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1970

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Recommended Citation

Editorial Board, Minn. L. Rev., "A Cause of Action for Wrongful Life: (A Suggested Analysis)" (1970). *Minnesota Law Review*. 2974.
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A Cause of Action For "Wrongful Life": [A Suggested Analysis]

I. INTRODUCTION

Within the past decade, a number of courts have been faced with a startling claim for recovery of damages on the part of infant plaintiffs—a claim that plaintiff is entitled to recover damages because the negligence of defendant led proximately to plaintiff's "wrongful existence." Two of the cases in this area have arisen where the mother contracted German measles (rubella) during the first trimester of pregnancy.[1] In one case,[2] the mother sought advice from her physician concerning the possible effects of rubella upon her unborn child. She was informed that there was no possibility of a defective child. Subsequently, the child was born blind, deaf and mentally retarded. The infant brought suit against the physician alleging that the physician had breached his duty to both the parent and himself by not informing the parents of the possibility of defects, that this breach had led proximately to the parents' failure to procure an abortion and finally to plaintiff's birth in a defective state. The court denied recovery. In the second case,[3] a woman who had contracted rubella during the first trimester of pregnancy was referred to a hospital by her physician to seek an abortion because she feared that the disease would cause congenital defects in her child. The woman was told by agents of the hospital that she did not need an abortion and that she should not seek one elsewhere. The mother acquiesced. The child was born with serious mental and physical defects and brought suit against the hospital claiming that its agents were negligent in failing to perform the abortion. Recovery was again denied.

In each case the court based its denial of recovery upon two

1. In another line of "wrongful life" cases, bastards have sued either their parents or the state (when a rape occurred in a state hospital) alleging that due to the negligence of the defendant, plaintiff had been wrongfully born and forced to endure the stigma associated with bastardom. These cases are not within the scope of this Note, but the concepts which evolved from them served as the basis for the decisions in the cases under consideration. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963); Williams v. State, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (1965).

2. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

3. Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968).

factors—damages and public policy. First, each reasoned that in a cause of action for "wrongful life," damages were incapable of being ascertained. Second, each concluded that public policy regarded human life as so precious that no decision should be made which might lead to the encouragement of abortion and thus to the violation of what it considered to be the public policy of its state. The courts' analyses are unsatisfactory. Both issues considered by the courts, damages and public policy, require a more thorough analysis than the courts provided. The issues of duty, causation and proximate cause which are also associated with a negligence action should be analyzed in relation to a cause of action for "wrongful life." The purpose of this Note is to analyze the damages issue involved in such a case,[4] and evaluate the duty, causation and proximate cause issues. Finally, the Note will analyze the conflicting public policy concerns in this area, for it is here that the most problematic questions arise.

II. THE FACTUAL SITUATIONS

In *Gleitman v. Cosgrove*,[5] plaintiff's mother visited the offices of defendant physician when she was two months pregnant to inquire into the possible relationship between her contraction of German measles (rubella) one month earlier and the possibility of birth defects. Mrs. Gleitman testified that Dr. Cosgrove told her that the contraction of rubella would have no effect upon her child.[6] After this first visit, Mrs. Gleitman was treated by army doctors at Fort Gordon, Georgia, where her husband was stationed. These physicians suggested she consult her family doctor again about the effects of rubella. Upon returning to New Jersey, she again consulted the defendant who reassured her that the child would suffer no defect. Shortly after birth, the child manifested

4. Although the recovery of damages is not generally considered first in a determination of negligence, it is so considered in this Note because recovery was denied to the infant plaintiffs in both *Gleitman* and *Stewart* on the ground that damages were incapable of being ascertained. However, a consideration of the duty and proximate cause issues is also necessary in order to reach a legally justifiable conclusion.

5. 49 N.J. 22, 227 A.2d 689 (1967).

6. The defendant testified at trial that he had told Mrs. Gleitman that there was a twenty percent chance that the child would be born with defects and that some doctors would recommend an abortion in such circumstances but that he ". . . did not think it proper to destroy four healthy babies because the fifth one would have some defect." However, for purposes of the appeal, the court assumed Mrs. Gleitman's testimony to be true because the trial court had dismissed the plaintiff's complaint on a motion for judgment by the defendant. Gleitman v. Cosgrove, 49 N.J. 22, 25-26, 227 A.2d 689, 690-91 (1967).

defective sight, hearing, speech and mental capacities. The child had several operations and subsequently was placed in a rehabilitative institute for blind and deaf children.

The theory of the infant plaintiff's cause of action[7] was that the defendant's failure to inform his parents of the possibility of birth defects was the proximate cause of his parents' failure to procure a eugenic abortion the consequence of which would have been non-life rather than life with defects. Expert medical testimony at the trial supported the finding that defendant was under a duty to inform the parents of the possibility of defects due to rubella. However, the trial judge dismissed the infant's claim because of failure to show proximate cause.[8]

The New Jersey Supreme Court affirmed the judgment of the trial court. The majority cited two reasons for the denial of recovery. First, the court stated that it was impossible to ascertain the compensatory damages normally associated with a negligence action.[9] It reasoned that in order to fix damages a comparison would have to be made between the relative values of life with defects and the "utter void of nonexistence," and that such comparison was impossible because there was no method by which one could place a valuation on nonexistence. Second, the court reasoned that the "preciousness" of human life outweighed the need for recovery.[10]

In *Stewart v. Long Island College Hospital*,[11] an action was brought against a hospital by an infant plaintiff who was born with birth defects.[12] Mrs. Stewart had contracted rubella during the first trimester of pregnancy. Her family physician

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7. The *Gleitman* complaint consisted of three separate counts. The analysis in this Note deals principally with the allegations involved in the first count—the child's actions for "wrongful life." The second count was for damages for the impairment of Mrs. Gleitman's emotional health due to the birth of a physically defective child. The third count was brought by Mr. Gleitman to recover for costs incurred while caring for the child. The latter counts are beyond the scope of this Note.

8. Gleitman v. Cosgrove, 49 N.J. 22, 26, 227 A.2d 689, 691 (1967). The parents' complaint was dismissed by the trial judge because he felt that any contemplated abortion would be criminal in New Jersey under N.J. STAT. ANN. § 2A:170-76 (1953) which provides criminal sanctions for abortions performed "without just cause."

9. *Id.* at 28, 227 A.2d at 692.

10. *Id.* at 31, 227 A.2d at 693.

11. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968).

12. As with *Gleitman*, the action was brought in three separate counts: one on behalf of the infant, a second on behalf of the mother and a third on behalf of the father.

sent her to defendant hospital to seek a eugenic abortion because he feared that the child would be born with disabling defects. A board of four doctors from the hospital staff considered whether an abortion should be performed. Two doctors voted for abortion and two voted against it. As a result, no abortion was performed. Defendant hospital through a doctor told Mrs. Stewart that she did not need a therapeutic abortion and that she should not seek an abortion elsewhere.

The child plaintiff alleged that she was born with serious congenital defects, both mental and physical, as a proximate result of the defendant hospital's negligence in failing to carry out a *necessary* therapeutic abortion.[13] The trial court awarded damages to the plaintiff, but the Supreme Court of King's County set aside the verdict and dismissed the cause of action.[14] The court, citing *Gleitman*[15] reasoned that no remedy exists for being born under a handicap when the only alternative is not to have been born at all. The court concluded that it was unable

13. This allegation differs in two ways from the allegation made by the infant plaintiff in *Gleitman*. First, the allegation here is that a therapeutic abortion was necessary. A therapeutic abortion is one which is necessary to preserve the life of the mother. The facts of *Stewart* do not indicate that the mother's life was in any way endangered nor do they indicate this as the reason for seeking the abortion. The type of abortion sought in this case is more properly termed eugenic abortion just as the abortion in *Gleitman* would have been. A eugenic abortion is one which is performed to preserve the integrity, well-being and physical perfection of the human race.

Second, the infant plaintiff here alleges that it was negligent of the hospital to fail to perform the abortion under the circumstances. This differs greatly from *Gleitman* where the infant plaintiff's allegation was that the defendant's failure to inform his parents kept them from attempting to procure an abortion. The infant plaintiff in *Stewart* could have alleged that the failure to inform his parents that the doctors differed as to whether to perform the abortion and the doctors' statement that they should not seek an abortion elsewhere led proximately to his wrongful birth. Such an allegation would conform more closely to the infant's allegation in *Gleitman* and, as will be discussed in note 34 *infra* and accompanying text, is a more justifiable grounds for recovery.

14. The second and third counts were brought by the mother and father respectively alleging negligence on the part of the hospital for its failure to inform them of the conflicting opinion as to whether an abortion should be performed, and the doctor's statement that an abortion was not needed and should not be sought elsewhere. The jury awarded them damages and, unlike the verdict for the infant, the verdict for the parents was affirmed. Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968).

15. The court also relied on the *Zepeda* and *Williams* cases in which recovery was denied to bastards who had brought suit for "wrongful life." *See* note 1 *supra*.

to ascertain damages because it saw no method for placing a valuation on nonexistence. It also concluded that the public policy concerning the preciousness of human life dictated that abortion was as much murder as the ultimate wrong would be.[16]

III. DETERMINATION OF DAMAGES

In denying recovery to the infant plaintiffs in *Gleitman* and *Stewart*, the courts relied heavily upon the conclusion that damages were not ascertainable.[17] The resolution of two fundamental issues is implicit in such a conclusion. First, can the traditional tort damage framework be utilized to determine damages in the context of "wrongful life" cases? Second, if the traditional framework can be used, are damages nevertheless unascertainable because of an inability to make the necessary valuations? These issues have been entangled. Both the courts and the author[18] upon whom the courts seem to rely have failed to distinguish these problems. It would seem desirable to analyze the issues separately. A negative answer to the first issue would indicate that tort law is an unsuitable manner in which to approach "wrongful life" cases. If, however, "wrongful life" *can* be analyzed within the traditional framework of tort law, the subsidiary issue is one of valuation. The problem is then similar to

16. Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 436, 296 N.Y.S.2d 41, 46 (1968). Although the court does not discuss the matter, in order to find that the parents may recover and the infant may not, they must have made the assumption that the hospital was under a duty to inform the parents of the disagreement among the physicians and not to discourage them from obtaining an abortion elsewhere, but that a corresponding duty was not owed to the fetus. However, the infant's cause was framed in terms of the hospital's failure to perform the abortion, and therefore the court was not faced with the issue of duty to inform in relation to the infant. If the infant's cause of action had been framed in terms of the failure of the hospital to inform, the court would probably have still followed the precedent established by *Gleitman* and not recognized a cause of action because of public policy and inability to ascertain damages. In fact their analysis of the "wrongful life" cases would seem unnecessary in view of the way in which the infant plaintiff's cause of action was framed.

17. This section assumes that damages *do exist* and from that assumption questions whether the traditional tort framework for ascertaining the amount of damages can be used and whether the necessary valuations can be made. However, there is another issue involved—do damages exist at all? It may be questioned whether our society is willing to classify the difference between life with serious defects as compared to nonlife as being damage. This question will be considered in the analysis of conflicting public policy concerns. *See* note 50 *infra* and accompanying text.

18. Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966).

determining the value of a whole arm as compared with the value of an amputated arm or the problem of determining what amount of pain and suffering an individual has endured and to what extent he should be compensated.

The *Gleitman* court begins its analysis of the damages issue by elaborating the traditional framework for determining tort damages—a comparison between the condition which plaintiff would have been in had the defendant not been negligent and plaintiff's impaired condition as the result of the negligence. It then states that there can be no recovery because it is "logically impossible" for the court to make such a comparison.[19] The *Stewart* court's analysis of the damage issue relies upon the analysis in *Gleitman* and naturally arrives at the same conclusion.[20] The *Gleitman* court in turn relied heavily on an article by Tedeschi.[21] That author's analysis begins with the proposition that damages in the context of "wrongful life" do not fall within the traditional framework used to ascertain damages in tort cases. To justify this proposition, however, he drifts into the issue of valuation in the form of a discussion of the state of nonexistence. Referring to a state of nonexistence, Tedeschi comments that although one can assign negative or positive values to a balance between misery and happiness in life, no comparison can be made between life and nonexistence because there is no happiness or misery in the latter state.[22] It is his assumption that any tort claim based on the concept of "wrongful life" is doomed to failure because ". . . the element of damages is

19. Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967). 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. . . . 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.

20. Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 434, 296 N.Y.S.2d 41, 44 (1968). The court in *Stewart* rested its opinion more heavily on its reasoning that the hospital had not breached any duty owed to the infant plaintiff and did not rely on the damage issue as heavily as the *Gleitman* court, except to the extent that the latter was used to justify the conclusion that no cause of action exists for "wrongful life."

21. Tedeschi, *supra* note 18, at 529. This article has reference specifically to cases where bastards have brought suit for "wrongful life." The courts, however, have used the analysis to justify denial in *Gleitman* and *Stewart*, the apparent reasoning being that in both situations it is logically impossible to make a comparison between nonexistence and life with defects, mental, physical or social.

22. *Id.* at 530.

missing if no difference can be drawn (in wealth or happiness) between the result of the act and its absence."[23] Thus, the analyses made by the *Gleitman* and *Stewart* courts as well as that of Tedeschi all fail to separate the issue of whether the traditional tort framework for determining damages can be used in "wrongful life" cases from the subsidiary issue of whether the necessary valuations can be made in order to arrive at a compensatory figure.

Utilization of the traditional tort damage framework in the context of "wrongful life" would necessitate a comparison between a state where plaintiff had not been born—nonexistence for want of a better term—and one where plaintiff was living but deformed—existence with defects. There seems to be no reason why these terms—nonexistence and existence with defects—could not be used in the formula envisioned by the traditional tort framework. When the question is whether the traditional tort framework can be used, the issue should be the "before" and "after" states of being—can one say that plaintiff existed in state A before the negligent act and now exists in state B after the negligent act? If so, then A and B can be used as the variables required for the traditional tort damages framework. It would seem that it is only if such "before" and "after" variables did not exist that it could be said that the factual situation does not conform to the framework for determining damages in a tort case. In the "wrongful life" cases the needed variables are present—life with defects and nonexistence.

The question then is whether the necessary computations can be made. Can values be placed on the state of nonexistence and the state of existence with defects in order to approximate a compensatory amount? Such a valuation is not impossible and at least one attempt to construct a formula for ascertaining damages has already been made.[24] Indeed, the court in

23. *Id.* at 533.

24. Comment, 49 IOWA L. REV. 1007 (1964). The author refers specifically to the cases involving bastards and states that damages should be awarded which would put plaintiff in a position in which life under adverse conditions would not be preferable to nonexistence. In order to recover, plaintiff would have to prove that the burden of life with defects was outweighed by the value of nonexistence. Under such an analysis, it seems that a plaintiff with physical and mental defects would have a greater likelihood of recovery than a bastard. The formula suggested is very confusing and the intention seems to be to place the plaintiff (by means of monetary compensation) in a position where it would make no difference to him whether he was dead or alive. Surely, this is not a desirable goal of the legal system.

Gleitman seems to have placed a certain type of value on the state of nonexistence, notwithstanding its language to the contrary. The majority opinion reflects such a valuation when it refers to ". . . the utter void of nonexistence . . . ."[25] Such a statement seems to imply that some negative value has been assigned to the state of nonexistence as compared with the positive value assigned to the state of existence. This inference is further supported by the court's references to famous persons who were born with physical defects[26] and by its quotation of passages from Theocritus extolling the virtues of life as compared with nonexistence.[27] The relative values assumed by the court's analysis could be expressed as follows:

Life = a plus value (+)
Life with defects = a plus-minus value (±)
Nonexistence = a minus value (-)

The implicit assumption is that life is preferable, that life with defects is a state with its drawbacks but one in which a person can still exist comfortably, but that nonexistence is under any circumstances least desirable of all.

Whether the above valuations are accurate would depend to a great degree upon the severity of the defect or defects being experienced by the infant plaintiff. In a case where the infant has but minor or single defects, the court's analysis may well be true—life with defects may be preferable to nonexistence. In referring to famous persons who were born with defects, the *Gleitman* court was obviously considering people who retained the ability to function in society. But what of the case where the child is blind, deaf, physically deformed *and* mentally retarded? There are cases—as in *Gleitman* and *Stewart*—where the defects are so severe that it is not particularly clear that life with defects should be assigned a higher value than nonexistence. In such an extreme case it would seem that one could make the following valuation:

25. Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967).
26. *Id.* at 30, 227 A.2d at 693. "Examples of famous persons who have had great achievement despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not be perfect to have a worthwhile life."
27. *Id.* ". . . [O]ur felt intuition of human nature tells us he [Jeffery] would almost surely choose life with defects as against no life at all. 'For the living there is hope, but for the dead there is none.'" Theocritus.

Life without defects = a plus value (+)
Nonexistence = 0
Life with defects = a minus value (-)

Such an analysis assumes that life without defects is to be desired most, but that in certain situations it would be preferable not to exist rather than to endure life incapacitated by severe physical and mental defects. Once the relative plus, minus and zero values have been established, a compensatory figure could be ascertained by the court. This would be no more difficult than placing a monetary value upon the difference between living with two arms as compared with living with only one—when the other has been severed due to the negligence of defendant. It would certainly be no more difficult to arrive at a monetary amount reflecting the difference between nonexistence and life with defects than in cases where the court regularly attempts to place a monetary value on pain and suffering.[28]

The two courts and the article upon which they have based their analysis have neither carefully separated the issues involved nor thoroughly analyzed them. The cases can be fit into the traditional framework for ascertainable damages and, once within the framework, the valuations necessary for making a comparison can be made. The analysis needed is similar to other situations in the field of tort law where it is difficult, but not impossible, to place a monetary value on the result of a comparison. While it might be difficult to determine whether the defects were so great as to merit the use of the analysis proposed, recovery should not uniformly be denied because of this difficulty. Rather, a case by case approach would be appropriate.[29]

28. *Id.* at 50, 227 A.2d at 704. The dissent in *Gleitman* points out that the concept of pain and suffering has no known dimensions—mathematical or financial—and that determining damages in the instant case would be no more difficult than attributing a compensatory figure to pain and suffering.

29. It should be noted that one might view the argument that the infant plaintiff should be allowed to recover damages as being moot in cases such as *Stewart* where the parents are allowed to recover. However, it is doubtful whether the parents would be allowed to recover damages for the child's pain and suffering. This could be a substantial amount. Also, a question arises as to what length of time damages awarded to the parents for the child's maintenance are to cover: through infancy, until his legal majority or for life? The issue would be moot only if the parents' recovery were commensurate with the child's. Even in such a case, the recovery would go to the parents and not be held in trust for the infant as it would be in the case of recovery in the infant's name. The optimal situation would be recovery for both infant and parents.

It might also be argued that there is no reason to be confined to the traditional framework in unique cases such as *Gleitman* and *Stewart*. One could hypothesize a varying standard for valuation of damages. Such a standard might involve a comparison between the child's defects and the life of a non-defective child of like socioeconomic background. This is by way of suggesting that principles of equity may dictate a unique approach when the court is presented with a unique factual situation which it concludes warrants relief.

IV. THE DUTY ISSUE

The issue of whether a duty was owed by the physician or hospital to the fetus and, if so, whether there was a breach of such duty seem to go unanalyzed in both *Gleitman* and *Stewart*. These issues, however, pose complex problems for the "wrongful life" plaintiff. In the normal tort case, the plaintiff alleges that the breach of a duty owed by the defendant to the plaintiff led proximately to the injuries for which damages are sought. In the "wrongful life" cases no assertion is made that defendant's breach of duty, in and of itself, caused plaintiff's defects. The defects result from his mother's contraction of rubella while pregnant with plaintiff, not from negligence on the part of the defendants. What the infant plaintiff alleges is that the breach of duty led proximately to his birth—the maturing of the harm—and, thus, he is forced to endure life with defects which he would not be forced to do but for the defendant's breach of duty. The allegation of duty and breach of duty could be framed in terms of the physician's failure to perform an abortion and thereby to avert the birth of the physically and mentally defective plaintiff, as in the *Stewart* case. Or the issue could be framed, as in the *Gleitman* case, in terms of the physician's failure to inform the parents of the probability of birth defects due to rubella on the theory that this duty extended to the fetus who was born because his parents did not have the information which would have caused them to procure an abortion.

In *Stewart*, the infant plaintiff alleged that the hospital was negligent in failing to grant and carry out an abortion.[30] Such an allegation assumes that the hospital board which denied the abortion was negligent in its interpretation of the medical history of the case and that had that board correctly interpreted the

30. Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 434, 296 N.Y.S.2d 41, 43 (1968).

facts it would have authorized the abortion. The alleged duty was the performance of a medically advisable abortion and the alleged breach of duty was the failure to perform such an abortion. The standard of care required of a physician is the possession and use of the knowledge and skill of an average member of the medical profession practicing in his community.[31] If the duty issue is framed in these terms, it would be necessary to introduce expert medical testimony that given the *Stewart* situation an abortion would be the normal procedure. Whether such an abortion is normal procedure will probably depend upon the statistical incidence of birth defects attributable to the mother's contraction of rubella during the first trimester of pregnancy. Statistics indicate that there is a ten to sixty percent chance of birth defects due to rubella[32]—an obviously wide variation in probability. Thus, to claim that a physician or hospital owes plaintiff a duty to perform an abortion is not persuasive given the present state of medical statistics regarding the probability of birth defects due to rubella.[33] Given such statistics it would be difficult to introduce evidence to the effect that an abortion would be normal procedure.

The alleged duty in the *Gleitman* case is quite different from that in *Stewart*. The infant plaintiff in *Gleitman* did not allege malpractice for failure to perform the abortion, but rather that the defendant physician was negligent in failing to inform the plaintiff's parents of the likelihood of birth defects due to rubella and that such negligence was the proximate cause of his parents' failure to procure an abortion.[34] The Gleitmans introduced expert medical testimony at the trial to show that the defendant had deviated from accepted standards of the medical

31. W. PROSSER, LAW OF TORTS 165-68 (3d ed. 1964).

32. Mendle & Short, *Maternal Rubella, The Practical Management of a Case*, 2 LANCET 373 (1964).

33. Why did counsel frame the infant's complaint in this manner instead of alleging a negligent failure to inform the parents of the probabilities of birth defects? It may well be that he was apprised of the refusal of the court in *Gleitman* to recognize the infant's cause of action and felt that the chances of success were greater if the complaint was framed in different terms.

34. The complaint of the infant plaintiff in *Stewart* could have been framed in similar terms. There, the infant could have alleged that the failure of the hospital board to inform her parents of the dissent among the physicians as to the necessity of an abortion and its statement that they should not seek an abortion elsewhere (when in actuality evidence showed abortions were being performed elsewhere in New York in cases where rubella was involved) were the negligent acts which were the proximate cause of her parents' failure to obtain an abortion.

profession by failing to inform an expectant mother of the possibility of birth defects due to rubella.[35] The court did not emphasize the duty issue.

The *Stewart* court did analyze the duty to inform and found that the hospital had breached such a duty with respect to the infant's parents.[36] The court stated that such "reasonable disclosure" would have allowed the parents to seek an abortion elsewhere. The evidence presented in the *Gleitman* case and the reasoning in the *Stewart* case only concerned a duty of care owed by the physician or hospital to the parents. The more pertinent question, however, is whether the same duty of care extends to the infant plaintiff who was still in a fetal state when the alleged breach of duty occurred.

The issue of what duty of care is owed to a fetus also arises in cases involving prenatal injuries. In such cases courts have discarded the concept that one cannot owe a duty of conduct to a person not in existence at the time of the tort in favor of a rule that recognizes the right of a child who survives birth to maintain an action for the consequences of prenatal injuries.[37] In most cases involving prenatal injuries, however, the discharge of the defendant's duty of conduct leads automatically to the fetus' avoidance of physical injury. For example, where the defendant, acting as a reasonable man would under the circumstances, avoids an automobile collision with a car carrying a pregnant woman, the defendant's discharge of his duty of care automatically results in noninjury to the fetus, who was a passive

35. Gleitman v. Cosgrove, 49 N.J. 22, 25, 227 A.2d 689, 690 (1967).

36. Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 438, 296 N.Y.S.2d 41, 47 (1968). In *Stewart*, the court granted recovery to the parents because of the defendant hospital's failure to inform the parents as to the dissent among the physicians as to whether an abortion should be performed and its statement that an abortion should not be sought elsewhere, but failed to discuss the question of whether such a breach of duty extended to the fetus. In affirming the judgment for the parents, the court cited a line of cases holding that a physician is under an obligation to disclose to his patient serious or statistically frequent risks of the proposed treatment. The court then reasoned that since defendant's refusal to perform an abortion meant that Mrs. Stewart would be risking the birth of a handicapped child, the defendant hospital in accord with the above cited principle should have informed the plaintiff mother that two of the four doctors believed that the pregnancy should have been terminated. It would be interesting to see what the court would have done if the infant plaintiff had framed the duty issue in terms of the board's failure to inform his parents. Would the court have extended this duty to the fetus as the *Gleitman* court was unwilling to do?

37. W. PROSSER, LAW OF TORTS 355-56 (3d ed. 1964).

participant in the act. In cases such as *Gleitman* and *Stewart*, however, the defendant's discharge of his duty to the fetus to inform the parents of the possibility of defects does not automatically lead to the procuring of the abortion which the infant plaintiff alleges was prevented by defendant's negligent behavior. In order for the plaintiff's fetal development to be terminated, someone must act upon the defendant's discharged duty to inform.

An analysis such as the above led one writer to suggest that it is impossible for the defendant physician to owe a duty to the infant plaintiff, as distinguished from the infant's parents, because the fetus itself would have been incapable of acting upon the information even if the defendant physician had disclosed the information in question.[38] It would mean that the existence or nonexistence of a duty to the fetus would depend upon whether it was necessary for a third person to take action as a consequence of the acts of the defendant. An analogy to the area of prenatal injuries is again helpful. Where the fetus was injured in an automobile accident caused by the negligence of the defendant, the child, if born alive, would have a cause of action against the defendant for such injuries as were the proximate result of the defendant's negligence.[39] If, on the other hand, the limitation offered above were imposed where the fetus was injured due to the defendant's negligence when its mother was a social guest on defendant's premises, recovery should be denied. For example, the defendant in such a situation need only warn the plaintiff of any dangerous condition on the premises.[40] Where the defendant fails to inform a pregnant woman of a known dangerously loose step on a staircase in his house and she trips on that loose step, leading proximately to injuries to the fetus, the mere discharge by the defendant of his duty to disclose with no further action by the infant's mother would not automatically save the fetus from injury. In order to avoid injury to the fetus, the mother would have had to act upon the defendant's disclosure of information because the fetus itself was obviously incapable of doing so. Yet, it is unlikely that a court would deny recovery to the child merely because in its fetal state it would have been unable to act upon such disclosure.[41] Under

38. Comment, 13 WAYNE L. REV. 750, 756-57 (1967).
39. *See* note 36 *supra* and accompanying text.
40. W. PROSSER, LAW OF TORTS 390 (3d ed. 1964).
41. In the *Stewart* case, the court held that the hospital was duty-bound to the parents to disclose the dissent among the physicians as to whether an abortion should be performed and therefore sustained

these circumstances, the law should protect the fetus from the defendant's failure to disclose information to the mother. Thus, it might be argued by analogy that the duty of informing the parents in the "wrongful life" cases should exist and be extended as a duty owed to the fetus even though the fetus could be protected thereby only through the intervening action of a third person.

V. CAUSATION AND PROXIMATE CAUSE ISSUES

Should the infant plaintiff establish the existence of a duty and its breach, he will still have to prove that any breach of duty on the part of the defendant physician or hospital was both the cause in fact and proximate cause of the failure to terminate the pregnancy. In a case such as *Stewart*, where the very purpose of his mother's visit to the hospital was to procure an abortion, the infant plaintiff will have little difficulty proving cause in fact and proximate cause. There would be no problem in showing that "but for" defendant's breach of duty the infant plaintiff would not have been born or that defendant's negligence was a "material and substantial" element contributing to plaintiff's birth—the cause in fact. Similarly, one could make a strong argument that the birth was the "direct and foreseeable result" of defendant's negligent omission—the proximate cause.

The situation in *Gleitman*, however, is somewhat different. Mrs. Gleitman asserted that had she known of the possibility of birth defects due to rubella she would have obtained other medical advice with regard to an abortion.[42] This poses three problems for the infant plaintiff in attempting to prove cause in fact. First, plaintiff would have to prove that lawful abortions were being performed in cases where the mother had contracted rubella during the first trimester of pregnancy.[43] Second, plain-

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the judgment for the parents. Had the infant plaintiff framed this count of the complaint in terms of nondisclosure, the court if it were to be consistent would have had to agree that the hospital owed the same duty to the fetus as to the parents. This, of course, does not mean automatic recovery for the infant. The court could still rely on the damages and public policy issues as both it and the *Gleitman* court chose to do. However, were one to assume that the physician owed a duty to disclose to the fetus, this raises the further question of whether the infant has a cause of action against its parents if they fail to act after the physician has informed them of the probability of defects or the disagreement as to whether an abortion should be performed. *See* note 53 *infra* and accompanying text.

42. Gleitman v. Cosgrove, 49 N.J. 22, 26, 227 A.2d 689, 691 (1967).

43. The alternative of procuring an abortion in another state or

tiff would have to prove that given the informaton on the probability of defects due to rubella his parents would have sought such an abortion. Third, assuming that abortions were being performed lawfully and that the plaintiff's parents would have sought such an abortion, plaintiff still must prove that the abortion would have been performed in his case.

The first element of proof does not seem particularly burdensome. An opinion which dissented in part from the majority in *Gleitman* pointed out that abortions were being performed by reputable doctors in reputable hospitals in New Jersey in cases where the mother had contracted rubella during the first trimester of pregnancy.[44] The *Stewart* court also observed that abortions were actually being performed at some hospitals in New York when the expectant mother contracted rubella during the first trimester of pregnancy.[45] Currently the parents would have the option of procuring an abortion in states where abortion laws have been liberalized to allow termination of pregnancy when there is a probability of serious birth defects.[46] It is also common knowledge that lawful abortions can be procured in foreign countries such as Sweden and Japan. Thus, it does not seem that it would be difficult for an infant plaintiff to prove that his parents *could* have procured a legal abortion based on the probability of birth defects due to rubella.

If the ability to procure an abortion in cases involving rubella were the only question involved in the cause in fact and proximate cause issues, the contention of one writer that there was little doubt in *Gleitman* that the plaintiff had suffered

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foreign country raises questions of public policy which will be discussed in Part C *infra*.

44. Gleitman v. Cosgrove, 49 N.J. 22, 56, 227 A.2d 689, 707 (1967). The question, however, whether such abortions were legal in New Jersey was not considered by the majority opinion.

45. Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 439 296 N.Y.S.2d 41, 48 (1968).

46. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 25950-954 (West Supp. 1967); COLO. REV. STAT. ANN. § 40-2-50(4)(ii) (1967); N.C. GEN. STAT. § 14-45.1 (1969). Both the Colorado and North Carolina statutes specifically provide for termination of pregnancy where there is a risk of physical or mental defects in the child. The California statute makes no reference to defects in the child. The question of whether the California statute would allow termination in such cases seems to be open. It should be noted that these statutes were put into effect after Mrs. Gleitman had completed her pregnancy, so that she would have been unable to take advantage of them. However, this does not preclude her having obtained an abortion under a liberal interpretation of the old abortion statute in her own state or some other state, and she also would have had the option of going abroad.

real injury as the proximate result of defendant's breach of duty[47] would be true. Beyond this, however, plaintiff must show that his parents would have sought *and* procured such an abortion. These two problems of proof are somewhat more challenging than the problem of proving that lawful abortions were being performed in such cases. The infant plaintiff would be required to show that his parents would have acted upon the information given by the physician or hospital by seeking an abortion. It is difficult to tell from the facts in the *Gleitman* case whether the parents would have done so. Here, a jury would be required to perform its traditional function and decide upon the basis of the facts introduced at trial whether the parents *would* have sought an abortion had they known of the possibility of defects. The infant plaintiff, finally, would have to show that the abortion actually would have been performed. He would have to show in this respect that his parents would have been able to convince the physicians and hospital where the abortion would have been sought that the mother had actually contracted rubella during the first trimester and that, therefore, it was necessary to terminate the pregnancy. This also would be the kind of question typically submitted to the trier of fact.

In a case such as *Gleitman*, the facts on record give no indication of whether or not the parents would have acted upon the information concerning the possibility of defects or whether they could prove that the mother had in fact contracted rubella. Consequently, proof of cause in fact might be somewhat difficult. In *Stewart*, the parents were already seeking an abortion but there was some question as to whether they could prove to the physician's satisfaction that the mother actually had contracted rubella. Thus, proof would be easier than in *Gleitman* in one respect but possibly more difficult in the other. Problems associated with these two issues, therefore, do not appear to be any greater than those associated with any case where a jury is required to resolve difficult factual questions. Conflicting evidence will have to be sorted and analyzed. In a factual situation such as *Gleitman* the infant plaintiff may have more serious problems of proof of cause in fact and proximate cause than in a *Stewart*-type situation. This, however, only indicates the prudence of a case-by-case approach, as opposed to a uniform denial of a cause of action.

47. *See* Comment, 28 MD. L. REV. 81, 84 (1968).

VI. PUBLIC POLICY

Even if the conceptual difficulties with the duty, cause in fact, proximate cause and damages issues are overcome and the elements of the cause of action can be established, it may still be argued that public policy demands that the court refuse to recognize the infant plaintiff's cause of action. Such an argument can arise under three different headings—damages,[48] family harmony and abortion.

A. Damages and Public Policy

Perhaps the most metaphysical question that should be considered is the question of whether damages actually exist in cases such as *Gleitman* and *Stewart*.[49] Without damages, plaintiff has no cause of action in tort.[50] Can the infant plaintiff allege persuasively that he has been damaged by being born with defects rather than being consigned to a state of nonexistence? This ultimately becomes a value judgment which society will have to make. Ours is a society which condemns a man's attempt to take his own life. We condemn euthanasia. It may be that given such societal norms the infant plaintiffs in *Stewart* and *Gleitman* cannot prove what our society would consider as damages.[51] On the other hand, it may also be that in some extreme situations it cannot reasonably be said that life with defects is preferable to nonexistence. In such a situation, one could argue that damages should be awarded in a "wrongful life" case. Although human life is in most cases "precious"—as in the case of some single defect such as deafness alone—it would be difficult indeed to conclude that it is more "precious" than nonexistence to a blind, deaf and mentally retarded infant such as Jeffery Gleitman. Thus, it should not be argued that damages do not exist in any of the "wrongful life" cases which might be conceived since in some cases there is no rational basis for concluding that a particular state of being is in any way more "precious" than nonexistence. It would seem preferable to take a case-by-case approach and weigh the number, kind and severity of the defects present along with other concerns of

48. *See* note 16 *supra*.
49. *See* note 16 *supra* and accompanying text.
50. In order for one to maintain a cause of action in tort and recover therein he must prove actual injury or loss as a result of the negligent act. W. Prosser, Law of Torts 146-47 (3d ed. 1964).
51. *See* discussion of valuation and the damages issue *supra* notes 16-27 and accompanying text.

public policy such as compensation of loss and the professional irresponsibility, if any, of the defendant.

B. FAMILY HARMONY

Another relevant policy concern has been raised in the "wrongful life" cases where bastards have brought suit against their parents for damages associated with the socio-psychological deprivations of bastardom. It has been argued there that suits by children against their parents are undesirable because such suits are disruptive of family life.[52] This consideration may have relevance in the *Gleitman* and *Stewart* context. If the physician were to discharge his duty to inform and the parents failed to act upon such information—failed to procure an available abortion—should the deformed child then be able to sue the parents for their failure to procure the abortion? Such suits would certainly be disruptive of the family structure. However, one need only think realistically about the factual situations in *Gleitman* and *Stewart* to realize the improbability of such suits being brought. The children involved had to be given special care and treatment in order to merely exist and it is highly unlikely that a child in such a condition would be able to even consider bringing a lawsuit. It is still more unlikely that the other available alternative would occur—the parents bringing a suit against themselves in the name of their child. This differs significantly from a case involving a bastard, who although he may be socially and/or psychologically deprived is less likely to be hampered with physical and mental defects which would preclude his initiation or participation in a suit on his own behalf. Also, in such cases the parents are likely to be at odds with each other encouraging one parent to bring a lawsuit against the other in the name of the infant. In such a situation there may be a danger that recognition of a cause of action will further promote disruption of family harmony.

One should also consider whether a suit by an infant plaintiff against his parents in cases such as *Gleitman* and *Stewart* presents grounds for a recognition of a cause of action. The decision as to whether the parents should attempt to procure an abortion is not properly the physician's. His moral judgment should not preclude his informing the parents of the possibility of defects and his moral convictions should not allow him to tell

52. Ploscowe, *On Action for "Wrongful Life,"* 38 N.Y.U.L. REV. 1078, 1080 (1963).

the parents that they should not seek further medical advice as to the possibility of an abortion. The issue is a legal one involving an analysis of whether the physician's actions constitute malpractice. It should recognize moral considerations only when the physician is asked to perform an abortion contrary to his moral convictions. In such a case, a defense of moral beliefs may be justified. Similarly, the question of whether the parents should act upon the information and obtain an abortion if available is a moral question and not a legal one. Since the parents' decision is a moral one, it should not give rise to a cause of action by a deformed child against his parents. This conclusion minimizes any threat to family harmony. Moreover, the likelihood of disharmony in the family unit might be higher if a cause of action against the non-disclosing physician is not recognized and compensation is not awarded where justified.

C. Abortion Law and Public Policy

Analysis of the state abortion law is crucial in any case such as *Gleitman*. If such an inquiry leads the court to the conclusion that an abortion would have been justified by state law under such circumstances, then a decision should be reached holding a physician liable for failure to discharge a duty of disclosure or for making a statement that no abortion should be sought elsewhere. The majority opinion in *Gleitman* fails to deal with public policy in this context, but rather assumes for purposes of the opinion that the Gleitmans would have been able to procure an abortion somehow, somewhere.[53] Given such an assumption, the approach suggested by this Note would dictate that a cause of action should be recognized and that recovery or denial of recovery be based solely upon the sufficiency of the plaintiff's proof of the elements of the cause of action. If, on the other hand, the abortion law were construed to preclude the performance of an abortion in New Jersey in cases where the mother has contracted rubella, the infant plaintiff would have to argue that because he could have procured an abortion in some other state or foreign country he should not be denied a cause of action in the forum state. This appears to be a persuasive argument unless there is a policy reason why the parents should not be advised by their physician to procure an abortion elsewhere.

Such policy concerns have been raised. It has been argued that the policy behind imposing on a physician the duty to in-

53. Gleitman v. Cosgrove, 49 N.J. 22, 27, 227 A.2d 689, 691 (1967).

form his patients of critical matters is the protection of an individual's physical integrity and his free choice between available lawful alternatives, and that the defendant in *Gleitman* was, therefore, not bound by such a duty because the alternative choice of abortion was one not sanctioned by the public morality or public policy of the State of New Jersey. By allowing recovery, one commentator reasons, the court would have given institutional approval to an alternative choice not sanctioned by the public policy of the state.[54]

A concurring opinion in *Gleitman* also attempts to provide the needed consideration of public policy. It states that a determination of the criminality of such an abortion must be made in order to determine whether the plaintiffs—parents and child—had a cause of action which should be recognized.[55] The opinion concludes that the performance of a eugenic abortion within the factual context of *Gleitman* would have been a crime. Furthermore, even if there were some state or foreign country where an abortion for rubella were lawful, no cause of action for a physician's nondisclosure should be recognized in New Jersey. Such recognition would encourage procurement of abortions in other jurisdictions.[56]

The law of divorce provides a helpful analogy in analyzing this argument. What should be allowed and required of a lawyer in a state which has strict divorce laws when a client seeks a divorce but lacks the grounds necessary in that state? Must the lawyer inform his client that he would be able to procure a divorce in a different state? If the argument made above—that a physician should not be required by law to do something which will encourage the procurement in another jurisdiction of something which is contrary to public policy in the forum state—were applied to such a situation, it would dictate that the attorney need not inform his client that it would be possible to obtain a divorce in another state because this would encourage New Jersey residents to go out of state to seek a result which is contrary to the public policy of their home state. It would certainly be violative of public policy if he represented her or helped her obtain local counsel. Any court decision sustaining the lawyer's right to take such action would be considered as encouraging a violation of the public policy of the state. In New Jersey, however, where the *Gleitman* concurring opinion

54. *See* Comment, 20 MAINE L. REV. 143, 154 (1968).
55. Gleitman v. Cosgrove, 49 N.J. 22, 40, 227 A.2d 689, 699 (1967).
56. *Id.* at 48, 227 A.2d at 703.

would not hold a physician to a standard of care whose fulfillment would encourage people to seek abortions elsewhere, it is not considered a violation of public policy for an attorney to apprise his client of the more liberal divorce laws of another state and the probability of procuring a divorce in such a state. In *Nappe v. Nappe*,[57] the court stated that an attorney could properly advise his client concerning the requirements for divorce in another state and the probability of his meeting those requirements. The court then stated:

> Once an attorney has done this and leaves it to the voluntary decision of the client as to whether such a proceeding is to be instituted by the client in a foreign jurisdiction, counsel may suggest the name of a reputable attorney in such other state so that his client may be advised by such lawyer who has the competence to give the necessary legal advice with reference to the contemplated action. We deem it advisable to state this warning, however, that at that point the attorney should terminate the relationship of attorney and client, present his bill and be paid for his services. Any participation thereafter in the divorce proceeding in the foreign state may form a foundation of a charge that the New Jersey attorney is *particeps criminis* when subsequently a fraud is perpetrated upon the courts of the foreign state. . . .[58]

It might be argued by analogy to the divorce cases that not only was it the duty of the physician in *Gleitman* to inform the patient of defects but also that it would not be violative of public policy to allow him to make the necessary arrangements after the patient has decided of her own volition to attempt to procure the abortion. As in the case of an attorney, any further action on his part would be violative of public policy. Unless the court is willing to draw some policy distinction between divorce and abortion, it is illogical to promulgate decisions that encourage the procurement of a divorce in another jurisdiction when a divorce could not be obtained in the party's home state and at the same time deny a cause of action in "wrongful life" cases on the ground that it encourages the procurement of abortions in other jurisdictions. One might argue that there is a distinction because the attorney's advice to his divorce client would not be classified as a crime whereas the doctor's advice to a patient seeking an abortion might be classified as a criminal act. However, query as to the value of such a distinction in light of the state of flux concerning the nation's abortion laws.[59]

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57. 20 N.J. 337, 120 A.2d 31 (1956); *accord, In re* Feltman, 51 N.J. 27, 237 A.2d 473 (1968).

58. *Id.* at 346, 120 A.2d at 36.

59. *See* notes 60-66 *infra* and accompanying text.

Further, to deny a cause of action on the ground that allowing it would be violative of the state's public policy on abortion is unreasonable due to the difficulty of determining the exact nature of the pertinent public policies of New Jersey and other states. The *Gleitman* case itself indicates varying opinions with regard to the prevailing public policy. The concurring opinion in *Gleitman* concluded that an abortion under such circumstances would be unlawful,[60] the dissent assumes that it would have been lawful[61] and Chief Justice Weintraub observed that from all evidence available, ". . . in cases of rubella during the first trimester of pregnancy abortions have been performed in New Jersey by reputable doctors in reputable hospitals, all of whom have believed such abortions to be lawful."[62] In California, where a liberalized abortion law has been passed, a recent decision under that law has held that the right to privacy guaranteed by the United States Constitution accords every individual woman the right to choose whether or not to give birth to an unwanted child.[63] In light of these considerations and the current debate over legalization of abortion,[64] there appears to be no strong settled public policy either in New Jersey or in many other states with regard to abortion. Thus, a denial of a cause of action for "wrongful life"on the ground that it is violative of the public policy of the state seems unwarranted.

Assuming, however, that holding the doctor to a duty to inform the parents of the possibility of defects might encourage a violation of the state's public policy on abortion, this public policy must still be balanced against other policies of the state. The dissenting opinion in *Gleitman* points to the following consideration:

> While the law cannot remove the heartache or undo the harm, it can afford some reasonable measure of compensation towards alleviating the financial burdens. In declining to so do, it per-

60. Gleitman v. Cosgrove, 49 N.J. 22, 48, 227 A.2d 689, 703 (1967).
61. *Id.* at 49, 227 A.2d at 703.
62. *Id.* at 56, 227 A.2d at 707.
63. People v. Belous, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). It was argued that the new law should be declared unconstitutional because it is too restrictive and because it leaves open the question of whether abortions can be performed where there is a possibility of birth defects. *See* note 15 of the *Belous* opinion.
64. *See, e.g., Abortion on Request*, TIME, March 9, 1970, at 34. This article is indicative of the confusion. The legislature of Hawaii has attempted to reach a solution by passing a liberalized abortion law. At the same time Washington, D.C. is in a "legal limbo" since a federal judge recently declared the restrictive District code unconstitutional because it is too vague.

> mits a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of torts.[65]

It could be argued that the failure to recognize a cause of action and to allow recovery in a case such as *Gleitman* leads to institutionalization of professional irresponsibility. The issue then becomes one of balancing public policies and determining which one is more worthy of institutional sanction.[66] Therefore, before the court denies recovery because of a conflict with the state's policy on abortion, it should consider more closely whether such a ruling is consistent with rulings in other areas of the law such as maintaining standards of professional responsibility for physicians and compensation for injured parties, whether the precise policy on abortion can be articulated and even if it can be articulated, what weight is properly to be assigned to it.

VII. CONCLUSION

This Note has attempted to demonstrate that suits for "wrongful life" within the context of medical malpractice do fit within the framework of tort law. Although it may be difficult to ascertain damages and to prove proximate cause in some cases, neither these difficulties nor the conceptual problems in extending to the fetus the duty which the physician owes the parents justify uniform denial of a cause of action for "wrongful life." The courts should adopt a logical legal analysis of the cause of action. Such analysis should lead to the conclusion that infant plaintiffs can state a cause of action for "wrongful life" in terms of medical malpractice and that recovery or denial of recovery should be based solely upon the facts of the individual cases, the plaintiff's ability to establish the element of a cause of action and the relevant public policy considerations inevitably involved in such cases. The physician should not be allowed to escape on the basis of either personal scruples or legal policy the duty to inform which would be required of him in other medical contexts; neither should he be allowed to mislead the patient as to the possibility of obtaining an abortion elsewhere. Further,

65. Gleitman v. Cosgrove, 49 N.J. 22, 49, 227 A.2d 689, 703 (1967). Justice Jacobs felt that the abortion in question could have been performed lawfully in New Jersey.

66. *See* note 55 *supra* and accompanying text, where the concern was that recognition of the cause of action of the infant plaintiff would be an institutional sanction of abortions.

the right of the parents to seek a lawful abortion and, if one is available, to make the final moral choice as to whether it is performed should be recognized. If the infant is to endure a life with defects, it must be because that was the moral choice made by his parents and not because they were given no alternative choice due to the negligence or private morality of a physician.