
I. INTRODUCTION

Can birth or life be "wrongful"? In January 1983 the Washington State Supreme Court confronted this question and approved the controversial "wrongful birth" and "wrongful life"1 causes of action in Harbeson v. Parke-Davis, Inc.2 The evolution of these "new torts"3 has been difficult and inconsistent. Past judicial consideration of these issues has resulted in sharp disagreement over policy justifications. Various parties have described the factual and philosophical bases for the actions in such terms as an "utter void of nonexistence,"4 a "Fascist-Orwellian societal attitude of genetic purity,"5 and a "retreat into meditation on the mysteries of life."6

State courts differ on the recognition of these torts. Since 1973 every jurisdiction confronted with a wrongful birth issue or


2. 98 Wash. 2d 460, 656 P.2d 483 (1983).
3. See infra notes 62-77 and accompanying text.
claim has accepted this cause of action,\(^7\) but wrongful life has met with very limited acceptance.\(^8\) In Harbeson, a unanimous Washington State Supreme Court broke from this pattern and recognized both wrongful birth and wrongful life as causes of action.\(^9\) This decision has fostered considerable concern and comment.\(^10\)

The recognition of the wrongful birth and wrongful life causes of action by the Washington State Supreme Court is supported by both policy rationales and legal theories. Wrongful birth and wrongful life causes of action receive support from traditional tort principles\(^11\) and, more important, further public policy by deterring negligent genetic counseling\(^12\) and negligent preconception medical treatment.\(^13\) This Note describes the legal history of these claims and analyzes several issues not addressed by the Washington court. In addition, this Note criticizes a more

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9. Harbeson, 98 Wash. 2d at 462, 656 P.2d at 486.
10. See infra notes 172-75 and accompanying text.
11. See infra notes 62-77 and accompanying text.
12. See infra notes 156-59 and accompanying text.
13. See infra notes 58-61 and accompanying text.
recent decision\textsuperscript{14} by the court, which limits wrongful conception causes of action, because that decision conflicts with the policy arguments presented in Harbeson.\textsuperscript{15}

II. The Harbeson Case

The plaintiffs in Harbeson were Leonard and Jean Harbeson and their children, Elizabeth and Christine Harbeson. In December 1970 Jean Harbeson suffered a grand mal seizure\textsuperscript{16} and was diagnosed as an epileptic.\textsuperscript{17} Military physicians\textsuperscript{18} prescribed Dilantin\textsuperscript{19} to control the seizures. Subsequently, the Harbesons were transferred to a military base in Washington State, and Mrs. Harbeson went to Madigan Army Medical Center\textsuperscript{20} for treatment of her epilepsy\textsuperscript{21}.

When the Harbesons contemplated having more children, they consulted three doctors at Madigan about the risks of using Dilantin during pregnancy.\textsuperscript{22} Although each doctor explained that cleft palate\textsuperscript{23} and temporary hirsutism\textsuperscript{24} could result, none of the doctors conducted a search of relevant literature for a potential correlation between Dilantin and birth defects.\textsuperscript{25} The Harbesons contended that if they had been informed of the potential birth defects associated with the use of Dilantin during

15. See infra notes 87-103 and accompanying text.
17. 98 Wash. 2d at 462, 656 P.2d at 486.
18. Leonard Harbeson was a member of the United States Air Force. Families of military personnel receive medical treatment at military medical centers. Id.
19. Dilantin is a registered trademark for phenytin sodium capsules. Dilantin is an anticonvulsant drug that is prescribed for epilepsy and for various types of seizures to assist the ability of the muscles to avoid seizure. For chemical and pharmacological information on Dilantin, see Physicians' Desk Reference 1478-84 (37th ed. 1983).
20. Madigan Army Medical Center serves McChord Air Force Base in Tacoma, Washington. McChord was Mr. Harbeson's new duty station. 98 Wash. 2d at 462, 656 P.2d at 486.
21. Mrs. Harbeson's new neurologist continued administering Dilantin. Id. at 463, 656 P.2d at 486.
22. Id.
23. A palate is the plate of cartilage that separates the nasal cavity from the mouth cavity. Cleft palate is "a palate having a congenital fissure in the median line." Dorland's, supra note 16, at 1120. A "congenital fissure" is a groove or division in the palate. Id. at 371.
24. Hirsutism is "abnormal hairiness, especially in women." Id. at 716.
25. Harbeson, 98 Wash. 2d at 463, 656 P.2d at 486.
pregnancy, they would not have had any more children. Relying on the doctors' assurances, the Harbesons decided to have more children, and Mrs. Harbeson later gave birth to two children, Elizabeth and Christine.

Elizabeth and Christine were born with "fetal hydantoin syndrome," a condition characterized by growth deficiencies, developmental retardation, wide-set eyes, and other physical and developmental defects. Mrs. Harbeson did not suspect that Dilantin had caused her children's birth defects until she saw a poster at Madigan warning of the correlation between Dilantin and birth defects. Subsequent tests established that Dilantin was the cause of the defects.

After hearing the evidence, the federal district court made a number of conclusions of law and certified to the Washington

26. Id.
27. Id.
28. Id.
29. The other defects include lateral ptosis and hypoplasia of the fingers. Id. at 463, 656 P.2d at 486. Lateral ptosis is a drooping of the upper eyelid. DORLAND'S, supra note 16, at 1285. Hypoplasia is "the incomplete development of an organ so that it fails to reach adult size." Id. at 752.
31. Id. at 6.
32. The Harbeson's claim was filed in the United States District Court for the Western District of Washington. 98 Wash. 2d at 462, 656 P.2d at 486. The Federal Tort Claims Act, 28 U.S.C. §§ 2674-2680 (1976), was the controlling procedural law because the claim was against physicians employed by the United States.
33. The District Court issued the following conclusions of law:
4. Dilantin was a proximate cause of the defects and anomalies suffered by Elizabeth and Christine Harbeson.
7. The physicians at Madigan failed to conduct a literature search or to consult other sources in regard to the effects of Dilantin during pregnancy, even though the plaintiffs Leonard and Jean Harbeson specifically asked all three Madigan physicians of possible birth defects associated with the mother's consumption of Dilantin during pregnancy. Said acts of the Madigan physicians:
   a. breached the standard of care for the average physician acting under the same or similar circumstances, and the physicians were thereby negligent;
   b. were not reasonably prudent, and therefore, were negligent.
8. An adequate literature search, or consulting other sources, would have yielded such information of material risks associated with Dilantin in pregnancy that reasonably prudent persons in the position of the Harbesons would attach significance to such risks in deciding to have further children.
9. Each of the four Harbeson plaintiffs has sustained permanent and severe damages and injuries past, present and future, as a direct and proximate result of the negligence of the Madigan physicians.

Harbeson, 98 Wash. 2d at 463-64, 656 P.2d at 486-87.
State Supreme Court the question of whether the wrongful birth and wrongful life actions could be maintained in Washington. The state supreme court answered those questions in Harbeson and established that in appropriate circumstances, parents can maintain wrongful birth actions and their children can maintain wrongful life actions. The court also set forth the standard for the measure of damages in each claim. The measure of damages for a parent’s successful wrongful birth claim is the pecuniary damage associated with the child’s birth, the special pecuniary damages arising from the child’s defective condition, and the parent’s emotional injuries caused by the birth of the defective child. The measure of damages for a child’s successful wrongful life claim is the cost of special medical treatment and training associated with the defects.

III. WRONGFUL BIRTH

A. Historical Development

The first claim by parents for the wrongful birth of a child born with defects was in Gleitman v. Cosgrove, a case before the New Jersey Supreme Court in 1967. In Gleitman, the plaintiff contracted rubella during her pregnancy. When she informed her gynecologist of the illness, he told her that the rubella would not affect the child. The doctor failed to inform the plaintiff that there was a twenty-percent chance that defects would occur. The mother claimed that if she had known of the possibility of defects, she would not have allowed the pregnancy to continue and would have obtained an abortion.

The New Jersey Supreme Court rejected the plaintiff’s claim and the concept of wrongful birth for two reasons. First, the court stated that the current public policy against abortion would not support the recognition of a wrongful birth cause of action. In the court’s language, “substantial policy reasons prevent this Court from allowing tort damages for the denial of the

34. Harbeson, 98 Wash. 2d at 464, 656 P.2d at 487.
35. Id. at 475, 656 P.2d at 493.
36. Id. at 483, 656 P.2d at 497.
38. Gleitman, 49 N.J. at 24, 227 A.2d at 690.
39. Id. at 25, 227 A.2d at 690.
40. Id. at 26, 227 A.2d at 691.
opportunity to take an embryonic life."\(^{41}\) The second reason for rejecting wrongful birth was the difficulty of measuring damages.\(^{42}\) To determine the damages, the court said that it would have to "evaluate the denial to them [the parents] of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries."\(^{43}\)

The rejection of wrongful birth claims merely because of public policies against abortion lost some legal support in 1973 with the decision in \textit{Roe v. Wade}.\(^{44}\) In \textit{Roe}, the United States Supreme Court recognized a constitutional right of privacy and applied that right to a person's procreative activities, including abortion in some circumstances.\(^{45}\) Once this constitutional right was established, any interference with that right would create a cause of action for the parents.

Accordingly, the New Jersey Supreme Court recognized a wrongful birth action, reversing \textit{Gleitman}, in \textit{Berman v. Allan}.\(^{46}\) The court noted the legal changes in the twelve years since \textit{Gleitman}, principally the \textit{Roe} decision, and stated that "[p]ublic policy now supports, rather than militates against, the proposition that she [the mother] not be impermissibly denied a meaningful opportunity to make that decision."\(^{47}\) Other jurisdictions adopted similar reasoning and accepted claims of wrongful birth of children with defects, noting the inapplicability of abortion

\(^{41}\) \textit{Id.} at 30, 227 A.2d at 693. The court continued by invoking its "felt intuition" that, if given a choice, the child "would almost surely choose life with defects as against no life at all" and by quoting Theocritus: "[f]or the living there is hope, but for the dead there is none." \textit{Id.}

\(^{42}\) \textit{Id.} at 29-30, 227 A.2d at 692-93.

\(^{43}\) \textit{Id.} at 29, 227 A.2d at 693.

\(^{44}\) 410 U.S. 113 (1973). The \textit{Roe} decision extended the constitutional right of privacy to a woman's decision of whether to have an abortion, without regulation by the state, during the first trimester of pregnancy. Justice Blackmun's plurality opinion established a balancing test of the woman's right to privacy and the state's right to protect unborn fetuses. The decision has been widely cited by those who seek to limit the state's involvement in procreative decisions and, in the case of wrongful birth, to establish a zone of privacy that, if invaded, creates a cause of action. \textit{See, e.g.}, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); \textit{In re R.}, 97 Wash. 2d 182, 190, 641 P.2d 704, 708 (1982).

\(^{45}\) \textit{Roe}, 410 U.S. at 152-53.


\(^{47}\) \textit{Berman}, 80 N.J. at 432, 404 A.2d at 14. The \textit{Berman} court recognized that not allowing recovery "would in effect immunize from liability those in the medical field" if their advice interfered with the woman's "constitutional right to abort fetuses." \textit{Id.}
considerations in the analysis of the cause of action. Since Roe v. Wade, all courts facing wrongful birth actions have accepted this reasoning.

The difficulty of measuring the damages that result from a wrongful birth was the second concern noted in Gleitman. This issue has not been resolved as easily as the abortion and privacy issues. The measure of damages varies widely from state to state. The three current variations are: first, all the costs of raising the child; second, the special cost incurred in raising the child; and third, the pecuniary and emotional damages suffered by parents plus the special costs of raising the child.

B. The Washington View

When the Washington Supreme Court considered wrongful birth in Harbeson, the cause of action was well established in other jurisdictions. The court began by defining wrongful birth as the parents' action against "a physician [who] failed to inform [them] of the increased possibility that the mother would give birth to a child suffering from birth defects ... [thereby precluding] an informed decision about whether to have the child." Under this definition, wrongful birth actions would be limited to violations of the physician's duty to obtain informed consent. Injuries arising from negligently performed sterilization procedures or genetic counseling would not be actionable.


49. See supra note 7.

50. 49 N.J. at 29, 227 A.2d at 693.

51. For a more detailed examination of the differing measures of damages, see Capron, supra note 1, at 634-45; Moore, Wrongful Birth—The Problem of Damage Computation, 48 UMKC L. Rev. 1, 4 (1979); Trotzig, Actions for Wrongful Life and Wrongful Birth, 14 Fam. L.Q. 15, 33-37 (1980).

52. Robak v. United States, 658 F.2d 471, 479 (7th Cir. 1981).


55. See supra note 7.

56. Harbeson, 98 Wash. 2d at 465, 656 P.2d at 487 (quoting Comment, Berman v. Allan, 8 Hofstra L. Rev. 257, 257-58 (1979)).

After presenting this definition, the court discussed with approval the case of Speck v. Finegold.\textsuperscript{58} In that case, a man who suffered from a genetic disorder called neurofibromatosis\textsuperscript{59} underwent a vasectomy to avoid having children and passing on the disorder. The vasectomy was negligently performed, and Mrs. Speck became pregnant and gave birth to a daughter who also suffered from neurofibromatosis. The Washington court saw no reason to exclude this type of action from the definition of wrongful birth.\textsuperscript{60} The breach of the physician’s duty to perform sterilization procedures with due care has the same effect of interfering with the parents’ right to make decisions about childbearing as does the failure to secure informed consent. Therefore, the Washington court held that wrongful birth arises when the parents’ right to prevent the birth of deformed children is violated.\textsuperscript{61}

An examination of when a medical practitioner’s actions can violate parental rights requires a discussion of the elements of negligence. Those elements are duty, breach of that duty, causation, and injury.\textsuperscript{62} In Washington, medical practitioners owe a duty to patients to secure informed consent\textsuperscript{63} and to perform medical procedures with due care.\textsuperscript{64} Because the current state of

\textsuperscript{58} 497 Pa. 77, 439 A.2d 110 (1981).

\textsuperscript{59} Neurofibromatosis is a genetically transmitted disease characterized by developmental defects and by the formation of soft tumors over the entire body. Dorland’s,
supra note 16, at 1040-41.

\textsuperscript{60} The court noted that the defendants in Speck had breached a duty of care in performing the vasectomy, and that the breach of that duty interfered with the parents’ right to prevent the birth of a defective child in the same way as does the absence of informed consent. Harbeson, 98 Wash. 2d at 466, 656 P.2d at 488.

\textsuperscript{61} Id. at 466-67, 656 P.2d at 488.


\textsuperscript{63} The doctrine was enunciated in Miller v. Kennedy, 11 Wash. App. 272, 289-90, 522 P.2d 852, 864 (1974), aff’d per curiam, 85 Wash. 2d 151, 530 P.2d 334 (1975), and was codified in 1976. The relevant statute provides:

(1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment . . .


\textsuperscript{64} The standards of medical care were most recently codified in 1975: In any civil action for damages based on professional negligence against a hospital . . . the plaintiff . . . shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by others in the same profession
medical knowledge is such that physicians can predict some congenital® and teratogenic® defects, the Harbeson court held that doctors owe a duty to secure informed consent for genetic counseling and preconception treatment.67

The inclusion of genetic counseling in the practitioner's duty of informed consent provides an incentive to perform genetic tests in an effort to reduce the incidence of genetic defects. One way that the courts can support this incentive is to allow recovery for breach of the requirement to secure informed consent. The failure of the Madigan physicians to secure informed consent interfered with the parents' right to control their procreation.68 The Washington court held, as have other jurisdictions in recent cases, that parents have a right to prevent the birth of a deformed infant.69

The court defined proximate cause for wrongful birth cases as cause in fact because it believed that the causation and duty questions were governed by the same basic policy. Thus, cause in fact is sufficient, according to the court.70 No further analysis of policy limitations on recovery was necessary, and the court chose not to use foreseeability as the proximate cause standard.71 However, even if the court had chosen foreseeability, the causation element would have been satisfied in this case. The injury resulting from the breach of informed consent is to the parents' right to decide whether or not to have children. The parents' visit to a physician, whether for genetic counseling or for medical sterilization, demonstrates that the birth of a child is


65. Congenital defects are those that occur during fetal development for any reason. Dorland's, supra note 23, at 351.

66. Teratogenic defects are those that occur during fetal development. Id. at 1549. The term is often used when defects arise from the introduction of a chemical that alters the genetic structure.

67. Harbeson, 98 Wash. 2d at 472, 656 P.2d at 491.

68. Id.


70. "The legal question whether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists. We therefore hold that as a matter of law in wrongful birth cases, if cause in fact is established, the proximate cause element is satisfied." Harbeson, 98 Wash. 2d at 476, 656 P.2d at 493.

being considered. Thus, a failure to secure informed consent or to perform medical procedures with due care includes the foreseeable risk of children, and children with birth defects. The extent of the parents’ injury is the appropriate measure of damages, the court’s final consideration in recognizing wrongful birth.\(^{72}\)

The court approached the problem of damages in a piecemeal fashion. The court began by employing the statutory measure of damages for an action brought by parents for an injury to a child.\(^{73}\) The policy underlying the statute is to compensate parents for both emotional damages and pecuniary losses.\(^{74}\) In accordance with this policy, the measure of damages may include all medical and educational expenses arising from the birth of the deformed child in excess of the expense of raising a normal child\(^ {75}\) and the emotional injury to the parents caused by the birth.\(^ {76}\) The benefit to the parents derived from having the child may mitigate the level of compensation for their emotional injury.\(^ {77}\)

The necessity of this special damages rule, developed by analogy to the statute,\(^ {78}\) is unclear. The standard measure of damages is all foreseeable costs arising from the negligent action.\(^ {79}\) If the injury to the parents is the negligent limitation or

\(^{72}\) Other courts have arrived at different measures for damages. See *supra* notes 51-54 and accompanying text.

\(^{73}\) *Wash. Rev. Code* § 4.24.010 (1983). The statute defines the damages available to the parents in an action for injury or death of their child:

The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child . . . . In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of the love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

*Id.*

\(^{74}\) *Harbeson*, 98 Wash. 2d at 475, 656 P.2d at 493.

\(^{75}\) “These damages may include pecuniary damages for extraordinary medical, educational, and similar expenses attributable to the defective condition of the children.” *Id.* at 477, 656 P.2d at 494.

\(^{76}\) “In addition, the damages may compensate for mental anguish and emotional stress suffered by the parents during each child’s life as a proximate result of the physicians’ negligence.” *Id.*


removal of their right to decide whether to have children because of lack of information, and that lack of information results in a birth, then all costs resulting from the pregnancy and birth should be considered as damages. The pecuniary damages should not have been limited to special costs attendant to the child’s injuries. In cases such as Harbeson, in which the plaintiffs want to have a child, the countervailing benefits rule could then be applied to deduct the costs of raising a normal child. Thus, in the final result, the award to the Harbesons would be the same. The court unnecessarily resorted to analogy to the child injury statute.

C. Implications and Applications

The Harbeson decision permits parents to recover damages when an absence of informed consent causes the parents to proceed with childbearing and the result is the birth of a deformed child. Thus, “parents have a right to prevent the birth of a defective child.” The acceptance of the result in Speck v. Finegold, however, indicates that the court should allow recovery in cases in which a negligent medical procedure, such as an ineffective vasectomy or tubal ligation, results in pregnancy and birth.

The term “wrongful conception” is used when parents have tried to avoid having children, but because of medical negligence, healthy children are born. The court expressly declined to address wrongful conception in Harbeson. Following the lead of other states, the court distinguished wrongful conception from wrongful birth. However, the court recently addressed the

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80. The countervailing benefits rule provides:
When the defendant's tortious conduct has caused harm to the plaintiff or his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

Restatement (Second) of Torts § 920 (1977).

81. Harbeson, 98 Wash. 2d at 472, 656 P.2d at 491.
82. Id. at 467, 656 P.2d at 488. See also supra note 60.
84. “We do not in this opinion address issues which may arise where the birth of a healthy child is allegedly caused by a breach of duty owed to the parents.” Harbeson, 98 Wash. 2d at 467, 656 P.2d at 488.
85. “Other jurisdictions have consistently treated such [wrongful conception] actions as different from, although related to, wrongful birth.” Id.
issue of wrongful conception in a decision\(^{86}\) that conflicts with the views expressed in *Harbeson*.

In *McKernan v. Aasheim*,\(^{87}\) the Washington Supreme Court examined actions for wrongful conception. The plaintiffs sought to recover damages for the costs of raising and educating a healthy but unplanned child.\(^{88}\) Dr. Aasheim had performed a tubal ligation on Mrs. McKernan, but she subsequently became pregnant. The parents alleged that the tubal ligation was performed negligently and that this negligence violated the parents' constitutional right to prevent future pregnancies.\(^{89}\) The *McKernan* damage request included the anticipated expenses for the child's birth and for the parents' emotional damages associated with the pregnancy.\(^{90}\) However, the McKernans went further and requested "an amount equal to the costs associated with rearing a child, college education, out of pocket expenses and services of parents, and emotional burdens."\(^{91}\)

The court rejected recovery of the costs of raising an unwanted but healthy child.\(^{92}\) The court noted that the vast majority of states denies recovery for wrongful conception, and that only a few states have permitted recovery.\(^{93}\) Many of the rationales presented in the current majority view were rejected by the Washington court. First, the court rejected the assumption that the benefits of parenthood always outweigh the costs of raising the child, noting that no sterilization procedures would take place if this were true.\(^{94}\) Second, the court stated that it would not deny recovery merely because it would place an "unreasonable" burden on medical practitioners.\(^{95}\) Finally,


\(^{88}\) Id. at 413, 687 P.2d at 851.

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Id. at 419, 687 P.2d at 854-55.


\(^{94}\) *McKernan*, 102 Wash. 2d at 418, 687 P.2d at 854.

\(^{95}\) Id. (citing Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974)).
recovery was not denied because of the risk of fraudulent claims.\textsuperscript{96}

The court presented two rationales that support the denial of compensation for child-rearing costs. First, the benefits rule\textsuperscript{97} was rejected because the court believed that damages could not be established with sufficient certainty. After admitting that the costs of raising the child could be determined, the court held that calculating the benefits conferred to the parents is impossible.\textsuperscript{98} Second, the court held that the child could suffer emotional harm by discovering that he or she was unwanted and that the parents considered him or her "damage." This risk of emotional harm made recovery of child-rearing costs violative of the public policy of the state.\textsuperscript{99}

Even though the court stated that "[i]t is not our place to deny recovery of certain damages merely in order to insulate health care providers from the shock of big tort judgments,"\textsuperscript{100} its action has in fact resulted in such insulation. In wrongful conception actions, the parents have sought to avoid the costs, pecuniary and emotional, of conceiving and raising a child. This desire has been frustrated by negligent medical actions. Therefore, the injury suffered by the parents is the cost they sought to avoid. This cost should be the measure of damages. The court's refusal to grant recovery of this cost infringes on the parental right to control pregnancies and insulates medical practitioners from responsibility for the full extent of injury caused by their negligence.

The public policies invoked by the court in \textit{Harbeson} and \textit{McKernan} are difficult to reconcile. The court recognized the public policy of preventing negligent genetic counseling and preconception treatment in \textit{Harbeson}\textsuperscript{101} and allowed recovery from physicians for the special costs arising from this negligence.

\begin{itemize}
\item 96. \textit{McKernan}, 102 Wash. 2d at 418, 687 P.2d at 854.
\item 97. \textit{Id.} at 419, 687 P.2d at 855.
\item 98. "But whether these costs [rearing and educating the child] are outweighed by the emotional benefits which will be conferred by that child cannot be calculated." \textit{Id.}
\item 99. [T]he simple fact that the parents saw fit to allege their child as a "damage" to them would carry with it the possibility of emotional harm to the child. We are not willing to sweep this ugly possibility under the rug by stating that the parents must be the ones to decide whether to risk the emotional well being of their unplanned child.
\item 100. \textit{Id.} at 421, 687 P.2d at 855.
\item 101. \textit{Id.} at 418, 687 P.2d at 854.
\end{itemize}
However, the court is willing to immunize a physician from recovery simply because the child is not born deformed.\textsuperscript{102} Why should a physician’s duty to provide adequate genetic counseling and preconception treatment be limited to preventing genetic and teratogenic disorders? The policies invoked in \textit{McKernan} are not sufficient to justify this limit. The benefits conferred to parents by children are calculated in wrongful death actions.\textsuperscript{103} In those cases, the policy of fully compensating parents for their loss overcomes the procedural difficulty of establishing damages with certainty.\textsuperscript{104} The emotional harm objection is similarly flawed. Parents are faced with the difficult admission to their children that they were unwanted, regardless of any lawsuit. The parents, not the courts, are in the best position to determine the potential for emotional harm to their children. The public policies advocated by the court for denying recovery for wrongful conception collide with the public policies presented in support of recovery for wrongful birth and wrongful life.

The best approach to reconcile this inconsistency is to allow the factfinder to consider all costs related to the conception, birth, and raising of the child. Then, as circumstances warrant, the factfinder can reduce this amount by the amount of countervailing benefits that the parents gain by the birth of the child. This approach protects both parents, who have sought to avoid children, and medical practitioners, who could be penalized if parents changed their minds about the desirability of children and sought to recover the costs of raising them.

The policy of protecting the right of parents to control pregnancy with medical assistance by imposing duties of informed consent and due care in medical procedures applies equally to cases of wrongful birth and of wrongful conception. The condition of the child, healthy or defective, should be immaterial. The special damages rule of \textit{Harbeson} should be modified not only to allow the consideration of all costs related to the pregnancy and

\textsuperscript{102} The physicians are not immunized from damages for the parents’ expense, pain and suffering, and loss of consortium resulting from the pregnancy and birth. \textit{McKernan}, 102 Wash. 2d at 421, 687 P.2d at 856. The physicians are immunized from any child-rearing costs. \textit{Id}.

\textsuperscript{103} \textit{Wash. Rev. Code} § 4.24.010 (1983) allows recovery for loss of the child’s love and companionship and for injury to the destruction of the parent-child relationship. If the loss of the benefits of having a child can be calculated, then the benefits should be ascertainable.

birth, but also to allow the offset of countervailing parental benefits. In addition, the denial of recovery for child-rearing costs of normal children in *McKernan* should be reversed in favor of the offset of parental benefits. These changes would reconcile wrongful birth and wrongful conception and fully protect the right of parents to practice family planning.

**D. Summary**

In *Harbeson*, the Washington Supreme Court followed the lead of other jurisdictions and recognized the parents' cause of action for the wrongful birth of a child born with defects. The court applied an increasingly popular, although logically problematic, measure of damages allowing only for compensation of pecuniary and emotional damages related to the child's defects, with no recovery for the general expenses and costs of raising a normal child. More remarkably, the court then proceeded to recognize a child's cause of action for wrongful life.

**IV. **WRONGFUL LIFE

**A. Historical Development**

Wrongful life is the designation given to a deformed child's claim for damages arising from negligent advice or treatment regarding the possible occurrence of birth defects. A wrongful life claim is often asserted together with the parents' claim for the wrongful birth of the child. The development of wrongful life, however, differs greatly from that of wrongful birth. The first wrongful birth case, *Gleitman v. Cosgrove*, was also the first wrongful life case. The New Jersey Supreme Court rejected the child's claim for damages for many of the same reasons that prevented the parents' wrongful birth claim. The court predicated its denial of the claim on the impossibility of "measur[ing] the difference between [the child's] life with defects against the utter void of nonexistence." Much of the support for the

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105. See supra note 7.
106. Capron, supra note 1, at 647.
107. Rogers, supra note 1, at 741-42.
110. Id. at 28, 227 A.2d at 692.
court's metaphysical\textsuperscript{111} view of damages was drawn from a law review article that analyzed wrongful life damages when the term wrongful life was used to denote illegitimacy actions.\textsuperscript{112} Furthermore, the court stated that public policy\textsuperscript{113} supported the birth of all children, regardless of the possibility or severity of defects.\textsuperscript{114}

The Gleitman view of wrongful life has been approved in most jurisdictions.\textsuperscript{118} Even when the courts have recognized wrongful birth, they generally have denied the child’s claim.\textsuperscript{118} In addition to the difficulty of determining damages, courts have noted that the child does not have “a fundamental right to be born as a whole, functional human being.”\textsuperscript{117} By analyzing wrongful life claims solely as a violation of a nonexistent “fundamental right,” the courts conclude that the child does not suffer a legally cognizable injury.

A New York court, in Park \textit{v.} Chessin,\textsuperscript{118} was the first to approve a claim for wrongful life. Unfortunately, that case was

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\textsuperscript{111} “This Court cannot weigh the value of life with impairments against the nonexistence of life itself.” \textit{Id.}

\textsuperscript{112} \textit{Id.} at 29, 227 A.2d at 692 (“[N]o comparison is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damages.”) (quoting Tedeschi, \textit{On Tort Liability for “Wrongful Life”}, 1 ISRAEL L. REV. 513, 529 (1966)).

\textsuperscript{113} “The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life . . . .” \textit{Gleitman}, 49 N.J. at 30, 227 A.2d at 693.

\textsuperscript{114} “It is basic to the human condition to seek life and hold on to it however heavily burdened.” \textit{Id.}


quickly overruled in *Becker v. Schwartz*,\(^{119}\) in which the New York Court of Appeals\(^{120}\) returned to the *Gleitman* position. Once again, a court chose the inconsistent view that permits a claim for wrongful birth, but rejects a claim for wrongful life.

California was the only other jurisdiction to precede Washington in recognizing wrongful life actions.\(^{121}\) In *Curlender v. Bio-Science Laboratories*,\(^{122}\) the California Court of Appeals held that a child could bring an action for wrongful life.\(^{123}\) The child was born with Tay-Sachs disease\(^{124}\) after physicians had negligently performed genetic tests that resulted in a subsequent failure to inform the parents adequately of the risk of defects.\(^{125}\) Under California law, a child receives compensation for pain and suffering throughout its projected life span, special pecuniary damages arising from its deformities, and punitive damages.\(^{126}\)

The *Curlender* court answered the metaphysical concerns regarding wrongful life claims that were enunciated in *Gleitman*. The court stated that it "need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all."\(^{127}\) Instead, the court allowed the claim because "the reality of the 'wrongful life' concept is that a plaintiff both exists and suffers, due to the negligence of others."\(^{128}\) Employing this rationale, the court held that the testing laboratories owed a duty of adequate care in administering genetic tests to "parents and their as yet unborn children."\(^{129}\) Adequate care in the administration of genetic tests is necessary

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119. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The *Becker* court stated that "a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence." *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

120. The New York Court of Appeals is the highest appellate court in the state of New York.


123. *Id.* at 830, 165 Cal. Rptr. at 489.

124. Tay-Sachs disease is a hereditary disorder chiefly affecting children of Jewish ancestry and is characterized by progressive dementia and progressive loss of vision resulting in blindness, paralysis, and death. *Dorland's, supra* note 16, at 760.


126. *Id.* at 831-32, 165 Cal. Rptr. at 489-90.

127. *Id.* at 829, 165 Cal. Rptr. at 488.

128. *Id.* (emphasis in original).

129. *Id.* at 828, 165 Cal. Rptr. at 488.
to inform parents properly of the risks of genetic disorders. Once this duty is established, the normal elements of tort present no obstacles to the child's recovery.\textsuperscript{130}

However, this inclusion of general damages in wrongful life claims did not survive long. The California Supreme Court re-examined the issue of wrongful life damages in \textit{Turpin v. Sortini}.\textsuperscript{131} The plaintiff in \textit{Turpin} sought compensation for suffering caused by a hereditary hearing loss. The plaintiff claimed that the defendant physician was negligent in failing to diagnose the same type of hearing disorder in an older sibling.\textsuperscript{132} This diagnostic failure was alleged to be a violation of the duty of adequate care in genetic counseling established in \textit{Curlender}.\textsuperscript{133} The California Court of Appeals had denied any recovery for the child's defect.\textsuperscript{134} The California Supreme Court took the opportunity to set forth a different measure of damages\textsuperscript{135} and to retreat from the broad \textit{Curlender} view of wrongful life damages.

Most of the criticism of \textit{Curlender} involved the statement that the court need not be concerned with the fact that had the physician not been negligent, the child might not have been born.\textsuperscript{136} The court seemed to return to the traditional view that no legally cognizable injury existed.\textsuperscript{137} General damages were, therefore, rejected because of the controversy as to whether such a birth is actually an injury and because of the apparent difficulty in assessing damages for that injury.\textsuperscript{138}

The California Supreme Court also rejected the argument that, as a matter of law, existence with very severe deformities is always preferable to nonexistence.\textsuperscript{139} Thus, even though the court rejected the claim for general damages, the claim for special damages arising from the child's defect was allowed.\textsuperscript{140} The distinction was based on the view that "it would be illogical and anomalous to permit only parents [through a wrongful birth action], and not the child, to recover for the costs of the child's

\textsuperscript{130} \textit{Id.} at 828-29, 165 Cal. Rptr. at 488.
\textsuperscript{131} Id. at 320, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
\textsuperscript{132} Id. at 223-24, 643 P.2d at 956, 182 Cal. Rptr. at 339.
\textsuperscript{133} Id. at 228, 643 P.2d at 959, 182 Cal. Rptr. at 342.
\textsuperscript{135} \textit{Turpin}, 31 Cal. 3d at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348.
\textsuperscript{136} Id. at 231, 643 P.2d at 960, 182 Cal. Rptr. at 343.
\textsuperscript{137} Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348.
own medical care." Since no difficulty existed in determining these special damages, and since recovery could help offset the costs of living with the defects, the court allowed recovery of special damages. When Harbeson was decided, California remained the only other state recognizing even a limited recovery for wrongful life.

B. The Washington View

In analyzing whether recovery should be allowed for wrongful life, the Washington Supreme Court took a position similar to the view of the Turpin court. Wrongful life was defined as a child's claim "that but for the inadequate advice [of the physician], it would not have been born to experience the pain and suffering attributable to the deformity." The court noted that permitting parents, rather than children, to recover for the child's special costs was "illogical." The court also stated that the child's special costs would not "miraculously disappear when the child attains his majority."

The court needed to decide who should bear the burden of these special costs. Either the parents (and possibly the government) or the persons who proximately caused the defects would assume the risk. Reasoning that the physicians had access to the information needed to reduce the risk of the special costs, the court chose the latter option and imposed liability.

After deciding to impose liability, the court compared the wrongful life action with the standard elements of negligence. The first and most troubling element in the wrongful life cause of action is duty. At the time of the medical practitioner's potentially negligent action, the child seeking damages has not been conceived. The question raised is whether a duty extends to persons not yet conceived. The answer is foreseeability.

141. Id. at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.
142. Id. at 238-39, 643 P.2d at 965-66, 182 Cal. Rptr. at 348-49.
143. Harbeson, 98 Wash. 2d at 478, 656 P.2d at 494 (quoting Comment, "Wrongful Life": The Right Not To Be Born, 54 Tul. L. Rev. 480, 485 (1980) (emphasis in original)).
144. Harbeson, 98 Wash. 2d at 479, 656 P.2d at 495 (quoting Turpin v. Sortini, 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982)).
145. Harbeson, 98 Wash. 2d at 479, 656 P.2d at 495.
146. Id.
147. Id. at 480, 656 P.2d at 495.
148. Id.
149. Id.
At one time, tort liability was not recognized before birth.\textsuperscript{151} However, negligently caused prenatal injuries have been actiona-
ble by the child for many years in Washington.\textsuperscript{152} If birth is not
a valid limit for tort liability because the injury is foreseeable, then concep-
tion should not be a limit either. Such a limitation would only serve to immunize medical practitioners from reme-
dying foreseeable negligence simply because no child had yet been con-
ceived. Therefore, the court chose to extend the duty of proper medical care to persons not yet conceived, as long as the
injury to the child was foreseeable.\textsuperscript{153} Since the Madigan physi-
cians in Harbeson knew of the Harbesons' intention to have
additional children, future birth was obviously foreseeable and, thus, an injury to a child not yet conceived was foreseeable.\textsuperscript{154} Given this definition of duty premised on foreseeability, both
the elements of duty and breach of duty were satisfied.\textsuperscript{155}

The compelling, if somewhat understated, reason for imposing a preconception duty is that public policy promotes proper
genetic counseling and preconception medical care.\textsuperscript{156} The court
included a footnote from Turpin that argued that permitting
recovery would serve as a deterrent to negligent conduct.\textsuperscript{157} The
deterrence value of recovery has been noted by a number of
commentators on the issues of wrongful birth and wrongful
life.\textsuperscript{158} Permitting recovery from the negligent party would also
provide "more comprehensive and consistent compensation"\textsuperscript{159}

\begin{footnotes}
\footnote{150. Id.}
\footnote{151. For a review of the origin of prenatal tort liability, see Comment, \textit{Wrongful Death of the Fetus: Viability Is Not a Viable Distinction}, 8 U. PUGET SOUND L. REV. 103 (1984).}
delivery). See Comment, supra note 151, at 103.}
\footnote{153. Harbeson, 98 Wash. 2d at 480, 656 P.2d at 495.}
\footnote{154. Id. at 481, 656 P.2d at 496.}
\footnote{155. Id. at 482, 656 P.2d at 496.}
\footnote{156. Id. at 481, 656 P.2d at 496.}
\footnote{157. Id. "Permitting recovery of these extraordinary out-of-pocket expenses whether
the cost is to be borne by the parents or the child should also help ensure that the
available tort remedies in this area provide a comprehensive and consistent deterrent to
negligent conduct." Id. (quoting Turpin, 31 Cal. 3d at 239 n.15, 182 Cal. Rptr. at 349
n.15).}
\footnote{158. See Rogers, supra note 1, at 755-57; Comment, \textit{Wrongful Life: An Infant's
and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic
Counseling, 87 YALE L.J. 1488 (1978).}
\footnote{159. Harbeson, 98 Wash. 2d at 481, 656 P.2d at 496.}
\end{footnotes}
than would be otherwise available. These public policy goals present a defensible basis for the duty underlying the wrongful life cause of action.

Once the court expanded the duty of proper medical care, including informed consent, to include foreseeable preconception actions, proximate cause did not serve as an impediment to recovery. The standard "but for" causation test was met in the Harbeson case. The Harbesons contended that they would not have conceived Elizabeth and Christine had the Madigan physicians warned them of the effect of Dilantin.\footnote{160} Thus, "but for" the physician's failure to inform the Harbesons of the risks of continuing to take Dilantin, Elizabeth and Christine would not have been born and would not suffer from the defects associated with fetal hydantoin syndrome.\footnote{161}

Injury was the final, and most controversial, element before the court.\footnote{162} The Washington court adopted the special damages rule developed in Turpin.\footnote{163} The recovery of general damages proposed in Curlender was rejected.\footnote{164} The contention that recovery for wrongful life disavows the sanctity of life did not persuade the Washington court.\footnote{165} The court was persuaded, however, by the metaphysical view that general damages are incalculable.\footnote{166} Without a means of calculating the extent of injury with sufficient certainty, the court was unwilling to permit compensation for that injury.

The same public policy goals that support the imposition of a duty support the recovery of special damages. The child born with defects has special medical and educational expenses, which must be borne by the parents, the government, or the negligent physician. Only the physician has the skill and the access to information sufficient to reduce the risks of negligent genetic counseling. The physician then should bear the costs commensurate with the ability to reduce the risk. Permitting the physician to escape this responsibility will only increase the financial burden of the parents or the government. Therefore, allowing recovery of special damages is the most equitable allo-

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\begin{enumerate}
\item \textit{Id.} at 463, 656 P.2d at 486.
\item \textit{Id.} at 483, 656 P.2d at 497.
\item \textit{Id.} at 482, 656 P.2d at 496.
\item \textit{Id.} at 479, 656 P.2d at 495.
\item \textit{Id.} at 482, 656 P.2d at 496.
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
cation of those expenses because the burden of risk is borne by the physician rather than by the parents or the state.

The allowance of special damages is an exception to the typical measure of damages. Generally, damages compensate the injured party by attempting to return the injured party to the position that he or she would have been in had the injury not occurred. In other words, the damages serve to make the injured party whole.\textsuperscript{167} The problem with the typical measure of damages in wrongful life actions is that the position the children would have been in, had the negligence not occurred, is nonexistence.\textsuperscript{168} Courts deciding claims for harm caused by the drug diethylstilbestrol\textsuperscript{169} (DES) have created a special damages rule to provide compensation from the negligent parties.\textsuperscript{170} Wrongful life damages should be similarly calculated to provide "more comprehensive and consistent compensation."\textsuperscript{171} The public policy goals of deterring negligent preconception counseling and treatment and of compensating children born with defects caused by that negligence justify this exception to the standard measure of damages.

In summation, the Washington Supreme Court followed the lead of the California Supreme Court in \textit{Turpin} and recognized a limited version of wrongful life. Although the standard rule for calculating damages does not easily fit wrongful life claims, the public policy goals of deterring negligent genetic counseling and preconception medical treatment and compensating children born with defects caused by the negligence override the metaphysical and doctrinal problems and support recovery of special damages in cases of wrongful life.

\textsuperscript{167} See Capron, \textit{supra} note 1, at 654-57.

\textsuperscript{168} "We agree . . . that measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors. However, we do not agree that the impossibility of valuing life and nonexistence precludes the action altogether." \textit{Harbeson}, 98 Wash. 2d at 482, 656 P.2d at 496.

\textsuperscript{169} Diethylstilbestrol is an estrogen-like chemical used to treat hormonal problems. \textsc{Dorland's, supra} note 23, at 443. The drug has been alleged as a cause of defects in children of women taking it.


\textsuperscript{171} \textit{Harbeson}, 98 Wash. 2d at 481, 656 P.2d at 496.
V. LEGISLATIVE RESPONSES

The recognition of actions for wrongful birth, and particularly those for wrongful life, fostered considerable public,\textsuperscript{172} scholarly,\textsuperscript{173} and legislative\textsuperscript{174} reaction. The actions have been perceived as requiring the use of abortion as a family planning option.\textsuperscript{175} In apparent response to this position, several states have promulgated legislation barring claims for both wrongful birth and wrongful life. Minnesota,\textsuperscript{176} South Dakota,\textsuperscript{177} and Utah\textsuperscript{178} have passed legislation barring actions for either wrongful birth or wrongful life. The Minnesota and Utah statutes refer only to the choice between abortion and live birth.\textsuperscript{179} Only the South Dakota statute extends the bar on actions to choices between conceiving and not conceiving potentially deformed children.\textsuperscript{180} Interestingly, none of these states has ever recog-

\textsuperscript{172} Seattle Post-Intelligencer, Jan. 7, 1983, at A1, col. 3.
\textsuperscript{174} See infra notes 176-89 and accompanying text.
\textsuperscript{175} One author has commented:
Conservative lobby groups have taken the court decisions as representing a proabortion opinion. They have attacked the decision and the Harbesons in the media . . . . Attorney Ken VanDerhoef, president of a group called Washington State Human Life, spoke out this spring in a weekly paper that serves the Catholic community in Western Washington. “The Harbeson decision is based on the erroneous supposition that we can legally destroy life. If abortion were not illegal they wouldn't have been able to expand the theory the way they did. It is clearly a mandatory abortion case.”

\textsuperscript{176} MINN. STAT. ANN. § 145.424 (West 1984). Subdivision 1 provides: “No person shall maintain a cause of action or receive an award of damages on behalf of himself based on the claim that but for the negligent conduct of another he would have been aborted.” Subdivision 2 provides: “No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.”
\textsuperscript{177} S.D. CODIFIED LAWS ANN. § 21-55-2 (1984) provide: “There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive.”
\textsuperscript{178} UTAH CODE ANN. § 78-11-24 (1983) provides: “A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.”
\textsuperscript{179} See supra notes 176, 178.
\textsuperscript{180} S.D. CODIFIED LAWS ANN. § 21-55-1 (1983) provide: “There shall be no cause of action or award of damages on behalf of any person based on the claim of that person
nized either wrongful birth or wrongful life. In other states where one of the two actions is recognized, no legislation has been enacted to abolish the action.

Members of the Washington Legislature reacted quickly to the recognition of wrongful birth and wrongful life. Within one month of the announcement of the Harbeson decision, four bills relating to wrongful birth and wrongful life were introduced in the legislature. Two of the bills barred actions for wrongful birth and wrongful life when the parents’ choice was between abortion and live birth. The third bill suggested barring all actions for wrongful birth or wrongful life, including choices of whether or not to conceive a child. These three bills

that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been permitted to have been born alive.”

181. See infra notes 182-83 & 187.


Both bills sought to add the following sections to WASH. REV. CODE ch. 4.24:

Sec. 1. . . .

No person may maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, he or she would have been aborted.

Sec. 2. . . .

No person may maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.

Sec. 3. . . .

Nothing in section 1 or 2 of this act precludes a cause of action for intentional or negligent malpractice or any other action arising in tort based on the failure of a contraceptive method or sterilization procedure. Nor shall section 1 or 2 of this act preclude a cause of action based on a claim that, but for the negligent conduct of another, tests or treatment would have been provided or would have been provided properly which would have made possible the prevention, cure, or amelioration of any disease, defect, deficiency, or handicap. Abortion, however, shall not be considered to be a means of preventing, curing, or ameliorating any disease, defect, deficiency, or handicap.

Both bills were referred to the Committees on the Judiciary, where they remained.

183. S.B. 3615, 48th Leg., Reg. Sess. (1983). The bill sought to add the following sections to WASH. REV. CODE ch. 4.24:

Sec. 1. . . .

No person may maintain a cause of action or receive an award of damages based on the claim that, but for the conduct of another, such person would not have been conceived or, once conceived, would not have been permitted to be born alive. The term “conception,” as used in this section, means the fertilization of a human ovum by a human sperm, which occurs when the sperm penetrates the cell membrane of the ovum.

Sec. 2. . . .

No person may maintain a cause of action or receive an award of damages based on the claim that, but for the conduct of another, a person would not have been permitted to be born alive.
sought to preclude recovery for wrongful birth and wrongful life because the actions were perceived as mandating abortion.\textsuperscript{184}

Nothing in either the theory of the actions or in the language of the \textit{Harbeson} decision supports that perception. The actions only recognize abortion as a privacy right available to parents in accordance with \textit{Roe v. Wade}.\textsuperscript{185} The interference with this decision creates a need for the legal remedy.\textsuperscript{186} Although many individuals and groups oppose abortion, as long as abortion receives protection as a constitutional privacy interest, the opposition should not and indeed cannot bar the actions for wrongful birth and wrongful life.

The fourth Washington bill advocated an immunization of parents from wrongful life claims.\textsuperscript{187} In California, the \textit{Curlender} court discussed, in dictum, the possibility of children bringing wrongful life actions against their parents.\textsuperscript{188} In response, the California Legislature passed an immunizing law.\textsuperscript{189} Such legislation is not necessary because wrongful life actions, as currently defined, cannot reach parents.\textsuperscript{190} The action furthers the deterrence of negligent genetic counseling and medical treatment.

Sec. 3. . . . .
The failure or the refusal of a person to prevent a live birth shall not be considered in awarding damages or in imposing a penalty in any action. The failure or the refusal of any person to prevent the live birth of a person is not a defense in any action.

Sec. 4. . . . .
Except as specifically provided, the provisions of sections 1 through 3 of this act do not prohibit a cause of action or award of damages based on the claim that a person is liable for injury caused by such person's wilful acts or caused by such person's want of ordinary care or skill.

The bill was referred to the Committee on the Judiciary, where it remained.

184. See \textit{supra} note 175.
185. \textit{Harbeson}, 98 Wash. 2d at 472, 656 P.2d at 491.
186. \textit{Id.} at 466-67, 656 P.2d at 488.
A parent or guardian, or if such person is deceased, his or her estate or personal representative, shall be immune from civil action for damages arising out of a child's birth in a defective condition, unless the parent's illegal activity was the proximate cause of the defective condition and the child has not refused available treatment or rehabilitation in connection with the resulting condition.

The bill was referred to the Committee on the Judiciary, where it remained.

189. \textit{Cal. Civ. Code} § 43.6(a) (West 1984). "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive."
190. See \textit{Capron}, \textit{supra} note 1, at 661-66.
Nothing in this policy goal seeks to preempt the parents' decision of whether to seek or continue a pregnancy; therefore the action could not extend to the parents.

VI. CONCLUSION

The Washington Supreme Court correctly recognized actions for wrongful birth and wrongful life. These actions serve public policy because of their deterrent effect on negligent genetic counseling and preconception medical treatment. Actions for wrongful birth have been consistently recognized in other jurisdictions since 1973, and Washington has followed that trend. The court's measure of damages for wrongful birth is consistent with other states' damage calculations. However, the measure does not include the total harm resulting from the interference with the parents' rights. The Washington courts should modify the measure to consider fully the costs and benefits resulting from an unwanted pregnancy, and should extend it to actions in which the child is born healthy.

Wrongful life is a more troubling and a more controversial matter. Only California had allowed any recovery for wrongful life before Harbeson. All other jurisdictions have rejected recovery on metaphysical grounds. Washington has correctly accepted the benefits of public policy over the hindrance of metaphysics. While the traditional tort calculation of damages is not applied in the Harbeson decision, the public policy noted above and the certainty of measuring special damages justify this deviation.

Wrongful birth and wrongful life actions have met with considerable criticism arising from the emotional connotations of the terms themselves and from the misperception that the actions encourage abortions. This misperception has caused some states to bar wrongful life and wrongful birth actions. Bills introduced in the Washington Legislature would impose a similar bar. These bills and the criticism of the decision by anti-abortion groups should be rejected. Actions for wrongful birth and wrongful life are necessary and proper extensions of medical malpractice principles into the arena of genetic and preconception counseling.

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