University of Miami Law Review

Volume 31 | Number 5 Article 4

11-1-1977

The Case of the Unwanted Blessing: Wrongful Life

Joseph S. Kashi

THE CASE OF THE UNWANTED BLESSING: WRONGFUL LIFE

JOSEPH S. KASHI*

The recognition of a cause of action for "wrongful life" is a relatively recent occurrence. In this article the author compiles the leading cases from many jurisdictions and presents an analytical framework for the treatment thereof. The author concludes by presenting the policy arguments in favor of allowing a cause of action for the cases which are loosely and inappropriately termed "wrongful life."

"For the living there is hope, but for the dead there is none."[1]

I. INTRODUCTION

Although the courts have traditionally regarded life as uniformly constituting a blessing, in a relatively recent class of cases, parents and even their offspring have sought damages for what has loosely been termed "wrongful life." Upon analyzing the cases, it appears that they fall into three distinct categories.

In the first group of cases, parents sue when a child is conceived although one of the spouses submitted to a sterilization operation or practiced some method of contraception. Suit may be predicated upon negligence or breach of contract, and the defendant may be either a physician or pharmacist or even a pharmaceutical manufacturer. Given the nature of the alleged wrong, it will be observed that the gravamen of the complaint is not wrongful life at all, but wrongful conception, for it is at the moment of conception that the damage results and the cause of action accrues.

In the second group of cases, an illegitimate child sues the party responsible for its birth for the damages to which it is exposed

* J.D., Oklahoma City University; LL.M., New York University; Associate with the firm of Druck, Grimmett, Scherer & James, Fort Lauderdale, Florida.

1. Theocritus, *quoted in* Gleitman v. Cosgrove, 49 N.J. 22, 30, 227 A.2d 689, 693 (1967).

as a result of its illegitimate status. The defendant may be a parent or parents or one having a duty to protect the infant's mother from sexual assault. Here, once again, it is more realistic to think of the damages not in terms of wrongful life but of emotional trauma resulting from the stigma of bastardy.

In the final group of cases, the parents of a child afflicted with birth defects, and sometimes the child itself, sue the physician who attended the mother during pregnancy for failing to apprise her of the probability of unavoidable birth defects in time to terminate the pregnancy. Here, although the term wrongful life may hold a haunting sense of reality, notions of the sanctity of all human life make it preferable to think of the damages as being for unfortunate circumstances of life.

This article will examine the foregoing causes of action, the public policy issues they generate, and the nature and recoverability of the damages suffered.

II. WRONGFUL CONCEPTION

Christensen v. Thornby[2] was the earliest case to confront the issue whether parents suffer legal damage as a consequence of the birth of an unplanned child. There, the plaintiff engaged the services of the defendant-physician to perform a vasectomy upon him after being advised that his wife, who had already given birth to one child, might not survive another pregnancy. Notwithstanding the performance of the operation, the plaintiff's wife conceived and gave birth to another child after an uneventful pregnancy. Thereafter, the plaintiff brought an action in which he sought to recover damages for his anxiety and expenses, alleging that the defendant had warranted the success of the procedure. After observing that the performance of a sterilization operation under the circumstances of the instant case did not offend the public policy of the state, the court affirmed an order sustaining a demurrer to the plaintiff's complaint, stating:

> The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child.[3]

2. 192 Minn. 123, 255 N.W. 620 (1934).

3. *Id.* at 126, 255 N.W. at 622. The court's approach fails to take into consideration that,

The court in *Shaheen v. Knight*[4] viewed with similar disfavor the parent's asserted cause of action. In that case, the plaintiff sued the defendant-physician for breach of contract when the vasectomy the defendant had warranted proved unsuccessful and a fifth child was born to the plaintiff. The plaintiff submitted to the operation not for therapeutic reasons but to enable the plaintiff "to support his family in comfort and educate it."[5] Accordingly, when the physician breached his contract, the plaintiff sought as damages the expense of raising his unplanned child. The court dismissed the complaint on the ground "that to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."[6] The court added:

> To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this [plaintiff's] fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such. He wants to have the child and wants to have the doctor to support it. In our opinion to allow such damages would be against public policy.[7]

Although not all of the early cases considering the issue expressed such a hostile view towards the parents' cause of action,[8] the

---

although avoidance of the medical expenses incident to childbirth was not the plaintiff's prime motivation in undergoing the operative procedure, the anxiety suffered and the expenses incurred by the plaintiff were certainly foreseeable results of the unsuccessful operation. Thus, if the defendant did in fact warrant the success of the procedure, he should be held liable for the damages caused by its failure.

4. 11 Pa. D. & C.2d 41 (1957).

5. *Id.*

6. *Id.* at 45.

7. This argument ignores the best interests of the unplanned child. See text accompanying notes 29 to 31.

In the following cases, the courts refused to recognize a cause of action for wrongful conception: Hartens v. Coons, 502 F.2d 1363 (10th Cir. 1974) (unsuccessful vasectomy); Coleman v. Garrison, 349 A.2d 9 (Del. 1975) (unsuccessful vasectomy); Aronoff v. Snider, 292 So. 2d 418 (Fla. 2d Dist. 1974); Maley v. Armstrong, No. 83195 (Iowa Dist. Ct. Jan. 11, 1967)(birth control pills) *cited in* Custodio v. Bauer, 251 Cal. App. 2d 303, 316, 59 Cal. Rptr. 463, 471 n.10 (1967); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974)(unsuccessful vasectomy); Terrell v. Garcia 496 S.W.2d 124 (Tex. Civ. App. 1973), *writ ref'd n.r.e., cert. denied*, 415 U.S. 927 (1974) (unsuccessful vasectomy); Hays v. Hall, 477 S.W.2d 402 (Tex. Civ. App.) *rev'd*, 488 S.W.2d 412 (Tex. 1972) (unsuccessful vasectomy); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (misdiagnosis of pregnancy).

8. West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945).

first major breakthrough occurred when the California Court of Appeal decided the case of *Custodio v. Bauer*[9] in 1967. Plaintiff, the mother of nine children, submitted to a therapeutic sterilization upon the advice of her physicians that another pregnancy would aggravate an existing bladder and kidney disorder. After the operation had been performed, the plaintiff conceived yet another child and sued her physicians, alleging that their unskillful treatment was responsible for the pregnancy.

In all, the plaintiff and her husband alleged seven causes of action:[10]

1. negligence in the performance of the operation;
2. negligent failure to warn the plaintiff of the fallibility of the sterilization procedure, so that contraception would have been practiced;
3. failure to obtain the informed consent of the plaintiff, in that she was not apprised of the alternative methods of achieving sterilization;
4. negligent misrepresentation in advising the plaintiff that she was incapable of conception, and that, therefore, it was unnecessary for her to practice any method of contraception;
5. plaintiff-husband's right to compensation for damages arising from the preceding tortious acts;
6. fraud and deceit in knowingly misrepresenting to the plaintiff and her husband that the operation had been a success in order to induce the plaintiffs to pay for the services rendered;[11] and
7. breach of a contract to successfully sterilize the plaintiff.

The trial court sustained the defendants' demurrer to the complaint on the ground of insufficiency, and the plaintiffs appealed. The significance of the appellate decision, however, lies not in its holding that the plaintiffs' factual allegations were legally sufficient to state the several causes of action averred, but in its discussion of the issues of proximate cause, public policy, and damages.

The court rejected the defendants' patently absurb suggestion that the plaintiffs' act of sexual intercourse constituted an interven-

9. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Ct. App. 1967).

10. *Id.* at 308, 59 Cal. Rptr. at 466.

11. The defendants claimed that no fraud had been perpetrated, because their statements concerning the success of the operation merely constituted the expression of an opinion. The court rejected this argument, because the defendants were experts hired to provide the plaintiff with information concerning a subject within the scope of their expertise, and the defendants' statements were unequivocal. *Id.* at 314, 59 Cal. Rptr. at 470.

ing cause sufficient to purge the defendants' acts of their liability producing character. After all, the risk of pregnancy from sexual intercourse was the very one which the defendants had undertaken to avert.

The court resolved that not only therapeutic sterilizations but those "motivated solely by personal or socio-economic considerations [are] . . . not antithetical to public policy."[12] This view is bolstered by the subsequent decision of the United States Supreme Court in *Roe v. Wade*[13] recognizing a woman's right—sometimes absolute[14] and at other times qualified[15]—to terminate her pregnancy by means of abortion. If the public policy is not violated by the termination of pregnancy after its inception, then *a fortiori* the public policy is not violated by the commission of purposeful acts to the end of preventing the condition of pregnancy from ever arising.

At this point, it should be observed that an aura of speculation as to damages was introduced by virtue of the fact that suit had been commenced after conception but prior to birth in order to toll the statute of limitations.[16] This obstacle, however, did not perturb the intrepid court, for it held that, if a breach of the defendants' duty could be established, the outlay for the unsuccessful operation would serve as the bottom line of recovery. Moreover, if the birth, or even its mere contemplation, were to cause demonstrable physical or mental pain and suffering, these would constitute foreseeable and, thus, compensable items of damage. Were the plaintiff to die

12. *Id.* at 317, 59 Cal. Rptr. at 472.

13. 410 U.S. 113 (1973).

14. *I.e.*, during the first trimester of pregnancy. *Id.* at 163.

15. *I.e.*, during the last two trimesters of pregnancy. *Id.* at 163-64.

16. For wrongful life cases specifically dealing with the statute of limitations see Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); Doerr v. Villate, 74 Ill. App. 2d 322, 220 N.E.2d 767 (1966); Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971); Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970); Hardin v. Farris, 87 N.M. 143, 530 P.2d 407 (1974); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974); Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947); Teeters v. Currey, 518 S.W.2d 512 (Tenn. Sup. Ct. 1974); Hays v. Hall, 477 S.W.2d 402 (Tex. Civ. App.), *rev'd*, 488 S.W.2d 412 (Tex. 1972).

It should be emphasized that, in actions for wrongful conception, as in all legal actions, the practical constraint posed by the statute of limitations may not be overlooked. Because of the nature of the circumstances and rights involved, it is conceivable that the statute of limitations could run before the plaintiff ever learns that a cause of action in fact existed. Therefore, it is particularly appropriate in these cases to apply the rule that the statute of limitations begins to run from the time plaintiff discovers, or reasonably should discover, the defendant's breach of duty.

during delivery, an action for wrongful death would lie in favor of the plaintiff's husband and remaining children. If the plaintiff were to survive the delivery but sustain a crippling disability, she could sue for her physical injuries and her husband could recover for loss of services and medical expenses. Even if the plaintiff were to survive the delivery free of any untoward result, a specie of damage would nevertheless be incurred, because the mother necessarily "must spread her society, comfort, care, protection and support over a larger group. If this change in the family status can be measured economically it should be as compensable as the former losses."[17]

The court was critical of *Christensen*[18] and *Shaheen*,[19] emphasizing that the purpose of damage awards in cases such as the present one is not to compensate the parents for an unwanted child but rather to "replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."[20] The court condemned as inconsistent with family stability the suggestion in *Shaheen* that, if the expense of raising unplanned children is not outweighed by the rewards of parenthood, dissatisfied parents should place their children for adoption. This indeed is a rather callous view to be expounded by the guardian of virtue the *Shaheen* court fantasized itself as being. Furthermore, it entirely misses the issue presented in these cases by overlooking the fact that, as stated

---

17. 251 Cal. App. 2d at 323-24, 59 Cal. Rptr. at 476.

18. 192 Minn. 123, 255 N.W. 620 (1934).

19. 11 Pa. D. & C. 2d 41 (1957).

20. 251 Cal. App. 2d at 324, 59 Cal. Rptr. at 477. *Contra*, Aronoff v. Snider, 292 So. 2d 418 (Fla. 2d Dist. 1974); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974).

Cox was an unsuccessful vasectomy case in which the court refused to recognize a cause of action in favor of the plaintiff's prior born children for the loss of that portion of their parents' love, guidance, and support which would have been received but for the birth of the unplanned child. It was observed that

> infants are not entitled as a matter of right to any specific share of their parents' wealth, much less their "care," "affection" or "training." The law cannot require a parent to love or train a child. It forbids abuse and abandonment but it does not compel devotion.

Id. at 160, 352 N.Y.S.2d at 840. Although this is quite true, the mere fact that the law does not compel the parents' affection should not frustrate the child's cause of action if that affection would have been voluntarily forthcoming but for the defendant's tortious act. What is significant is that the damage was foreseeable and would not have occurred in the absence of the defendant's wrongful conduct. Similarly, although the child is not entitled as of right to enjoy a particular standard of living, if its lot in life is diminished because the family's economic resources are spread thinly as a result of the defendant's breach of duty, there is no logical reason why that child should be denied relief.

by one court, these children are not "unwanted or unloved, but . . . unplanned."[21] Although the plaintiffs may not have wished to undertake the responsibility of parenthood, once that responsibility has been thrust upon them, they may nevertheless find themselves equal to the task. Indeed, people such as these, who fully appreciate the enormity of a parent's responsibilities, may in fact make the finest parents. But it must not be forgotten that it is the defendant's wrongful act which has forced the status of parent upon the plaintiff, and thus, the interest the plaintiff sought to preserve by avoiding parenthood should be placed intact once again by the defendant. Thus, if the plaintiff could not afford the expense of raising a child, there is no sound reason in logic or public policy why the defendant should not be responsible for this cost. Reliance on the Restatement of Torts section 920 (1939)[22] is misplaced. That section provides that benefit to the plaintiff accruing from the defendant's tortious acts may be considered in mitigation of the injury such acts have produced. It is clearly provided, however, that the benefit must be to the interest which was harmed. Thus, in the hypothetical of the undercapitalized parent, the rewards of parenthood may not be considered in mitigation of the concomitant financial burden associated with that status, because these rewards are emotional in nature and, great though they may be, do nothing whatever to benefit the plaintiff's injured financial interests.

Another celebrated case recognizing a cause of action for wrongful conception, albeit not under that epithet, was *Troppi v. Scarf*.[23] There, the defendant-druggist negligently substituted a mild tranquilizer for the birth control pills which had been prescribed by the plaintiff's physician, and notwithstanding the fact that she dutifully took a tranquilizer each day, the thirty-seven year old plaintiff's equanimity was shattered when she discovered she was pregnant for the ninth time. When sued, the druggist argued that the plaintiff had no cause for complaint, because she was blessed with a healthy child. The plaintiff remained unmollified, however, and she and her husband sought four items of damage:[24] (1) the

21. Jackson v. Anderson, 230 So. 2d 503 (Fla. 2d Dist. 1970).

22. Restatement of Torts § 920 (1939) states: "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."

23. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

24. *Id.* at 244, 187 N.W.2d at 513.

plaintiff-wife's lost wages; (2) medical expenses; (3) pain and anxiety associated with childbirth; and (4) economic costs of raising the unplanned child. Although the issue is somewhat mooted by *Roe v. Wade*,[25] it is noteworthy that the court in *Troppi* rejected the notion that recognition of the plaintiff's cause of action would violate the public policy. In support of its holding, the court cited payments by the state for contraceptives as part of its welfare program, widespread use of contraceptives by the public, and the constitutional cloak of privacy protecting the use of contraceptives by married couples.[26] The court reasoned that, since the state could not interfere with the right of married couples to use contraceptives, it could not render this right nugatory by exempting the negligent purveyors of contraceptives from civil liability.

Next, the court refused to hold as a matter of law that the benefits of parenthood always exceed the costs. However, it interpreted the Restatement benefit rule[27] far more liberally than did the court in *Custodio v. Bauer*.[28] According to *Troppi*, the benefits and burdens of pregnancy and parenthood are so integrally related that they should be balanced against each other in applying the same interest limitation to the benefit rule. The court believed that applying the benefit rule in this manner would be best calculated to achieve a fair assessment of damages according to the circumstances of the particular plaintiff, and the circumstances it regarded as being of the greatest moment were the plaintiff's economic resources, family size, age, and marital status.[29]

Although the court's reasoning possesses an initial allure, closer examination reveals that it is fatally flawed. Certainly, the birth of the child may confer certain intangible emotional benefits upon the parent, but these are benefits the parent did not ask for and quite possibly cannot afford. The defendant can be analogized to an officious intermeddler, and when he argues that the damages assessed against him should be offset by the unsolicited benefits of parenthood, the resemblance is quite striking indeed. Let us say that there

25. 410 U.S. 113 (1973).

26. 31 Mich. App. at 252-54, 187 N.W.2d at 517 *citing* Griswold v. Connecticut, 381 U.S. 479 (1965). *Griswold's* protection was extended to unmarrieds in Eisenstadt v. Baird, 405 U.S. 438 (1972).

27. Restatement of Torts § 920 (1939), *supra* note 22.

28. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

29. 31 Mich. App. at 254-55, 187 N.W.2d at 518.

are two adjacent and uninhabited tracts of land, one owned by the plaintiff and the other owned by the defendant. The defendant wishes to erect a house on his tract, but as a result of a negligent error, erects it on the plaintiff's property instead. When the parties discover the error, they are unable to settle their differences and look to the judicial system for a Solomon-like decision. Three possibilities are immediately apparent.

First, the parties may be left as we find them, on the ground that the defendant has conferred an unsolicited benefit upon the plaintiff for which the latter party should not be made to pay. The problem with this approach is that it is quite harsh on the defendant and may unjustly enrich the plaintiff.

Second, the plaintiff may be required to pay the defendant an amount equal to the value of the improvement to the plaintiff. If this approach is followed, the defendant may not recoup his costs, but at least unjust enrichment of the plaintiff is avoided.

Finally, if the plaintiff does not wish to retain the benefit, the defendant may be permitted to enter upon the plaintiff's land for the limited purpose of removing the building to the defendant's own tract.

It will be observed that the *Troppi* court has followed the second solution, and although this is a most equitable approach when inanimate objects are at issue, it is wholly inadequate when we are dealing with children. To illustrate this assertion, let us examine the plight of the forced parent of modest resources, who cannot afford to raise his unplanned child. If the second solution is followed, the plaintiff's damage award will be reduced by the benefits of parenthood, that is, those intangible feelings of love we hope most parents feel for their children. At once, a great anomaly becomes apparent; the more loving the parent, the smaller the damage award and the more the entire family will suffer as scarce economic resources are spread over a greater number of family members.

So what are we to do, follow the third solution and place the child for adoption? Certainly not, the *Troppi* court itself rejects the very idea as abhorent, stating: "The law has long recognized the desirability of permitting a child to be reared by his natural parents."[30] If the forced parent is willing to shoulder the enormous responsibility of parenthood, the law should not throw obstacles in

30. *Id.* at 259, 187 N.W.2d at 520.

his path but rather should endeavor to do everything in its power to assist him. If this places a difficult burden on the defendant, it is well to remember that he is a tortfeasor, and it is far more equitable to shift the burden to him than to the plaintiffs who placed their faith in him, or the innocent infant for whose birth he is responsible.

What then of the argument that the mother should abort the unplanned child? The very suggestion carries a pungent odor of moral depravity. The defendant, whose tortious act is responsible for the conception of the child, would now force the termination of its existence so that the damages assessed against him might be minimized. Moreover, the defendant, who has committed one trespass upon the mother's body, would expose her to yet another trespass.

It thus becomes apparent that the first solution, which seemed so harsh when applied to houses, is in fact the most equitable when applied to children. But our examples have dealt with the forced parent of modest resources. Does this suggest a sort of discrimination against the affluent? It is submitted that the affluent are just as worthy of recovery as the humble. In both cases, economic resources (though scarcer in one situation than the other) must be spread over a greater number of family members with the result that existing members will receive less than their planned share. It might even be argued that, since the tortfeasor takes his plaintiff as he finds him, the damages awarded to the affluent family should even be greater, so existing family members may maintain their current standard of living, and the latest addition to the family will not have to live as a "second class citizen." It could also be argued, however, that the financial injury to the affluent family, although greater in the aggregate, is proportionately less, so that, out of some solicitude for the defendant, the damages should be geared to the average cost of raising a child with the family supplying anything over that amount if it so desires.

At this point, it is worth distinguishing between those situations in which pregnancy is sought to be avoided altogether and those in which it is merely to be postponed for a time. In the former situation, the damage award should include the cost of raising the unplanned child for his entire infancy; in the latter situation, the damage award should only include the cost of raising the child

during that period of time in which pregnancy was sought to be avoided.[31]

III. Emotional Trauma Resulting from the Stigma of Bastardy

Zepeda v. Zepeda,[32] decided by the Appellate Court of Illinois in 1963, was a case of first impression. As stated in the amicus brief of the renowned family law authority, Max Rheinstein, the claim advanced was "novel,"[33] lacking statutory or judicial precedent in any common or civil law jurisdiction. Rising to the occasion, the court authored a sensitive and insightful opinion, unparalleled by the subsequent decisions from other jurisdictions confronting the issue it was the first to face.

In *Zepeda*, the defendant induced the plaintiff's mother to enter into adulterous intercourse by concealing his existing marriage and fraudulently promising to marry her. The plaintiff, whose illegitimate birth resulted from the illicit union, sought "damages for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors and for being stigmatized as a bastard."[34] At the outset, the court characterized the complaint as

31. Other cases recognizing a cause of action for wrongful conception are: Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967) (unsuccessful sterilization); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (misdiagnosis of pregnancy); Pearson v. Sav-On Drugs, Inc., 108 Cal. Rptr. 307, *opinion withdrawn*, 1974 Rptr. H.R.L. IV-A-1 (wrong prescription); Jackson v. Anderson, 230 So. 2d 503 (Fla. 2d Dist. 1970) (unsuccessful sterilization); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975). Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971) (unsuccessful sterilization); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 680 (1967) (failure to warn of rubella); Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974) (misdiagnosis of pregnancy); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (unsuccessful vasectomy); Coloff v. Hi-Ho Shopping Center, Inc., No. 168070 (Wash. Super. Ct. 1966) (wrong prescription) *cited in* Custodio v. Bauer, 251 Cal. App. 2d at 316, 59 Cal. Rptr. at 471 n.10 (1967).

In the following cases, the plaintiffs did not prevail, but the courts impliedly recognized a cause of action for wrongful conception: Whittington v. Eli Lilly & Co., 333 F. Supp. 98 (S.D. W. Va. 1971) (ineffective oral contraceptive); Hill v. Geathers, No. 633174 (Cal. Co. Ct. 1975) *reported in* 1975 Rptr. H.R.L. IV-A-8 (unsuccessful abortion); Medinas v. Spindler, No. 415394 (Cal. Co. Ct. 1973) *reported in* 1974 Rptr. H.R.L. IV-A-3 (unsuccessful vasectomy); Herrera v. Roessing, 533 P.2d 60 (Colo. App. 1975) (unsuccessful tubal ligation); Lane v. Cohen, 201 So. 2d 804 (Fla. 3d Dist. 1967) (unsuccessful vasectomy); Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973) (unsuccessful sterilization); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964) (unsuccessful vasectomy).

32. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

33. *Id.* at 246, 190 N.E.2d at 851.

34. *Id.*

sounding in tort and, therefore, rejected the plaintiff's contention that he should be regarded as a third party beneficiary of the contract to marry. Proceeding then from a tort viewpoint, the court discussed seriatim the obstacles to the maintenance of the suit.

The court stated quite freely that the defendant's conduct was "tortious in its nature,"[35] because of his willful indifference to the foreseeable consequences of his act. In fact, the court noted that defendant's conduct may even have been criminal. Conceding the tortious character of the act, one of the initial questions facing the court was whether an actionable wrong could "be inflicted upon a being simultaneously with its conception."[36] The court paid obeisance to the ancient rule of tort law that there can be no recovery for prenatal physical injuries and then traced the rule's erosion through the *Bonbrest v. Kotz*[37] line of cases, which provide that prenatal physical injuries may be the subject of legal action if the child "was viable at the time of the injury and if it survived birth."[38] Then, taking a common sense approach, the court shifted the emphasis from the viability of the infant to the foreseeability of the harm and, since this element was present, proceeded to confront the next issue, concerning the character of the plaintiff's injury.[39]

Although the court acknowledged that, under the facts, the complaint could have been drawn in such a manner as to state a cause of action for the intentional infliction of emotional distress, the complaint did not charge mental distress and could not be sustained on that ground. Moreover, the complaint failed to state a cause of action for defamation.[40] Although the fact of the plaintiff's illegitimacy might be injurious to his reputation, publication was not alleged, and even if it had been, the defense of truth certainly would have been applicable.

Directing its attention to the damages claimed in the complaint, the court observed that not even a legitimate child could "maintain an action against his own parents for lack of affection,

35. *Id.* at 247.

36. *Id.*

37. 65 F. Supp. 138 (D.D.C. 1946).

38. 41 Ill. App. 2d at 248, 190 N.E.2d at 853.

39. Actually, it was unnecessary for the court to deal with the prenatal injury issue, because the wrong to the infant occurs not at conception but the moment he is born out of wedlock. Nevertheless, the court is to be commended for its progressive approach in dealing with the issue.

40. 41 Ill. App. 2d at 254, 190 N.E.2d at 855.

for failure to provide a pleasant home, for disrupting the family life or for being responsible for a divorce which has broken up the home."[41] Furthermore, although the court did not address this point, it should be noted that no child has a vested right to inherit from his father, and even legitimate issue may be disinherited. Nevertheless, the court fully appreciated that

> [c]hildren born illegitimate have suffered an injury. If legitimation does not take place, the injury is continuous. If legitimation cannot take place, the injury is irreparable.
>
> The injury is not as tangible as a physical defect but it is as real. This is acknowledged by the State itself. The statutory provisions that a child's illegitimacy must be suppressed, in certain public records, is an admission of the hardship that can be caused by its disclosure. How often during his life does an illegitimate try to conceal his parentage and how often does he wince in shame when it is revealed? Public opinion may bring about more laws ameliorating further his legal status, but laws cannot temper the cruelty of those who hurl the epithet "bastard" nor ease the bitterness in him who hears it, knowing it to be true. This, however is but one phase, one manifestation of the basic injury, which is in being born and remaining an illegitimate. An illegitimate's very birth places him under a disability.[42]

Notwithstanding its sensitivity to the plight of the illegitimate child, the court refused to recognize a new cause of action for what it characterized as "wrongful life."[43] To do so, feared the court, would encourage other problematical claims.[44] In fact, the ramifications of the new cause of action were so overwhelming that the court felt it necessary to leave its adoption to the discretion of the legislature, after that body's thorough consideration.[45]

---

41. 41 Ill. App. 2d at 255, 190 N.E.2d at 856.

42. *Id.* at 258, 190 N.E.2d at 857.

43. *Id.* at 259, 190 N.E.2d at 858.

44. The court explained:

> Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.

Id. at 260, 190 N.E.2d at 858.

45. When presented with similar cases, the courts of other jurisdictions have also refused to extend legal sanction to the claims of illegitimate children. Thus, in Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), the plaintiff alleged that she was forced

Although the court refrained from adopting a new cause of action for "wrongful life," it should be recalled that the court did acknowledge that the facts were susceptible to a complaint predicated upon the intentional infliction of emotional distress. Thus, it is worthwhile to examine whether there can be recovery for emotional trauma resulting from the stigma of bastardy under the existing framework of the law.

At the outset, it should be recognized that an infant's action for emotional distress might be premature in the sense that he would not yet feel the effects of his illegitimate birth. Thus, although he would be damaged in a legal sense, the infant's injuries would be prospective from an emotional standpoint. Therefore, damages for emotional distress, if permitted, would be unavoidably speculative in nature unless suit were postponed until the plaintiff grew older. Of course, this assumes that the statute of limitations would be tolled during infancy and that jurisdiction could later be obtained over the defendant.

Furthermore, the problem should be analyzed in a broader factual context than that presented by the principal case. Let us assume that an unmarried man and woman cohabit, that no deception is practiced and that a child is born of their meretricious relationship. Let us further assume, in the first instance, that no method of contraception is employed. A cause of action for the intentional

---

to suffer the pains of illegitimacy, because her incompetent mother was raped in a state hospital for the mentally ill as a result of the state's failure to maintain an adequate vigil for her protection. The court declined to engage in judicial law-making by recognizing a cause of action in the infant-plaintiff, essentially characterizing her dilemma as damnum absque injuria.

In Pinkney v. Pinkney, 198 So. 2d 52 (Fla. 1st Dist. 1967), *overruled on other grounds*, Brown v. Bray, 300 So. 2d 669 (Fla. 1974), plaintiff's father mortally wounded her mother, and plaintiff, who was born of her parents' meretricious relationship, sought damages from her father for wrongful death and "having to live under the continuing stigma of bastardy." 198 So. 2d at 53. The court affirmed the dismissal of the claim growing out of the plaintiff's status as a bastard, stating that an illegitimate's father's sole duty is his statutory obligation of support and that plaintiff's purported cause of action should be recognized, if at all, by the legislature.

In Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974), a complex and intriguing case in which a counterclaim for "wrongful life" was asserted by an adulterine bastard, the court followed *Zepeda*, declaring that recognition of the cause of action was a matter for legislative cognizance. Similarly, in Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976), an unsuccessful abortion case, the court refused to recognize an adulterine bastard's asserted cause of action for "wrongful life" because of the logical impossibility of comparing an imperfect life to no life at all.

infliction of emotional distress might lie, and the parents might be subject to liability as joint tortfeasors. Of course, the action could not be maintained unless the defendant had intended to cause severe emotional distress in the plaintiff, but since it is substantially certain that sexual intercourse will culminate in the birth of a child when contraception is not practiced, the requisite intent might be found to exist.

But what if the couple practiced contraception? Would this not subject them, at most, to liability for the negligent infliction of emotional distress?[46] In this regard, it should be remembered that, since no method of contraception is currently foolproof, conception is always foreseeable, even if unlikely. If the couple carefully adhered to a relatively safe method of contraception, however, they might not be considered negligent. Even if an action for the negligent infliction of emotional distress were maintainable, the plaintiff might still have the formidable task of proving that the emotional distress manifested itself in the form of physical injury.[47]

The foregoing analysis illustrates that the current framework of the law is insufficiently flexible to provide a meaningful remedy for infants who suffer emotional trauma resulting from the stigma of bastardy. Therefore, if it is socially desirable that a remedy be provided, it is suggested that unwed, heterosexual couples, voluntarily engaging in sexual intercourse, be held strictly liable to children born of the union who suffer emotional trauma as a result of the stigma of bastardy. Whether their act be regarded as intentional, negligent, or even nonnegligent is immaterial from the illegitimate child's point of view. Thus, it may be argued that, so long as a risk of pregnancy exists, no matter how slight, it is one which should be borne by the partners to the sex act and not by the innocent child who is its product. Furthermore, in order to overcome the problem of premature damages, general damages, akin to those recoverable in an action for slander per se, could be made available to infant plaintiffs. Although it could be argued that such damages might expose defendants to unwarranted liability, it could be countered that it is the defendants' voluntary act which has created the uncertainty, so they should not be heard to complain.

---

46. W. PROSSER, LAW OF TORTS 32 (4th ed. 1974).

47. In an action for the *negligent* infliction of mental distress, an accompanying physical injury must generally be shown. W. PROSSER, LAW OF TORTS 329 (4th ed. 1971).

The issue now arises whether it is desirable from a public policy viewpoint to provide redress for emotional trauma resulting from the stigma of bastardy. A negative answer to this query is suggested.

A threshold problem is provided by the family immunity rule, which, although declining in significance, cannot be disregarded altogether.[48] The rule is designed to promote family harmony. In the case of a father who has never acknowledged his illegitimate child, allowance of suit would be unlikely to result in domestic discord, but a very real problem would be posed were the illegitimate child to sue its custodial mother, who, as suggested, may be subject to liability as a joint tortfeasor.

Another problem which would be produced by these suits, particularly if both parents were vulnerable to them, is the danger of a type of "shotgun" marriage, which could be equally or even more damaging to the child than his bastardy. The possibility exists that, while the defendants may have made compatible sex partners, their forced marriage could result in a tempestuous union with unfortunate ramifications for the child. If loveless marriages are viewed as an unlikely consequence of these suits, witness the phenomenon of husbands remaining unhappily married to their spouses to avoid the payment of alimony and adverse property settlements.

In addition, if the mother were subject to suit, there might be an incentive to abort the child, and it is urged that life as a bastard is preferable to the utter absence of life. At least if born, the child has an opportunity to overcome what may be regarded as an initial handicap and make a meaningful life for itself. In any event, the mother's decision whether to give birth to the child or abort should be influenced by more important considerations than the possibility of an adverse tort judgment.

Moreover, even if only the illegitimate's father were to be subject to suit, this would result in the imposition of a greater duty on the fathers of illegitimate children than on the fathers of legitimate children. It is to be recognized that, in law, the parent has only two duties to his child. One is affirmative and requires that the parent support his progeny. Even this duty is not absolute, because the child may be placed for adoption. The other duty is negative and

48. See the recent case of Holodook v. Spencer, 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. 1973), *rev'd*, 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (1973), *aff'd*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974), in which the doctrine reared its head once again.

requires that the parent refrain from physically abusing his child. The parent is not required to love his child or provide it with a happy home, much less a happy life. But precisely such a duty would be imposed upon the illegitimate's father if the suits under consideration were given legal sanction.

Finally, it is maintained that any injury to the child as a result of his bastardy is not the fault of his parents but of the sexual immaturity of society in its treatment of illegitimate persons. Although it could be argued that, given this sexual immaturity, the defendant should take his plaintiff as he finds him, in this context, the time honored rule must yield to individualism and the evolution of a more mature outlook regarding sex in American society.[49] After all, is the illegitimate's father any more culpable than a father who divorces his wife and whose only contact with the child is the payment of its support? Would not the illegitimate's cause of action vanish if his father married his mother and immediately filed suit for divorce?

---

49. It should be observed that Oregon has eradicated the legal significance of illegitimacy. OR. REV. STAT. § 109.060 (1957) provides: The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married.

A similar statute was to be found in Arizona, ARIZ. REV. STAT. § 14-206, but it was repealed and superseded. ARIZ. REV. STAT. §14-2109. Section 14-206 provided:

> A. Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married.
>
> B. Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock.
>
> C. This section shall apply although the natural father of such child is married to a woman other than the mother of the child, as well as when he is single.

Section 14-2109 provides:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through or from a person:
>
> . . . .
>
> 2. [A] person born out of wedlock is a child of the mother. That person is also a child of the father, if either:
>
> (a) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void.
>
> (b) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that paternity established under this subdivision is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

It is most regretable that the Arizona Legislature chose to abandon its former, progressive posture concerning the legal rights of illegitimate children.

What of those people who may wish to live together and raise children without marrying? Must they be subject to suit? Or what of an unmarried woman who wishes to have a child but not a husband and indulges in a brief sexual interlude or resorts to artificial insemination? Must her individuality be punished? Or what if scientists succeed in simulating life?[50] Will they have committed the ultimate sin by creating a child with no parents at all? It is earnestly submitted that, if the illegitimate has anyone to blame for the stigma of bastardy, it is society, and, if a cause of action should be permitted at all, it should be against the attorney general as the representative of the state.

IV. UNFORTUNATE CIRCUMSTANCES OF LIFE

Gleitman v. Cosgrove[51] was another pioneering case. There, plaintiff contracted rubella during the first trimester of pregnancy and asked her physicians whether her illness might have an adverse effect on the health of her baby. According to the plaintiff, the defendants assured her that she had nothing to fear. Relying on these assurances, she failed to obtain a eugenic abortion and subsequently gave birth to a child suffering from substantial defects in sight, hearing, speech, and physical condition. Thereafter, suit was initiated in which damages were sought by the child for his birth defects, by the mother for her emotional suffering, and by the father for his medical expenses attributable to the child's abnormalities.

The court, in a divided opinion, affirmed the dismissal of the complaint. A plurality[52] held that the infant's claim required the impossible feat of valuing "life with defects against the utter void of nonexistence."[53] Similarly, the parents' claims were not legally cognizable because of the impossibility of weighing the benefits of parenthood against the alleged emotional and financial injuries suf-

50. This issue was raised in Zepeda v. Zepeda, 41 Ill. App. 2d at 261-62, 190 N.E.2d at 859 (1963).

51. 49 N.J. 22, 227 A.2d 689 (1967).

52. One justice concurred in the plurality opinion both because he agreed with its reasoning and, under his construction of relevant state law, the mother could not legally have aborted the child. Two justices dissented in separate opinions. One declared that the suits should have been entertained because plaintiffs' damages were capable of ascertainment, and the public policy of the state would not be offended, because an abortion could legally have been obtained. The other justice asserted that the parents (but not the child) suffered legally cognizable injury.

53. 49 N.J. at 28, 227 A.2d at 692.

fered. In addition, the plurality concluded that the parents' suit was barred by public policy considerations involving the sanctity of the child's worthwhile, albeit imperfect life. It was maintained that the child's right to life outweighed the parents' interest in avoiding emotional and financial injury. Of course, this argument has been substantially weakened by the United States Supreme Court's recognition of a woman's unqualified right, during the first trimester, to terminate her pregnancy.[54]

A salutary change in the law in this area was provided by *Jacobs v. Thiemer*,[55] a post-*Roe* case decided by the Supreme Court of Texas. Plaintiff alleged that the defendant-physician failed to diagnose her affliction with rubella during her pregnancy and apprise her of the risk of birth defects that it posed. It was further alleged that, had plaintiff been so informed, she would have terminated her pregnancy, and that as a consequence of the defendant's

54. Roe v.Wade, 410 U.S. 113 (1973). Another pre-*Roe* case denying damages for unfortunate circumstances of life was Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S. 2d 502 (1970), *aff'd as modified*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972). In *Stewart*, the defendant -hospital refused to abort the rubella stricken plaintiff, and she gave birth to a child afflicted with serious mental and physical defects. Jury verdicts in favor of the infant and her parents were set aside on the grounds that their causes of action were unknown to the law, the mother could not have legally obtained an abortion, and it was impossible to assess the parents' damages.

Post-*Roe* cases have also denied recovery. Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975), was a rubella case prosecuted by a mother as next friend for her son under the Federal Tort Claims Act. Summary judgment was granted for the defendant on two grounds: (1) since there was no method of treatment the defendant could have employed to bring about the plaintiff's birth without defects, the defendant's failure to detect the mother's rubella was not the proximate cause of the plaintiff's injuries; and (2) insofar as plaintiff's damages were predicated on the factum of his birth, he failed to state a legally cognizable claim.

In LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976), plaintiffs alleged that, as a result of the negligent performance of a sterilization operation on plaintiff-wife, a child suffering from an umbilical hernia was born to them. Damages were demanded for the expenses of raising the child and repairing his birth defect. The claim for the expense of raising the child was dismissed on the authority of Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *writ ref'd n.r.e., cert. denied*, 415 U.S. 927 (1974), which refused to recognize a cause of action for wrongful conception. Likewise, the claim for medical expenses was dismissed, this time on the highly dubious ground that the umbilical hernia was not a foreseeable consequence of the defendant's alleged negligence. Jacobs v. Thiemer, 519 S.W.2d 846, (Tex. 1975), was distinguished on the ground that, there, a negligent diagnosis was responsible for the continuing development of a fetus which was highly susceptible to being born with defects because of the mother's illness with rubella during the first trimester of pregnancy.

55. 519 S.W.2d 846 (Tex. 1975).

negligence, the plaintiff gave birth to a child with grave birth defects and had expended $21,472 for medical treatments on his behalf by the time of trial. Accordingly, the plaintiff, joined by her husband, sought damages for their child's medical expenses, past and future, and for their own mental suffering. The Supreme Court of Texas, reversing a summary judgment for the defendant, held that the complaint stated a cause of action and remanded for trial.

The court noted that the adverse judgment against the plaintiffs in the lower courts was prompted by the fact that eugenic abortions were outlawed in the state during the tenure of the plaintiff-mother's pregnancy. A majority of the court, however, did not consider this factor dispositive, because the plaintiffs did not fault the doctor for his failure to abort the fetus or recommend its abortion, but merely for negligently failing to apprise the plaintiff-mother of her condition and its ramifications. In essence, the plaintiffs alleged that, if the defendant had provided them with the information which it was his duty to furnish, they would have circumvented the laws of the forum state.[56] This is hardly the type of claim one would expect to be upheld by a court of law, and the dissenting justices were quick to seize upon the anomaly of the plaintiffs' stance. Perhaps this is but another instance of the truism that hard cases make bad law.[57] Be that as it may, this hurdle overcome, the court correctly perceived that the parents' claim for medical expenses was free of the troublesome public policy issues present when the child himself sues or the parents seek recovery for their mental suffering. Therefore, the court recognized the parents' right of action, limited to the "expenses reasonably necessary for the care and maintenance of the child's physical impairment."[58] Note carefully, however, that once the parents' cause of action for medical expenses

56. Thus, defendant's negligence was the cause in fact but not the proximate cause of plaintiff's injuries.

57. This criticism extends only to the court's treatment of the liability issue under the law existing at the time of the physician's alleged negligence. If the pregnancy had occurred after Roe v. Wade, 410 U.S. 113 (1973), however, the parents would certainly have been entitled to damages for medical expenses if the fetus would have been aborted but for the physician's negligence. Then, not only causation, but proximate cause, would have existed, because the parents' proposed course of action, had they been properly informed, would have been legal.

58. 519 S.W.2d at 850. *See also* Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975), a rubella case in which the court rejected an infant's claim of "wrongful life" but held that her parents' claim for medical expenses incident to raising the deformed child stated a cause of action.

is allowed, any interest in the child's right of action for medical expenses is purely academic, because he is being compensated through his parents.[59]

It is submitted, however, that, having gone this far, the court erred in failing to allow the parents to recover damages for their emotional suffering. The primary objection stated to the award of such damages is the supposed impossibility of balancing the rewards and heartaches of being the parents of a child afflicted with birth defects. Instinctively, however, one senses that what the courts fear is not the impossibility of the balancing act but a harsh quality of life judgment, expressed in monetary terms, that the child represents more trouble than he is worth. Once it is realized that a damage award would not imply such a value judgment, however, the objections to the parents' cause of action dissolve. What needs to be appreciated is that the parents do not sue because the child is unloved or a burden; they sue because they must live with the excruciating pain of seeing a child whom they dearly love face life under harsh disabilities. Thus, it becomes apparent that a damage award would symbolize not a lack of love but the very essence of parental love and devotion.

---

59. Should the child be able to sue for medical expenses in lieu of the parents? The child's right of action has uniformly been denied by the courts on the ground that he lacks standing to claim that his own life is wrongful. This view is typified by the plurality opinion in Gleitman v. Cosgrove:

> The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

49 N.J. 22, 28, 227 A.2d 689, 692 (1967). A New York court put the matter more succinctly, stating that "a plaintiff has no remedy against a defendant whose offense is that he failed to consign the plaintiff to oblivion." Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 436, 296 N.Y.S.2d 41, 46 (Sup. Ct. 1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd as modified*, 30 N.Y.2d 695, 233 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

It is suggested, however, that this analysis is inapposite because the infant-plaintiff does not complain that his life is wrongful but that the defendant should make it right. After all, were it not for the defendant's negligence, the plaintiff would not be alive at all, so it is logical that the plaintiff should look to the defendant to alleviate the unfortunate circumstances of his life. The plaintiff asks not for pity but that the defendant, who is responsible for the plaintiff's life, make it a true blessing.

V. CONCLUSION

The term "wrongful life" has proved to be a seductive one, and there has been a tendency on the part of courts and commentators to characterize all of the causes of action discussed in this article under that heading. This is an unfortunate practice, because it tends to blur the distinctions among them.

It is suggested that the phrase "wrongful conception" be used to denominate the cause of action in the unsuccessful sterilization and contraception cases, for it is at the instant of conception that the damage occurs. After all, it is for the purpose of preventing conception that the sterilization operation is undergone or contraception is practiced, so, when notwithstanding resort to these precautionary measures, a child is nevertheless conceived, there is cause for complaint. That the injury is not damnum absque injuria was established beyond peradventure by *Griswold v. Connecticut*[60] and reemphasized by *Roe v. Wade*.[61] Who has standing to complain is less certain, however. Surely the parents are aggrieved, but the standing of prior born children is subject to question. Although it has been stated, by way of dictum, that prior born children may recover for the loss of that portion of their parents' affection and support occasioned by the birth of an unplanned sibling,[62] when prior born children have actually sued on this premise, they have not survived the defendant's motion to dismiss.[63] The damages recoverable by the parents include physical and mental pain and suffering, medical expenses, loss of consortium, possibly lost wages, and, of course, compensation for any physical injuries received as a result of conception or birth of the child. The greatest area of debate centers around the recoverability of the expense of raising the unplanned child. Those courts which have permitted such damages have, for the most part, allowed the defendant an offset for the benefit to the parents resulting from the birth of the child.[64] It is submitted, however, that this offset should not be allowed to the extent that the benefit is noneconomic, for no amount of emotional

60. 381 U.S. 479 (1965).

61. 410 U.S. 113 (1973).

62. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Ct. App. 1967).

63. Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974); Aronoff v. Snider, 292 So. 2d 418 (Fla. 2d Dist. 1974).

64. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971), is representative of these cases.

pleasure will enable a family to meet the financial burdens of raising a child, and thus, the allowance of such an offset would penalize the child and the family because of the family's socially desirable affection for the child. If an analogy may be drawn, surely no one would suggest that an award of child support, in a domestic relations case, should be reduced in accordance with the custodial parent's love for the child. The noncustodial parent is required to pay support because he is partially responsible for the birth of the child, and the payment of support is required for its welfare. To an even greater extent, the negligent defendant in a wrongful conception case is responsible for the birth of the unplanned child, because the parents took reasonable precautions to prevent its conception. Therefore, the defendant should pay the total cost of raising the unplanned child because, from a legal standpoint, he is solely responsible for its birth, and the payment of support is required for the welfare of the child.[65]

The illegitimate child, on the other hand, essentially seeks to recover for emotional trauma resulting from the stigma of bastardy. The courts have rightfully made short shrift of the plaintiff-child's asserted right to compensation for the impairment of his inheritance prospects and the denial of a happy home because he is not legally entitled to either. It is suggested that the action for emotional trauma resulting from the stigma of bastardy is no more meritorious because its recognition could imperil family harmony, promote loveless marriages, provide an incentive to abort illegitimates, result in the imposition of a greater duty on the fathers of illegitimate children than on fathers of legitimate children, and punish parents for society's narrow-mindedness.

The true "wrongful life" case arises when a physician negligently fails to apprise a pregnant woman of the probability of unavoidable birth defects in time to abort the fetus. Only recently have the courts begun to recognize a right of action in parents, under such circumstances, for the recovery of medical expenses attendant to raising the child.[66] No case has awarded damages to the child, himself, on the ground that he lacks standing to complain that his own

65. The defendant would not be entitled to visitation, however, for his negligence does not confer any rights upon him.

66. Jacobs v. Thiemer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

life is wrongful, and this is a clear case of a meritorious cause of action being denied because of its ill-chosen label. It is submitted that the child's life is not wrongful, but neither is it as it should be. Therefore, since that life would not have come into being but for the physician's negligence, it is the physician who should pay the medical expenses necessary to nurture the child. Similarly, no case has awarded emotional damages to the parents, but this is because the essential nature of these damages has been misunderstood. Rather than berating the child's worth, such damages would epitomize the high station he holds in his parents' hearts.