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Wrongful Conception: A Conditional Prospective Liability to One Not Yet in Being

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WRONGFUL CONCEPTION: A Conditional Prospective Liability to One Not Yet in Being—*Park v. Chessin*, 000 Misc. 2d 000, 387 N.Y.S.2d 204 (Sup. Ct. 1976).

I. INTRODUCTION

A slowly but steadfastly emerging area in the field of tort liability is the action for "wrongful life"[1] or, as it has been termed, "an action based on the right to be well born."[2] The courts have, for the most part, grimly denied recovery on such theory, citing lack of precedent,[3] impossibility of measuring damages,[4] the fear of opening the door to a flood of litigation,[5] lack of causation,[6] lack of duty,[7] and the public policies against intra-family suits and against encouraging abortions.[8] Most of the judicial objections are policy-based, thereby affording the courts the ever-available rationale that decisions and judgments as to such matters are best left to the legislatures.

In recent years, a few decisions have recognized the viability of actions[9] which closely resemble the original "wrongful life" actions. These decisions, coupled with writings of legal commentators advo-

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1. The term "wrongful life" was originally coined to describe the action brought by bastards against their putative fathers, alleging that the negligence of the defendant caused their wrongful birth and concomitant stigma of bastardom. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). Inasmuch as the term "wrongful life" leads to some confusion among writers and courts, the generic term "wrongful birth" is usually used to include actions by either parents or children for the basic grievance of wrongfully causing a child to be born. In addition, the term "wrongful birth" is used to denote a specific type of action within the genre, as illustrated by the following text. *See* note 13 *infra* and accompanying text. When the term is used in its generic sense in this work, such usage will be specifically indicated.

2. Affirmation in Opposition for Plaintiff, at 9, Park v. Chessin, 000 Misc. 2d 000, 387 N.Y.S.2d 204 (Sup. Ct. 1976).

3. *See, e.g.*, Aronoff v. Snider, 292 So. 2d 418 (Fla. Ct. App. 1974) (without foundation in law or logic).

4. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (impossibility of measuring life with defects versus no life at all).

5. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

6. *See, e.g.*, Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975).

7. *See, e.g.*, Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974).

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

9. Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237 (10th Cir. 1973) (products/strict liability, negligence, and breach of warranty action brought by mongoloid children); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (action for cost of raising child by parents after unsuccessful sterilization); Jackson v. Anderson, 230 So. 2d 503 (Fla. Ct. App. 1970) (suit in tort and warranty for negligent sterilization resulting in normal birth not barred by public policy); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975) (suit for pregnancy after tubal ligation); Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974) (action by woman against doctor for failure to diagnose pregnancy in time to terminate it); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (action by parents for pregnancy subsequent to partial salpingectomy).

cating the generic type of action,[10] may signal the emergence of a new cause of action or at least the definition of a new class of foreseeable plaintiffs in the field of malpractice tort action.

There has been much confusion among the courts as to exactly what constitutes an action for wrongful life, and because of this, the reasons used in rejecting claims for damages under causes of action which are, or which look like, wrongful life actions have not been entirely consistent. It seems, then, that a need for distinguishing the various types of action, lumped together as they have been under the generic term of art of "wrongful birth," has arisen in order to adequately identify each type and to determine its ramifications.

A true "wrongful life" action, as defined by one writer,[11] is a suit brought by an infant against a defendant whose conduct was a contributing cause to the infant's conception and birth. Generally, the issue may be stated as the claim of a person, usually an infant, that the defendant's conduct either prevented the termination of his life *en ventre sa mere* or brought about his conception or birth so that his very life is wrongful.[12]

Moving away from the "wrongful life" plaintiff class, another class comes into view. This class of plaintiffs claims damages under a cause of action aptly described as "wrongful birth."[13] Here the plaintiff sues not because of his birth, but for the birth of another, which birth is causally related to damages sustained by the plaintiff. Included in this class are parents of children born with birth defects,[14] parents of children who are normal but unplanned or un-

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10. *See, e.g.*, Dunn, *New York's Abortion Reform Law: Unanswered Questions*, 37 ALBANY L. REV. 22 (1972); Note, *A Cause of Action For "Wrongful Life": (A Suggested Analysis)*, 55 MINN. L. REV. 58 (1970); Note, 28 MD. L. REV. 81 (1968).

11. Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140 (1976).

12. Chief Justice Weintraub, dissenting, in Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) described it this way: "the choice is not between being born with health or being born without it . . . [r]ather the choice is between a worldly existence and none at all." *Id.* at 711. Other examples are: Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (action by bastard against putative father for status as bastard); Pinkney v. Pinkney, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967), *overruled on other grounds*, Brown v. Bray, 300 So.2d 668 (Fla. 1974) (action by adulterine bastard for stigma of bastardom against her father for carrying on illicit relationship with her mother); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (action by infant born out of wedlock to mentally deficient mother who was sexually assaulted while an inmate in state institution).

13. It should be noted that the use of the term "wrongful birth" here is not used in the generic sense, *see* note 1 *supra*, rather in the specific, narrow sense which distinguishes one action from another. When the generic sense of this term of art is used, it will be so indicated. *See* note 30 *infra* and following text.

14. The classic case is Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (failure to detect rubella). Other, more recent rubella cases include: Smith v. United States, 392 F.

wanted,[15] and prior born children alleging diminution of love and affection and loss of potential estate.[16]

Moving still farther away from true wrongful life actions, there appear actions which are in reality medical malpractice actions, utilizing standard tort law and containing elements of a wrongful birth action. One court, in an attempt to unravel this tangled skein, used the term "wrongful pregnancy" to accurately describe the gravamen of the complaint. Here the pregnancy complained of is the proximate result of the negligence alleged, and the birth is a remote result.[17] By limiting the cause of action in this manner, the scope of damages is confined to the ascertainable expenses, thereby eliminating speculative damages which have been the bugbear of courts in the true wrongful life actions.[18]

At the other end of the spectrum is the action for prenatal injury. This is not an action for wrongful life or birth, because the plaintiff, although an infant, is not suing for damages attributable to birth per se. Here, the plaintiff is suing for injury and damages attributable to cause other than birth; the birth is merely a condition subsequent to the injury enabling the plaintiff to bring the action.[19]

To date, no true wrongful life action has succeeded, although in the seminal case of *Zepeda v. Zepeda*,[20] an Illinois appellate court admitted that the defendant's conduct toward the plaintiff was tortious and that an action for damages is implicit in any wrong that

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Supp. 654 (N.D. Ohio 1975); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

15. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (action for damages including cost of raising child by parents after unsuccesful sterilization); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (action by parents against pharmacist for negligently filling contraceptive prescription with tranquilizer).

16. Aronoff v. Snider, 292 So. 2d 419 (Fla. Dist. Ct. App. 1974); Coleman v. Garrison, 281 A.2d 616 (Del. Super. Ct. 1971), *remanded*, 298 A.2d 320 (Del. 1972); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974).

17. *See* note 11 *supra*.

18. Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974) (where term was coined). *See* Lapoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). There, the class of plaintiffs consisted of parents suing physicians for improperly performing sterilizations. *See also* Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 35 App. Div. 2d 531 (1970).

19. *See* note 11 *supra*. The modern trend in prenatal injury cases had its inception in Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). This case and subsequent cases required that injury occur at or after the time of viability. Now universal recognition is given to a cause of action for prenatal injury and the great majority of jurisdictions have abandoned the requirement of viability. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 335 (4th ed. 1971); Annot., 40 A.L.R.3d 1222 (1971) (prenatal injuries).

20. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (action of bastard against putative father).

is called a tort. The *Zepeda* court, however, was unwilling to "create a new tort" and left that task to the Illinois General Assembly.[21] Other courts, confronted with similar claims, have followed this thinking, citing absence from legal concepts of any such idea of wrongful life,[22] impossibility of measuring damages,[23] and public policy embracing the preciousness of life.[24]

The wrongful birth cases at first met unyielding resistance from the courts. Originally, because the action looked and sounded like a wrongful life action, the courts were opposed to recognizing it as viable.[25] This trend is now being reversed in more and more jurisdictions,[26] and fewer and fewer objections are voiced against it.[27]

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21. *Id.* at 859. The court admitted that its stance was inconsistent but decided that it was inappropriate to create, by judicial sanction, the new action required by the complaint. It was chiefly concerned with the flood of litigation which would be unleashed by allowance of such an action.

22. Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

23. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). There the court stated, in an oft-quoted passage: "The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination. This court cannot weigh the value of life with impairments against the non-existence 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." *Id.* at 692.

24. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974) (dicta). The court in *Coleman* flatly stated its view that no cause of action should be established allowing damages for "wrongful life" inasmuch as "[t]he preciousness of human life should not be held to vary with the circumstances surrounding birth."

25. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 35 App. Div. 2d 531 (1970). Here the courts were not only concerned with damages but also with the fact that the only apparent method of alleviating the plaintiff's aggrieved condition at the time of the tortious activity was eugenic abortion which was then illegal in most jurisdictions.

26. Since the pivotal cases of Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973) were decided, the problems of abortion vanish, at least in the first trimester. Thus, if a physician fails to diagnose a pregnancy where a child is unplanned, or if he fails to diagnose a possible birth defect (as with the rubella syndrome or Tay-Sachs syndrome) early enough to permit a valid, legal abortion as defined by *Wade*, the birth may be said to be wrongful. *See, e.g.*, Ziemba v. Sternberg, 357 N.Y.S.2d 265, 45 App. Div. 2d 230 (1974). However, no court has yet recognized the claim of prior born children who allege damages due to diminution of parental love and affection and loss of estate because of the birth of an unwanted child. *See, e.g.*, Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974).

27. Two stumbling blocks remain. One is the concept of "overriding benefit" or the "benefits rule" as stated by the RESTATEMENT OF TORTS, viz: "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." RESTATEMENT OF TORTS § 920, at 616 (1939). The argument is that the birth of a child confers so substantial a benefit as to outweigh the expenses of his birth and support. One court openly invited a weighing of the claimed damages versus the benefit as a resolution of the problem. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971). *See also* Custodio v. Bauer, 251 Cal. App.

The "wrongful pregnancy" actions are finally being recognized for what they are, *i.e.*, malpractice actions with "wrongful life" overtones, and on that basis the cause of action is allowed.[28] Inasmuch as basic principles of tort theory are applied, there is some controversy as to allowable damages, but this is really no different from problems that beset a "normal" tort action.[29]

It is crucial to make such categorizations in order to distinguish among the various classes of cases and define the status of the fetus as narrowly as possible. Because of the blurred distinctions, some courts have applied the reasoning of "wrongful birth" cases[30] where basic negligence principles should have been applied.[31]

Recent trends in the law, antithetical to one another, have rendered the status of a fetus into what may be called a nice legal question. On one hand, the rights of the unborn have been expanded,[32] and on the other hand, the rights of privacy have been expanded to include a woman's right to terminate her pregnancy.[33]

303, 59 Cal. Rptr. 463 (1967) (where the court held that the birth of the tenth child was not necessarily such a blessing).

The other concept involves the duty of mitigating damages. The argument here is that parents seeking to recover for the birth of an unwanted child have a duty to mitigate damages by placing the child for adoption or by seeking an abortion. This has generally been dismissed as untenable, for "[t]he right to have an abortion may not be automatically converted into an obligation to have one," Ziemba v. Sternberg, 357 N.Y.S.2d 265, 269, 45 App. Div. 2d 230, 233 (1974), and to insist upon adoption ignores the very real emotional and spiritual bonds which few parents can bring themselves to break upon the birth of a child.

28. *See, e.g.*, Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 497 (1976); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

29. In *Jacobs*, 519 S.W.2d 846 (Tex. 1975), the court held that damages should be confined to provable expenses, *e.g.*, pain and suffering, cost of operation, loss of consortium and medical expenses. Allowing damages for cost of raising a child was held to be too speculative and ethically questionable inasmuch as the parents would derive all the benefit of raising the child and the physician would be shouldered with all the cost. *Id.* at 850. In *Bowman*, 48 Ohio St. 2d 41, 356 N.E.2d 497 (1976), however, the jury rendered an award which included costs of rearing the "unplanned" twins, one of whom required institutionalization. This question was not presented and therefore not decided by the Ohio Supreme Court. *Id.* at 43.

30. Here used in the generic sense to include all actions distinguished above. This use continues through note 34 *infra* and accompanying text.

31. *See, e.g.*, Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970) (court dismissed action of parents without adequately discussing tort theory).

32. Note 19 *supra*. In commenting on the case of Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), the New York seminal case allowing prenatal injury recoveries, one writer commended: "Woods in effect gave to the foetus born alive the same status under tort law that it had previously enjoyed under the criminal law and the laws of property and succession with whatever rights and benefits that were inherent in such status." Dachs, *Liability for Wrongful Harm to the Unborn—Past, Present and Future*, N.Y.L.J., Aug. 2, 1971, at 4, col. 3. Generally speaking, criminal law and property law have always imputed a legal personality to the unborn child for all purposes working to the benefit of the infant, but not for purposes working to his detriment. *See generally* 1 W. BLACKSTONE, COMMENTARIES *130 (rights of unborn in property law); R. PERKINS, CRIMINAL LAW 139 (1969) (abortion).

33. *See* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). In *Wade*,

Generally, when faced with this problem, courts have refused to countenance a cause of action wherein a plaintiff alleges that he was damaged by the very fact of his birth. It is in this framework that *Park v. Chessin* must be analysed.[34]

II. FACTS

Plaintiffs, Steven and Hetty Park, individually and as administrators of the estate of their deceased child, Lara, brought this action against the defendants who were licensed physicians in the state of New York and who held themselves out to be specialists in obstetrics and genetic counseling. The plaintiffs contended[35] that Hetty Park, having previously delivered an infant who died of polycystic kidney disease shortly after birth, consulted the defendants for medical information and advice as to the possibilities of having a normal child in a future pregnancy. One of the defendants, Dr. Chessin, had attended Mrs. Park at the birth of her polycystic infant. The doctors told her that there was no hereditary nor genetic reason to fear having another defective child. Proceeding on this advice, Mrs. Park once again became pregnant and delivered the infant Lara, attended by the other defendant, Dr. Gibstein. The infant was born with polycystic kidney disease from which she died approximately two-and-one-half years later. During her short life she was almost constantly in pain, and it was known from the beginning that her life expectancy was minimal. She was hospitalized on twenty-seven different occasions and the medical costs exceeded $60,000. Plaintiffs alleged that, contrary to what the doctors had told Mrs. Park, polycystitis is a hereditary, dominant, non-sex-linked autosomal disease and that where one child has been born with the disease, the risks of having an affected sibling are one in four.[36] This knowledge was not so esoteric as to be unknown by the medical obstetrics community at large. Moreover, the defendants failed to test the chromosomal and genetic make-up of the parents to determine the possibilities of another child being born with defec-

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the United States Supreme Court struck down Texas criminal abortion statutes as a violation of a woman's fundamental right to decide whether or not to terminate her pregnancy until at least the point of viability. Generally, critics have levied the criticism that these decisions abrogate the legal rights of the unborn and therefore are inconsistent with prior law. *See* note 32 *supra*. Comment, *Live Birth: A Condition Precedent to Recognition of Rights*, 4 HOFSTRA L. REV. 805 (1976).

34. 000 Misc. 2d 000, 387 N.Y.S.2d 204 (Sup. Ct. 1976).

35. Since this opinion was written upon a motion by the defendants to dismiss for failure to state a cause of action, all of the facts as set out by the plaintiffs have to be taken as being true. Kober v. Kober, 16 N.Y.2d 191, 211 N.E.2d 817, 264 N.Y.S.2d 364 (1965).

36. This information is to be found in the complaint and brief of plaintiffs.

tive kidneys. The plaintiffs alleged eight causes of action, but the sixth cause of action was the crux of the complaint.[37] This cause of action was by the infant, through her administrators, alleging fraud and malpractice, seeking damages for conscious pain and suffering sustained by her after birth, and contending that as a result of the defendant's tortious conduct she was conceived and born in violation of her claimed right not to be conceived and therefore not to be born.

III. THE DECISION

The court recognized that the complaint set out both malpractice and fraud allegations but considered them as if they were based only on malpractice.[38] The sixth cause of action was the focal point of the entire opinion, inasmuch as the court noted that the entire complaint must stand or fall upon it. The motion by defendants to dismiss was denied, and the court found the sixth cause of action to be viable. Of course, in ruling on a sufficiency motion the court makes no prediction as to the likelihood that plaintiffs will prevail upon litigation. The court recognized the fears of the legal community that its holding could lead to myriad ramifications, but stated that upon true analysis such fears were groundless and that prior decisions denying such causes of action may well be regrettable.

Analysis

The court in deciding this case utilized a judicious admixture of related parts of the actions distinguished above.[39] On the one hand, the infant, suing for damages resulting from malpractice which violated her right not to be conceived and born, asserted a variation of a "true wrongful life" theme. It is necessary to examine whether this "right not to be conceived" is cognizable in the law.

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37. In causes of action one through five, the mother and father alleged fraud and malpractice and requested damages for emotional distress, expenses incurred in the care of the infant, loss of services and consortium, and exemplary damages. In the seventh and eighth causes of action, the parents alleged malpractice and wrongful death respectively, claiming damages for loss of society and companionship of the child and funeral and burial expenses. Disregarding the wrongful death aspect, these causes of action fit at least into the "wrongful birth" categorization.

38. The court only had to pass judgment on the sufficiency of the complaint in establishing a viable cause of action. All facts alleged in the complaint must be taken as true, and the pleading *in toto* must be deemed to allege whatever can be implied from its statements by fair intendment. Thus, the cause of action must stand if in any aspect upon the facts stated the plaintiff is entitled to a recovery. Kober v. Kober, 16 N.Y.2d 191, 211 N.E.2d 817, 264 N.Y.S.2d 364 (1965).

39. *See* notes 1-31 *supra* and accompanying text.

The decision of *Woods v. Lancet*[40] has been characterized as bringing "the common law . . . into accord with the demand of natural justice which requires recognition of the legal right to every human being to begin life unimpaired by physical or mental defects resulting from the negligence of another."[41] If the right to be born unimpaired by negligence of another exists, it follows that the right to be conceived unimpaired also exists, since birth without conception is impossible. This is in keeping with what was held in *Zepeda v. Zepeda*[42] as to allowance of such an action:

> [I]f recovery is to be permitted an infant injured one month after conception, why not if injured one week after, one minute after, or at the moment of conception. It is inevitable that the date will be further retrogressed. . . . If there is human life, proved by subsequent birth, then that human life has the same rights at the time of conception as it has at any time thereafter. . . . But what if the wrongful conduct takes place before conception? Can the defendant be held accountable if his act was completed before the plaintiff was conceived? Yes, for it is possible to incur, as Justice Holmes phrased it in the *Dietrich* case, *"a conditional prospective liability in tort to one not yet in being."*[43]

This italicized phrase has been frequently cited[44] for the proposition that while, generally speaking, under tort concepts a child *en ventre sa mere* has (1) no separate juridical existence, (2) no legal personality, (3) no legal identity, and (4) no legal right to be born

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40. 303 N.Y. 349, 102 N.E.2d 691 (1951). *See* note 32 *supra.*

41. Park v. Chessin, 000 Misc. 2d 000, 387 N.Y.S.2d 204, 210 (Sup. Ct. 1976), *quoting from,* Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

42. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

43. Park v. Chessin, 000 Misc. 2d 000, 387 N.Y.S. 2d 204 (Sup. Ct. 1976) (court's emphasis), *quoting from,* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963). The cited reference in the quote alludes to the opinion in Dietrich v. Northampton, 138 Mass. 14 (1884), which was written by Justice Holmes. That court denied a woman's claim for prenatal injury. The main issue was whether a child who survived his premature birth for only a few minutes was a "person" within the meaning of the law. In the *Zepeda* opinion, the Illinois court gave examples of hypothetical preconception negligent acts injuring subsequently conceived offspring, as, *e.g.,* products manufactured and sold prior to conception causing injury to a child after birth. *See also* Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237 (10th Cir. 1973) (defective birth control pill causing Down's Syndrome).

44. *See, e.g.,* Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E. 2d 901, 301 N.Y.S.2d 65 (1969). *See also* the recent case of Shack v. Holland, 000 Misc. 2d 000, 389 N.Y.S.2d 988 (1976), where the court answered affirmatively the question whether a conditional prospective liability to a fetus is created when an unborn child's mother is not sufficiently informed of the risks, hazards and alternatives of the delivery procedure administered, and whether such liability attaches upon the birth of the child and inures to the benefit of the child in the nature of a cause of action for lack of informed consent. Interestingly, the birth occurred twenty-two years prior to the bringing of the action.

so that it suffers no damage by not being born,[45] an unborn plaintiff is nevertheless considered in being for its own benefit, which includes protection of its rights against injury. An injury to an unborn plaintiff is prospective in the sense that the harm will not mature until he sees the light of day and conditional in the sense that he must be born alive in order to bring an action.[46] Thus the establishment of a conditional prospective liability in tort to an unconceived fetus is possible and logical within the law, but it is dependant for its existence upon the aspect of foreseeability and duty on the part of the defendant.

The *Chessin* court addressed this problem by citing an old case[47] for the proposition that the plaintiff, although not individually in the mind of the defendants, belonged to a class which defendants had in mind when advising the mother to go ahead with her planned pregnancy. Thus, at the time of the commission of the tort, plaintiff belonged to a "class in contemplation" of the defendants which the defendants could foresee, and as such was a "potential being with essential reality at the time of the act."[48]

Although the element of causality was not discussed by the court, there can be little doubt that "but for" the action of the defendants, the plaintiff would not have been injured, so that the defendants' negligence was a material and substantial element contributing to the plaintiff's conception—the cause in fact. As such, there should be no problem in showing that conception was the direct and foreseeable result of the defendants' negligent advice—the proximate cause. The *Chessin* court pointed out that if there is a causal relationship between the wrongful act and the resulting injury, it makes no difference how much time elapses between the two.

Up to this point the *Chessin* opinion was consistent with *Zepeda v. Zepeda*[49] which held, as aforementioned, that defendant's activity was tortious but no recovery would be allowed because the

45. Dachs, *Liability for Wrongful Harm to the Unborn—Past, Present and Future*, N.Y.L.J., Aug 2, 1971, at 4, col. 4.

46. Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

47. Piper v. Hoard, 107 N.Y. 73, 13 N.E. 626 (1887). Here equitable relief was given to a plaintiff by declaring a trusteeship *ex maleficio* for a wrong that occurred before plaintiff was conceived. In order to protect his fee interest in land, defendant had fraudulently induced plaintiff's mother to marry defendant's grantor, by representing that if she did so, the land would go to her child, if she had one. It is submitted that in *Piper* the plaintiff was less in contemplation of the defendant than was the plaintiff in the present case.

48. 000 Misc. 2d 000, 387 N.Y.S.2d 204, 208 (Sup. Ct. 1976).

49. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

creation of a new tort should be left to the legislature.[50] It was at this point that the *Chessin* court "shifted gears" and moved to a different nuance in wrongful life.

In distinguishing this case from recent cases decided in New York,[51] the court in *Chessin* determined that the case was one of first impression in the state inasmuch as no other New York court had been confronted with (1) a definitive tort action brought by a child, (2) after its birth, (3) for conscious pain and suffering, (4) based on a tort committed prior to its conception. The difference was in point number three. The court declared that the child was not seeking damages for being born, *per se,* but rather for pain and suffering *after* birth based on a tort committed prior to conception.[52] It is in this aspect that the action departed the realm of true "wrongful life" and enters the realm of standard tort with overtones of wrongful life. In this respect the *Chessin* court escaped the oft-repeated admonition: "Suits seeking recovery of damages due solely to the existence of life, or "wrongful life" rather than no life, have not met favor in the courts."[53]

The action now resembles one for prenatal injury although the basis of the tort was "the violation of the right not to be conceived and thus not to be born."[54] The court concluded that having been born alive, and having been foreseeable by and within the contemplation of the defendants, the child came within the "orbit of dan-

50. *See* note 21 *supra* and accompanying text. It should be noted at this point that cases such as *Zepeda* and Pinkney v. Pinkney, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967), wherein bastards sue for their wrongful status, have very little chance of succeeding absent legislative activity. This is because of the current controversy in the law and social science concerning illegitimates and the best interests of children as they relate to domestic relations. *See* Slawek v. Stroh, 62 Wis.2d 295, 215 N.W.2d 9 (1974) for a good discussion of the social ramifications of such an action. When the same reasoning is applied to actions brought by children deformed by malpractice negligence most of these problems disappear. For policy and social reasons, courts generally refuse to hold that being born out of wedlock itself gives a right to damages, including compensation for the disadvantages of illegitimate birth. Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

51. The *Chessin* court distinguished Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970) and Howard v. Lecher, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976). The same court had decided both. *Stewart* was distinguished on the ground that there a fetus in being sued the hospital for failure to abort it. *Howard* was distinguished on the ground that there the action was solely for the parents' mental distress at the birth of their child afflicted with Tay-Sachs disease following the negligent omission of the defendant doctor to diagnose the disease in time. In denying the parents' claim, the *Howard* court observed that the injury from which their emotional harm stemmed was suffered by the child.

52. Park v. Chessin, 000 Misc. 2d 000, 387 N.Y.S.2d 204, 209 (Sup. Ct. 1976).

53. Howard v. Lecher, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976). *See, e.g.,* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

54. Park v. Chessin, 000 Misc. 2d 000, 387 N.Y.S.2d 204, 207 (Sup. Ct. 1976).

ger" and thus within the "orbit of duty"[55] for which defendants could be held liable, especially because they held themselves out as experts and should have known of the danger.

The court did not direct much attention to the question of damages, saying only that though damages may be speculative and difficult to prove, the action should not be barred on this basis, especially on a sufficiency motion.[56]

It is thus apparent that the action in *Chessin* is a hybrid, commingling the essential elements of wrongful life, wrongful birth, and tort theory (including prenatal injury). The court deftly threaded its way through an intricate maze of legal theory in stating a cause of action in this case. It is doubtful, however, that the case will serve as a model for future actions, because it is apparent that the action survived only because of artful pleading, whether by design or happenstance, on the part of the plaintiff. Wrongful birth actions[57] have been sufficiently defined as to the term of the art, and public policy has evolved to the point where the success of the action should not depend on artful pleading and clever delineations. The following illustrates this hypothesis.

The plaintiff claimed a right not to be conceived, and thus not to be born, rather than merely a right not to be born with defects caused by the wrongdoing of another. Conceptually, this is easily understood for it is generally recognized that the unborn have a right to begin life free from deleterious interference from another.[58] Even though this concept usually applies to rights of fetuses *en ventre sa mere*, the court demonstrated that the concept can be properly applied to rights of beings not yet conceived, thereby severely narrowing the scope of the action to claims for damages caused by tortious activity prior to conception and eliminates actions based on tortious activity conducted subsequent to conception which could result in wrongful birth.[59] Admittedly, this restriction

55. Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

56. Park v. Chessin, 000 Misc. 2d 000, 387 N.Y.S.2d 204 (Sup. Ct. 1976).

57. Used here in the generic sense, and used in this sense throughout the remainder of the note.

58. "[T]he law does not recognize the right of the unborn (who but for the negligence of another would be born) to be born but it does recognize its legal right, if born, to begin life unimpaired by physical or mental defects resulting from the negligence of another." Dachs, *Liability for Wrongful Harm to the Unborn—Past, Present and Future*, N.Y.L.J., Aug. 3, 1971, at 4, col. 4-5.

59. An example is that of an infant who suffers from rubella syndrome because a physician failed to adequately diagnose and/or advise its mother concerning the disease. It is interesting to note that only one recent cause of action for tortious activity prior to conception has been allowed and this was for products liability in a birth control pill. Jorgensen v. Meade

to wrongful conception eliminates the painful alternative to wrongful birth that most writers and courts find so objectionable—that of abortion.[60] This alternative is eliminated inasmuch as there is no fetus "in being," and the mere discharge of defendant's duty will result in the avoidance of injury to the "prospective" child. Hence, the situation, regarded by so many as anomalous,[61] of the plaintiff "suing himself into oblivion" is obviated simply because the abrogation of the "entity" is done by non-creation rather than by destruction.[62]

The answer to this alternative is two-fold: first, the expansion of the right of privacy of a woman to allow termination of her fetus at least up to the point of viability renders the lawfulness of the "painful alternative" moot.[63] Secondly, as was pointed out above,[64] the unborn is still not regarded by the law as having any juridical existence or personality, so that at least during the first trimester the fetus is considered part of the mother and the mother can decide whether or not to abort.[65] This view will ultimately redound to the

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Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973). Problems in this area may also be fostered by the inability to pinpoint the precise moment of conception, which occurs when the male semen contacts and fertilizes the female ovum, which may happen at coition or several hours later. A.S. PARKE, 1 MARSHALL'S PHYSIOLOGY OF REPRODUCTION 315 (3d ed. 1960). These problems are probably not material except in an exploration of some question of basic ontology. *See* notes 69 and 70 *infra* and accompanying text.

60. As evidenced by the following quote from Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41, 46 (Sup. Ct. 1968):

> The gravity of a defendant's wrong is measured by the extent to which his conduct has put the plaintiff in a handicapped condition. The ultimate wrong that can be committed is to cause another person's death. It would be the antithesis of these principles to require the defendant . . . to respond in damages to the infant plaintiff because it did not prevent the infant's birth.

61. *See, e.g.*, Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 145 (1976). *See also* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

62. This, of course, does not suggest that the doctor has a duty to abort a defective fetus, nor does the fetus have such a concommitant right. However, the physician does have the duty to correctly diagnose and to advise the mother. Thus, if the infant can show that: (1) the defendant's performance was negligent; (2) the parents would have sought an abortion if they had been correctly advised; and (3) the abortion would have been performed, then the infant has a valid cause of action which may be regarded as a form of derivative liability which permits a plaintiff to institute an action to redress a wrong done to himself which is proximately caused by a wrong done to another.

63. Roe v. Wade, 410 U.S. 113 (1973). It should be noted that the court in *Wade* did not define the viability stage as the point when life begins. It said only that it is at the viability stage when the state's interest in protecting "potential life" becomes so compelling as to outweigh the need for privacy and permit governmental intrusion and regulation.

64. *See* note 45 *supra* and accompanying text.

65. It is significant that the New York Legislature, as an expression of public policy, does not consider a fetus of under twenty weeks uterine gestation as having a separate legal

benefit of the infant and will make it less difficult to reconcile the antithetical movements mentioned above.[66] This allows the mother to protect her rights of privacy and simultaneously allows the unborn plaintiff protection from injury, which is afforded by the "conditional prospective liability" which ripens only upon live birth. At that point the unborn plaintiff becomes a legal entity who can make damage claims for injuries sustained. Viewed in this sense there can be no agonizing over the possibilities of "killing" a legal entity or over responding in damages in tort for failure to cause a death which would otherwise be regarded as the ultimate wrong. Thus, when the court in *Chessin* (and in *Zepeda)* referred to the unborn plaintiff as a life "in being" with the rights of a human person, it spoke of such status and rights in a qualified sense, that is, this status and these rights are at once "prospective" and "conditional," viable and unmatured.

The *Chessin* court indicated that damages could be ascertained by the trier of fact and the fact that they might be difficult to determine should not bar the action. While this is correct, it is necessary to look at damages from a perspective not taken by the pleadings. The plaintiff artfully alleged damages for pain and suffering sustained *after* birth and did not ask for damages for her birth, *per se.* These damages could be calculated by a jury just as pain and suffering damages in any other tort claim. But what if Lara Park had sued for a "wrongful life"—for being born? It is submitted that damages could have been ascertained and rightfully awarded on that basis. As already discussed, courts since *Gleitman v. Cosgrove*[67] have balked at allowing such suits because of the apparent impossibility of comparing life with defects versus no life at all for purposes of assessing damages. While formulas have been proposed which would allow calculation of wrongful life damages within the traditional torts framework using this comparison, it is submitted that this comparison is not the one to be made. Rather, the proper comparison is that between plaintiff with her defects and other normal, healthy human beings. This makes sense from a logical standpoint. If the law does not recognize the rights of the unborn to be born, then the unborn has no legal standing and its complete destruction prior to birth brings into being no rights in its favor. On

existence. *Cf.* N.Y. PUBLIC HEALTH § 4162 (excludes evidence of pregnancy recovered by curettage or operative procedures or other products of conception of under twenty weeks utero gestation from the requirements of burial).

66. *See* notes 32 and 33 *supra* and accompanying text.

67. 49 N.J. 22, 227 A.2d 689 (1967).

the other hand, the child who is born alive achieves a legal status in the eyes of the law. The non-entity is accorded a quasi-status only for its own benefits. Thus the question: how can a comparison be made between what is nothing in the eyes of the law versus what is something in the eyes of the law?[69] Viewed in this light damages as to the infant are indeed definable and calculable for wrongful life.[70]

Lastly, the *Chessin* court addressed the policy considerations.[71]

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68. *See, e.g.*, the following analysis suggested by the author of Note, *A Cause of Action For "Wrongful Life": (A Suggested Analysis)*, 55 MINN. L. REV. 58 (1970). The relative values assumed by the courts in analysis of damages in these cases looks like the following:

Life = a plus value (+)

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

Nonexistence = a minus value (−)

The implicit assumption is that life, *per se*, is preferable, that life with defects is a state with drawbacks but one in which a person can still exist comfortably, and that nonexistence is under any circumstances least desirable of all. The author suggests that where the defects are so severe that it is not particularly clear that life with defects should be given a higher value than nonexistence, the analysis should then be:

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." *Id.* at 66. Once these values have been established, compensation in damages can be easily established by the courts.

69. Dachs, *Liability for Wrongful Harm to the Unborn—Past, Present and Future*, N.Y.L.J., Aug. 3, 1971, at 4, col. 5. This author's suggested analysis is in the form of a dialectic by the injured infant, viz:

> Had you done your job correctly, it is true I would not be your accuser today. I would have had no recourse against anybody because when I died, I was not a person or at least, I was not legally recognized as such.
>
> But your wrongdoing allowed me to become a person but not like other persons. . . .
>
> But the law says I have the right to be born with my faculties unimpaired [by the negligence of others] and were it not for your negligence, I would not have been born the way I am. Don't compare me the way I am with the way I never was.
>
> Compare me the way I am with the way other normal and healthy human beings are since you cannot compare me with nothing but only with something.

70. If the action were one brought by the parents for wrongful birth, then the measure of damages should include medical expenses and the cost of rearing the child offset by the expenses in rearing a healthy child; in addition to these damages, damages for mental distress could be added. More detailed discussion of this issue lies outside the scope of this note. The court found the parents' cause of action for these damages to be viable; however, the court did not feel that the father came within the "orbit of danger" sufficiently to recover damages for unintended mental anguish solely as a result of injuries inflicted directly upon the mother and child.

71. In Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974), the Supreme Court of Wisconsin set out six policy considerations on the basis of which recovery may be denied even when the chain of causation is complete and direct: (1) the injury is too remote from the negligence; (2) the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) allowance of recovery would place an

It stressed the following points: specializing physicians owe a greater degree of care to their patients than do the ordinary general practioners,[72] and the public policy against imposing an "unreasonable burden" upon the medical profession is untenable.[73] The medical profession is not to be given preferential treatment or immunity; the court is the guardian of the rights of all the citizenry. As to the "no sensible-stopping-point" argument, the judiciary can intelligently evaluate claims and prevent fraudulent or frivolous ones. Finally, standards of duty for the medical profession must be very high, because unlike other professions, the medical profession deals not with money or property, but with the continuance of life and the avoidance of death.

In conclusion, it can be said that the new tort of "wrongful life" is slowly coming into focus, as its contours are defined and objections to it dispelled. This is in keeping with a prophecy once made by a noted commentator:

> [I]t is not outside the realm of possibility that, in the future, recovery predicated on a theory that a physician owes a duty to the parent and to the unborn child will be permitted. . . . 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.[74]

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unreasonable burden upon physicians and obstetricians; (5) allowance of recovery would be likely to open the way for fraudulent claims; and (6) allowance of recovery would enter a field that has no sensible or just stopping point. *See* text following for the court's answers to most of these points.

72. Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

73. Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969). Indeed, in this case it was said that when "birth" ensues, public policy no longer applies.

74. J. HOLZMAN, 14 CLINICS ON OBSTETRICS AND GYNECOLOGY 44 (1971).