.M. 1991). In addition, this court applied a traditional offset analysis under general negligence principles, despite the majority rule that employs unique offset analysis in birth-related torts. Id. at 613; see also Arche v. United States, 798 P.2d 477, 481 (Kan. 1990) (applying offset rule correctly); discussion infra Part II.C.

14. The term “wrongful life” should be rejected altogether in recognition that wrongful life claims are simply medical malpractice claims brought by infants, and the issues of causation and injury are no different than in typical medical malpractice claims. The term “wrongful life” is used herein because it is the term currently employed to distinguish this particular type of medical malpractice—negligent failure to detect potential or existing genetic defects—from prenatal negligence and other malpractice for analytical purposes. Thus, this Article argues that courts should recognize the wrongful life cause of action.

15. DOBBS, supra note 2, § 288.

underlying premise is that but for the negligence, the defect still would occur in the child because it pre-existed the malpractice. 17 Wrongful life jurisprudence is based, at least in part, on the assumption that no medical intervention could prevent or minimize the pre-existing genetic defect. 18

However, genetic testing and prenatal medical intervention are rapidly advancing. It is now sometimes the case that early detection of genetic defects provides an opportunity for the mother and/or fetus to undergo medical treatment to prevent the defect’s manifestation at birth. In these cases, the claim is not that life itself was wrongful but rather that but for the doctor’s negligent failure to detect the defect, medical intervention could have minimized or could have prevented the defect from manifesting at birth. Current wrongful life analysis is rendered obsolete by such cases involving negligent genetic testing, which are more akin analytically to prenatal malpractice, as causation arguably exists between the malpractice and the defect. 19 Wrongful life plaintiffs in such cases suffer injury resulting from a lost chance of a healthier life, not “life” per se. Thus, the current majority rule in wrongful life jurisprudence unfairly divests from the plaintiff the opportunity to demonstrate injury based on the lost opportunity for a healthier life.

Second, many of the early cases express concern about the public policy problem of encouraging abortion as a result of wrongful life litigation and the related public policy concern that wrongful life litigation undermines the concept that life is always preferable to non-life. 20 However, both the Court’s clarification in Roe v. Wade 21 that public policy favors a woman’s right to choose abortion and contemporary public policy regarding the relative values of a painful, terminally ill life and non-life 23 mitigate in favor of recognizing the wrongful life cause of action in situations where a fetus is severely defective. Indeed, both the right to abortion and the right to reject life in order to avoid a terminally ill existence are currently protected by the federal Constitution. 24 The concept that any life is superior to no life and

17. See, e.g., Turpin, 643 P.2d at 957-67.
18. Some courts have specifically relied on the distinction between prenatal injury and wrongful life to deny the wrongful life cause of action since the wrongful life plaintiff’s defect predated the malpractice. See Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 698 (Ill. 1987).
19. Some courts that reject wrongful life causes of action have addressed this issue directly, stating:
   This case would be entirely different if medical knowledge were such that a fetus could be treated prior to birth to cure or alleviate the hereditary defect in question. . . . Such an advance in medical science would thus make this case analogous to the prenatal injury decisions . . .

Turpin, 643 P.2d at 961 n.8.
24. At the present time, the right to avoid a painful, terminally ill life is limited to a competent adult’s right to refuse life support. See Cruzan, 497 U.S. at 279. Nonetheless, Cruzan represents the first time the Supreme Court was called upon to determine whether, at least in some instances, a person’s
therefore must be preserved at any price—the policy employed in most cases refusing to recognize the wrongful life cause of action—has lost both legal and public support.

Finally, both the historical and current technical legal analysis employed in wrongful life jurisprudence is flawed and cannot withstand close scrutiny. This analysis departs from established tort policy and negligence methodology in two basic ways. First, courts rely on an incomplete and inaccurate conception of tort law’s role in society, thereby justifying denial of relief on the concept that tort law’s goal of restoring plaintiff to his pre-tort condition would not benefit the plaintiff because the defect pre-existed the malpractice. Second, courts use methods for establishing and calculating damages that depart radically from both traditional and modern negligence methodologies, refusing to recognize clear economic damages and/or denying general damages as a matter of law. Particularly in light of tort law’s jurisprudential and philosophical evolution since the early wrongful life cases were decided—a shift toward a system of compensation based on social security and cost-spreading—the analysis employed to deny wrongful life claims is even less defensible. A consistent approach to medical malpractice cases, including wrongful life cases, will enhance the legitimacy of our tort system and comport with concepts of equal protection and justice.

This Article is organized around the majority rule in wrongful life jurisprudence, referencing advancements in prenatal medicine and modern societal values where appropriate to demonstrate that the injustice flowing from the wrongful life analysis will be exacerbated over time and must be corrected. Part I of this Article argues that wrongful life analysis is flawed because it is grounded in an inaccurate and incomplete conception of the fundamental “goal” of tort law that is used to deny liability in wrongful life cases. Part II argues that the damages analysis employed in wrongful life cases departs from both traditional and contemporary damages analysis in other types of negligence cases and is also rendered obsolete in some cases by advancements in prenatal medicine and changes in societal mores. Part III reviews additional social policy reasons why wrongful life actions should be recognized.

I. WRONGFUL LIFE CASES RELY ON A MISINTERPRETATION ABOUT THE FUNDAMENTAL GOAL OF TORT LAW

A number of courts have discussed the purpose and policy of tort law generally as a basis for denying the wrongful life cause of action. These courts focus on tort law’s purported ultimate goal of restoring the plaintiff to her pre-tort condition. Courts have relied on this incomplete statement about the goal of tort law to determine that recognizing wrongful life claims

choice of death over life is not only valid, but also constitutionally protected.

25. See e.g., Turpin v. Sortini, 643 P.2d. 954, 961 (Cal. 1982); Gleichman, 227 A.2d at 692.
would not or could not further the goal because putting the wrongful life plaintiff back in the position she would have occupied but for the negligence would not help her, as the genetic defect pre-existed the malpractice. Although restoring a plaintiff to her pre-tort condition as a goal of tort law finds some authoritative support, it is neither a goal focused on in other negligence cases nor is it consistent with negligence policy when relied upon to deny recovery in wrongful life cases.

The focus on restoring plaintiffs to their pre-tort condition as the goal in wrongful life claims is traceable to what is widely considered the seminal wrongful life case, *Gleitman v. Cosgrove.* There were a few "wrongful life" cases prior to *Gleitman,* but those involved claims by healthy babies that they were harmed by being born out-of-wedlock, due to the fault of the defendant. In *Gleitman,* the mother discovered that she was two months pregnant just one month after having been diagnosed with German measles. Her doctors negligently told her that the illness in her first trimester of pregnancy would not impact the health of her child. However, her baby was born with substantial defects in sight, hearing, and speech, and the medical evidence available at that time indicated that his serious physical impairments resulted from his mother’s bout with German measles during the first trimester of pregnancy. There was no issue about causation of the infant’s physical impairments—the doctors’ malpractice did not cause the impairments. There was also no issue about whether the fetus’s potential injuries could have been minimized had the doctors explained the risks of carrying the fetus to term in light of the mother’s infection during the first few weeks of pregnancy—at that time, there was no known therapy for fetuses exposed to German measles in utero. The mother’s only recourse in the absence of negligence would have been to abort the fetus. As stated by the majority of the *Gleitman* court, "[t]he infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all . . . that his very life is ‘wrongful.’"

The court then made its precedent-setting and much-quoted statement about tort law’s goal of restoring the plaintiff to his pre-tort condition, which supported its conclusion that wrongful life damages were not legally cognizable:

---

26. *Gleitman,* 227 A.2d at 692 (rejecting both the wrongful life and wrongful birth claims), overruled by *Berman,* 404 A.2d at 8 (recognizing the wrongful birth claim, while rejecting the wrongful life claim). Ironically, although *Gleitman* was the seminal case that set forth the basic analysis that is followed in most jurisdictions, *Gleitman* was overruled and New Jersey is now one of only three states that recognizes the wrongful life cause of action.


29. *Id.* at 691.

30. There was a strong dissent in *Gleitman,* yet the majority view is followed by the vast majority of courts, often with no reference to the views set forth in the dissent and no critical analysis of the majority view.


32. The court also questioned the legality of abortion in support of its position that the action was
The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies. 33

This statement by the Gleitman majority created the analytical cornerstone for the majority of courts' decisions to deny the wrongful life cause of action. 34 Most courts have rejected the cause of action based on the Gleitman majority's statement about how to measure damages to meet the compensatory purposes of tort law, 35 and ten state legislatures codified rejection not cognizable. Although the Supreme Court settled this issue in Roe v. Wade, 410 U.S. 113 (1973), the theme that life itself in whatever form is always more valuable than non-life continues to persuade most courts to deny the wrongful life cause of action. See infra note 34 and accompanying text.

33. Gleitman, 227 A.2d at 692 (emphasis added). The court also denied the parents' wrongful birth claim based on the impossibility of measuring their damages against the "intangible, unmeasurable, and complex human benefits of motherhood and fatherhood," as well as the public policy against taking an embryonic life. Id. at 693. The majority's real basis for denying the cause of action may have been based, in part, on their belief that, as a factual matter, the child would have chosen an impaired life over no life. After asserting the "impossibility" of comparing no life to an impaired life, the court concluded that if the child were to be asked, he would choose life:

It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all.

Id.

34. See, e.g., Kassama v. Magat, 792 A.2d 1102, 1117 (Md. 2002). A few older cases relied on the public policy against abortion to deny the claim. See, e.g., Stewart v. Long Island Coll. Hosp., 313 N.Y.S.2d 502 (1970), aff'd, 238 N.E.2d 616 (N.Y. 1972). Various cases have refused to recognize the wrongful life cause of action in the absence of legislative resolution, finding that the legislature is in a superior position to determine the propriety of recognizing such a claim. See, e.g., Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978); Speck v. Finegold, 439 A.2d 110, 122 (Pa. 1981) (per curiam). A few cases rejected this cause of action based on the idea that the duty to inform the mother of birth defects does not extend to the fetus. Piore v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1158 (La. 1988); James G. v. Cersa 332 S.E.2d 872, 881 (W. Va. 1985). Another argument sometimes advanced in early cases but since abandoned is the "floodgates" argument, i.e., that by recognizing a wrongful life cause of action, millions of children, unhappy with their lots in life, could sue their parents or others for their less-than-ideal existence. See, e.g., Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 486 (Cal. Ct. App. 1980); Zepeda v. Zepeda, 190 N.E.2d 849, 858 (Ill. App. Ct. 1963). The argument that anti-abortion public policy mitigated against recognizing the wrongful life cause of action was also abandoned after Roe v. Wade, 410 U.S. 113 (1973). See, e.g., Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979). One court based its refusal to recognize the cause of action on the concept that a doctor does not owe a duty of care to an unconceived child to protect her from being born with albinism. Piore, 530 So. 2d at 1158.

35. The fundamental idea that a court must compare an impaired life to no life to determine whether the injury/damages element of a negligence claim can be met is the reason almost all courts have denied the wrongful life cause of action. Although Gleitman's technical reason—impossibility of measuring damages—was overruled in Berman, 404 A.2d at 8, in favor of a blanket rule that life in whatever form
of the claim.\textsuperscript{36} It is important to analyze the flaws in the \textit{Gleitman} majority’s reasoning in denying the wrongful life claim, because its basic principles are followed in the vast majority of jurisdictions with little or no critical analysis.

The most important flaw is the court’s statement about how damages \textit{must} be measured to meet tort law’s compensatory purpose: The court employs the reliance measure of contract damages, calling it the “normal” measure of tort damages to compensate victims of malpractice. Fuller and Perdue first articulated the reliance measure of damages in 1936.\textsuperscript{37} This measure of damages seeks to compensate the plaintiff for his “changed position” on account of defendant’s breach of promise:

We may award damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant’s promise has caused him. Our object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the \textit{reliance interest}.\textsuperscript{38}

\begin{quote}


\textsuperscript{38} \textit{Id.} at 54. \textit{See also} Spang Indus., Inc. v. Aetna Cas. & Sur. Co., 512 F.2d 365, 368 (2d Cir. 1975) (“The function of the award of damages for a breach of contract is to put the plaintiff in the same position he would have been in had there been no breach . . . .”).

\end{quote}
In this way, reliance damages restore the individual to his position prior to the breach.\footnote{See, e.g., Dan B. Dobbs, The Law of Remedies § 12.3 (2d ed. 1993).}

The Gleitman court’s use of the reliance measure of damages as a proxy for meeting tort law’s compensatory purpose is exemplified by the court’s statement that damages are “normally” measured by comparing plaintiff’s pre-tort and post-tort condition.\footnote{Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967).} The court then elevates this reliance measure of damages to a mandatory requirement for tort damages analysis by stating that courts are required to compare the plaintiff’s pre-tort and post-tort conditions and attempt to put the plaintiff back to his pre-tort condition in making a liability decision.\footnote{Id.}

The court cited no statutory or common law authority for its requirement of a reliance measure of damages in a medical malpractice lawsuit.\footnote{However, the court cited to an Israel Law Review article. Id. (citing Guido Tedeschi, On Tort Liability for “Wrongful Life,” 1 Israel L. Rev. 513, 529 (1966)).} Neither the reliance measure of damages nor any “mandatory” application of it in a malpractice case is supported by case precedent, fundamental tort law principles, or social policy. Yet this method for measuring damages in wrongful life cases has become entrenched in wrongful life jurisprudence subsequent to Gleitman.

There are fundamental differences between the policies underlying contract damages and negligence damages that make the use of a reliance measure of damages in negligence lawsuits inappropriate. Contract damages are awarded solely to compensate the plaintiff, not to punish or deter the defendant, hence the general rule of no punitive damages for breach of contract and no presumed damages.\footnote{Dobbs, supra note 39, § 3.11(1), at 310-18.} The “efficient breach” principle holds that one is permitted to breach a contract so long as he pays the other’s damages, to maximize efficient use of societal resources.\footnote{See, e.g., id., § 12.2(c), at 27.} That is, contract law allows a person considering whether to breach a contract to apply a cost-benefit analysis and breach only if it is financially beneficial to breach considering the required pay-off to the non-breaching party.\footnote{There are other ways of measuring damages in contract cases, but the fundamental goal of contract law damages jurisprudence is the same—compensation to the non-breaching party by means consistent with the efficient breach principle.} Foreseeability has played a central role in contract liability, because fault is not required to impose liability, rendering it appropriate to limit damages to those foreseeable at the time the contract was made.\footnote{Robert S. Thompson & John A. Sebert, Jr., Remedies: Damages, Equity and Restitution § 2.03 (2d ed. 1989).} There is no public policy against breach of contract per se, and indeed, the measure of damages employed in contract law encourages breach of contract in some cases based on the efficient breach principle.
Tort law’s goal is not simply to restore plaintiff to his pre-tort condition. There are numerous goals sought to be advanced by the imposition of tort liability that are not advanced by using a reliance measure of damages. These include allocating losses to wrongdoers over innocent victims, assuring compensation for victims, spreading the costs of harm resulting from torts, and punishing and deterring tortious conduct. For example, Prosser and Keeton on Torts, a leading treatise on tort law, describes tort law as follows:

The law of torts . . . is concerned with the allocation of losses arising out of human activities . . . of persons living in a common society . . . The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.47

Other influential authorities in tort law concur with a broad conception of tort law’s policy of compensation to innocent victims. One authority provides: “The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused by defendant’s breach of duty,” referred to as the “principle of compensation.” 48 This authority defines compensation as:

repairing plaintiff’s injury or . . . making him whole as nearly as that may be done by an award of money. . . . [O]bviously it cannot be done in anything but a figurative and essentially speculative way for many of the consequences of personal injury. . . . [I]t is the aim of the law to attain at least a “rough correspondence between the amount awarded as damages and the extent of the suffering,” or other intangible loss.49

Dan B. Dobbs, another leading authority on tort law, states the following about tort law policy: “Tort law is primarily intended to redress legally recognized harms by rendering a judgment against the wrongdoer. This award is usually a money award called ‘damages,’ and it is usually intended as a kind of compensation for the harm suffered.”50 Similarly, a New York treatise on tort law states: “The primary goal of a damages award in a tort action is to allocate to the wrongdoer the burden of compensating the plaintiff by the payment of an amount commensurate with his or her loss or injury or harm.”51

47. Keeton et al., supra note 8, at 6.
49. Id. at 493 (internal footnotes omitted).
50. Dobbs, supra note 2, § 1, at 2 (internal footnote omitted).
Thus, leading authorities on tort law clarify that the goal of tort law is broad and general—to provide a system of compensation for social wrongdoing, often compensating for intangible harms by means of money damages. While this "principle of compensation" has been described as meaning that "damages should (at least) put the plaintiff as nearly as my be in the same position he would have been in if defendant's wrong had caused no injury," that is merely a way of describing one aspect of tort law's goal, not the sole basis for making a liability decision, and certainly not a "required" analytical paradigm as the Gleiman majority suggested. Tort law's goal is more properly described as a system of compensation for harm to members of society consistent with principles of personal accountability, social justice, and cost-spreading.

Prosser and Keeton set forth specific factors to be used in assessing the propriety of tort liability which exclude altogether consideration of a plaintiff's pre-tort condition: a need for compensation, the moral blameworthiness of defendant's conduct, and the need to deter future conduct. They describe "[a] [r]ecognized [n]eed for [c]ompensation" as the "primary function of tort law and the primary factor influencing its development." An injured party's need for compensation has played a substantial role in contemporary tort law analysis, sometimes trumping defendant's fault or even proof of actual causation. For example, strict products liability and market-share liability as a substitute for "but for" cause in fact analysis subvert both fault and causation to a recognized need for compensation to innocent members of society.

Luke's United Methodist Church, 704 N.E.2d 1020, 1027 (Ind. 1998) (stating that the "goals of tort law . . . include deterring negligent conduct and compensating the victims of those who act unreasonably"); Kottler v. Washington, 963 P.2d 834, 843 (Wash. 1998) (Talmadge, J., concurring) (finding that "[t]he key principles today animate Washington's civil . . . law: (1) compensation to injured victims; (2) apportionment of fault to wrongdoers according to their share of fault; and (3) encouragement of settlements"). New Jersey overruled Gleiman in Berman, which recognized a wrongful birth but not a wrongful life cause of action. It subsequently overruled Berman and recognized a wrongful life cause of action as well. See Procanik v. Cillo, 478 A.2d 755 (N.J. 1984). Although the New Jersey court described the goal of tort law inaccurately in Gleiman, it recently described the "fundamental goals of tort law" as "deterrence and compensation." Erny v. Estate of Merola, 792 A.2d 1208, 1217 (N.J. 2002) (citation omitted).

52. The Second Restatement of Torts describes the basic nature of a negligence action as follows:
   The actor is liable for an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

RESTATEMENT (SECOND) OF TORTS § 281 (1965).

53. HARPER ET AL., supra note 48, at 494.

54. See generally DOBB, supra note 2, § 1, at 1-25. As one court stated, "one of the functions of compensatory damages is to indemnify the injured party against financial losses proximately caused by the negligence of another. The primary issue is whether the damages are a reasonably foreseeable result of the negligence of the defendant." Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 616 (N.M. 1991) (citing RESTATEMENT (SECOND) OF TORTS §§ 901, 903, 917 (1965)).

55. KEETON ET AL., supra note 8, at 20.

56. Id.

57. See, e.g., Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980); Hymowitz v. Eli Lilly, Co., 539
Particularly since the mid-twentieth century, tort law evolution has been influenced tremendously by its cost-spreading capability, implementing enterprise liability based not on fault, but on the reality that where no one is at fault, someone must bear the loss, and enterprises are most capable of absorbing and spreading losses. A party’s capacity to bear loss, to distribute it to a larger group, and to avoid breaching the duty of due care in the first place have thus become important factors in tort liability analysis. One authority has described contemporary tort liability for resulting harms as follows: “The prevailing ethic of our time is one of welfare for the unfortunate.” No such ethic animates contract law jurisprudence. Using a contract-based reliance measure of damages to determine the propriety of imposing liability in wrongful life cases undermines the primary policy of compensating victims and unfairly shifts the enormous costs resulting from the malpractice onto the victim.

The morality or blameworthiness of defendant’s conduct also plays a role in tort law development. Some fault is usually required prior to imposing tort liability, whereas no fault is required to impose liability for breach of contract. The law of torts generally “reflects current ideas of morality, and when such ideas have changed, the law has tended to keep pace with them.” This fault factor also mitigates in favor of imposing tort liability in wrongful life cases. The wrongful life plaintiff must show that a medical professional failed to meet the duty of due care by failing to detect and inform parents of birth defects; thus, fault is established. The wrongful life defendant’s fault results in under-utilization of societal resources, i.e., lost use of medical technology available to prevent the potential harm to the victims and to society. As the Washington Supreme Court stated, “We be-

N.E.2d 1069, 1075 (N.Y. 1989) (adopting the national market share theory of tort liability against manufacturers of DES despite a lack of foreseeability that vaginal cancer and other harms would occur in female children of mother patients up to twenty years after ingestion of DES to prevent miscarriage). In Hymowitz, the court stated:

“There would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the insidious [sic] nature of an injury that long remains dormant . . . the cost of injury should be borne by the innocent and not the wrongdoers. . . . Consequently, the ever-evolving dictates of justice and fairness, which are the heart of our common law system, require formation of a remedy for injuries caused by DES. Id. at 1075 (citations omitted). See also Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977) (recognizing a cause of action on behalf of a child who suffered severe prenatal injuries as a result of defendant’s negligent administration of an Rh-positive blood transfusion to her Rh-negative mother nine years prior to the child’s conception).

See Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963) (Justice Traynor’s reasoning, influencing Dean Prosser in drafting the RESTATEMENT (SECOND) OF TORTS § 402A (1965), which led to products liability law as we know it today). See also DOBBS, supra note 2, § 353, at 972-77.


60. THOMPSON & SEBERT, supra note 46, at 529.

61. Where the fault is great, tort law allows punitive damages to prevent tortfeasors from employing a cost-benefit analysis and committing torts in situations where profits outweigh compensatory damages. See DOBBS, supra note 2, § 3.11(1)-(3), at 310-28.

62. KEETON ET AL., supra note 8, at 21. See also DOBBS, supra note 2, § 353, at 975-77.
lieve we must recognize the benefits of these medical developments.\textsuperscript{63} That is, society should benefit from technological advancements in genetic testing, and recognizing a cause of action for wrongful life would "promote societal interests in genetic counseling and prenatal testing."\textsuperscript{64} The failure of a medical professional to meet the duty of care in relation to genetic testing results in a loss of benefits of medical technology and is socially irresponsible, undermines the medical profession, and is unfair to the victims of malpractice. This factor supports liability for wrongful life.

The "prophylactic" factor of preventing future harm—that is, punishment and deterrence—has always been an important reason for imposing tort liability.\textsuperscript{65} Tort liability has its origins in criminal law, so there is a punitive element to tort liability.\textsuperscript{66} These factors—punishment and deterrence—are obviously more important in situations in which the defendant has the clear ability to prevent the harm, so imposing liability will effectively and efficiently result in deterrence and therefore less future harm.\textsuperscript{67} This factor alone—discouraging medical practitioners from carelessness in genetic testing and disclosure—warrants imposition of liability in wrongful life cases.\textsuperscript{68} Indeed, the first courts to recognize a wrongful life cause of action focused on society's interest in deterring this type of malpractice and preventing genetic defects.\textsuperscript{69} Contract damages analysis, on the other hand, is not concerned with deterring future breaches of contract, resting on the assumption that the efficient breach principle will preclude inefficient breaches, thereby minimizing harm to society.

At least one court has relied on section 901 of the \textit{Second Restatement of Torts} (the "Restatement") to compare plaintiff's pre-tort and post-tort conditions to determine that wrongful life plaintiffs may not recover general damages.\textsuperscript{70} While section 901 contains some support for the position that a goal of tort law is to put an injured party back to his pre-tort condition, it

\textsuperscript{63} Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983).

\textsuperscript{64} \textit{Id.} at 491 (quoting Thomas Dewitt Rogers, \textit{Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing}, 33 S.C. L. Rev. 713, 757 (1982)). Note that the court's statements pertained to its decision to recognize wrongful birth, but the court also relied on the same policies in recognizing wrongful life. \textit{Id.} at 478-81.

\textsuperscript{65} Keeton et al., \textit{supra} note 8, at 25-26.


\textsuperscript{67} Note, however, that whether tort liability effectively deters medical malpractice has been questioned. See, e.g., Edward A. Dauer, \textit{A Therapeutic Jurisprudence Perspective on Legal Responses to Medical Error}, 24 J. LEGAL MED. 37 (2003); Michell M. Mello & Troyen A. Brennan, \textit{Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform}, 80 TEX. L. REV. 1595 (2002) (analyzing empirical evidence). However, wrongful life liability relies on a clear link between failure to conduct prenatal testing and liability, and thus the confounding factors between doctors' actions and malpractice liability that give rise to questions about the efficacy of malpractice liability to reduce medical negligence are significantly less problematic in the wrongful life context.

\textsuperscript{68} Imposing liability for wrongful birth but not wrongful life, the majority rule has some deterrent effect, although damages are often limited. In jurisdictions where both wrongful life and wrongful birth claims are not recognized, such as in Michigan, Minnesota, and Pennsylvania, there is no deterrence to negligent genetic testing and disclosure.


\textsuperscript{70} See Turpin, 643 P.2d at 961 (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 901 cmt. a (1965)).
must be viewed in the context of the entire section. Comment (a) to the section reads in part:

While the law of contracts gives to a party to a contract as damages for its breach an amount equal to the benefit he would have received had the contract been performed, the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.71

However, reliance on this comment alone to deny general damages in a negligence action is inappropriate for several reasons.

First, the quote set forth above is only a fragment of comment (a), and the entire comment must be read in the context of section 901 in its entirety if the section is to be relied upon in setting policy for tort liability or damages calculations. If read in context, the quote does not stand for the proposition that where restoring a plaintiff to his pre-tort condition is impossible or makes damages difficult to assess, recovery must be denied. The text of section 901 sets forth four purposes of tort law which should be used collectively to determine the propriety of imposing damages: "(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; (d) to vindicate parties and deter retaliation or violent and unlawful self-help."72 Comment (a) relates to the first of the four only. Of the four purposes set forth, only (a) relates to injury, and the other three purposes are based on social policy concerns that remain in full force regardless of the nature of the injury.73 Comments (b), (c), and (d) clarify that recognizing rights, deterring negligence, and preventing unlawful retaliation are fundamental reasons for imposing tort liability that are unrelated to compensating victims. These four purposes for imposing tort liability mirror the policies set forth by leading authorities discussed herein above.

Second, comment (a) discusses the flexible nature of tort law damages to meet the purpose of compensation, recognizing that damage to persons are not always quantifiable and that damages are awarded to compensate for pain and distress despite the lack of monetary equivalent.74 Comment (a) further clarifies that, unlike restoring a plaintiff to his pre-tort condition

71. Restatement (Second) of Torts § 901 cmt. a (1965) (citation omitted).
72. Id.
73. For example, the right of the mother-patient and her fetus not to be subjected to malpractice exists whether or not "but for" causation can be proven. Further, a doctor's negligence in failing to diagnose birth defects should be deterred regardless of whether the doctor caused the defects. Social policy favors vindication of malpractice victims to avoid seeking justice by unlawful means.
74. Section 901, comment (a) of the Second Restatement of Torts provides:

The law is able to do this [put plaintiff back to his pre-tort condition] only in varying degrees dependent upon the nature of the harm. Thus when the plaintiff has been harmed in body or mind, money damages are no equivalent but are given to compensate the plaintiff for the pain or distress or for the deterioration of the bodily structure.

Restatement (Second) of Torts § 901 cmt. a (1965).
where rights to land or chattels have been interfered with—which can easily be done monetarily—the law can compensate for harms to mind or body only in an inexact manner, using money damages as a proxy for the intangible harms to the tort victim. Section 901 of the Restatement does not support the proposition that—despite clearly negligent conduct giving rise to enormous medical costs, pain and suffering, and emotional distress—general damages should be denied because of the difficulty in comparing plaintiff’s pre-tort and post-tort conditions.

To the extent that the Restatement focuses on the ultimate goal of “restoring” plaintiff to pre-tort condition, it does so primarily in relation to rules “normally applicable” to determine the measure of damages in fraudulent misrepresentation actions. In this context, it makes more sense to impose a reliance measure of damages, since generally economic damages only are at issue, as in the case of most contract disputes. Indeed, to the extent that tort cases other than wrongful life cases employ a reliance measure of damages and discuss restoring a plaintiff to the position he would have occupied but for the tort, it is in the context of business torts with economic damages only, not malpractice or personal injury cases.

In sum, tort law jurisprudence is moving toward a more abstract system of compensation via cost-spreading based on social policy concerns where innocent persons are harmed and need help, and away from denying recovery based on a technical application of elements required to state a cause of

---

75. The Second Restatement of Torts states:

[When land or chattels have been wrongfully taken from a person, he can be placed substantially in the position which he formerly occupied by giving him specific restoration of that which was taken from him, or by giving him its value, together with, in either case, compensation for the deprivation during the period of detention.

76. Indeed, the court in Turpin v. Sortini, 643 P.2d 954 (Cal. 1982), stated that “we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all,” referring to the vast difference between being born merely deaf and being born to suffer and then die of Tay Sachs disease. Turpin, 643 P.2d at 963 & n.10. The court, however, relied on section 901 of the Second Restatement of Torts to make the pre-tort and post-tort comparison. It then denied general damages based on this comparison because:

(1) it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born, and (2) even if it were possible to overcome the first hurdle, it would be impossible to assess general damages in any fair, nonspeculative manner.

77. See Restatement (Second) of Torts § 549, cmt. on subsection (2) (1965).

78. There is, of course, the issue of deterrence in tort cases, which is not an issue in contract disputes based on the efficient breach principle. However, fraud cases are more similar to breach of contract cases than are malpractice cases because of the type of harm suffered by the plaintiff and the quantifiable, reimbursable nature of the damages.

79. See, e.g., Weinberg v. Whatcom County, 241 F.3d 746, 751-52 (9th Cir. 2001) (citing Restatement (Second) of Torts § 549 (1965)) (land use litigation); Tronzo v. Biomet, 156 F.3d 1154, 1161 (D.C. Cir. 1998) (citing Restatement (Second) of Torts § 549 (1965)) (patent infringement); Lerman v. City of Portland, 675 F. Supp. 11, 18 (D. Me. 1987) (wrongful demolition of building); Panos v. Island Gem Enters., Ltd., N.V., 880 F. Supp. 169, 176 (S.D.N.Y. 1995) (fraud in sale of resort apartment). The author could find no cases outside of the fraud context that discussed “restoring” plaintiff to his pre-tort condition for the purpose of measuring damages other than the wrongful life cases cited herein.
action at common law. Judicial creativity in creating new methods of establishing traditional negligence elements has contributed to tort law’s trend to compensate persons in need where a technical application of the elements would lead to a denial of compensation and injustice. At least one judge in the wrongful life context has recognized that denying the wrongful life claim is contrary to fundamental policies and principles that have become the bases of contemporary tort law jurisprudence.

The fundamental goals of tort law mitigate in favor of imposing liability for wrongful life where the facts prove that defendant’s breach of duty caused the plaintiff harm that would have been avoided but for the malpractice, even if difficult jury questions arise in measuring damages. In view of the full spectrum of policy goals sought to be advanced through tort law liability, wrongful life victims must be afforded a remedy to effectuate these goals.

II. WRONGFUL LIFE CASES IMPROPERLY ANALYZE AND CALCULATE DAMAGES

Wrongful life cases are grounded in medical malpractice—the doctor is negligent in failing to test for and diagnose either defective hereditary genes in prospective parents or an existing genetic defect in an embryo or fetus. Medical malpractice is negligence, and the general rules of negligence law apply, although the duty of care is dependent upon a medical standard or medical custom, not the average reasonable person.

The elements for a negligence cause of action are generally set forth as follows: duty, breach, causation (sometimes set forth separately as cause in fact and proximate cause), and damages. Courts have generally had little

80. See supra note 57 and accompanying text. Also, alternate causes liability was created to avoid the unfair burden plaintiff had at common law to show by a preponderance of the evidence that each defendant was at fault. See Summers v. Tice, 199 P.2d 1 (Cal. 1948); see also Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. 1992); Landers v. E. Tex. Salt Water Disposal Co., 248 S.W.2d 731 (Tex. 1952).
82. See, e.g., Keeton et al., supra note 8, § 30, at 164-65; Harper et al., supra note 48, at 290-95. The rationale in Gleiman v. Cosgrove, 227 A.2d 689 (N.J. 1967), for rejecting the wrongful life cause of action—difficulty of measuring damages—was rejected by several courts based on the Supreme Court’s statement that difficulty in measuring damages is not a sound basis for denying a damages recovery. See, e.g., Berman v. Allan, 404 A.2d 8, 11-12 (N.J. 1979) (citing Story Parchment Co. v. Pater- son Parchment Paper Co., 282 U.S. 555, 563 (1931)); see also infra note 95 and accompanying text.
83. There are a few wrongful life cases where the negligence consists of the doctor prescribing medication to the expectant mother that causes harm to the fetus. However, these cases are really prenatal injury cases, not wrongful life cases. See supra note 6 and accompanying text.
85. The Second Restatement of Torts sets forth the four elements plaintiff has the burden of proving in a negligence action:

HeinOnline -- 55 Ala. L. Rev. 342 2003-2004
trouble establishing the first three elements in wrongful life cases. Duty is normally based on the concept of informed consent, which requires medical professionals to disclose to patients all facts necessary to make an informed decision about proposed medical treatment. In the context of wrongful birth, a medical professional must inform parents of all possible birth defects she knows about, or in the exercise of reasonable care, should know about, to allow the parents to make fully-informed health decisions on their own behalf and on behalf of their potential children. The duty owed to the parent inures to the child because the child is a third party whose physical well-being is foreseeably at risk as a result of the negligence. Since 1946, courts have recognized that a duty of care exists to a fetus in utero. The wrongful life plaintiff is quite foreseeable relative to other contemporary negligence cases allowing recovery to victims harmed in utero. Failing to inform the parents of a genetic defect creates an unreasonable risk.

In an action for negligence the plaintiff has the burden of proving (a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff, (b) failure of the defendant to conform to the standard of conduct, (c) that such failure is a legal cause of the harm suffered by the plaintiff, and (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages. RESTATEMENT (SECOND) OF TORTS § 328A (1965). Section 328B sets forth the functions of the court, which includes "whether the harm claimed to be suffered by the plaintiff is legally compensable." Id. at § 328B(f). Thus, the courts have discretion to determine that the plaintiff was not damaged. But in other contexts, judges do not routinely find compensable harm where medical bills were caused by the defendant's negligence. Indeed, several courts found that the normal costs of rearing a healthy child constitute "damages" for purposes of wrongful pregnancy actions. See, e.g., KEETON ET AL., supra note 8, § 30, at 164-65. See infra notes 117-18 and accompanying text. 86. See, e.g., Harbeson v. Parke-Davis, 656 P.2d 483, 489 (Wash. 1983). Some early courts refused to find duty and breach in wrongful life cases, but this is an unusual analysis. See, e.g., Albala v. City of New York, 429 N.E.2d 786 (N.Y. 1981); see also supra note 34 and accompanying text.


90. The Second Restatement of Torts provides:

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 such third persons as the actor should expect to be put in peril by the action taken.

RESTATEMENT (SECOND) OF TORTS § 311(1)(b) (1965).

91. See Bonbrust v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). Even children not yet conceived at the time of the negligent act have been held to be foreseeable where defendant's conduct toward the mother created a risk of harm to her future children. See, e.g., Jorgensen v. Meade-Johnson Lab., Inc., 483 F.2d 237 (10th Cir. 1973); Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977).

92. In prenatal injury contexts, the need for the injury to be foreseeable has been all but discarded in certain cases, such as the DES cases, in order to impose liability against medical professionals in favor of innocent victims. See supra note 57 and accompanying text. The wrongful life plaintiff presents a much more clearly foreseeable victim with foreseeable and predictable medical problems than the DES victims.
of clearly foreseeable harm to the clearly foreseeable future child,\textsuperscript{93} so a
duty is owed to the defective fetus.

Breach is simple to establish. All that need be shown is that the medical
professional’s conduct fell below the care that would have been exercised
by the average reasonable medical professional under similar circum-
cstances.\textsuperscript{94} Where genetic testing is available, is the established practice, and
a reasonable doctor with similar credentials in similar circumstances would
conduct the testing, the doctor who fails to conduct testing or misinforms
parents of the results has breached his duty of care.

Causation is usually broken down into cause in fact and proximate
cause. Cause in fact is established by the mother’s testimony that but for
the failure to inform her of potential or actual birth defects, she would have
avoided conception or would have had an abortion. Proximate cause limits
defendant’s liability for harms in fact caused by his negligence to persons
reasonably foreseeable harmed by the negligence and to harms of a type
that are reasonably foreseeable.\textsuperscript{95} Since the fetus will be the person who will
suffer from the harms that foreseeably ensue from the undisclosed birth
defects, the fetus is clearly in the class of persons foreseeable harmed. The
harm is the manifestation of the birth defects that were not disclosed, so
failure to disclose the birth defects results in precisely the type of harm that
is foreseeable. Causation thus creates no obstacle to recovery for wrongful
life.

Almost all courts rejecting wrongful life claims have done so based on
the damages element.\textsuperscript{96} Despite clear proof of enormous medical expenses
and/or extraordinary healthcare and educational costs and/or pain and suf-
ferring, courts have denied liability based on a lack of “legally cognizable
injury.”\textsuperscript{97} Gleitman’s misstated “goal” of tort law and “required” damages

\textsuperscript{93} The Second Restatement of Torts provides the following with regard to negligent misrepresenta-
tion involving risk of physical harm:

(1) 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 (a) to the other, or (b) to such third persons as the actor should expect to be
put in peril by the action taken. (2) Such negligence may consist of failure to exercise reason-
able care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it
is communicated.

\textsuperscript{94} Dobbs, supra note 3, § 242, at 632.

\textsuperscript{95} Id. § 181, at 444.

element of a negligence action, damages, has been the most troublesome element in the analysis of a
wrongful life claim and has been the basis for denying the claim for relief.”), overruled by Lininger v.
1985) (Exum, J., dissenting) (noting that simple application of traditional tort concepts compels recogni-
tion of wrongful birth claims). \textit{See also id. at} 541 (Martin, J., concurring in part and dissenting in part)
(“Most of the recent cases of this nature have been resolved on traditional tort grounds.”).

\textsuperscript{97} See, \textit{e.g.}, Lininger, 764 P.2d at 1210 (finding it impossible to assess and compare value of
child’s life as is versus nonexistence); Blake v. Cruz, 698 P.2d 315, 322 (Idaho 1985) (“To recognize
wrongful life as a tort would do violence to [the purpose of protecting, preserving, and improving
the quality of human life] and is completely contradictory to the belief that life is precious.”); Goldberg v.
Wrongful Life Jurisprudence

analysis—to put the plaintiff back to his pre-tort condition—form the basis for almost all courts finding that the wrongful life plaintiff cannot establish a legally cognizable injury. As stated in a 2002 Maryland appellate court

cause of action seeking recovery for wrongful life, the trier of fact would be required ‘to measure the difference in value between life in an impaired condition and ‘the utter void of nonexistence.’” (citations omitted); Cowe v. Forum Group, 575 N.E.2d 630, 635 (Ind. 1991) (“Persuaded that the generally prevailing view is better reasoned . . . we conclude that ‘life, even life with severe defects, cannot be an injury in the legal sense.”’ (citations omitted)); Kassama v. Magat, 792 A.2d 1102, 1119 (Md. 2002) (noting that most courts rejected the cause of action based on the fundamental ground advanced in Berman that an impaired life is not worse than nonexistence and therefore cannot constitute “legally cognizable injury”); Azzolina, 337 S.E.2d at 532 (noting that the necessary comparison is between life in an impaired state and no life at all, and life cannot constitute injury as a matter of law). More specifically, the court concluded that “life, even life with severe defects, cannot be an injury in the legal sense.” Id. The court also felt that wrongful life and wrongful birth are matters more appropriately left to the legislature and consequently, denied the wrongful birth cause of action. Id. at 537. See, e.g., Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) (“[D]amages recoverable on behalf of an infant for wrongful life are limited to that which is necessary to restore the infant to the position he or she would have occupied were it not for the failure of the defendant to render advice to the infant’s parents in a nonnegligent manner.”); Ellis v. Sherman, 478 A.2d 1339, 1342 (Pa. Super. Ct. 1984) (“Accordingly, faced with the almost imponderable question of whether non-existence is preferable to existence in an impaired state, and the inability either to answer the question or to ascertain the appropriate calculation of damages, we must hold that [the child’s] cause of action for ‘wrongful life’ is not cognizable in law.”), aff’d, 515 A.2d 1327 (Pa. 1986); Nelson v. Kruisen, 678 S.W.2d 918, 924-25 (Tex. 1984) (holding that no wrongful life cause of action may be maintained in Texas because “[t]he basic role of tort compensation . . . requires a comparison of the condition that the plaintiff would have been in without the negligence of the plaintiff’s actual condition as a result of the defendant’s negligence . . . [which] unavoidably involves the relative benefits of an impaired life as opposed to no life at all . . . [and that] this calculation is impossible”). The court also clarified that the imprecision of damages is not a bar per se, but in wrongful life cases, it is impossible to say whether plaintiff was damaged at all. Id. See, e.g., Dumer v. St. Michael’s Hosp., 233 N.W.2d 372, 396 (Wis. 1975) (“We agree with [Gleitman]. The damages claimed cannot be measured by any standards recognized by our law.”); see also Phillips v. United States, 508 F. Supp. 537, 542-43 (D.S.C. 1980); Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Moores v. Lucas, 405 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 1981); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987); Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988); Smith v. Cote, 513 A.2d 341 (N.H. 1986); Alquijay v. St. Luke’s-Roosevelt Hosp. Ctr., 473 N.E.2d 244 (N.Y. 1984); Hester v. Dwivedi, 733 N.E.2d 1161 (Ohio 2000). As stated by Keeton: “Following a couple of wrongful life cases denying recovery to children born into a state of illegitimacy in the early and mid-1960s, New Jersey in 1967 handed down Gleitman v. Cosgrove, which was destined to become the fountainhead for debate in this country in cases of this type.” KEETON ET AL., supra note 8, at 370 (internal footnotes omitted).

98 Although Gleitman was overruled twelve years later in Berman, the pre-tort versus post-tort comparison first articulated in Gleitman remains the basis for most courts’ rejection of the wrongful life cause of action. Berman rejected Gleitman’s specific holding that wrongful life causes of action could not be recognized because damages were impossible to calculate and abortion was contrary to public policy, holding instead that wrongful life was not legally cognizable because a child is not damaged by being brought into existence as a matter of law. Berman v. Allan, 404 A.2d 8, 12-13 (N.J. 1979). The court thus substituted a “sanctity of life” rationale in lieu of a damages measurement problem and public policy rationale. But the gist of the reasoning is the same: Negligence that causes life, no matter how impaired, can never be considered injury in the legal sense regardless of the amount of actual medical expenses and suffering attributable to the negligence based on comparing plaintiff’s pre-tort and post-tort conditions. The Berman court overruled Gleitman’s rejection of the wrongful birth cause of action and held that the parents of defective children, who were born due to a doctor’s negligence in failing to inform the parents of prenatal defects, could maintain an action for wrongful birth. Id. The court grounded its finding of a parent’s legally cognizable injury on the constitutional right to an abortion, a right that was not yet recognized at the time of Gleitman. Id. (citing Roe v. Wade, 410 U.S. 113 (1973)). The court’s analysis in Berman is just as problematic as the analysis in Gleitman. Again, the court ignored the child’s need for compensation and society’s need for deterrence, focusing instead on whether the child suffered legally cognizable harm predicated on the difference between life and non-life. Id. at 12 (citing Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967)). The continued adherence to measuring
decision, "Th[e] core problem [of comparing the value of life to nonexistence], with its several offshoots, has plagued all of the courts that have had to deal with the issue."99 Although a few courts have denied the claim based on public policy,100 holding no duty of notice owed to the fetus,101 or deferring to legislative bodies in such controversial areas,102 the vast majority has denied the claim based on some expression of lack of a legally cognizable injury.

Semantically, courts state this in various ways. Some argue that a comparison between the plaintiff’s pre-tort and post-tort condition is impossible because humans have no ability to compare no life whatsoever to a damaged life.103 We cannot conceive of nonexistence.104 Others argue that the problem lies in measuring damages, because a factfinder cannot quantify a damaged life compared to no life whatsoever.105 Most modern courts hold that no damages exist as a matter of law, because any life is preferable to no life.106 However, this analysis fails to account for the fact that enormous expenses, like medical and other expenses, are incurred by a child that would not live but for the malpractice. Thus, a number of courts in wrongful life cases construct a bifurcated proof paradigm for the element of damages.107 They divide it into two separate elements, economic damages and

damages by comparing plaintiff’s pre-tort and post-tort condition is an inappropriate application of contract law principles, instead of tort law policy and doctrine. Despite the flaws inherent in Gleitman’s impossibility-of-measuring-damages reasoning and Berman’s “sanctity of life” reasoning, the analysis employed in these decisions formed the basis for almost all other jurisdictions’ rejection of the wrongful life cause of action. See supra note 35 and accompanying text. Some courts have even noted the “two intimately related grounds” set forth in Gleitman and Berman as the basis for their “systematic rejection of wrongful life claims.” Siemieniec, 512 N.E.2d at 697; see also Kassama, 792 A.2d at 1118-19 (noting that “two flaws” in the wrongful life cause of action, as set forth in Becker, 386 N.E.2d 807, are the impossibility of measuring damages and the concept that life can never constitute injury when compared to nonexistence).

99. Kassama, 792 A.2d at 1118. Indeed, even in jurisdictions that recognize the wrongful life cause of action, the concept that the benefits of life necessarily outweigh general damages is employed to preclude the child’s recovery of general damages. See Turpin v. Sortini, 643 P.2d 954 (Cal. 1982).

100. E.g., Phillips, 508 F. Supp. 537 (applying South Carolina law).


102. E.g., Becker, 386 N.E.2d at 816-19 (Wachtler, J., dissenting in part) (“Any attempt to find the physician responsible, even to a limited extent, for an injury which the child unquestionably inherited from his parents, requires a distortion or abandonment of fundamental legal principles and recognition, by the courts, of controversial rights and duties more appropriate for consideration and debate by a legislative body.”); see also Azzolino, 337 S.E.2d at 536-37 (citing Wachtler’s dissent in Becker, the court held that the problems arising from claims for wrongful birth and wrongful life should be left to the legislature).

103. Gleitman, 227 A.2d at 689.

104. Id. at 693.

105. Id., at 689.


107. Turpin v. Sortini, 643 P.2d 954, 960 (Cal. 1982) ("Although the issues of 'legally cognizable injury' and 'damages' are intimately related and in some sense inseparable, past cases have generally treated the two as distinct matters and, for purposes of analysis, it seems useful to follow that approach.") This division between legally cognizable injury and damages may have been inspired by the Second Restatement of Torts, section 7(1)-(2), which distinguishes "harm" (damages) from "injury," which is defined as "the invasion of any legally protected interest." Restatement (Second) of Torts § 7 (1965). See also Lovelace Med. Ctr. v. Mendez, 805 P.2d 603 (N.M. 1991).
"legally cognizable injury," requiring proof of both to sustain a claim.\textsuperscript{108} These courts deny liability based on a lack of "injury" despite clear proof of enormous economic damages and the general rule in negligence that economic damages that would not have been incurred but for the negligence suffice to satisfy the damages element.\textsuperscript{109}

In line with traditional and contemporary negligence jurisprudence, medical expenses and other economic losses should suffice to establish the damages element in wrongful life cases. In addition, even employing such a bifurcated proof paradigm, wrongful life plaintiffs can prove injury in addition to actual economic losses. Injury can be based on proof of pain and suffering, a lost chance of a healthier life, and/or interference with personal autonomy.\textsuperscript{110} This Part will first argue that economic losses per se should satisfy the damages element in wrongful life cases. Next, this Part will suggest three bases for finding injury in addition to economic losses in wrongful life cases. Finally, this Part will discuss wrongful life courts' incorrect application of the offset rules.

A. Medical Expenses and Other Extraordinary Economic Expenses Establish Damages in a Wrongful Life Action

The requirement of proving damages in a negligence case is one of the most important distinguishing characteristics between negligence and intentional torts. Intentional torts generally provide for liability without proof of physical injury or economic loss based on the nature of the interest infringed and the defendant's intentional state of mind.\textsuperscript{111} Thus, nominal dam-

\textsuperscript{108} Some courts do not split the damages issue in wrongful life cases into two separate issues, thereby aligning their analysis more closely with traditional tort law analysis and not coincidentally, finding that the child may state a claim based on medical and other expenses. For example, the Washington Supreme Court recognized that a negligence cause of action is stated where the plaintiff proves "duty, breach, proximate cause, and damage or injury." Harbeson v. Parke-Davis, 656 P.2d 483, 489 (Wash. 1983) (emphasis added).

\textsuperscript{109} See infra notes 110-14 and accompanying text. Some jurisdictions hold that in order to satisfy the harm element in a malpractice case, a plaintiff needs to prove damages or injury. See, e.g., Harbeson, 656 P.2d at 489. Some courts allowing wrongful life liability have entirely relaxed the "harm" element or barely discussed it, focusing instead on the social policy of allowing compensation for a defective child who exists and needs help. See, e.g., Curner v. Bio-Sci. Labs., 165 Cal. Rptr. 477 (Cal. Ct. App. 1980), overruled on other grounds by Turpin, 643 P.2d at 854.

\textsuperscript{110} Jurisdictions recognizing the cause of action thus far have not attempted to employ a novel basis for finding "injury," but instead have disagreed with the majority rule that any life is preferable to non-life as a matter of law. See, e.g., Turpin, 643 P.2d at 961-62; Harbeson, 656 P.2d at 496. Other courts have criticized the jurisdictions that recognize the cause of action, claiming that allowing the wrongful life claim is an "attempt to reach a 'right' result" by discarding "established principles of tort law." E.g., Lininger v. Eisenbaum, 764 P.2d 1202, 1212 (Colo. 1988); Smith v. Cote, 513 A.2d 341, 354 (N.H. 1986); Nelson v. Kruzen, 678 S.W.2d 918, 930 (Tex. 1984) (Robertson, J., concurring).

\textsuperscript{111} Dobbs, supra note 2, § 23, at 47 ("Liability for trespassory torts . . . is based upon the defendant's intent . . . .") At least in certain cases, a wrongful life plaintiff may show that the physician intentionally failed to disclose results of genetic testing on pro-life grounds. If such intent can be shown, the tort becomes an intentional one because defendant has interfered with plaintiff's rights of privacy, autonomy, and bodily integrity. These rights are similar to the types of rights recognized and protected without proof of damages under the laws of battery, assault, false imprisonment, and invasion of privacy. Once intentional interference is shown, the damages obstacle to negligence-based wrongful life liability
ages are recoverable despite no physical injury or economic damages to the plaintiff,\textsuperscript{112} and to the extent that unforeseeable harm ensues—either to the plaintiff or to any other person—extended liability against the intentional wrongdoer is imposed.\textsuperscript{113}

Negligence and intentional conduct are mutually exclusive grounds for imposing tort liability.\textsuperscript{114} A negligence action presupposes that a defendant did not act with intent to harm the plaintiff. The damages requirement and limitations based on foreseeability in negligence law reflect both the lesser degree of defendant’s fault and the concept in our society that you cannot complain of another’s carelessness unless you are in fact damaged by it. As stated by Prosser and Keeton:

Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred. . . . Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.\textsuperscript{115}

The purpose of the damages element is to distinguish between a person complaining of another’s carelessness because it was offensive and a person whose legally protected financial or personal interests were actually harmed by the negligence.

Keeton defines the damages element as “[a]ctual loss or damage resulting to the [plaintiff].”\textsuperscript{116} Dan Dobbs, in his textbook on torts, describes the element of damages in negligence cases as follows: “The [actual harm] element of a negligence prima facie case is that the plaintiff must suffer legally cognizable harm, \textit{frequently referred to as actual damages}. The plaintiff who proves that the defendant’s conduct was negligent, but fails to show

\textsuperscript{112} This is an acknowledgement that the infringed right constitutes harm to the plaintiff per se.

\textsuperscript{113} \textit{DOBBS, supra} note 2, \S 40.

\textsuperscript{114} \textit{Id.} \S 26, at 51 ("Any given act may be intentional or it may be negligent, but it cannot be both. Intent and negligence are regarded as mutually exclusive grounds for liability.").

\textsuperscript{115} \textit{KEETON ET AL., supra} note 8, \S 30, at 165 (internal footnote omitted). \textit{See also} \textit{RESTATEMENT (SECOND) OF TORTS} \S 904 (1965). The \textit{Second Restatement of Torts} says nothing about a separate element of "legally cognizable injury" in negligence actions but rather discusses only "damages." The \textit{Restatement} discusses the need to prove "special" compensatory damages, such as lost wages or medical bills, but no need to prove "general" compensatory damages such as pain and suffering, as they are assumed to flow from the commission of the tort and emotional distress in negligence cases. \textit{Id.} The \textit{Restatement} addresses the fact that where the damages are pecuniary loss, they must be proven specifically: "Compensatory damages that will not be awarded without proof of pecuniary loss include compensation for (a) harm to property, (b) harm to earning capacity, and (c) the creation of liabilities." \textit{Id.} \S 906. The \textit{Restatement} says nothing about needing to prove a legally cognizable injury \textit{in addition} to proof of these types of pecuniary loss. Rather, it indicates that proof of these pecuniary losses satisfies the damages element. \textit{Id.} Basically, proof of lost earning capacity or medical bills (the creation of liabilities) resulting from the negligence of another should satisfy the damages element. \textit{Id.}

\textsuperscript{116} \textit{KEETON ET AL., supra} note 8, at 165 (citing Richards v. City of Lawton, 629 P.2d 1260 (Okla. 1981)).
what actual damage resulted from it, will lose the case." 117 Thus, legally cognizable injury in tort law means either invasion to an interest so important that we recognize the invasion via nominal damages in the absence of actual damages—as in the case for most intentional torts—or actual loss or damages, which may be either economic118 or personal in nature—as in the case of negligence actions, which are often purely economic. Where a plaintiff shows either economic damages or personal injury, he has met his burden of showing a legally cognizable injury for purposes of negligence liability.

Injury means "the invasion of any legally protected interest of another." 120 All persons have a protected interest in not being damaged economically due to the negligence of another.121 In genetic testing malpractice cases not analyzed as wrongful life, courts have specifically recognized that economic damages such as medical expenses and costs of rearing a disabled child are sufficient to establish the damages element, because the "injury" consists of "extraordinary expenses." 122 In the wrongful pregnancy context, several courts have declared that the expense of rearing a healthy, but unwanted, child constitutes injury: "The interest in one's economic stability is clearly an example of an interest that receives legal protection . . . ." 123

118. Many negligence actions allow recovery for economic loss in the absence of personal injury. Property damages for negligence are recoverable in the absence of personal injury and the lost economic support of a family member/wage-earner are recoverable for wrongful death per se. Indeed, the economic losses the family incurred after the wage-earner was negligently killed were the only recognized injuries at common law. Dobbs, supra note 2, § 297, at 841. In addition, economic damages are the measure of injury in legal malpractice cases.
119. For example, damages in negligent infliction of emotional distress and loss of consortium cases often consist of emotional harm only, as no property damage, economic loss, or injury to the body is required.
120. Restatement (Second) of Torts § 7(1) (1965); see Black's Law Dictionary 785 (6th ed. 1990) (defining "injury" as "any wrong or damage done to another, either in his person, rights, reputation, or property"). See also Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 610 (N.M. 1991) (citing Restatement (Second) of Torts § 7(1) (1965)).
121. See Lovelace Med. Ctr., 805 P.2d at 609 (citing Black's Law Dictionary 924 (4th ed. 1968)).
122. See, e.g., Atlanta Obstetrics & Gynecology, P.A. v. Abelson, 392 S.E.2d 916, 919 (Ga. Ct. App. 1990) (holding that but for the defendants' negligence in failing to diagnose Down's Syndrome, parents would not have been injured by incurring the extraordinary expenses of rearing a Down's Syndrome child), rev'd, 398 S.E.2d 557, 561 (Ga. 1990) (holding that the decision whether to allow wrongful birth claims should be left to the legislature and specifically agreeing with Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985), that "we are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury" (alteration in original)). See also Garrison v. Med. Ctr. of Del., 571 A.2d 786 (Del. 1989) (holding that in parent's wrongful birth claim, where negligently performed amniocentesis resulted in the birth of a Down's Syndrome child, "[t]he resultant injury to the parents is that they have arguably been required to incur . . . extraordinary expenses in the raising, care and education of their child, who suffers from a genetic disorder"); Nelson v. Krusen, 678 S.W.2d 918, 928 (Tex. 1984) (Robertson, J., concurring) (stating that "injury consists of medical bills" with regards to wrongful life birth).
123. Lovelace Med. Ctr., 805 P.2d at 611 (holding that the economic stability of the family was impaired by the costs of raising an unwanted child subsequent to a negligently performed sterilization operation); see also Marciniak v. Lundborg, 450 N.W.2d 243, 246 (Wis. 1990) ("Individuals often seek sterilization precisely because the burdens of raising a child are substantial . . . . That is what this suit is about . . . . Relieving the family of the economic costs of raising the child may well add to the emotional
Some courts have allowed all out-of-pocket losses flowing from wrongful pregnancy, i.e., the actual expenses of rearing an unwanted but healthy child to the age of majority, since a traditional application of tort law principles demonstrates that but for the negligently performed sterilization, the parents would not have incurred any expenses of rearing a child. In the wrongful life context, even as far back as *Gleitman*, Justice Jacobs dissented, arguing that although the emotional distress damages may have been difficult to calculate, the medical and maintenance expenses causally related to the child’s abnormalities were “readily measurable,” indicating that, at the very least, medical expenses incurred but for the negligence should be recoverable. In response to the majority rule requiring both economic losses and injury, one judge stated, “Might it not be injudicious of this court to assume that a lifetime of dependence is not an injury?”

These courts have recognized that “ordinary damages rules” in tort cases, such as that the “basic principles of damage law is the concept that a wrongdoer may be held liable for all damages which he may have caused and all costs which the victim may sustain as a result of the wrong” should apply uniformly in torts cases. Applying basic negligence principles, it is often factually clear that but for the physician’s negligence, the disabled child would not have been born and that he will incur enormous medical expenses, extraordinary healthcare costs, and other

---

124. *See*, e.g., Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); Univ. of Ariz. Health Sci. Ctr. v. Super. Ct., 667 P.2d 1294 (Ariz. 1983); Custiodio v. Bauer, 59 Cal. Rptr. 463, 477 (Cal. Ct. App. 1967); Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982) (“[T]he better rule is to allow parents to recover for the expenses of rearing an unplanned child to majority when the child’s birth results from negligent medical care. The defendants ask us to carve out an exception, grounded in public policy, to the normal duty of a tortfeasor to assume liability for all the damages that he has proximately caused.”); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Lovelace Med. Ctr., 805 P.2d at 603; Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976); Markinak, 450 N.W.2d at 243. However, different jurisdictions allow different damages elements and most do not award full child-rearing costs without any offset to the child’s age of majority. *See*, e.g., Hatter v. Landsberg, 563 A.2d 146 (Pa. Super. Ct. 1989) (awarding only special damages and pain and suffering relating to the pregnancy and birth itself in suit for damages resulting from negligent tubal ligation and subsequent unwanted birth). *See also* Shork v. Huber, 648 S.W.2d 861 (Ky. 1983) (applying offset rule in holding benefits of healthy, unwanted child outweighed any related economic burden).

125. *Gleitman* v. Cosgrove, 227 A.2d 689, 704 (N.J. 1967). Jacobs cites *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), to support his contention that the majority was wrong to deny recovery on the basis that it was difficult to measure damages. *Id.* Story Parchment Co. held:

Where the tort itself is of such a nature as to preclude the ascertaining 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 amends for his acts.

*Story Parchment Co.*, 282 U.S. at 563. In his dissent, Jacobs also argues, on public policy grounds, that the majority’s decision provides no deterrent to professional irresponsibility, leaves the injured party wholly unredressed, and departs from the general enterprise liability trend of expanded liability in tort law. *Gleitman*, 227 A.2d at 703-04.


out-of-pocket losses that cannot be offset by the financial gain, if any, resulting from the birth.\(^{128}\)

Indeed, the lack of injury reasoning in wrongful life jurisprudence seems pretextual, perhaps the result of anti-abortion sentiment.\(^{129}\) Other negligence cases do not require such a high standard of proof of injury. To the extent that the problem of lack of a legally cognizable injury arises in other negligence cases, it usually relates to situations in which neither physical injury nor economic damage is present, such as in toxic exposure cases without proof of physical symptoms\(^{130}\) or negligent interference with chattels resulting in no property damage or other loss.\(^{131}\) Courts have bent over backwards at times in finding proof of physical injury from toxic exposure cases, such as by entertaining the argument that chromosomal irregularities are sufficient proof of physical injury, despite no proof of present or future pain or suffering whatsoever.\(^{132}\) Indeed, in other contexts, legally cognizable injury has been found in situations in which no actual damages have been established and no physical injury has been proven: Plaintiffs have been allowed to recover because they fear that they may suffer future injury as a result of toxic exposure, and such fear has been held sufficient proof of “damages” to sustain a negligence cause of action.\(^{133}\)

The jurisdictions that recognize wrongful life seem to rely on the fact of certain and readily ascertainable out-of-pocket losses to meet the element of damages.\(^{134}\) Although these courts have not always precisely articulated the basis for establishing the damages element, they focus on the child’s need for compensation for medical and other expenses and the injustice that could result if the child is denied a remedy. For example, in recognizing the cause of action, New Jersey based its holding on the public policy of providing compensation necessary for the child to live, i.e., “the needs of the living [wrongful life plaintiffs] . . . for help in bearing the burden of their affliction.”\(^{135}\) In addition, both California and Washington allowed the

\(^{128}\) See discussion infra Part II.C.

\(^{129}\) See infra notes 215-17 and accompanying text.


\(^{133}\) See, e.g., Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986). Although the majority of jurisdictions reject claims for negligent infliction of emotional distress in toxic exposure cases unless the plaintiff can establish by a preponderance of evidence that she will become ill on account of the exposure, at least some courts recognize that fear of future cancer constitutes legally cognizable harm, despite no actual damages and no present physical injury. E.g., Straughan v. Ahmed, 618 So. 2d 1225 (La. Ct. App. 1993).


wrongful life claim in part because it would be illogical and anomalous to permit the parents, but not the child, to recover the expenses of the child's needed medical and other extraordinary care. This illogical distinction becomes especially meaningful in cases where parents recover damages and put the child up for adoption, leaving the child without access to any funds to meet the extraordinary expenses resulting from her affliction.

Consistent with the leading authorities on tort law, the purpose of the damages element in negligence law and contemporary negligence jurisprudence in other cases where physical injury is difficult to assess, economic damages should suffice to establish the damages element in a wrongful life case. When public policies such as compensation to tort victims, cost-spreading, and deterrence are considered, failing to provide a remedy for child victims of malpractice seems indefensible.

B. Legally Cognizable Harm in Addition to Economic Damages Can Be Established in Wrongful Life Cases

As argued in the preceding section, wrongful life plaintiffs should not have to prove both economic damages and an additional "injury" to establish the damages element in a negligence cause of action. However, even employing a bifurcated proof paradigm, wrongful life plaintiffs can establish injury in addition to economic losses. Injury can be established by the pain and suffering that the child would not have experienced but for the malpractice, assuming his pain and suffering is not offset by the joys of life—a question of fact depending on the disorder involved and other facts of the case. The child may also prove injury based on a lost chance of medical intervention where defects are not detected in time for available in utero medical intervention. In addition, the child may establish injury based on interference with his due process liberty interest and right of personal autonomy. These bases for finding injury in addition to economic losses are discussed separately.

1. Pain and Suffering Constitute Injury

Proof that a child suffers pain and suffering that she would not have suffered but for the doctor's negligence establishes personal injury. Al-
though no court in a wrongful life action has offered pain and suffering as a basis for finding "injury," there are some opinions tacitly urging such reasoning to support a finding. As one judge opined:

[I]n cases such as this—a diseased plaintiff exists and . . . would not exist at all but for the negligence of the defendants. Existence in itself can hardly be characterized as an injury, but when existence is foreseeably and inextricably coupled with a disease, such an existence . . . may be intolerably burdensome. To judicially foreclose consideration of whether life in a particular case is such a burden would be to tell the diseased, possibly deformed plaintiff that he can seek no remedy in the courts and to imply that his alternative remedy, in the extreme event that he finds his life unduly burdensome, is suicide.141

At least in some cases, pain and suffering resulting from negligent genetic testing seems to far outweigh any benefits of life. For example, Tay Sachs babies are born to experience extreme pain and suffering for up to four years, and then they inevitably die; thus, their pain and suffering from birth until death could have been avoided but for the malpractice.142

Damages awarded for pain and suffering are often the largest part of negligence damages awards,143 and awards that fail to compensate for pain and suffering are held inadequate as a matter of law.144 In contexts other than wrongful life, courts employ very relaxed standards for proving injury grounded in pain and suffering. Some courts allow plaintiffs to recover for fear of future potential injury, despite no present symptoms and no present physical pain.145 Such emotional pain is significantly less concrete and less worthy of compensation than the very real and present physical pain of a Tay Sachs baby,146 who was born only to suffer and die as a result of negligent genetic testing.

---

142. Tay Sachs is a progressive, fatal disease of the nervous system that renders infants capable of experiencing only pain and suffering until they die at the age of two or three. DUNCAN'S DISEASES OF METABOLISM: GENETICS AND METABOLISM 456-58 (Philip K. Bondy & Leon Rosenberg eds., 7th ed. 1974). Tay Sachs can be detected prenatally with genetic testing. Id.
144. Allright, 711 S.W.2d at 686; see, e.g., Todd v. Bercini, 92 A.2d 538 (Pa. 1952).
145. See supra note 133 and accompanying text.
146. See supra note 141 and accompanying text.
There is no meaningful difference between the pain and suffering experienced by an infant on account of a physician’s negligent genetic counseling and pain and suffering in other types of cases where such afflictions would not be experienced but for the negligence. Neither is susceptible to mathematically certain calculations. But in areas other than wrongful life claims, pain and suffering is compensated nonetheless. As stated by the New Jersey Supreme Court:

For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been “fair and reasonable compensation.” . . . There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries. And it is equally plain that there is no measure by which the amount of pain and suffering endured by a particular human can be calculated. No market place exists at which such malaise is bought and sold.\footnote{147}

Failing to recognize a cause of action for the child means their pain and suffering goes un-redressed, although others’ pain and suffering, which may be substantially less severe, is recognized in different negligence actions.\footnote{148} This is fundamentally unfair, violates concepts of equal protection, and departs from general principles of tort law.

\textit{Gleitman}'s seminal analysis, employing a pre-tort versus post-tort comparison, implies that it is impossible to determine whether a child has suffered more or less on account of having experienced life instead of having his life terminated in utero. Ironically, the court goes on to state that if the child could be asked, he would choose life over non-life, indicating that the issue is capable of determination, after all, by a court’s intuition, without the benefit of medical expertise.\footnote{149} The factfinder is the proper entity to make a determination of whether a child suffered net “injury” in the form of pain and suffering resulting from his birth, which will usually depend on the testimony of expert medical professionals who have superior knowledge about pain and consciousness.\footnote{150} Certainly, there are situations in which any rational being would prefer non-existence over a short, painful life with no consciousness of life and only consciousness of pain.\footnote{151} By taking the issue
from the jury, courts in wrongful life cases have unfairly deprived the wrongful life plaintiff of the opportunity to demonstrate injury as a matter of fact, while requiring proof of injury in addition to economic damages as a matter of law. This is fundamentally unfair to the child.\(^\text{152}\)

Even after \textit{Gleitman}'s impossibility-of-measuring-damages rationale was rejected, courts have relied on the "sanctity of life" rationale to deny the child's cause of action, referring to the Constitution, the Declaration of Independence, criminal law provisions, and/or public policy to support their decision that all life is infinitely precious and a fetus cannot be injured as a matter of law by being born.\(^\text{153}\) Yet most courts that rely on the sanctity of life rationale to deny the wrongful life claim quickly subvert the sanctity of fetal life to the mother's right to abortion in recognizing the parents' cause of action for wrongful birth.\(^\text{154}\) Ironically, the value of fetal life, no matter how defective or painful, is paramount to non-life for purposes of rejecting a wrongful life cause of action but not quite so paramount relative to a woman's right to choose abortion for purposes of recognizing the wrongful birth cause of action. If the right to an abortion may supersede the value of even \textit{perfectly healthy} human life, then it is illogical to conclude that no other right—such as the right to avoid experiencing extreme pain and suffering on account of another's negligence—may ever supersede the value of human life when a child seeks recovery in his own name. It is more logical to conclude that, at least in cases of severely defective life, the choice to avoid suffering is at least as important as the right to choose to abort, and either may form the basis for choosing to end a fetal life.\(^\text{155}\)

Both expert and perceptive witness testimony may be necessary to establish proof of suffering for wrongful birth plaintiffs, but there is little question that some of these infants experience severe pain and suffering that renders non-life less painful.\(^\text{156}\) To the extent that a wrongful life plaintiff

---

152. See discussion \textit{supra} note 97.
154. The majority of jurisdictions reject the wrongful life claim based on some conception that life is infinitely precious and cannot constitute injury, yet recognize the wrongful birth claim based on infringement of the mother's right to abort human life. See \textit{supra} note 35 and accompanying text. The distinction is grounded in \textit{who} possesses the right. The question is whether this distinction is meaningful enough to alter the relative values assigned to human life in wrongful life versus wrongful birth actions.
155. There is, of course, the issue of determining whether the child would have chosen no life over the impaired life. But this is a question of fact for a jury to decide and case law regarding parents' right to control children's upbringing—including healthcare choices—may be used by analogy to support the parents' right to make the choice of non-life over life on behalf of the fetus. \textit{But see Cruzan v. Dir., Mo. Dept' of Health}, 497 U.S. 261 (1990) (discussing the factual problems involved in determining the wishes of an incompetent person to choose to terminate life).
156. See Note, \textit{The Evidentiary Problems Involved in Personal Injury Damage Cases}, 41 B.U. L. Rev. 409, 411-16 (1961). Some courts have entertained the argument that an infant's pain and suffering is not compensable for lack of proof because infants cannot express the extent of their pain in an articulate manner. See, e.g., \textit{Babb v. Murray}, 79 P.2d 159 (Cal. Dist. Ct. App. 1938), \textit{cited in Capelouto v. Kaiser Found. Hosp.}, 500 P.2d 884 (Cal. 1972). However, the concept that a child's pain and suffering is incapable of proof, and therefore not recoverable, has been cogently rejected. In reversing the lower court's jury instruction that damages for pain and suffering to an infant were not recoverable because the damages were incapable of proof due to the age of the child, the California Supreme Court held:
can demonstrate pain and suffering without sufficient joy or positive life experiences to offset such pain and suffering, he has demonstrated an injury resulting from malpractice in addition to economic injury.

2. **Loss of Chance of Healthier Life Constitutes Injury**

In 1978\textsuperscript{157} courts throughout the country began a trend\textsuperscript{158} of recognizing that where a doctor’s negligent diagnosis causes a patient to lose the chance to undergo medical treatment to prevent death or prolong life, such a loss is actionable as a medical malpractice lawsuit.\textsuperscript{159} Others allow a plaintiff to show that he lost any percent chance of survival in order to recover but are split on whether once a lost chance is shown, the plaintiff recovers all of his damages resulting from death (that is, disregarding the fact that plaintiff was likely to die regardless of the doctor’s negligence) or only a percentage of the total damages based on the percent chance he had of survival but for the negligence.\textsuperscript{160} The issue is usually analyzed as one of cause in fact: Where a plaintiff is already terminally ill and a doctor’s negligent diagnosis prevents him from obtaining medical treatment that could save his life, did the doctor in fact cause the plaintiff’s death?\textsuperscript{161} Although frequently analyzed as a cause in fact issue, the issue fundamentally concerns whether plaintiff was injured but for the negligence: Was the plaintiff actually injured by the misdiagnosis, considering that his illness pre-existed the misdiagnosis and he probably would have died even in the absence of the negligent diagnosis?\textsuperscript{162} The nature and extent of any injury caused by the doctor’s negligent diagnosis is the key issue in these cases.

\textsuperscript{157} The seminal case appears to be Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978).

\textsuperscript{158} As stated by Judge Posner:

This [loss of chance] basis for an award of damages is not accepted in all jurisdictions, but it is gaining ground and it is in our view basically sound. . . . It recognizes the inescapably probabilistic character of many injuries. It is essential in order to avoid undercompensation and thus (in the absence of punitive damages) underdeterrence . . . .

\textsuperscript{159} Doll v. Brown, 75 F.3d 1200, 1206 (7th Cir. 1996).

\textsuperscript{160} See DOBBS, supra note 2, § 178, at nn.1-16 (listing state decisions in this area). Courts are split on whether a plaintiff must show by a preponderance of the evidence that he would have survived but for the misdiagnosis. Id. § 178, at 435. Some courts hold that a plaintiff must show a fifty percent or greater chance of survival but for the malpractice or else he recovers nothing. Id. § 178, at 435-36. See also Jorgenson v. Vener, 640 N.W.2d 485 (S.D. 2002).

\textsuperscript{161} DOBBS, supra note 2, § 178, at 435-36.

\textsuperscript{162} See, e.g., Fennel v. S. Md. Hosp. Ctr., 580 A.2d 206 (Md. 1990) (discussing the “relaxed causation approach” in medical malpractice cases where there is a probability that malpractice caused death); see also McMullen v. Ohio State Univ. Hosp., 725 N.E.2d 1117 (Ohio 2000) (finding that defendant’s negligence caused plaintiff’s death).

\textsuperscript{162} See, e.g., Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. 1992) (stating that the “harm” is the “loss of the chance of recovery”); see also McMullen, 725 N.E.2d at 1117.
This issue—what injury was caused by the malpractice when the health condition pre-existed the malpractice—is the same issue courts grapple with in wrongful life cases. Although the early wrongful life cases were based in part on the belief that but for the negligence the only other option was non-life (via abortion or contraception), this is not always the case in today’s world. For example, a positive result in prenatal testing for congenital adrenal hyperplasia gives the pregnant mother the option of hormone treatment while pregnant to prevent female fetuses from developing male genitalia.\(^{163}\)

If genetic testing of parents indicates Tay Sachs, the parents can choose to avoid conception until they are able to undergo pre-implantation genetic intervention.\(^{164}\) The procedure allows parents to choose and implant an embryo that is not afflicted with Tay Sachs.\(^{165}\) Fetal surgery, while risky, is currently possible for fetuses testing positive for spina bifida.\(^{166}\) Several other fetal conditions have been treated successfully in utero.\(^{167}\) As technology advances, additional fetal conditions will be treatable during gestation.\(^{168}\) The present and future state of in utero medical help for defective fetuses means that in many cases, but for the negligence, in utero surgery or chemical intervention could have prevented or minimized the defect’s manifestation at birth. Thus, at least in some wrongful life cases presently and in many more in the future, the comparison will be between a defective life and the chance of a healthier life—not between a defective life and non-life.

The general malpractice paradigm employed in prenatal injury cases is more appropriate for these types of actions because the plaintiff can prove that causation exists, or may exist, between the negligence and the defect’s manifestation at birth. Loss of chance cases provide analytical solutions for determining whether and to what extent a fetus in fact suffered injury resulting from negligent genetic testing or disclosure.\(^{169}\) Thus, at least in some

---

163. Interview with Dr. Bonnie Leroy, Professor, Department of Genetics, Cell Biology, and Development, University of Minnesota (June 10, 2003) [hereinafter Leroy Interview].
164. Id.
165. Id.
166. Interview with Dr. Paul Wolpe, Professor, Center for Bioethics, University of Pennsylvania (June 20, 2003) [hereinafter Wolpe Interview]. Spina bifida is a failure of the spinal column to close properly, necessitating very expensive medical care. Some of the children depicted in the March of Dimes posters suffer from spina bifida. Leroy Interview, supra note 163.
167. For example, the following fetal disease states have all been treated successfully: fetal hydrocephalus, sacrococcygeal teratoma, congenital diaphragmatic hernia, fetal myelomeningocele, obstructive congenital epulis, and cystadenomatoid lung malformations and immunodeiciencies. Interview with Bryan A. Liang, John & Rebecca Moores University Professor, University of Houston Law Center (Nov. 2, 2003).
168. According to Dr. Paul Wolpe, fetal surgery is probably the most likely means of intervening and minimizing the impact of genetic defects of fetuses in utero. Drug intervention may also be used more commonly in the future. There is also some hope of genetic intervention, such as gene replacement in cystic fibrosis, Tay Sachs, or Down’s Syndrome fetuses. However, this later potential form of medical intervention for genetically defective fetuses is very risky and speculative, because it is not possible to know how such genetic intervention may impact the long term health of the fetus, or the fetus’s reproductive genes and future children. Wolpe Interview, supra note 166.
169. Note that jurisdictions are sharply split over the proper proof methodology for loss of chance cases. See DOBBS & HAYDEN, supra note 117, at 205-15. Some jurisdictions reject the loss of chance theory of recovery altogether: the District of Columbia, California, Florida, Texas, Tennessee, and by
cases currently dismissed for lack of injury, the injury can be established by
the fetus's lost chance of receiving treatment in utero to prevent or mini-
mize the defect's manifestation at birth. At least one court has relied upon
loss of chance methodology in establishing injury to a mother in a wrongful
birth action.\textsuperscript{170} A wrongful life plaintiff should be given the opportunity to
prove such injury.

3. \textit{Interference with the Child's Due Process Rights Constitutes Injury}

The majority of jurisdictions recognize wrongful birth actions but deny
wrongful life actions.\textsuperscript{171} These courts find that parents of a disabled child
suffer legally cognizable injury because their legally protected interest in
making fully informed reproductive decisions was violated by the doctors
who failed to advise them of genetic problems.\textsuperscript{172} "The harm, if any, is not
the birth itself but the effect of the defendant's negligence on the [parents]
resulting from the denial to the parents of their right . . . to decide whether
to bear a child or whether to bear a child with a genetic or other defect."\textsuperscript{173}
This legally protected interest, which includes the right to an abortion, is
grounded in the constitutional right of privacy, one aspect of the liberty in-
terest secured by the Due Process Clause.\textsuperscript{174} These courts reason that the
infant has no similar right to reproductive choice that was infringed by the
doctor's negligence, so no similar basis exists for finding a legally cogni-
zable injury.\textsuperscript{175}

The Supreme Court recognizes a right to die in some situations, which
is also protected as part of the Due Process Clause.\textsuperscript{176} Justice O'Connor
argued in \textit{Cruzan v. Director, Missouri Department of Health} that this right
exists as part of the liberty interest.\textsuperscript{177} The Court also held that a state may
require increased evidentiary requirements, such as a clear and convincing
standard, that a person wants lifesaving medical treatment terminated, and
that a state may prevent family members from terminating treatment for
other family members.\textsuperscript{178} In 1990, the Court held that the choice of non-life

\begin{itemize}
\item See Greco v. United States, 893 P.2d 345, 348-50 (Nev. 1995).
\item See \textit{supra} note 8, at 372; see \textit{supra} note 35 and accompanying text.
\item See, e.g., Kassama v. Magat, 792 A.2d 1102, 1104 (Md. 2002).
\item \textit{Id.} at 1104 n.4 (quoting Viccaro v. Milinsky, 551 N.E.2d 8, 9 n.3 (1990)).
(Harlan, J., concurring).
\item See, e.g., Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. 1990) (en banc) ("[T]he ability to
decide questions of conception or termination of pregnancy resides in the parents, not the fetus. . . .
[A]ny wrong that was done was a wrong to the parents, not to the fetus."); see also Hester v. Dwivedi,
733 N.E.2d 1161, 1166 (Ohio 2000) ("Thus, the only injury causally related to the appellees' breach of
duty was the deprivation of the chance to make a fully informed decision whether to continue the preg-
nancy. That decision, legally, belonged to [the mother].")
\item \textit{Id.} at 287 (O'Connor, J., concurring).
\item \textit{Id.} at 281, 286.
\end{itemize}
Wrongful Life Jurisprudence

over life is not only valid in some situations but is a constitutionally protected interest, at least where a terminally ill adult clearly makes the choice to terminate life support. Sometimes competent adults choose to die rather than continue to live in an impaired or painful state. Chief Justice Rehnquist, writing for the Supreme Court, referred to this as a “deeply personal decision.”

The Court’s opinion reflects the contemporary societal view that sometimes death is preferable to life. The concept is hardly a new one. State courts have ordered removal of life support upon request by the person receiving life support, explaining the rationale as follows:

[Where] the quality of . . . life has been diminished to the point of hopelessness, uselessness, unenjoyability and frustration . . . [if] [the] right to choose [to die] may not be exercised because there remains . . . in the opinion of a court . . . a certain arbitrary [amount of time left to live such a life], . . . [the right to live] will have lost its value and meaning.

In recognizing that the choice of non-life over life is not only valid but constitutionally protected in some circumstances, these decisions undermine the concept that life is always preferable to non-life and the attendant concept that experiencing painful life can never constitute an injury. Once the right to avoid suffering by choosing non-life is recognized in certain circumstances, equal protection concerns arise in failing to confer the right to all humans who may needlessly suffer. Infants should be given the same rights as others to avoid an extremely painful, terminal life. Interference

179. Id. at 281.
180. Id.
181. This also supports the argument that life can constitute injury when the experience of life is so painful that non-life is preferable. Many professional medical associations, including the American Medical Association and the American Academy of Neurology, filed amicus briefs urging reversal of the Missouri Supreme Court’s ruling to deny the request to terminate life support. See id. at 264. Other national organizations, including the American Academy of Medical Ethics and the Association of American Physicians and Surgeons, urged the Court to affirm. Id.
182. State courts have recognized an individual’s right to die, grounded in protecting the individual’s subjective will and autonomy. See, e.g., Matter of Quinlan, 355 A.2d 647 (N.J. 1976).
184. Note, however, that to the extent courts have considered the issue they appear to find that a failure to terminate life support does not constitute injury as a matter of law. See, e.g., Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225 (Ohio 1996) (three justices dissented, relying on Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261 (1990)).
185. This argument is not supported directly by Cruzan. Cruzan is cited for the limited proposition that the Supreme Court recognizes a right, grounded in battery law, to avoid medical treatments to sustain life in certain circumstances. This right is recognized despite the state’s interest in preserving life. Thus, the Court acknowledges that life is not always preferable to non-life and the ultimate decision resides in the terminally ill patient. The problems lie in determining the wishes of an incompetent person who is terminally ill. See Cruzan, 497 U.S. at 267-69. Fundamentally, the Court deferred to the state’s public policy reflected in the state living will statute and held that the Due Process Clause does not require a state to accept the substituted judgment of a close family member in the absence of clear and convincing proof that the patient would have made the same judgment. Id. If a state were to allow substituted judgment by parents of defective fetuses, Cruzan would pose no obstacle to such an exercise of
with that right constitutes an injury grounded in violation of personal autonomy in the same way that interference with the parents’ right to abortion constitutes an injury.

There are some obvious distinctions between the right to die cases and wrongful life cases. First, the right to die cases are clearly limited to rejecting affirmative, life-prolonging treatment or “passive euthanasia” and do not confer a right to doctor-assisted suicide or “active euthanasia.” The wrongful life plaintiff would be required to argue for extension of the right to die doctrine based essentially on a theory of a right to active euthanasia that converges with the mother’s right to abortion. As a practical reality, the mother’s right to choose to abort a defective fetus constitutes the parent’s substituted judgment for the fetus to forego a painful and disabled life, and the child need not rely on a separate right of autonomy that confers a right to euthanasia. The fact that the mother already holds the right to substitute her judgment about the quality of her fetus’s life via her right to abortion lends some support to the child’s claim that negligence in genetic testing and disclosure caused him injury in the form of a loss of liberty, albeit dependent upon her mother’s substituted judgment, which is effectuated by abortion. In addition, as a practical reality, active euthanasia is already being practiced by a substantial number of doctors throughout the United States.

Another problem lies in determining the will of an incompetent fetus. It is often clear when an adult chooses not to continue living under certain conditions, because his will is expressed in a living will or medical directive, whereas a fetus never had the opportunity to express his will in such a clear manner. However, parents make medical decisions on behalf of incompetent minors regularly, and in the wrongful life context, the judgment of a parent is necessarily substituted for that of the fetus because he is incompetent to state whether he prefers non-life to an impaired state. It seems clear that parents are in the best position to choose between life and non-life on behalf of their defective potential child and will make the decision in the fetus’s best interests.

This decision may not be an easy one in some cases, but in others, it appears clear that the fetus’s best interests are served and her right to avoid  

state sovereignty.

186. See Robert M. Hardaway et al., The Right to Die and the Ninth Amendment: Compassion and Dying After Glucksberg and Vacco, 7 Geo. Mason L. Rev. 313, 323 (1999).
187. Id. at 321-22.
190. See Turpin v. Sortini, 643 P.2d 954 (Cal. 1982). The emotional bonds of affection between parents and their offspring are recognized by the Supreme Court as reliable indicia that parents will act in the best interests of their offspring. See Parham v. J.R., 442 U.S. 584, 610 (1979) (discussing the “presumption” that parents make choices about their children based on the children’s best interests). The parents’ decision to abort should be presumed to converge with the best interests of the fetus in the wrongful life context.
suffering is most effectively advanced by terminating her life prior to birth.\textsuperscript{191} Regardless of the difficulty of the decision in a particular case, the child’s right to avoid suffering should be recognized, and infringement of that right should constitute injury. The proof is the parents’ testimony that they would have made the decision to abort the fetus but for the malpractice and that such an exercise of their reproductive rights was actually an act of substituted judgment on behalf of their fetus to prevent the fetus from being born and experiencing pain.

The fact that American courts universally recognize doctors’ duty of care to fetuses and the fetuses’ right not to suffer on account of prenatal medical malpractice\textsuperscript{192} lends additional support to the concept that the fetus has a similar right to avoid needless suffering resulting from medical malpractice in the form of negligent genetic testing or disclosure. The right of self-determination and avoiding pain from another’s negligence is at the heart of our tort system and where it can be shown that those rights were infringed, an injury has occurred that is at least as grave as the injury parents suffer when their right to an abortion is violated.\textsuperscript{193} A wrongful life plaintiff should be given the opportunity to prove injury in this manner.

\section*{C. Wrongful Offset Analysis in Wrongful Life Cases}

Another problem with wrongful life jurisprudence is the way that courts apply the offset rule to deny liability altogether or to limit damages. In all negligence cases, damages resulting from the negligence are offset by any benefits to the same interest of the plaintiff that was damaged by the negligence.\textsuperscript{194} In wrongful life jurisprudence, courts offset damages in an original manner that finds no support in precedent, resulting in two flaws in wrongful life offset analysis: First, most courts employ the offset rule incorrectly to reach a determination that the plaintiff is not injured as a matter of law, therefore denying liability altogether;\textsuperscript{195} and second, even courts that recognize the cause of action deny general damages as a matter of law based on the offset rule.\textsuperscript{196} These two flaws in offset analysis are discussed separately.

First, most courts deny liability by applying the offset rules incorrectly, offsetting different interests of the plaintiff. The Restatement sets forth rules regarding offset as follows:

\begin{itemize}
\item \textsuperscript{191} For example, Tay Sachs disease is a genetically inherited and incurable disease that kills children by the age of four if not sooner and causes the child to experience a great deal of pain during his short life. \textit{See Geler v. Akawie}, 818 A.2d 402 (N.J. Super. Ct. App. Div. 2003). \textit{See also supra} note 142 and accompanying text.
\item \textsuperscript{192} American courts universally recognize that doctors owe a duty of care to fetuses in utero. \textit{See Dobbs}, \textit{supra} note 2, \S\ 288, at 781.
\item \textsuperscript{193} As noted herein, many courts have found the “injury” element in wrongful birth cases based on interference with the parents’ reproductive rights. \textit{See supra} note 172 and accompanying text.
\item \textsuperscript{194} \textit{See Restatement (Second) of Torts} \S\ 920 (1965).
\item \textsuperscript{195} \textit{See infra} notes 192-94 and accompanying text.
\item \textsuperscript{196} \textit{See infra} notes 195-200 and accompanying text.
\end{itemize}
When the defendant’s tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.\(^{197}\)

The comment to this section clarifies that the benefit must be to the same interest.\(^{198}\) For example, as illustrated by the Restatement, if a surgeon performs an unprivileged operation resulting in pain and suffering, it may be shown that the operation averted future suffering, and the diminution in future pain is a factor to consider in awarding damages for pain and suffering caused by the operation.\(^{199}\) In this example, the pain and suffering averted by the surgery would offset plaintiff’s pain and suffering resulting from the surgery, but it would not offset any medical expenses or damages to any of plaintiff’s interests other than pain and suffering.

In yet another departure from general tort law doctrine, courts in wrongful life cases use the offset rule to deny recovery by offsetting economic damages and pain and suffering jointly by the presumed “benefits” of experiencing life, finding that the benefits of any life outweigh both economic damages and pain and suffering as a matter of law.\(^{200}\) In Gleitman, the majority set forth this unusual application of the offset rule in denying the wrongful birth claim.\(^{201}\) Similar analysis has been employed in subsequent wrongful birth and wrongful life cases. In Berman v. Allan, while recognizing the wrongful birth cause of action, the court adopted Gleitman’s application of the offset rule in denying the wrongful life claim.\(^{202}\) The court

\(^{197}\) Restatement (Second) of Torts § 920 (1965) (emphasis added).

\(^{198}\) Id. cmt. a, illus. 1.

\(^{199}\) Similarly, if a surgeon destroyed one body part, it may be shown in mitigation of damages that another body part has improved due to the loss of the other body part, as when eye surgery results in the loss of an eye but also results in saving the eye that was not operated on. Id. illus. 2. The last example given in the Restatement occurs when a tortfeaser’s interference with another’s land results in an improvement to the land, such as where defendant tortuously digs a channel through plaintiff’s land, making it impossible to grow crops on the land through which the channel runs but also allowing drainage to the remainder of plaintiff’s land, increasing its market value. Id. illus. 3.

\(^{200}\) Not all courts dealing with birth-related torts have misapplied the offset rule. In the wrongful pregnancy context, one court made clear that costs involved in rearing an unwanted child cannot be offset by emotional benefits of having the child:

[T]his “offsetting benefits” principle applies only to reduction of damages for invasion of the same interest as the one that has been harmed. . . . [A]pplying Section 920 of the Restatement, . . . the emotional benefits from having an additional (healthy) child do not mitigate the economic costs of rearing the child.

Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 613-14 (N.M. 1991). This court also held that emotional distress damages are not compensable, because it is against public policy to require parents to prove how slight or non-existent the psychological benefit of having the child was in order to minimize the offset to their nonpecuniary interests. Id. at 614.

\(^{201}\) The majority stated that “[i]n order to determine [the parents’] compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries.” Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1979) (emphasis added).

\(^{202}\) Berman v. Allan, 404 A.2d 8, 13-14 (N.J. 1979). It should be noted that although most jurisdictions allow wrongful birth actions, they have not reached a consensus about whether the parents’ dam-
offset medical and other economic costs incurred in raising the child by the emotional “love and joy they will experience as parents.” 203  Ironically, the court made an additional mistake in applying the offset rule by awarding the parents full emotional distress damages without offsetting them by the emotional benefits resulting from the parent-child relationship. 204 Pursuant to the Restatement, a proper comparison is between: (1) medical expenses and other out-of-pocket expenses incurred in raising a defective child and financial benefits incurred as a result of having the defective child, if any; and (2) pain and mental suffering from giving birth to and raising a defective child and the emotional benefits of having the child. 205

In relation to the child’s wrongful life claim, similar unprecedented offset analysis is employed. The Berman court discussed at length the value of human existence per se and then held that that value necessarily outweighed any other considerations—implicitly lumping together the economic losses resulting from the birth and the “great deal of physical and emotional pain and anguish” the wrongful life plaintiff will experience. 206 The court should have first compared the child’s emotional distress resulting from living a disabled life with the emotional benefits and joys of life that also resulted

---

203. Berman, 404 A.2d at 14. The Berman court explicitly adopted this part of Gleitman’s reasoning. Id.

204. Id. at 14-15. In other wrongful birth contexts, courts offset money damages with presumed benefits of parenthood, which confuses plaintiff’s interests. In Gleitman, the court denied both the wrongful life claims and the wrongful birth claims. Gleitman, 227 A.2d at 692-93. As to the latter, the court stated:

A considerable problem is raised by the claim of injury to the parents. In order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is similar to that which we have found impossible to perform for the infant plaintiff. 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.

Id. at 693. The lower court seemed to assume that all compensatory damages represent the same interests of the plaintiff.

205. Some courts recognize that the benefit must be to the same interest and have opined that no offset to parents’ financial burden should be made on account of pleasure they may receive from the child’s birth, as the interests are “sufficiently unrelated.” See Linniger, 764 P.2d at 1206-07.

206. The court did not address directly the child’s expected medical and other expenses. Berman, 404 A.2d at 13.
from defendant's negligence. Offsetting these interests may result in no net emotional damages. But economic damages are an entirely different matter. In most wrongful life cases, a disabled child sustains enormous financial damages because medical and other extraordinary expenses are incurred, and she is not capable of gainful employment during her life, so no offset is possible. If the child is capable of gainful employment, then the income the child produces should offset the economic damages she incurs by living her life, because but for the negligence of the doctor, she would have incurred neither losses nor lived to produce income.

Regardless of the particular facts of any given case, the offset rule should not apply when money damages relate to a different human interest than pain and suffering. The wrongful life plaintiff should be given the same opportunity to prove damages as any other tort plaintiff, and the offset rule should be applied in the same way that it applies in other negligence cases, limiting offsets to the same interest. Using the offset rule to deny liability altogether in wrongful life cases distorts the offset rule and departs from negligence jurisprudence.

Second, in jurisdictions that recognize wrongful life claims, courts employ the offset rule to deny general damages as a matter of law. The California Supreme Court, the first court to apply the offset rule in this manner, limited recovery in wrongful life actions to special damages, such as medical care, education, and training that the child needs over her lifetime.

207. For example, in the case of a Down’s Syndrome child, a jury may very well determine that the benefits of life outweigh the disability, as Down’s Syndrome children are capable of giving and receiving love. Recent studies show that Down’s Syndrome children can lead useful, productive lives and that they can be educated, employed, and get along in society. See Kassama v. Magat, 792 A.2d 1102, 1123 (Md. 2002).

208. Interestingly, Justice Handler, concurring in part and dissenting in part, argued that a child should receive compensation for the lost parental capacity resulting from the doctors’ negligence and the “diminished childhood” resulting from the parental capacity to rear which is damaged by the parents’ suffering. Berman, 404 A.2d at 16. Justice Handler also discussed the social policy problems in refusing to recognize the wrongful life action, specifically the lack of deterrence for doctors negligently misinforming pregnant women about their fetuses’ problems. Id. at 16-17.

209. For example, assume that plaintiff is leaving work for the day and is on his way to purchase a lottery ticket at a convenience store that sells dozens of lottery tickets per hour. Further, assume that defendant negligently runs into plaintiff’s car on the freeway, causing property damages and personal injury, but that after exchanging insurance information, plaintiff drives on to purchase a lottery ticket then goes home. If plaintiff is delayed thirty minutes on account of the accident but then happens to win the lottery because he got in line at the right time to purchase the winning ticket, it is likely that but for defendant’s negligence, plaintiff would not have purchased the winning ticket. Yet assuming plaintiff’s property damage and personal injury claims are valid, no one would seriously consider offsetting his property damage (economic harm) by the amounts received on account of the winning lottery ticket (economic benefit that arguably would not have been obtained but for the delay caused by the defendant’s negligence). That would be contrary to the purposes of tort law. And certainly no one would argue that his pain and suffering from injuries sustained in the collision should be offset by the financial gain resulting from the winning lottery ticket—the interest in not being in pain is clearly distinct from the financial benefit.


211. Turpin, 643 P.2d at 965. Note that the court also disallowed punitive damages, which is inconsistent with tort law generally and California law specifically, in circumstances where the plaintiff is able to show extreme disregard for human suffering, or in the words of California law, “oppression, fraud, or
The court denied general damages, including pain and suffering, reasoning that it was "simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born," and also that a fair, nonspeculative award is impossible. Washington and New Jersey follow this approach.

While this approach is a more technically correct application of the offset rule because it offsets pain and suffering by emotional benefits, leaving economic interests out of the mix, the analysis still suffers from a failure to treat wrongful life cases similar to other malpractice cases by divesting from the plaintiff the opportunity to prove net emotional damages under the facts of a particular case. The approach of these courts to the offset rule reflects the same impossibility-of-measuring-damages rationale that was expressly rejected post-Gleitman and the "sanctity of life" reasoning employed by the majority of cases that reject the cause of action altogether. While the approach avoids the outrageously unfair result of leaving a disabled child without recovery even for his economic expenses in dealing with his disability, a better approach that is more consistent with tort law principles and medical malpractice precedent, would allow the jury to calculate damages and apply the offset rule to limit recovery by benefits conferred to the same interest if the facts support such limitation. Calculating pain and suffering damages and then offsetting such damages by the emotional gain in having life, while difficult, is no more difficult than other calculations for general damages that are routinely made by juries for loss of consortium, lost chance of extended life, lost limbs, and so forth. As one scholar explained:

[J]urors can never actually experience a plaintiff's life in its "normal" state before an injury or in the injured state that resulted from a defendant's actions. An imaginative leap is always required; the more severe the injury the greater the leap . . . . [In some cases] common understanding would lead to the conclusion that it would
be better . . . never to have existed . . . and it is for the finder of fact to determine just how much better it would be.\textsuperscript{218}

Juries should offset emotional injuries by the joys of life in accordance with the deference traditionally vested in juries in negligence cases.\textsuperscript{219}

In sum, the damages analysis in wrongful life jurisprudence is fraught with unique irregularities that relegate wrongful life victims to a class of unfortunates legally ignored by most jurisdictions. Wrongful life damages jurisprudence needs to be revisited with fundamental tort doctrine as the starting point for analytical review. Contemporary medical technology and evolving societal mores should also be considered in reforming wrongful life jurisprudence. A logical, objective application of negligence damages rules clarifies that wrongful life plaintiffs suffer damages resulting from negligent genetic testing and deserve a remedy.

III. SOCIAL POLICY SUPPORTS RECOGNIZING THE WRONGFUL LIFE CAUSE OF ACTION

In addition to the tort law policies supporting the wrongful life cause of action, such as compensation to victims, cost-spreading, and deterrence, there are other social policy reasons supporting recognition of this claim. First, failing to impose tort liability for wrongful life may impact doctors’ decisions regarding genetic testing above and beyond the failure to deter negligent conduct per se. Abortion is a highly emotional and controversial issue that, in the absence of clear liability for wrongful life, could impact a non-negligent doctor’s otherwise objective medical judgment. At least one English court has argued that allowing liability for wrongful life could place physicians under “subconscious pressures to advise abortions,” leading to recommendations for abortions in cases where it is unclear whether the child will suffer from defects sufficient to warrant abortion.\textsuperscript{220} This concern seems a bit overstated: A physician’s duty is to provide full medical disclosure in order to allow the mother to choose whether to abort the fetus, not to advise abortions.\textsuperscript{221} This concern leads, however, to the converse concern:


\textsuperscript{219} See DOBBS, supra note 2, § 18, at 33-36.

\textsuperscript{220} See Anthony Jackson, \textit{Wrongful Life and Wrongful Birth: The English Conception}, 17 J. LEGAL MED. 349, 351 (1996) (citing McKay v. Essex Area Health Auth., [1982] 1 Q.B. 1166, 1181). In denying both wrongful life and wrongful birth, one court noted the following real life story regarding doctors recommending abortion:

A clinical instructor asks his students to advise an expectant mother on the fate of a fetus whose father has chronic syphilis. Early siblings were born with a collection of defects such as deafness, blindness, and retardation. The usual response of the students is: "Abort!" The teacher then calmly replies: "Congratulations, you have just aborted Beethoven."

\textsuperscript{221} Azzolina v. Dingfelder, 337 S.E.2d 528, 535 (N.C. 1985) (citation omitted). Note, however, that medical testing has advanced dramatically since Beethoven’s time and is more exact. In any event, doctors would likely leave the abortion decision to the parents after fully disclosing the medical facts.
Pro-life physicians may, consciously or unconsciously, fail to conduct genetic testing or fail to fully disclose the results of genetic testing to prevent abortion. Particularly in jurisdictions that also reject wrongful birth claims or severely limit damages for wrongful birth, physicians are given a virtual license to undertake grassroots anti-abortion efforts by intentionally not disclosing facts that would lead the average reasonable pro-choice person to abort a fetus. The latter situation, however, should give rise to an intentional tort. In order to deter doctors from making decisions about genetic testing and disclosure based on a personal philosophy, liability should be imposed.

Second, although most jurisdictions recognize wrongful birth, wrongful life liability is still necessary to assure compensation to wrongful life victims. Parents may fail to bring a timely wrongful birth claim, which leaves the child with no funds to meet his needs. The ability of a disabled child to secure the finances needed to pay for extraordinary medical and other expenses should not depend on whether her parents are responsible, meet the filing deadline, and set aside the judgment proceeds to meet her needs as they arise. The majority rule fails to protect disabled children from their parents' potential negligence or irresponsibility in either failing to pursue an action or failing to use the proceeds wisely.

Failing to recognize wrongful life claims may leave a disabled person without adequate care for additional reasons. Some jurisdictions do not recognize wrongful birth claims, so even the parents have no opportunity to secure funds to care for the disabled child. And regardless of the parents' ability to obtain compensation or pay for the expenses, in some jurisdictions parental liability for a child terminates upon the child reaching the age of

advise a patient on whether to abort a child. A physician's responsibility is simply to exercise due care to provide the information necessary for the patient to make an informed decision. If physicians do this, they need not fear a lawsuit .... ").

222. This is particularly true in jurisdictions that reject both the wrongful life and wrongful birth causes of action, such as Pennsylvania, Minnesota, and Missouri. See supra notes 34-35.


224. DOBBS, supra note 2, § 292, at 794-96.

225. Intentional interference with an important personal right such as autonomy over one's body (battery) or the right to move about freely (false imprisonment) gives rise to liability without proof of damages, as damages are presumed upon proof of the intentional tort. See DOBBS, supra note 2, § 23, at 47. Thus, if it is proven that a doctor intentionally withheld information to divest an expectant mother of her right to choose an abortion, automatic liability should attach. This, of course, makes the wrongful life damages analysis moot, since no damages need be proven in cases of intentional torts.

226. If the plaintiff shows intentional interference with the right to abort, the plaintiff could conceivably state a claim for an intentional tort. This kind of intentional interference with personal autonomy seems at least as important as the right to avoid an offensive kiss or apprehension of harm, both of which are recoverable under battery and assault law, respectively, where damages are presumed. If the plaintiff shows an intentional interference, the problematic damages element need not be proven and the main issue with wrongful life based on negligence is avoided.

227. E.g., Taylor, 600 N.W.2d at 670 (parents' wrongful birth claim barred by statute of limitations).
majority.228 Thus, even assuming that the parents are diligent in bringing a wrongful birth action, their damages are limited to caring for the child until the age of majority. Yet, as recognized by at least one court, the child’s need for expensive medical care and other costs attributable to the malpractice “will not miraculously disappear when the child attains his majority.”229 This scenario may leave the real victim, the newly emancipated disabled person with little or no ability to earn even minimal wages, without compensation, relegating him to a state institution despite the possibility that he could lead an independent life with sufficient financial resources. Thus, recognizing wrongful birth but not wrongful life may seriously undercompensate for the damages caused by the malpractice, shifting the financial responsibility onto the taxpayers when parental responsibility ceases upon emancipation.

This reality—the emancipated victim’s continued need for financial assistance resulting from the doctor’s malpractice—was specifically recognized in Washington’s decision to accept the claim for wrongful life.230 Obviously, there should be only one recovery for extraordinary costs, and at least one court that recognizes both wrongful life and wrongful birth held that either the parent or child may recover the extraordinary costs during the child’s minority.231

The law should provide a cause of action for the child, and the child should be provided with a guardian ad litem to protect her legal interests. This would take some pressure off the presumably distraught parents, as they could focus on the child and allow a knowledgeable and professional third party to pursue legal remedies. It would toll the statute of limitations, because if the child pursues the action, the statute of limitations for her cause of action is automatically tolled until she reaches age eighteen. This is particularly desirable in cases where medical needs are unclear for some time, since the needs of the child are more readily ascertainable as she pro-

228. See, e.g., Gallagher v. Duke Univ., 852 F.2d 773, 778 (4th Cir. 1988) (recognizing parents’ obligation to support terminates at their death); Arche v. United States, 798 P.2d 477, 486 (Kan. 1990) (finding that parents are not responsible for the child’s expenses after the child reaches the age of majority, based on court’s deference to legislative decision); Bani-Esrailli v. Lerman, 505 N.E.2d 947 (N.Y. 1987). There is also the issue of what period of time parents in wrongful birth actions may recover extraordinary costs of raising the child. Some courts recognize that where the child is not emancipated from the parents, the parents’ liability may extend beyond the child’s age of majority and permit recovery of medical expenses in wrongful birth actions for all times during which the child is dependent on her parents. See Robak v. United States, 658 F.2d 471 (7th Cir. 1988) (applying Alabama law); Phillips v. United States, 575 F. Supp. 1309, 1317 (D.S.C. 1983) (extraordinary expenses recoverable for child’s forty-year life expectancy); Linninger v. Eisenbaum, 764 P.2d 1202, 1207 (Colo. 1988); Garrison v. Med. Ctr. of Del., 571 A.2d 786 (Del. 1989); Blake v. Cruz, 698 P.2d 315 (Idaho 1984) (based on Idaho statute); Greco v. United States, 893 P.2d 345 (Nev. 1995) (allowing extraordinary medical and custodial expenses in wrongful birth action beyond age of majority if the child cannot support itself, pursuant to Nevada law.); James V. Caserta, 332 S.E.2d 872 (W. Va. 1985). For a thorough discussion about the history of parental obligations for disabled children over the age of majority, see Arche, 798 P.2d at 477.


230. Arche, 798 P.2d at 479-80 (clarifying that the costs of caring for the child during his minority is recoverable only once, not by both the parents and the child, as that constitutes double recovery).

gresses in life. Additionally, the proceeds from the action should go into a trust fund for the child, with withdrawals limited to use for the child’s medical and other expenses and the parents serving as trustees absent proof that they are not competent and responsible.\textsuperscript{232} If the money is put in trust for the disabled child’s care, it serves the dual purposes of making sure the child is adequately cared for while also making sure that the defendants do not pay damages that are not actually incurred in the event that the child does not survive long.\textsuperscript{233} This protects not only the child and the defendant, but society at large, which bears the cost if the child is not provided for and becomes a ward of the state.

There is, of course, the problem of parents who choose not to abort despite being informed that their fetus is defective. To the extent that such a parental choice is made, imposing wrongful life liability does nothing to further such goals of tort liability compensation to the victim and cost-spreading. This class of disabled children will continue to be left without legal protection for their potentially very expensive and difficult lives even where wrongful life liability is available.\textsuperscript{234} This factual scenario led one court to suggest imposing wrongful life liability against parents for “the pain, suffering and misery which they have wrought upon their offspring.”\textsuperscript{235}

However, the fact that all persons disabled by hereditary traits will not have a remedy if wrongful life liability is imposed is not a reason to deny a remedy to victims of malpractice who can state a claim for wrongful life. It is still better social policy to recognize the claim. Both deterrence and access to genetic information will be enhanced per se through recognition of wrongful life liability, so that the parental choice to abort or not abort is a fully informed one. And in some recent cases, as technology advances, anti-abortionists have choices other than abortion to prevent manifestation of genetically predisposed defects.\textsuperscript{236}

Third, current wrongful life jurisprudence undermines the social value of having society participate in tort law evolution. The jury’s role in shaping the legal system is undermined entirely when courts hold as a matter of law that life cannot constitute harm to a person.\textsuperscript{237} Courts generally make rulings as a matter of law where “reasonable” minds cannot differ,\textsuperscript{238} but here, as

\begin{itemize}
  \item \textsuperscript{232} One court advocated the use of a reversionary trust for wrongful birth damages to make sure that the proceeds are used for the child’s benefit. \textit{Arche}, 798 P.2d at 486-87.
  \item \textsuperscript{233} That is, the trust should only be used for the child’s care and any excess funds that remain upon the child’s death should revert to the defendant.
  \item \textsuperscript{234} The child also lacks a remedy in malpractice cases. But the parents testify that but for the physician’s negligence, they would never have aborted the fetus. Therefore, there is no cause in fact.
  \item \textsuperscript{236} \textit{See supra} Part II.B.2. While beyond the scope of this Article, it makes sense from a social policy and justice standpoint to place all punitive damages awards in wrongful life cases into a fund to help care for all children disabled from genetic defects who, for whatever reason, cannot bring wrongful life claims and need financial assistance.
  \item \textsuperscript{237} \textit{See Dobbs, supra note 2, § 18, at 33-36 (regarding the jury’s role in the legal system).}
  \item \textsuperscript{238} \textit{Id.}
\end{itemize}
with the abortion issue in general, reasonable minds differ tremendously. Answering philosophical questions about life and death, the propriety of imposing liability in the wrongful life context, and the appropriate measure of damages are quintessential jury issues. There are many sets of facts that may give rise to wrongful life claims, some more compelling than others, and a jury represents the social barometer on whether and to what extent liability is appropriate. The role of the jury is particularly important in controversial and rapidly evolving areas of law. It is contrary to a democratic society for courts to dictate the answers to these questions, thereby eviscerating society’s input into the social policy evolution inherent in tort liability.

Some courts have clearly stated that juries are incompetent to assess damages for wrongful life, because “[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.”

However, these same courts answer the question themselves as a matter of law. Juries are routinely called upon to assess damages for loss of consortium, loss of lifestyle, loss of body parts, loss of sight, loss of chance of life, and other damages assessments also beyond the understanding of the average juror who can never fully understand the losses involved. The jury’s role is nonetheless critical to shape the law in accordance with societal views, and particularly changes in societal views, reflected by jury verdicts. As the first California court to recognize the wrongful life cause of action stated, “the law reflects, perhaps later than sooner, basic changes in the way society views such matters.” The jury’s role is particularly crucial in controversial matters, to assure that the law is reflective of, and consistent with, contemporary societal values.

Finally, allowing liability for wrongful birth but not wrongful life, which is the law in the majority of jurisdictions, is logically inconsistent and undermines the legitimacy of our legal system. Courts have held that the “injury” resulting from the birth of a defective child is to the parents, not the child, as the injury is grounded in denial of the right to choose abortion, a right the fetus lacks. It defies human experience to assert that parents are...

240. KEETON ET AL., supra note 8, at 21 (stating that the law reflects current ideas of morality and that when such ideas change, the law intends to keep up).
242. See, e.g., Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978) ("Fundamental to the recognition of such a cause of action is the notion that the defendant has violated some legal right of plaintiff’s and as a result she has suffered injury. However, a legal right not to be born is alien to the public policy of this State to protect and preserve human life. The right of women in certain cases to have abortions does not alter the policy."); Walker by Pizano v. Mart, 790 P.2d 735, 740 (Ariz. 1990) ("In short, the ability to decide questions of conception or termination of pregnancy resides in the parents. . . . Any wrong that was done was a wrong to the parents, not to the fetus."); Smith v. Cote, 513 A.2d 341, 354 (N.H. 1986) (arguing that there is "no anomaly in permitting the parents but not the child to recover . . . because the loss at issue is the parents', not the child's [since a] parent is liable for a minor's medical expenses when the minor is living with or supported by the parents"); Hester v. Dwivedi, 733 N.E.2d 1161, 1167 (Ohio 2000) ("In contrast to a pregnant woman . . . the child herself does not have an option to decide whether or not it will be born. . . In short, the injury allegedly suffered by [the mother] (deprivation of opportu-
injured (as a matter of law) by having a disabled child over no child, but a child is not injured under any circumstances (as a matter of law) by having a disabled life over no life. It is the child, after all, who is disabled.

Indeed, the disabled child always suffers, while the parents of that child may not. A child born with an affliction necessarily and undeniably suffers—the characteristic is immutable for the child. Although most parents may keep a disabled child, parents have the option of removing the disability from their lives by way of adoption—the disability is not immutable for them.243 It is not factually supportable to declare as a matter of law that the parents necessarily suffer, but not the disabled child.

Perhaps more importantly, the majority rule sets the stage for outrageously unfair outcomes, which potentially undermine our legal system. Under the current law in the majority of jurisdictions, parents can recover damages for wrongful birth and then put the child up for adoption, leaving the child with no means to fund her disabled and expensive life while giving a windfall to the parents who have received special damages for expenses they may avoid.244 While this certainly presents an unlikely scenario, it also exemplifies the flawed nature of the current analytical paradigm: it always undercompensates the child and potentially overcompensates parents. The current analyses for wrongful birth and wrongful life are intuitively unfair, inconsistent, and undermine concepts of equal protection and justice. Wrongful life liability should be recognized in a step to correct this injustice.245

CONCLUSION

Wrongful life cases should be analyzed under basic negligence principles and should converge with the analysis currently employed in prenatal

243. Rosen v. Katz, No. 930394A, 1994 WL 879466, at *1 (Mass. Super. 1994). The parents gave the child up for adoption, so the child, through his adoptive parents, sought extraordinary expenses that were incurred on account of his defective condition. The court clarified that it was not recognizing a wrongful life cause of action, but that it was allowing the child to recover the extraordinary expenses which are allowed pursuant to Viccaro v. Milansky, 551 N.E.2d 8, 13 (Mass. 1990) ("As long . . . as [the child's] parents are entitled to recover against the [physician] for the extraordinary costs they will incur because of [the child's] genetic disease, [the child] need not have his own cause of action . . . . We do not totally discount the possibility that we might impose liability for the extraordinary expenses of caring for [the child] after his parents' deaths, perhaps in order to keep such a person from being a public charge."). See also Arche v. United States, 798 P.2d 477 (Kan. 1990) (stating that the parents in Becker reportedly put their handicapped child up for adoption after the denial of their wrongful life claim while the wrongful birth claim was pending); George A. Brown, Wrongful Life: A Misconceived Tort—An Introduction, 15 U.C. DAVIS L. REV. 445, 470 n.136 (1981).

244. Arche, 798 P.2d at 486.

245. Indeed, between wrongful life and wrongful birth, wrongful life is the better tort to recognize because recovery is in the child's name and earmarked for his needs. As a minor, the child needs a trust and a trustee to protect the funds from misuse by irresponsible guardians. To the extent that the parents have creditors, recovery in the child's name also protects the funds from such creditors.
negligence cases and malpractice generally. Duty, breach, and causation are fairly simple to establish and do not pose a problem.

The analysis of damages in wrongful life actions is analytically simple—but for the malpractice in failing to diagnose and/or disclose birth defects, the child would not have incurred enormous medical expenses, special education costs, and other actual damages resulting from his burdened life. These actual damages are foreseeable and proximately caused by a medical professional’s negligence, and it is therefore fair to hold the medical professional responsible.

In addition, the wrongful life plaintiff often suffers injury in addition to economic losses. The plaintiff should have the opportunity to prove that she suffered net pain and suffering, for which she should be compensated. Where the malpractice results in a lost chance of medical intervention, the jury should be allowed to make findings as to the extent of injury resulting from the malpractice and award damages for any defects that could have been avoided or minimized. Finally, at least in cases of severely defective infants who are born terminally ill and experience a life comprised primarily of pain, the child should be allowed to state a due process violation based on her lost chance to avoid pain and suffering. Such a theory of injury converges with a parent’s loss of the right to terminate a fetus’s life in utero through an abortion. The values expressed in right to die cases support recognizing injury grounded in due process.

The appropriate damages elements to consider in applying the offset rule in wrongful life cases are: (1) emotional harm—pain and suffering, including physical pain and emotional distress in being conscious of the disability—should be offset by the emotional gain, including love, joy, and other positive life experiences; and (2) financial interests—medical expenses, costs of special education and equipment, training, and other economic losses incurred on account of the life—should be offset by income produced as a result of the child’s life, if any. The measure of these damages is dependent upon the facts of the case. A jury should be allowed to hear evidence of all such damages and should be instructed on a proper offset application.

There may still be cases in which a judge may rule as a matter of law that a child is not harmed by being born, such as where the child suffers mildly from Down’s Syndrome and will be able to enjoy life and secure gainful employment. But in most wrongful life cases, there will be a variety of factual issues relating to injury and damages that should be fully briefed


247. Interestingly, in one English wrongful birth case, the court offset pain and discomfort resulting from pregnancy and childbirth by the pain and suffering that was avoided because she did not undergo an abortion. Allen v. Bloomsbury Health Auth., [1993] 1 All E.R. 651, 657. This court awarded the mother damages for raising the child to the age of eighteen. Jackson, supra note 220, at 373 nn.103-04.
and decided by a factfinder representing contemporary societal views and mores.

A consistent analytical paradigm for all cases of medical malpractice involving fetuses will allow tort law to keep pace with society’s changing values and advancements in medical technology and provide the flexibility that is needed in this factually complex and rapidly changing area of law. American courts should recognize that wrongful life cases are simply medical malpractice cases involving fetuses, despite difficult factual issues. Wrongful life plaintiffs should therefore be allowed to prove the elements of negligence in accordance with established negligence jurisprudence. Such an approach would enhance the legitimacy of our tort system and place wrongful life plaintiffs on equal footing with other victims of negligence.