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Finding a Legal Remedy for the HIV-Positive Infant: Wrongful Life and Lack of Informed Consent Explored

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FINDING A LEGAL REMEDY FOR THE HIV-POSITIVE INFANT: WRONGFUL LIFE AND LACK OF INFORMED CONSENT EXPLORED

The AIDS[1] epidemic has had a devastating effect on society.[2] It has affected a large number of women and children who have contracted the human immunodeficiency virus (HIV).[3] Women comprised an estimated ten percent of the AIDS known cases in the United States at the beginning of the 1990's.[4] As a result, there were approximately three thousand cases of pediatric AIDS known by the end of 1991.[5] As the end of the twentieth century

[1] *See* BLACK'S LAW DICTIONARY 69 (6th ed. 1990) [hereinafter BLACK'S]. Acquired Immune Deficiency Syndrome is "a virus which attacks a person's immune system and damages his or her ability to fight other diseases. Without a functioning immune system to ward off other germs, person becomes vulnerable to becoming infected by bacteria, fungi, and other viruses and malignancies which may cause life-threatening illness[.]" *Id.*; *see also* James D. Hegarty et al., *The Medical Care Costs of Human Immunodeficiency Virus Infected Children in Harlem*, J. AM. MED. ASS'N, Oct. 7, 1988, at 1901. Acquired Immune Deficiency Syndrome is colloquially known as AIDS. *Id.*

[2] *See generally* Robert H. DuRant et al., *High School Students' Knowledge of HIV/AIDS and Perceived Risk of Currently Having AIDS*, AM. SCH. HEALTH ASS'N J. OF SCH. HEALTH, Feb. 1992, at 59 (analyzing levels of correct knowledge of cause, spread and prevention of HIV infection); *Preventing HIV/AIDS in Adolescents; Human Immunodeficiency Virus; Acquired Immunodeficiency Syndrome*, AM. SCH. HEALTH ASS'N J. SCH. HEALTH, Jan. 1994, at 39 [hereinafter *Preventing HIV/AIDS*] (surveying broad range of topics as they relate to AIDS and adolescents, including adolescent developmental issues, youth in high-risk situations and youth who use alcohol and drugs); *The Family: Growing Up Gay*, NEWSWEEK, Jan. 13, 1986, at 3 (discussing difficulties for young homosexuals when "the AIDS epidemic casts its shadow").

[3] *See HIV Infection, Pregnant Women, and Newborns: A Policy Proposal for Information and Testing. (Human Immunodeficiency Virus)*, J. AM. MED. ASS'N, Nov. 14, 1990, at 2416 [hereinafter *HIV Infection*] (discussing growth of HIV virus in women and children); *see also* Salynn Boyles, *Transmission (HIV) 15,000 Kids in U.S. Infected By Their Mothers*, AIDS WKLY., Oct. 16, 1995 (noting that approximately 6,530 HIV infected women gave birth in United States in 1993); Gabriella Scarlatti, *Pediatric HIV Infection (HIV Series)*, LANCET, Sept. 28, 1996, at 863 (estimating 1.5 million children were infected with HIV by 1994 and by 2000 there will be 5-10 million children infected with HIV).

[4] *See HIV Infection*, *supra* note 3, at 2416 (estimating approximately 30% of HIV positive mothers will pass virus on to their children); *see also* Howard L. Minkoff & Jack A. DeHowitz, *Care of Women Infected with the Human Immunodeficiency Virus*, J. AM. MED. ASS'N, Oct. 23, 1991, at 2253 (quoting Surgeon General Report that rate of AIDS-infected women has increased 29%, with women comprising over 11% of AIDS cases in United States and further estimating three million women will die of AIDS in this decade); Scarlatti, *supra* note 3, at 863 (evaluating rate of mother-child transmission of HIV at 13%-42%).

[5] *See HIV Infection*, *supra* note 3, at 2416 (discussing percentage of population infected with HIV); *see also* Sunny Rosenfeld, *Developments in Custody Options for HIV-Positive Parents*, 11 BERKELEY WOMEN'S L.J. 194, 195 (1996) (maintaining by year 2000, somewhere between 32,000 and 38,000 HIV-positive children will have been born to HIV-positive women).

approaches, the number of infants infected with HIV continues to increase.[6] Legal concerns[7] relating to the epidemic are as numerous as medical concerns.[8]

The fate of an HIV-positive infant is particularly tragic.[9] Since his or her mother is usually HIV-positive,[10] the likelihood of that mother's death, soon after the infant's birth, is disproportionately high. Many of these mothers are poor;[11] as a result care of infected

[6] *See The New Frankness in AIDS Ads*, WASH. POST, Jan. 5, 1994, at A18 (discussing dramatic affect of AIDS epidemic on infants and children in recent years); *see also* Boyles, *supra* note 3 (stating approximately 15,000 children in United States were prenatally infected with HIV in 1994 and adding as of 1995, approximately 12,000 of those children were still alive); Juliet J. McKenna, *Where Ignorance is Not Bliss: A Proposal for Mandatory HIV Testing of Pregnant Women*, 7 STAN. L. POL'Y REV. 133, 135 (1996) (citing 1994 Centers for Disease Control report, author states in 1994, reported pediatric AIDS cases increased 8% from 1993, totaling 6,209 reported cases by beginning of 1995); Rosenfeld, *supra* note 5, at 195 (predicting number of children who will be born to HIV-positive women); Kevin J. Curnin, Note, *Newborn HIV Screening and New York Assembly Bill No. 6747-B: Privacy and Equal Protection of Pregnant Women*, 21 FORDHAM URB. L.J. 857, 858 (1994) (stating twenty million children will be affected by HIV/AIDS by year 2000).

[7] *See* Jean R. Stern Light, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 713 (1996). Another thought provoking concern is that of mandatory HIV testing of pregnant women. *Id.*; James M. Smith, *AIDS, HIV Hit Families with Wide Range of Legal Problems*, CHI. DAILY L. BULL., Nov. 12, 1991, at 2. Among these legal concerns are issues of family law, such as custody, guardianship and foster care. *Id.*

[8] *See* Smith, *supra* note 7, at 2. Medical concerns may include insurance, public benefits and health care. *Id. See, e.g.*, Doe v. Roe, 139 Misc. 2d 209, 217, 526 N.Y.S.2d 718, 726 (Sup. Ct. N.Y. County 1988). It has been suggested that the discrimination, stigmatization and mass hysteria surrounding AIDS have been veiled as medical issues and the courts should repudiate such allegations. *Id.*; Elliott B. Oppenheim, *Physicians as Experts Against Their Own Patients? What Happened to the Privilege?*, 63 DEF. COUNS. J. 254, 257 (1996). An alarming concern is patient medical record confidentiality and the protection of doctor-patient privilege. *Id.*

[9] *See* John F. Hernandez, *Perinatal Transmission of HIV: Cause for the Resurrection of Wrongful Life*, 27 J. MARSHALL L. REV. 393, 394-95 (1994). "HIV-positive newborns, perhaps the most 'innocent' of all HIV-positive individuals, generally live short, tortured lives necessitating expensive and intrusive medical intervention." *Id.*; *see also* Josephine Gittler and Merle McPherson, M.D., *HIV Infection Among Women of Reproductive Age, Children and Adolescents*, 77 IOWA L. REV. 1283, 1298-99 (1992). The authors discuss the mortality rate of AIDS and assert that by 1997 AIDS may be the fifth leading cause of death among children. *Id.*

[10] *See HIV Infection*, *supra* note 3, at 2416 (stating that in most cases infants acquired HIV virus through vertical transmission from their mothers); *see also* Leonardo Renna, *New York State's Proposal to Unblind HIV Testing For Newborns: A Necessary Step in Addressing a Critical Problem*, 60 BROOK. L. REV. 407, 411 (1994) (noting that in 93% of cases involving HIV-positive children, transmission was perinatal); C. Rouzioux et al., *Estimated Timing of Mother-to-Child Human Immunodefiency Virus Type 1 (HIV-1) Transmission by Use of a Markov Model*, AM. J. EPIDEMIOLOGY, Dec. 15, 1995, at 1330 (discussing that transmission of HIV-1 from mother to child can occur during pregnancy and at delivery and further estimating that one-third of infected infants are infected in utero and remaining are infected on day of birth).

[11] *See HIV Infection*, *supra* note 3, at 2416 (noting "HIV disproportionately affects disadvantaged women and children of color"); *see also* Gittler & McPherson, *supra* note 9, at 1310 n.145 (*citing* Margaret Heagerty, *Pediatric AIDS, Poverty and National Priorities*, 145 AM. J. DISEASES CHILDREN 521, 527 (1991) (discussing difficulty for poor families to get

infants may fall on already overburdened social institutions.[12] The cost of caring for "boarder babies"[13] is extraordinary[14] and the cost of caring for HIV-positive infants even greater.[15]

Some cases of HIV-infected newborns have resulted from the negligence of health care providers.[16] Specifically, health care providers may inaccurately administer an HIV test or fail to inform a woman that she should take an HIV test.[17] The tort action of wrongful life[18] is not available to these infants in New York.

medical care from disorganized and fragmented series of supports for poor); Rev. Raymond C. O'Brien, *A Legislative Initiative: The Ryan White Comprehensive AIDS Resources Emergency Act of 1990*, 7 J. COMTEMP. HEALTH L. & POL'Y 183, 183 (1991) (asserting that, after ten years post-recognition, AIDS has affected more of poor, urban population); Laurie Rubinstein, *Prosecuting Maternal Substance Abusers: An Unjustified and Ineffective Policy*, 9 YALE L. & POL'Y REV. 130, 141-42 (1991) (indicating that poor women are more closely focused upon in medical studies).

[12] *See* Hernandez, *supra* note 9, at 395 (arguing for tort remedy for HIV-positive infants in light of impact on social institutions).

[13] *Id.* at 410 n.10 (noting parents who are unable to or unwilling to care for "boarder babies" abandon them at hospitals). *See* Thomas J. Downey and George Miller, *Ten Years Later: Foster Care Again*, CHRISTIAN SCI. MONITOR, July 10, 1990, at 18 (noting term "boarder babies" evolved from nature of problem—children "boarded" in hospitals after being abandoned by "parents too sick or strung out to care for them"); Hegarty, *supra* note 1, at 1901 (discussing costs of caring for HIV newborns).

[14] *See* Hegarty, *supra* note 1, at 1901 (estimating total cost of caring for boarder baby was $466.00 per day, according to 1988 study at Harlem Hospital); *see also* Paul J. Donohue, *Federal Tax Treatment of Health Care Expenditures: Is it Part of the Health Care Problem?*, 46 WASH. U. J. URB. & CONTEMP. L. 141, 163-64 (discussing financial impact of current health care practices and proposing alternatives, such as preventative care at government expense); Suzanne Sangree, *Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Legal Policies*, 41 BUFF. L. REV. 309, 314 n.14 (estimating annual cost in 1989 of caring for AIDS babies was $1 billion).

[15] *See* Hegarty, *supra* note 1, at 1901. The Harlem Hospital study estimated that the total cost of caring for an HIV-positive infant was $705.00 a day. *Id.*

[16] *See* Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 120-21 (1992) (advocating doctrine of informed consent, author provides that health care provider must be liable for medical malpractice if negligent in disclosing or administering treatment); Jill Y. Miller, *Mom Not Told of Her HIV*, CHI. TRIB., Aug. 14, 1992, at 8 [hereinafter *Mom Not Told*] (discussing case where patient tested positive for HIV, but was not informed of result until after she was seven months pregnant with her child, born HIV-positive). *See, e.g.*, Anastosopoulos v. Perakis, 644 A.2d 480, 481 (Me. 1994) (explaining that though physician was aware of patient's prior sexual history and history of intravenous drug use, physician failed to recommend HIV test, resulting in mother's lack of information to decide whether to abort child, who was born HIV-positive.)

[17] *See, e.g.*, Newman v. Flaten, 618 So. 2d 374, 375 (Fla. Dist. Ct. App. 1993) (discussing case where mother not told of HIV-positive test results and subsequently gave birth to HIV-positive infant).

[18] *See* BLACK'S, *supra* note 1, at 1613. The term "wrongful life" is often used interchangeably with the terms "wrongful birth" and "wrongful conception" or "wrongful diagnosis." *Id.* The tort action of "wrongful life" is a "medical malpractice claim brought on behalf of a child born with birth defects, alleging that the child would not have been born but for negligent advice to, or treatment of, the parents." *Id.* Wrongful life is distinguished from a "wrongful birth" claim, which the parents of a child bring "alleging that negligent treatment or advice deprived them of the opportunity to avoid conception or terminate the pregnancy." *Id.* at 1612. It also differs from a "wrongful conception" or "wrongful diagnosis" claim which "aris[es] from the negligent performance of a sterilization procedure or abor-

While wrongful life claims are not statutorily prohibited,[19] the companion cases of *Becker v. Schwartz*[20] and *Park v. Chessin*[21] effectively restrict such actions in New York State. Although other jurisdictions have had occasion to address wrongful life actions in the context of HIV-positive infants,[22] New York courts have not. New York, however, does have a statutory cause of action[23] for lack of informed consent, providing a viable remedy in some cases of HIV-positive infants.

Part One of this Note will explore whether an HIV-positive infant, infected due to the negligence of a health care provider, has a tort remedy in New York. This Note will show that when a physician negligently performs an HIV test on a mother, the infant born HIV-positive should have a remedy in wrongful life. Part Two will examine the liability surrounding a physician who fails to recommend that a patient take an HIV test, given his or her knowledge of the patient's history. This Note will conclude that although New York courts have prohibited wrongful life actions, children born with HIV could have a viable cause of action for wrongful life or lack of informed consent.

tion." *Id.*; *see also* Becker v. Schwartz, 46 N.Y.2d 401, 404, 386 N.E.2d 807, 810, 413 N.Y.S. 2d 895, 898 (1978). "[T]he term 'wrongful life' has functioned as a broad umbrella under which plaintiffs alleging factually diverging wrongs have sought judicial recognition." *Id.*; Azzolino v. Dingfelder, 337 S.E.2d 528, 531 (N.C. 1985). Wrongful life is a claim for relief of parents and their children for negligent medical treatment or advice which deprives the parents of the opportunity to abort a fetus to prevent birth of an impaired child. *Id. See generally* Oscar Leroy Warren, *Negligence in the New York Courts* § 82.09 (Matthew Bender 1990). A discussion of the various claims that fall under the term "wrongful life" are provided therein. *Id.*

[19] *See* N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1996). The wrongful life action has sprung out of the New York statute for wrongful death. *Id.* This statute provides that the personal representative of a decedent, who is survived by distributees, may maintain an action to recover damages for wrongful conduct which caused the decedent's death against a person who caused the wrongful conduct. *Id.*; *see also Azzolino*, 337 S.E.2d at 532. This court held a wrongful life claim is not cognizable in the law because there is no injury when a child is impaired, as opposed to a child never born. *Id.*

[20] 46 N.Y.2d 401, 409, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899 (1978) (prohibiting wrongful life claim).

[21] *Id.* (holding that plaintiffs failed to state legally cognizable claims).

[22] *See Newman*, 618 So. 2d at 375 (appealing from lower court's dismissal of wrongful life claim); Anastosopoulos v. Perakis, 644 A.2d 480, 481 (Me. 1994) (discussing case in which doctors failed to recommend former prostitute and intravenous drug user take HIV test and both mother and subsequently born child developed AIDS); *Claim by Boy Born with AIDS To Go To Trial*, BANGOR DAILY NEWS, Feb. 9, 1995, at A1 [hereinafter *Claim by Boy*] (discussing *Anastosopoulos* case); Jill Y. Miller, *Mother Sues for Not Being Told She Had HIV-Case Shows the Newness of AIDS Litigation*, SAN DIEGO UNION-TRIB., Aug. 2, 1992, at A41 [hereinafter *Mother Sues*] (discussing *Newman* case).

[23] *See* N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1996) (providing cause of action for lack of informed consent).

I. CLAIMING WRONGFUL LIFE: A LEGALLY COGNIZABLE ACTION

A wrongful life action, brought on behalf of an impaired infant,[24] is a claim sounding in negligence.[25] The plaintiff seeks a remedy for the actual birth of that child.[26] A successful action for wrongful life requires the plaintiff to prove the elements of negligence.[27] Most courts, including New York, have typically found it to be impossible to show duty, breach, causation and damages.[28] Public policy concerns for HIV-positive infants[29] suggest that there should be a resolution of the traditional arguments[30] restricting wrongful life claims in favor of infected infants.

[24] *See Azzolino*, 337 S.E.2d at 532 (defining wrongful life as alleging that child would not have been born but for negligent advice to, or treatment of, parents); BLACK'S, *supra* note 1, at 1613 (defining wrongful life); *see also* Zepeda v. Zepeda, 190 N.E.2d 849, 853 (Ill. App. Ct. 1963) (recognizing wrongful life cause of action); Hernandez, *supra* note 9, at 394 (asserting HIV infected infant can claim wrongful life cause of action).

[25] *See* Reed v. Campagnolo, 630 A.2d 1145, 1148 (Md. 1993) (noting general negligence rules apply in malpractice cases); *see also* Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 819, 364 N.E.2d 1340, 1341, 396, N.Y.S.2d 647, 648 (1977) (denying wrongful life claim because there was no breach of duty); Duffey v. Fear, 121 A.D. 2d 928, 930-31, 505 N.Y.S. 2d 136, 139-40 (1st Dept 1986) (analyzing wrongful life claim in framework of negligence); James Bopp, Jr., *The 'Rights' and 'Wrongs' of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461, 462 (1989) (noting that in wrongful life alleged negligence consists of childs claim that existence is legal wrong due to doctor's failure to test, detect, or warn of fatal defects); Hernandez, *supra* note 9, at 399 (reasoning that conventional negligence tort analysis of duty, breach, causation and damages applies to cause of action for wrongful life).

[26] *See* BLACK'S, *supra* note 1, at 1613 (defining wrongful life); *see also* Bopp, *supra* note 25, at 462 (asserting wrongful life claim seeks to compensate for birth of child); Al Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 18 (1980) (defining remedies for wrongful life and wrongful birth causes of action).

[27] PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 131 (John W. Wade et al. eds., 9th ed. 1994) [hereinafter PROSSER]. The traditional elements of negligence are: duty to use reasonable care; breach of the duty; causal connection between conduct and injury, and; loss or damage. *Id.*

[28] *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (denying recovery for failure to prove damages); *Johnson*, 42 N.Y.2d at 819, 364 N.E.2d at 1341, 396 N.Y.S.2d at 648 (denying recovery for failure to prove breach of duty); *Duffey*, 121 A.D.2d at 930-31, 505 N.Y.S.2d at 139 (holding physician did not breach standard of care).

[29] *See* Boyles, *supra* note 3 (estimating HIV infection in children); *HIV Infection*, *supra* note 3, at 2416 (discussing growth of HIV virus in women and children); Minkoff & DeHowitz, *supra* note 4, at 2253 (estimating rise in women infected with HIV); Rosenfeld, *supra* note 5, at 195 (estimating number of children infected with HIV); Scarlatti, *supra* note 3, at 863 (discussing growing number of children infected with HIV).

[30] *See* Bopp, *supra* note 25, at 461-73 (discussing supporting arguments for wrongful life actions).

A. *Allowance of Wrongful Life Actions*

In a Florida case, Sophie Newman was not informed[31] that the HIV test[32] administered to her came back positive.[33] After becoming pregnant,[34] her obstetrician tested her for HIV, again yielding positive results.[35] Ms. Newman sued for wrongful life on behalf of the infant and the circuit court dismissed the action.[36] The court held the complaint did not state a cause of action under Florida law, which does not recognize wrongful life actions.[37]

Like Florida, New York courts would also prohibit the Newman infant's wrongful life claim.[38] Other jurisdictions, however, have shown some movement toward recognition of wrongful life.[39] For example, a Washington court found, in *Harbeson v. Parke-Davis, Inc.*,[40] that a wrongful life plaintiff could prove the elements of

[31] *See Mother Sues*, *supra* note 22, at A41 (noting Ms. Newman collapsed while at work, requiring trip to hospital); *see also* Renna, *supra* note 10, at 408 (noting that, as of 1994, New York State did test all newborns for HIV, but results were blinded and never revealed to doctors or mothers); *HIV Testing Ruling Clears Way for Testing of Newborns for HIV*, AIDS WKLY., June 3, 1996 [hereinafter *HIV Testing Ruling*] (asserting that regulations allow health care providers to provide HIV test results to mothers and counsel pregnant women about HIV transmission and mothers to decide whether or not they would like to be told of babies' HIV test results).

[32] *See Mom Not Told*, *supra* note 16, at 8 (noting numerous tests were administered, including HIV test); *see also* Jill Y. Miller, *Diagnosis of HIV Brings Lawsuit-Florida Woman Says She Was Not Told About Condition Before Pregnancy*, SAN ANTONIO LIGHT, Aug. 9, 1992 [hereinafter *Diagnosis of HIV*] (discussing administration of tests in *Newman* case).

[33] *See Mother Sues*, *supra* note 22, at A41. Ms. Newman saw her physician for a dozen follow-up visits after her hospital stay, but still did not learn the results of the HIV test. *Id.* She later developed a fungus in her mouth and sought the advice of her obstetrician. *Id.*

[34] *See id.* Ms. Newman was seven months pregnant before she learned she was HIV-positive. *Id.*

[35] *See id.* at A41 (noting child did not test HIV-positive at birth); *see also* Newman v. Flaten, 618 So. 2d 374, 375 (Fla. Dist. Ct. App. 1993) (appealing from lower court's dismissal of wrongful life claim). *See generally Locals Please Understand She has HIV, Her Mother is Dying of AIDS, Can't She Just Be a Little Girl*, FT. LAUDERDALE SUN-SENTINEL, Dec. 4, 1994, at 1A [hereinafter *Locals Please*] (detailing story of newborn and her mother with AIDS).

[36] *See Mother Sues*, *supra* note 22, at A41 (dismissing claim against both her physician and North Broward Hospital District); *see also* Kush v. Lloyd, 616 So. 2d 415, 423 (Fla. 1992) (finding wrongful life is not part of Florida tort law).

[37] *See Mother Sues*, *supra* note 22, at A41. Defendants argued that damages were purely speculative and the action is a "'thinly disguised cause of action for "wrongful life". . . the unmistakable thrust of the claim is that [the child] should not have been born'." *Id.*; *see also Newman*, 618 So. 2d at 375. The Court of Appeals affirmed the lower court's dismissal of the *Newman* cause of action. *Id.*

[38] *See* Becker v. Schwartz, 46 N.Y.2d, 401, 410, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899 (1978) (prohibiting wrongful life claim).

[39] *See* Turpin v. Sortini, 643 P.2d 954, 965 (Cal. 1982) (finding recovery of extraordinary expenses in wrongful life possible); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1161 (La. 1988) (allowing recovery of extraordinary expenses in wrongful life); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (holding wrongful life is valid claim).

[40] 656 P.2d 483, 486 (Wash. 1983) (holding wrongful life is valid claim).

negligence and recover the extraordinary expenses related to medical care for a defect.[41] Similarly, a Louisiana court found (in *Pitre v. Opelousas General Hospital*)[42] that if the infant's injury was foreseeable at the time the defendant treated the mother, the infant may recover extraordinary expenses.[43] California also has recognized that in some cases a severe debilitating defect may be worse than nonexistence,[44] though calculation of such damages is too speculative.[45] Special damages, however, were recoverable.[46] Certainly New York courts may look to these jurisdictions in reviewing wrongful life claims and award special damages to the HIV-positive infant.

B. New York's Position on Wrongful Life Actions

New York effectively eliminated wrongful life claims in the companion cases of *Becker v. Schwartz*[47] and *Park v. Chessin*.[48] In *Becker*, Dolores Becker claimed her physician never advised her to take an amniocentesis test to determine whether her unborn child was afflicted with Down's Syndrome.[49] In *Park*, Mrs. Park gave birth to a child with polycystic kidney disease.[50] After the physician informed the Parks[51] that the chances they would conceive a second child with the same disease were "practically nil,"[52] Mrs.

[41] *Harbeson*, 656 P.2d at 479 (finding that since parents may recover expenses for child's extraordinary care in wrongful birth, it is anomalous to deny same recovery to child).

[42] 530 So. 2d 1151, 1161 (La. 1988) (allowing recovery of extraordinary expenses in wrongful life).

[43] *Pitre*, 530 So. 2d at 1157 (recognizing that doctors owe duty to infants not yet conceived if harm to them is foreseeable).

[44] *Turpin*, 643 P.2d at 962-63 (finding it is possible for short life with severe, debilitating defects to be worse than non-existence).

[45] *Id.* at 963 (denying recovery of general damages based on inability to accurately assess).

[46] *Id.* at 965 (noting that parents, if able, may sue for extraordinary expenses in wrongful birth action, so child should be able to recover in wrongful life action).

[47] Becker v. Schwartz, 46 N.Y.2d 401, 410, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899 (1978) (prohibiting wrongful life claim).

[48] *Id.* (holding that plaintiffs failed to state legally cognizable claims).

[49] *Id.* at 406, 386 N.E.2d at 808-09 413 N.Y.S.2d at 896-97. An amniocentesis test is often used on women over 35 years of age to detect a higher risk of Down's Syndrome to an unborn child. *Id.*

[50] *Id.* (noting child died after five hours); Park v. Chessin, 60 A.D.2d 80, 81, 400 N.Y.S.2d 110, 111 (2d Dep't 1977) (discussing, in detail, facts of these actions).

[51] *Becker*, 46 N.Y.2d at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. The Parks expressed concern to their physician that a second child would be similarly affected. *Id.*

[52] *Id.* (discussing wrongful life action); *Park*, 60 A.D.2d at 81, 400 N.Y.S.2d at 111 (discussing assertion of facts at trial).

Park's second child also was afflicted.[53] Both couples commenced wrongful life actions on behalf of their children.[54]

The Court of Appeals of New York held that wrongful life is not a valid claim,[55] finding two flaws to the action.[56] First, the infants did not suffer a legally cognizable injury.[57] The court found that the "mystery"[58] of whether impaired life is worse than nonexistence is better left "to the philosophers and the theologians."[59] Second, the court reasoned that a negligence remedy places an injured party in the position he or she would have occupied but for the negligence of the defendant.[60] Since the infants would not have existed but for the negligence of the defendants, calculation of damages was too speculative.[61] The *Becker/Park* court felt this was a matter best left to the legislature.[62] To date, New York has yet to promulgate a statute affording a wrongful life remedy to an impaired infant.[63]

[53] *Becker*, 46 N.Y.2d at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. The child died after two and one half years. *Id.*

[54] *Id.* The Becker's also commenced an action in their own right to recover damages for long-term institutional care of the child, damages for Mrs. Becker's emotional and physical injuries and damages suffered by Mr. Becker for loss of consortium and medical expenses incurred. *Id.* The Appellate Division modified Mr. Becker's claim, limiting it to loss of services based upon his wife's mental anguish and distress. *Id.* at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898. The Court did not allow recovery for psychic and emotional damages. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. The *Becker* Court did allow recovery for extraordinary expenses. *Id.* The Parks also sued for the expenses incurred for care of their child, emotional and physical injuries suffered by both Mr. and Mrs. Park, loss of consortium on behalf of Mr. Park and wrongful death. *Id. See Park*, 60 A.D.2d at 82-84, 400 N.Y.S.2d at 111-12. The Appellate Division dismissed the wrongful life claim and all claims for mental anguish and emotional distress. *Id.* at 88, 400 N.Y.S.2d at 114.

[55] *Becker*, 46 N.Y.2d at 403-09, 386 N.E.2d at 808-11, 413 N.Y.S.2d at 896-99. The *Becker* court did allow recovery for all claims related to extraordinary expenses incurred as a result of negligence and remanded the actions for a liability determination. *Id.* at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898.

[56] *Id.* at 807 (discussing claims set forth before court).

[57] *Id.* at 411 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (quoting *Park* "There is no precedent for the recognition at the Appellate Division of 'the fundamental right of a child to be born as a whole, functional human being'." *Id.*

[58] *Becker*, 46 N.Y.2d at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898 (discussing "mystery" of whether impaired life was better than nonexistence).

[59] *Id.* (leaving issue of damages to "philosophers and theologians").

[60] *Id.* (determining calculation of damages too speculative).

[61] *Id.* The calculation of damages is "dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make." *Id.*

[62] *Id.* at 412 386 N.E.2d at 812, 413 N.Y.S.2d, at 901 (leaving wrongful life issue to legislature).

[63] *See* N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1996) (setting forth New York's wrongful death statute).

C. *Resolving Wrongful Life in Favor of An HIV-Positive Infant*

If an infant is infected with HIV due to a health care provider's improper administration of an HIV test[64] or failure to inform the mother of the test results,[65] that infant should be able to claim wrongful life.[66]

1. Breach of a Duty to an Unborn Child

The wrongful life plaintiff must first show the defendant owed him or her a duty.[67] Historically, courts have held that a physician treating a pregnant woman has no duty to the unborn child.[68]

[64] *See* R.J. and P.J. v. Humana of Florida, Inc., 625 So. 2d 116, 116 (Fla. Dist. Ct. App. 1993) (discussing case where patient was informed he was HIV positive, when indeed he was not); *see also* Sylvia Mayer Baker, *HIV: Reasons To Apply Traditional Methods Of Disease Control To The Spread Of HIV*, 29 HOUS. L. REV. 891, 892 (1992) (discussing risk of false results in HIV testing); Taunya L. Banks and Roger R. McFadden, *Rush To Judgment: HIV Test Reliability And Screening*, 23 TULSA L.J. 1, 7 (1987) (discussing reliability of AIDS testing).

[65] *See* N.Y. PUBLIC HEALTH LAW § 2500-f (McKinney 1996) (requiring New York to set up comprehensive program for disclosure and administration of HIV tests); Newman v. Flaten, 618 So. 2d 374, 374 (Fla. Dist. Ct. App. 1993) (appealing from Circuit Court for Broward County); Chambarry v. Mt. Sinai Hosp., 161 Misc. 2d 1000, 1002-03, 615 N.Y.S. 2d 830, 832-33 (Sup. Ct. N.Y. County 1994) (discussing case where patient never informed of possible HIV infection through blood transfusion). *See, e.g.*, *Diagnosis of HIV*, *supra* note 32 (commenting on Newman's plight); *Mom Not Told*, *supra* note 16, at 8 (discussing Newman's expectations); *Mother Sues*, *supra* note 22, at A41 (discussing Sophie Newman's comment, "[i]t sounds stupid, and maybe we take everything for granted, but I just assumed he would tell me . . . [y]ou have a trust in people, and that's what it came down to").

[66] *See* Turpin v. Sortini, 643 P.2d 954, 961-62 (Cal. 1982) (validating child's wrongful life claim, court asserted that awarding damages to severely defective child would not disavow sanctity of life); *see also* Procanik by Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (validating wrongful life claim); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 488 (Wash. 1983) (holding children could maintain action for wrongful life); Hernandez, *supra* note 9, at 401-06 (discussing wrongful life and AIDS); Bernadette Kennedy, *The Trend Toward Judicial Recognition Of Wrongful Life: A Dissenting View*, 31 UCLA L. REV. 473, 473-500 (1983) (arguing against wrongful life cause of action). *But see also* Bopp, *supra* note 25, at 461-73 (providing critical analysis supporting wrongful life cause of action).

[67] PROSSER, *supra* note 27, at 131. An actor must "conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Id.*; *see also* United States v. Caroll Towing Co., 159 F.2d 169, 186 (2d Cir. 1947). The court set out the negligence formula and noted that defendant owes plaintiff a duty of care. *Id.*; Merluzzi v. Larson, 610 P.2d 739, 742 (Nev. 1980). Duty is an obligation to behave with a particular standard of conduct towards others. *Id.*; RESTATEMENT (SECOND) OF TORTS § 291 (1965). A risk is unreasonable if "a reasonable man would recognize [it] as involving a risk of harm to another." *Id.*; RESTATEMENT (SECOND) OF TORTS § 292 (1965). The risk must outweigh the utility of the act based upon the social value of the act, the extent the risk will advance the social value and whether there is another less dangerous course of conduct. *Id.*

[68] *See generally* John C. Wunsch, *Parental Recovery for Loss of Society of the Unborn: The Plaintiff's Perspective*, 77 ILL. B.J. 538, 544 (1989) (discussing wrongful life actions for unborn child). *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 141 (D. D.C. 1946) (questioning anomaly of "[w]hy a human being, under the civil law, and a non-entity under the common law?"); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15 (1884) (controlling case for number of years, holding unborn infant does not have separate cause of action as separate plaintiff), *overruled by* Farley v. Sartin, 466 S.E.2d 522, 525 (W. Va. 1995); Gleitman v.

Lack of duty, however, no longer defeats a wrongful life claim in New York.[69] Judicial allowance of a wide range of derivative suits[70] is indicative of the trend to permit third party recovery.[71] Applicable to the wrongful life discussion, courts now recognize[72] a physician's duty to a pregnant patient extends to the viable fe-

Cosgrove, 227 A.2d 689, 691 (N.J. Super. Ct. App. Div. 1966) (discussing reasonable standard of care for disclosure of defects to mother who contracted German measles during her first trimester); Albala v. City of New York, 78 A.D.2d 389, 391, 434 N.Y.S.2d 400, 402 (1st Dep't) (stating damages are subject "to the limitations that recovery may not be had for such injuries when the wrong is committed against another"), *aff'd*, 54 N.Y.2d. 269, 429 N.E. 2d 786, 445 N.Y.S. 2d 108 (1981); Khan v. HIP Hosp., Inc., 487 N.Y.S. 2d 700, 704 (Sup. Ct. Queens County 1985) (holding physicians did not violate standard of care because duty did not extend to unborn infant).

[69] *See* Walker v. Rinck, 604 N.E.2d 591, 595 (Ind. 1992) (concluding physician owes duty of care to unborn child); *Gleitman*, 227 A.2d at 691-92 (citing State by Smith v. Brennan, 31 N.J. 353, 364, 157 A.D.2d 497, 503 (1960)) (establishing that there is right for infant to sue for prenatal torts); Bopp, *supra* note 25, at 479 (citing W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 367, 368 (5th ed. 1984)) (noting that, beginning in 1946, courts began to recognize action for prenatal injuries as long as child was born alive). *But see* Tobin v. Grossman, 24 N.E. 2d 609, 609, 249 N.Y.2d 419, 419, 301 N.Y.S.2d 554, 554 (1969) (concluding that under well-established applicable doctrines no cause of action lies for unintended harm sustained by one, solely as result of injuries inflicted directly upon another, regardless of relationship); *Albala*, 434 N.Y.S.2d at 402 (finding damages are not recoverable when wrong was committed against another); Robin C. Hewitt, Farley v. Sartin: *Viability of a Fetus No Longer Required for Wrongful Death Liability*, 98 W. VA. L. REV. 955, 960-65 (1996) (reasoning behind denial of wrongful death damages for unborn is that mother may recover for death of her unborn child through damages for her physical injury and mental suffering associated with stillbirth; if she also recovered damages as administrator of her stillborn child, she would be receiving double recovery). *See generally* Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. L. REV. 185, 214 (1993) (stating that duty of care extends to unborn child). *See, e.g.* Becker v. Schwartz, 46 N.Y.2d at 401, 404 386 N.E.2d 807, 810, 413 N.Y.S.2d at 895, 898 (1978) (assuming physicians owed duty to infants in utero).

[70] BLACK'S, *supra* note 1, at 443 (defining derivative action as actions based on injury to another).

[71] *See* Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1158 (La. 1988) (noting it is well-settled that duty may exist to foreseeable plaintiff, even if they were unknown and remote in time and place); *Id.* (citing Renslow v. Mennonite Hosp., 367 N.E. 1250, 1254-55 (Ill. 1977)) (recognizing limited area of transferred negligence). *See generally* Wintersteen v. National Cooperage & Woodenware Co., 197 N.E. 578, 582 (Ill. 1935) (finding every person owes duty to others to exercise ordinary care to prevent injury that have reasonably probable and foreseeable consequence). *See, e.g.*, Dini v. Naiditch, 170 N.E.2d 881, 892-93 (Ill. 1960) (recognizing cause of action on behalf of parent or spouse as derivative parties); Miller v. Rivard, 180 A.D.2d 331, 334 585 N.Y.S.2d 523, 526 (3d Dep't 1992) (finding harm to husband from negligent sterilization procedure gives rise to wife's cause of action).

[72] *See* Reed v. Campagnalo, 630 A.2d 1145, 1148 (Md. 1993) (stating duty to mother extends to unborn child); *see also Becker*, 46 N.Y.2d at 409, 386 N.E.2d at 811 413 N.Y.S. 2d at 899 (accepting duty to parents extends to infants in utero); *Id.* (citing Woods v. Lancet, 303 N.Y. 349, 353, 102 N.E.2d 691, 695 (1951) (N.Y. 1951) (holding viable fetus has separate existence that is recognized in law)); Michael A. Berenson, *The Wrongful Life Claim-The Legal Dilemma of Existence Versus Nonexistence: "To Be or Not to Be"*, 64 TUL. L. REV. 895, 898 (1990) (asserting courts recognized viability of fetus before most legislatures did).

tus.[73] Some jurisdictions have gone so far as to extend the duty to a fetus not yet viable at the time of injury.[74]

Numerous policy considerations[75] support extension of duty to an unborn child. Duty to an unborn child encourages thorough analysis by health care providers.[76] In all areas of medicine,[77] a health care provider is more likely to use reasonable care if he or she may be subject to legal liability.[78] The possibility that there

[73] *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946) (holding, for first time, that child, if born alive and viable can maintain action for injuries wrongfully inflicted while in womb of mother); Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1253 (Ill. 1977) (extending duty to infants not even considered viable at time of injury); *Walker*, 604 N.E.2d at 594 (concluding physician treating pregnant mother owes duty to unborn child based on contractual relationship between them; that child is foreseeable plaintiff, and; public policy compels extension of duty); *Becker*, 46 N.Y.2d at 404, 386 N.E.2d at 810, 413 N.Y.S.2d at 898 (assuming physicians owed duty to infants in utero); Bopp, *supra* note 25, at 479-80 (noting that prenatal torts require fetus be born alive, otherwise making it impossible to determine if child was viable in utero at time of injury).

[74] *See Renslow*, 367 N.E.2d at 1253 (rejecting viability as criterion for recovery for prenatal injuries); *see also* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (holding duty may extend to persons not yet conceived at time of negligent act); Bopp, *supra* note 25, at 480 (citing PROSSER & KEETON, *supra* note 70, at 369) (noting that due to recent advances in embryology and medical technology, medical proof of causation has become increasingly reliable, which supports eliminating viability or other arbitrary developmental requirements).

[75] *See, e.g.*, Ramey v. Fossoulas, 414 So. 2d 198, 200-01 (Fla. Dist. Ct. App. 1982) (noting that cost of raising impaired child included in damages award); Mears v. Alhadeff, 88 A.D.2d 827, 827 451 N.Y.S.2d 133, 133-34 (1st Dep't 1982) (allowing damages for education, but not for embarrassment to unwed mother); Mason v. Western Pennsylvania Hosp., 453 A.2d 974, 977 (Pa. 1982) (O'Brien, J., dissenting) (finding that benefit of raising child does not outweigh physician's negligence) (quoting Howard v. Lecher, 42 N.Y.2d 109, 111, 366 N.E.2d 64, 66, 395 N.Y.S.2d 363, 365 (1977)).

[76] *See Harbeson*, 656 P.2d at 496 (noting recognition of duty provides comprehensive and consistent deterrent to malpractice); *see also* Turpin v. Sortini, 643 P.2d 954, 962 (Cal. 1982) (recognizing extension of duty discourages malpractice); Hernandez, *supra* note 9, at 405 (arguing that approval of wrongful life claim deters medical malpractice); Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505, 508 (1991) (arguing that in genetic counseling wrongful claims, deterrence is consistent with purposes of tort law).

[77] *But see* Greco v. United States, 893 P.2d 345, 352 (Nev. 1995) (finding public policy concern in deterring wrongful conduct is not so great as to overcome difficulty of determining damages in wrongful life action). *See, e.g.*, Chizman v. Mackie, 896 P.2d 196, 209 (Alaska 1995) (noting award of punitive damages is necessary to deter wrongdoer from offensive act and may be imposed for lack of reasonable care in malpractice cases); Madrid v. Lincoln County Med. Ctr., 923 P.2d 1154, 1162 (N.M. 1996) (finding, in light of deadly nature of AIDS, courts should encourage reasonable care standard in handling of potentially contaminated blood products and impose liability for failure to use reasonable care in effort to deter unreasonable conduct); Matthew K. Richards, *The Utah Medical No-Fault Proposal: A Problem-Fraught Rejection of the Current Tort System*, 1996 BYU L. REV. 103, 106-07 (1996) (advocating tort reform to better address deterrence and compensation in tort actions).

[78] *See Harbeson*, 656 P.2d at 496 (discussing policy reasons underlying recognition of wrongful life action); *see also* Peter A. Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 992 (1984) (concluding that essential deterrent value of tort system is psychological: "the declaration of wrongfulness and the social stigma"); Randall R. Bovbjerg, *Medical*

may be redress for health care providers for the extraordinary expenses related to pediatric AIDS[79] deters negligent administration of HIV tests.[80] This extension also supports societal objectives to prevent harm detectable with medicine and technology.[81] The extensive availability of HIV tests is an important preventative measure,[82] so failure to administer an HIV test correctly undermines the test's preventative effect.[83] Finally, extension of the duty allows comprehensive compensation for those injured by malpractice.[84] HIV-positive infants require expensive care.[85]

Malpractice on Trial: Quality of Care is the Important Standard, 49 L. & CONTEMP. PROBS. 321, 328-35 (1986) (discussing deterrent value of malpractice suits). *But see also* Mitchell S. Berger, *Following The Doctor's Orders — Caps on Non-Economic Damages in Medical Malpractice Cases*, 22 RUTGERS L.J. 173, 184 (1990) (stating that there is no deterrent effect in liability for medical malpractice because of liability insurance system and medical financial care market structure).

[79] *See* James Bopp, Jr. & Deborah Hall Gardner, *Aids Babies, Crack Babies: Challenges to the Law*, 7 ISSUES L. & MED. 3, 3 (1991) (stating cost of hospital delivery, prenatal care, and foster care for only 8,974 of HIV-positive infants through age of five would be $500 million, and additional cost of preparing children for school could exceed $1.5 billion). *See generally* O'Brien, *supra* note 10, at 610 (discussing costs involved in caring for HIV positive infants); Joelle S. Weiss, *Controlling HIV-Positive Women's Procreative Destiny: A Critical Equal Protection Analysis*, 2 SETON HALL CONST. L.J. 643, 709 (1992) (discussing HIV infants and cost of care).

[80] *See generally* Hernandez, *supra* note 9, at 406 (discussing rationale of shifting costs of any resulting harm to those who are in better position to prevent harm from occurring); Terri Skladany, *Physician Immunity Under the Massachusetts Tort Claims Act: A Test Without Direction*, 10 W. NEW ENG. L. REV. 5, 42 (1988) (stating that there is substantial support for position that tort law can deter negligent medical liability).

[81] *See Harbeson*, 656 P.2d at 496 (stating imposition of duty to child fosters societal objectives of genetic counseling and prenatal testing, and discourages malpractice); *see also* Siemienic v. Lutheran Gen. Hosp., 480 N.E. 1227, 1234 (Ill. App. Ct. 1985) (noting development of techniques that mitigate or alleviate child's prenatal harm, requiring extension of duty), *aff'd in part, rev'd in part*, 512 N.E.2d 691, 708 (Ill. 1987) (allowing recovery for emotional distress).

[82] *See* Michael L. Closen, *Mandatory Disclosure of HIV Blood Test Results to the Individuals Tested: A Matter of Personal Choice Neglected*, 22 LOY. U. CHI. L.J. 445, 458 (1991). Closen argues that HIV test results should not be mandatorily disclosed to tested persons. *Id.* He notes that "members of the public are aware of HIV/AIDS and the routes of its transmission" because of media attention focused upon the epidemic. *Id.* at 457. For example, "[t]he Surgeon General's pamphlet . . . was mailed to almost every household in the United States; reports . . . appeared widely in newspapers and magazines, and on television and radio." *Id.* at 457-58; *see also Preventing HIV/AIDS*, *supra* note 2, at 39. A step toward prevention of HIV in young people is comprehensive HIV education and services. *Id. See, e.g.*, WIS. STAT. ANN. § 146.022(a)(3) (West 1990). This statute describes Wisconsin's public education campaign about HIV and AIDS. *Id.*

[83] *See, e.g.*, Closen, *supra* note 82, at 457-58 (discussing media attention on AIDS epidemic and distribution of HIV/AIDS information); *Preventing HIV/AIDS*, *supra* note 2, at 39 (discussing role of various institutions, including media, schools and parents, in educating teens about prevention of AIDS); *Condoms Are All the Rage*, U.S. NEWS AND WORLD REP., Oct. 17, 1988, at 44 (discussing controversial giveaway plans for comdoms in hopes of preventing spread of AIDS).

[84] *See Harbeson*, 656 P.2d at 496 (noting extension of duty permits payment of extraordinary expenses); *see also* Hernandez, *supra* note 9, at 406 (arguing benefits of cost-shifting). *See generally* Hutton Brown et al., *Special Project Legal Rights and Issues Surrounding*

Since paying extraordinary medical costs is a difficult burden[86] for families of infected infants,[87] imposing liability on negligent health care providers places the responsibility squarely upon those most culpable.[88]

Health care providers also have a duty to meet a standard of reasonable care.[89] In medical malpractice actions,[90] New York

Conception, Pregnancy, and Birth, 39 VAND. L. REV. 597, 752-54 (1986) (discussing adequate compensation in wrongful life actions); James M. Parker, Jr., *Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas*. 16 ST. MARY'S L.J. 639, 675 (1985) (discussing wrongful life, compensation and cost-shifting).

[85] *See* Hegarty, *supra* note 1, at 1901 (estimating cost of caring for boarder babies); Hernandez, *supra* note 9, at 406 (discussing benefits of cost shifting); Sangree, *supra* note 14, at 314 n.14 (estimating cost of caring for AIDS babies).

[86] *See, e.g.*, N.Y. PUB. HEALTH LAW § 3614 (McKinney 1996) (mandating that no government agency will pay for long term health care relating to AIDS unless commissioner authorizes such care, after assessing various factors, including cost, geography, economic factors, and need for incentives); N.Y. SOC. SERV. LAW § 369-m (McKinney 1992) (providing that social services will only pay part or all of insurance costs relating to AIDS treatment if patient is unemployed; has no health care through employer, or pays health care benefits independently; and patient resides in household with income less than 185% of poverty line); N.Y. COMP. CODES R. & REGS. tit. 10, § 86-4.41 (1996) (limiting reimbursement to freestanding ambulatory units to single price per visit, one visit per day for treatment relating to AIDS); Lee Ann Dean, *Acquired Immune Deficiency Syndrome, Viatical Settlement, and the Health Care Crisis: AIDS Patients Reach into the Future to Make Ends Meet*, 25 RUTGERS L.J. 117, 121 (1993) (discussing trend of viatical companies which buy insurance policies from terminally ill patients at 50-80% of death benefit and AIDS patients use money to cover treatment costs); Malcolm E. Osborn, *Rapidly Developing Law on Viatical Settlements*, 31 WAKE FOREST L. REV. 471, 478 n.44 (1996) (discussing concern for minimum payments related to AIDS treatment in light of advancing medical therapies that extend life of AIDS patients).

[87] See Hernandez, *supra* note 9, at 394 (discussing medical care and maintenance falling on "overburdened social institutions"); McKenna, *supra* note 6, at 145 (discussing that state has interest because of costs of providing medical care to infected infants and foster care to children whose mothers can no longer care for them); Sangree, *supra* note 14, at 315 (stating that because majority of HIV-infected women are poor, HIV-positive babies present tremendous economic burden to state).

[88] *See, e.g.*, Gonzalez v. Association Life Ins. Co., 641 So. 2d 895, 896-97 (Fla. Dist. Ct. App. 1994) (holding insurance company did not conspicuously put in provision limiting benefits attributable to AIDS treatment); Bradley v. Empire Blue Cross and Blue Shield, 562 N.Y.S.2d 908, 910-11 (Sup. Ct. N.Y. County 1990) (directing insurance company to pay for bone marrow transplant hospitalization costs for patient infected with HIV); Jackson Township Volunteer Fire Co. v. Workmen's Compensation Appeal Bd. (WALLET), 594 A.2d 826, 828-29 (Pa. Commw. Ct. 1991) (holding Workmen's Compensation benefits must extend to insured persons exposed to serious risk of contracting contagious and infectious diseases, including HIV); Katherine Benesch, *AIDS and the ADA in the Health Care Workplace*, Brief, 23-SPG BRIEF 22, 24 (noting that HIV infections is protected by American with Disabilities Act); Sharona Hoffman & Guy D. Kidd, *AIDS: Insurance Coverage and the Americans with Disabilities Act*, 32-AUG HOUS. LAW. 27, 27 (1994) (discussing impact of rising cost of AIDS treatment on private and employer-provided health insurance).

[89] *See* PROSSER, *supra* note 27, at 131 (noting that actor must protect others from unreasonable risks); *see also* Berman v. Allan, 404 A.2d 8, 9-11 (N.J. 1979) (deciding in favor of wrongful birth action where physician failed to exercise reasonable care by not informing his patients, expectant mother and her husband, of need to undergo amniocentesis, diagnostic procedure to determine whether fetus was congenitally defective). *See generally* RESTATEMENT (SECOND) OF TORTS § 291 (1965) (finding risk to be unreasonable if "a reasonable man would recognize [it] as involving a risk of harm to another"); R. Keith Johnson,

courts examine use of reasonable care,[91] requisite skill and knowledge and one's best judgment.[92] In wrongful life actions,[93] the reasonable care standard is problematic.[94] Risks, accuracy of testing, and predictability of potential dangers in pre-natal care are unclear.[95] As medicine and technology progress at a rapid rate,[96]

Medical Malpractice And 'Wrongful Birth': A Critical Analysis Of Wilson v. Kuenzi, 57 UMKC L. REV. 337, 340 (1989) (discussing requirements that medical malpractice claim establish that physician failed to live up to standard of reasonable care of his or her profession, that plaintiff was injured, and that failure to live up to standard of care was proximate cause of plaintiff's injury).

[90] *See* Pike v. Honsinger, 155 N.Y. 201, 203, 49 N.E. 760, 762 (1898). The court noted that:

> law relating to malpractice is simple and well settled . . . A physician . . . impliedly represents that he possesses . . . that reasonable degree of learning and skill that is ordinarily possessed by physicians . . . in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine.

Id. Failure to exercise requisite knowledge and skill constitutes breach. *Id. See generally* Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1197 (1992). The author surveys the history and elements of medical malpractice. *Id.*

[91] *See Pike*, 155 N.Y. at 203, 49 N.E. at 762 (discussing malpractice action).

[92] *See id.* (discussing reasonable care in malpractice actions).

[93] *See* Gleitman v. Cosgrove, 227 A.2d 689, 691 (N.J. Super. Ct. App. Div. 1966) (discussing reasonable standard of care for disclosure of defects to mother who contracted German measles during her first trimester); *see also* Khan v. HIP Hosp., Inc., 127 Misc.2d 1062, 1067, 487 N.Y.S.2d 700, 704 (Sup. Ct. Queens County 1985) (holding physicians did not violate standard of care because duty did not extend to unborn infant). *See generally* Johnson, *supra* note 89, at 346 (discussing standards of care and wrongful life); Phillip J. Van Derhoef, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis* Harbeson v. Parke-Davis, Inc., 58 WASH. L. REV. 649, 665 (1983) (stating standard of care as element of wrongful life).

[94] *See, e.g.*, Reed v. Campagnalo, 630 A.2d 1145, 1148-49 (Md. 1993) (questioning whether offering or performance of amniocentesis test was standard practice); *Gleitman*, 227 A.2d at 691 (discussing reasonable standard of care for disclosure of defects to mother who contracted German measles during her first trimester); *Khan*, 127 Misc.2d at 1067, 487 N.Y.S.2d at 704 (holding physicians did not violate standard of care because duty did not extend to unborn infant).

[95] *See, e.g.*, Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 819, 364 N.E.2d 1340, 1341 369 N.Y.S.2d 647, 648 (1977) (concluding use of amniocentesis test was not standard practice in 1969); *see also* Estate of Doe v. Vanderbilt Univ., 824 F. Supp. 746, 750 (D.D.C. 1993) (discussing applicable standards for disclosure of HIV test results in 1987 and 1988); Duffey v. Fear, 121 A.D.2d 928, 931, 505 N.Y.S.2d 136, 139 (1st Dep't 1986) (finding that removal of IUD was not standard practice in 1970).

[96] *See* John R. Penhallegon, *What's Happening in the Law: Surveying the New Developments*, 60 DEF. COUNS. J. 365, 365 (1993) (noting "in the preconception tort arena, increases in medical science have caused plaintiffs to press the cutting edge (some would say the bleeding edge) of foreseeability"); *see also HIV Infection*, *supra* note 3, at 2416 (noting that in 1990 many HIV-infected women had no access to medical care for management of HIV); *Obstetrics / Testing HIV Counseling and Voluntary Testing for All Pregnant Women Urged*, AIDS WKLY, July 31, 1995 [hereinafter *Obstetrics / Testing*] (discussing development of guidelines showing women can reduce HIV transmission to babies by two-thirds if zidovudine (AZT) therapy is performed at 14 weeks). *See generally* Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1370 (1989) (stating that despite technological progress, appropriate treatment for particular case is often debated within medical field).

there is disagreement in the medical community concerning what are standard tests and risks.[97] These problems have led New York courts to determine that physicians often have not violated a standard of care.[98]

It is submitted that the standard of care in wrongful life actions on behalf of HIV-infected infants is ascertainable. HIV testing is widespread and the procedures for administration[99] are clear.[100] When a health care provider tests a pregnant mother for HIV, that mother may reasonably expect accurate communication of those results.[101] Inaccurate communication of test results,[102] or

[97] *See Johnson*, 42 N.Y.2d at 819, 364 N.E.2d at 1341, 369 N.Y.S.2d at 648 (discussing amniocentesis test); *see also Estate of Doe*, 824 F. Supp. at 750 (deciding disclosure of HIV test results); *Reed*, 630 A.2d at 1148-49 (questioning standard of amniocentesis test); *HIV Infection*, *supra* note 3, at 2416 (discussing difficulty in finding adequate medical care for HIV-positive newborns).

[98] *See Khan*, 127 Misc.2d at 1067 487 N.Y.S.2d at 704 (holding physician did not violate standard of care); *see also* Bougher v. Choi, 562 N.E.2d 1289, 1290 (Ind. 1990) (determining that evidence did not support conclusion that orthopedic surgeon breached standard of care); Rodriguez v. Reeves, 730 S.W.2d 19, 21 (Tex. Ct. App. 1987) (holding that plaintiff in medical malpractice action failed to establish standard of care in community for purpose of establishing that conduct of physician or hospital violated or breached that standard); Jason Wolfe, *Doctors Cleared in Boy's HIV Case the Lawsuit Raised the Sticky Question of Whether it is Ever Better for a Child Never to Have Been Born*, PORTLAND PRESS HERALD, Apr. 3, 1996, at 1A (discussing dismissal of case on grounds that physician met standard of care).

[99] *See* N.Y. PUB. HEALTH LAW § 2781(1) (McKinney 1996) (providing health care provider cannot order HIV test without written, informed consent of subject of test); N.Y. PUB. HEALTH LAW § 2782 (McKinney 1996) (providing person may not disclose HIV-related information except in certain enumerated situations); N.Y. PUB. HEALTH LAW § 2783(1)(b) (McKinney 1996) (stating maximum civil penalty for violation of either § 2781 or § 2782 is $5000 for each occurrence); N.Y. PUB. HEALTH LAW § 2784 (McKinney 1996) (excluding insurance organizations from rules regulating confidentiality and testing for HIV); N.Y. PUB. HEALTH LAW § 2785(2)-(5) (McKinney 1996) (setting forth rules for obtaining court order for disclosure of HIV information); *see also* 42 C.F.R. § 482 (1996) (requiring hospitals participating in Medicare and Medicaid programs, as of November 8, 1996, to take appropriate action when receiving blood at increased risk of transmitting HIV, including notifying donor or patient).

[100] *See* Renna, *supra* note 10, at 412-15 (discussing various HIV tests available and their accuracy, difficulty and expense). *But see* Larry Gostin, *Hospitals, Health Care Professionals, and Aids: The 'Right To Know' the Health Status of Professionals and Patients*, 48 MD. L. REV. 12, 39 (1989) (stating that it is mistakenly presumed that routine testing for HIV is standard of care in medical profession, but Center for Disease Control recommends against screening low risk groups). *See generally* Taunya L. Banks, *Women and AIDS—Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 354-60 (1990) (discussing testing methodology for HIV).

[101] *See Mother Sues*, *supra* note 22, at A41 (discussing Sophie Newman's comment after doctor failed to inform her of HIV-positive test result); *see also* N.Y. PUB. HEALTH LAW § 2500-f (McKinney 1996) (requiring New York state to set up comprehensive program for disclosure and administration of HIV tests); *Diagnosis of HIV*, *supra* note 32 (discussing failure of doctor to inform Newman); *Mom Not Told*, *supra* note 16, at 8 (noting Newman's plight).

[102] *See* R.J. and P.J. v. Humana of Florida, Inc., 625 So. 2d 116, 116 (Fla. 1993) (discussing case where patient diagnosed as HIV positive, when, in fact, he was not); *Mother Sues*, *supra* note 22, at A41 (discussing physician's failure to tell Newman of her correct HIV test

failure to properly administer the test, then, are violations of the standard of care.[103]

The second element to a negligence-based claim, breach of duty,[104] is not normally a problematic element in wrongful life actions.[105] In earlier HIV-related cases, however, plaintiffs met some obstacles.[106] Previously, medicine and technology related to HIV and AIDS were slow to standardize themselves.[107] Today, the

results); *see also Estate of Doe*, 824 F. Supp. at 747 (discussing case of pregnant mother who was never informed of receiving HIV-positive blood, and died, along with her child from AIDS-related disease); Gostin, *supra* note 100, at 39 (stating that physician who fails to adequately inform and counsel patient prior to performing HIV test is likely to be found negligent for failing to conform with professional standard of care); Renna, *supra* note 10, at 407 (imagining "tragedy of a mother who rushes her sick infant to the hospital . . . and learns that her child is infected with [HIV]"). *See generally* Constance H. Baker & Megan M. Arthur, *Aids in the Hospital Workplace: Theories of Hospital Liability*, 24 TORT & INS. L.J. 1, 2 (1988) (discussing misdiagnosis and failure to adequately counsel in HIV testing); Roger N. Braden, *Aids: Dealing with the Plague*, 19 N. KY. L. REV. 277, 293 (1992) (stating that after development of testing for HIV in 1985, blood bank would be held liable in negligence for failure to administer test, improperly administering test or misreading results).

103 *See generally* Young v. Colligan, M.D., 560 So. 2d 843, 845-46 (La. Ct. App. 1990) (discussing necessity of calling expert witnesses qualified in medical profession to prove whether defendant health care provider possessed requisite knowledge or skill, or failed to exercise reasonable care); Martin B. Adams & Glenn W. Dopf, *Trial Practice in Medical Malpractice Case: A Defense Perspective* (PLI Corp. L. Practice Course Handbook Series No. 396, 1990) 109, 119-123 (1990) (discussing requirement of medical expert testimony in malpractice cases to establish defendant's departure from medically accepted standards of care).

104 *See* PROSSER, *supra* note 27, at 131 (setting forth breach of duty element as essential to negligence action); *see also Young*, 560 So. 2d at 845-46 (finding requirement of expert testimony to establish whether defendant failed to exercise reasonable care and diligence); Jennifer S.R. Lynn, *Connecticut Medical Malpractice*, 12 BRIDGEPORT L. REV. 381, 388-89 (1992) (explaining that plaintiff in medical malpractice case must present expert testimony to establish applicable standard of care and deviation from that standard of care and to prove causation and extent of plaintiff's injury).

105 *But see* Marsh v. Minneapolis Herald, Inc., 134 N.W.2d 18, 21 (Minn. 1965) (discussing case where once duty proven, finding breach of that duty was difficult). *See, e.g.*, Cramer v. Housing Opportunities Comm'n of Montgomery County, 501 A.2d 35, 39 (Md. 1984) (noting that breaches of duty owed to another is negligence); Blair v. Mt. Hood Meadows Dev. Corp., 630 P.2d 827, 832 (Or. 1980) (discussing that establishing duty and breach is necessary and important factor when proving negligence), *modified*, 634 P.2d 241 (Or. 1981); Russ Versteeg, *Running Scared: Negligence and the Running Boom*, 4 SETON HALL J. SPORT L. 447, 450 (1994) (noting that breach of duty occurs when defendant fails to act like reasonable person under circumstances).

106 *See R.J. and P.J.*, 625 So. 2d at 117 (denying recovery to patient told he was HIV-positive when he was not because he suffered no physical injury); *see also Estate of Doe*, 824 F. Supp. at 749 (denying recovery against blood bank because statute of limitations had run); Chambarry v. Mt. Sinai Hosp., 161 Misc.2d 1000, 1002-03, 615 N.Y.S.2d 830, 833 (Sup. Ct. N.Y. County 1994) (finding plaintiff could not recover against hospital who gave her transfusion of HIV-positive blood because she had not yet developed AIDS); Wolfe, *supra* note 98, at 1A (discussing denial of Anastosopoulos claim because HIV screening not standard medical practice until after birth of her child).

107 *See Estate of Doe*, 824 F. Supp. at 749 (noting that questions to ask, screening procedures, identification of inappropriate blood donors, and tests applied to blood samples rely upon medical judgments); *see also Chambarry*, 161 Misc.2d at 1003, 615 N.Y.S.2d at 833 (discussing judge's concern about state of knowledge of HIV and AIDS in 1981); Hernandez,

administration of HIV tests has specific guidelines.[108] Policy concerns also support accurate disclosure of HIV test results to the patient.[109] Failure to administer the test properly,[110] or failure to inform a mother of the results,[111] constitutes a breach of the standard of care.

2. Finding a Causal Link Between Breach and Injury

Establishing causation[112] requires a systematic analysis.[113] First, courts employ the "but for" test[114] to establish whether the

supra note 9, at 405 (noting that as of 1994 physicians could not ensure child would not be born with HIV).

[108] *See* Renna, *supra* note 10, at 412-15 (discussing various types of available HIV tests). *See generally* Leonard C. Heath, Jr., *A Hospital's Dilemma: The Legal Implications of Promulgating Guidelines Concerning Human Immunodeficiency Virus*, 23 U. RICH. L. REV. 39, 43-44 (1988) (explaining procedures for testing for HIV); Maia E. Scott, *Tests For Pediatric Aids: Are We Failing Our Children?*, 3 VA. J. SOC. POL'Y & L. 217, 232-34 (1995) (discussing HIV testing in newborns).

[109] *See* N.Y. PUB. HEALTH LAW § 2500-f (McKinney 1996) (addressing HIV testing of newborns by ordering promulgation of regulations to deal with issue by June 26, 1996); *see also*, 1996 N.Y. LAWS 220 (adding, in Executive Memorandum of Governor, on June 26, 1996, § 2500-f to Public Health Law of New York); 1996 N.Y. LAWS 220 (stating, in Memorandum, New York State Assembly's support of § 2500-f of Public Health Law); *R.J. and P.J.*, 625 So. 2d at 116 (discussing case where patient told he was HIV-positive when he was not); *Mother Sues*, *supra* note 22, at A41 (discussing case where mother not informed of her HIV test results).

[110] *See, e.g.*, Byrd v. State Dep't of Pub. Safety & Corrections, 637 So. 2d 114, 117 (La. 1994) (discussing case in which plaintiff alleges physician was negligent in failing to test for viral cause of patient's colitis); Young v. Colligan, M.D., 560 So. 2d 843, 845 (La. Ct. App. 1990) (discussing plaintiff's claim that physician was negligent in his failure to administer pregnancy test prior to performing hysterectomy); McNulty v. McDowell, 613 N.E.2d 904, 907 (Mass. 1993) (noting that when physician failed to administer tests or procedures designed for benefit of later-conceived child, duty was breached).

[111] *See Mother Sues*, *supra* note 22, at A41 (discussing case where mother not informed of her HIV test results). *See generally* Heath, *supra* note 108, at 43-44 (discussing guidelines for HIV testing).

[112] *See* PROSSER, *supra* note 27, at 131 (defining causation as "reasonably close causal connection between the conduct and the resulting injury"); *see also* United States v. Carroll Towing Co., 159 F.2d 169, 175 (2d Cir. 1947) (setting out elements of negligence, including causation); Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 341, 162 N.E. 99, 101 (1928) (finding that bodily security only protected against some forms of interference or aggression). *See generally* Beauchene v. Synanon Found., Inc., 88 Cal. App.3d 342, 345-47 (Cal. Ct. App. 1979) (recognizing components of causation); Reiman Assoc., Inc. v. R/A Advertising Inc., 306 N.W.2d 292, 294-95 (Wis. 1981) (stating that legal cause is comprised of two components: cause in fact and proximate cause).

[113] *See* Williams v. University of Chicago Hosp., 667 N.E.2d 738, 742 (Ill. App. Ct. 1996) (defining proximate cause as injury that is natural and probable result of negligent act). *Id.* (citing Quirke v. City of Harvey, 639 N.E.2d 1355, 1358 (Ill. 1994) (discussing requirements of proving proximate cause, intervening acts and superseding acts); *see also* Yonce v. Smithkline Beecham Clinical Lab., Inc., 680 A.2d 569, 575-76 (Md. Ct. Spec. App. 1996) (analyzing proximate cause under two tests).

[114] *See Yonce*, 680 A.2d at 575 (defining "but for" test); *see also* Hensley v. U.S., 728 F. Supp. 716, 721 (S.D. Fla. 1989) (stating that to establish proximate cause under Florida law, plaintiffs must show that defendant's alleged wrong caused damage of which they complain; "but for" test or causation in fact is essential element to proximate cause); Rober-

causation was necessary to evince an injurious result.[115] If the injury would have occurred absent the defendant's wrongful conduct,[116] the defendant is not liable.[117] The HIV-positive status of an infant would not occur[118] without inaccurate administration of an HIV test to the mother.[119] The "but for" test, however, is not the end of the inquiry when more than one independent cause brings about the harmful result.[120] Defendants often argue in wrongful life actions that conception, or a mother's decision not to abort the fetus,[121] occurred after the alleged violation of the standard of care.[122] When an infant is HIV-positive, the mother's conduct creates additional causes of that HIV-positive status.[123] With two independent causes bringing about the child's subsequent impaired birth, courts must also ascertain whether the health care provider's conduct was a proximate cause[124] of the injury.[125]

son v. National R.R. Passenger Corp., No.86-3359, 1988 WL 26478, at *4 (E.D.Pa. Mar.11, 1988) (defining causation in terms of "but for" sole cause test); BLACK'S, *supra* note 1, at 200 (defining "but for" test as "[t]est used in determining tort liability by applying the causative criterion as to whether the plaintiff would not have suffered the wrong 'but for' the action of the defendant").

115 *See* BLACK'S, *supra* note 1, at 221 (defining "cause in fact" as "particular cause which produces an event and without which the event would not have occurred"). *See generally* Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1737-59 (1985) (discussing causation theories in negligence causes of action).

116 *See Yonce*, 680 A.2d at 575 (defining "but for" test).

117 *See id.* (defining "but for" test).

118 There is an assumption in the analysis that a mother with knowledge she is HIV-positive will not conceive or give birth to an HIV-positive infant. This Note also assumes that the HIV-infection does not come from some source other than the mother, such as a blood transfusion to mother or child.

119 *See Yonce*, 680 A.2d at 575 (defining "but for" test); *Roberson*, 1988 WL 26478, at *4 (defining causation in terms of "but for" sole cause test); BLACK'S, *supra* note 1, at 200 (defining "but for" test).

120 *See Roberson*, 1988 WL 26478, at *4 (finding that "but for" test should not be used when more than one independent cause brings about injury).

121 Any reference in analysis of conception as an intervening, superseding cause also refers to a mother's decision not to abort.

122 *See* Hernandez, *supra* note 9, at 403 (discussing "fundamental stumbling block" in determining difference in value between life with HIV and no life at all). *See, e.g.*, Kush v. Lloyd, 616 So. 2d 415, 423-24 (Fla. 1992) (denying recovery that requires weighing value of impaired life against nonexistence); Becker v. Schwartz, 46 N.Y.2d 401, 409-11 386 N.E.2d 807, 811-12 413 N.Y.S.2d 895, 899-900 (denying recovery for failure to prove injury).

123 *See, e.g.*, Goldberg by Goldberg v. Ruskin, 471 N.E.2d 530, 537 (Ill. App. Ct. 1984) (discussing mother's right to have all options, including abortion, available to her concerning pregnancy); Jacqueline E. Mega, *Negligent Infliction of Emotional Distress: Confusion in New York and a Proposed Standard*—Lynch v. Bay Ridge Obstetrical and Gynecological Associates, P.C., 56 BROOK. L. REV. 379, 389-90 (1990) (discussing rejection in New York courts of argument that failure to abort was superseding cause); Maxine A. Sonnenburg, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. CAL. L. REV. 477, 478-79 n.9 (1982) (discussing proposed California statute eliminating tortfeasor's possible defense that failure to abort is intervening cause).

124 *See Yonce*, 680 A.2d at 575 (noting two subparts of proximate cause); *see also* Keel v. Banach, 624 So. 2d 1022, 1026 (Ala. 1993) (noting that plaintiff must prove causal connec-

To determine proximate cause,[126] courts ascertain whether the defendant's conduct substantially contributed to the birth of an impaired child[127] by examining the chain of causation.[128] Conception[129] only breaks the chain of causation[130] if it is also a super-

tion between child's birth and defendant's negligence, showing that without that negligence, plaintiff would have known of child's defects and would not have conceived or terminated pregnancy); Blair v. Hutzel Hosp., 552 N.W.2d 507, 512 (Mich. Ct. App. 1996) (asserting in wrongful life claim that plaintiff can show that defendant's negligence deprived her of opportunity to learn of risks of bearing child with defects). *See generally* PROSSER, *supra* note 27, at 131 (noting causation is composed of two elements: causation in fact and proximate causation).

[125] *See Keel*, 624 So. 2d at 1026 (noting that plaintiff must prove causal connection between child's birth and defendant's negligence); *Blair*, 552 N.W.2d at 512 (asserting in wrongful life that plaintiff can show that defendant's negligence deprived him or her of opportunity to learn of risks of bearing child with defects).

[126] *See* BLACK'S, *supra* note 1, at 1225 (defining proximate cause as "[t]hat which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces injury, and without which the result would not have occurred"); Palsgraf v. Long Island R.R., Co., 248 N.Y. 339, 341, 162 N.E. 99, 101 (1928) (noting without element of proximate cause courts would always find liability for any and all consequences); *see also* Williams v. State, 308 N.Y. 548, 553, 127 N.E.2d 545, 548 (1955) (finding that there is difficulty in applying general rule to unique set of circumstances); O'Neill v. City of Port Jervis, 253 N.Y. 423, 433, 171 N.E. 694, 697 (1930) (noting proximate cause is dependent upon facts of particular case); Martin v. Herzog, 228 N.Y. 164, 170, 126 N.E. 814, 816 (N.Y. 1920) (noting question of negligence should not be confused with causal connection between negligence and injury).

[127] *See* PROSSER, *supra* note 27, at 276 (discussing substantial factor test).

[128] *See Yonce*, 680 A.2d at 576-77 (examining analysis of chain of causation).

[129] *See, e.g.*, Roseberry v. Brooks, 461 S.E.2d 262, 267 (Ga. Ct. App. 1995) (finding mother's decision to undergo abortion as qualifying for unique medical treatment, was superseding cause and actual cause of unborn child's death); Walker v. Rinck, 604 N.E.2d 591, 592 (Ind. 1992) (stating defendants argued conception was superseding cause); Lynch v. Bay Ridge Obstetrical & Gynecological Assocs., P.C., 72 N.Y.2d, 632, 636-37, 532 N.E.2d 1239, 1241-42, 536 N.Y.S.2d 11, 13-14 (1988) (noting that plaintiff must show that any action he or she took, or failed to take, to avoid danger created by defendant was normal consequence of defendant's conduct); People v. Kane, 213 N.Y. 260, 268-69, 107 N.E. 655, 657 (1915) (discussing that in case where defendant shot victim, causing miscarriage, causing her death, miscarriage was not superseding cause, as shooting was traceable directly to her death); Hoffman-Rattet v. Ortho Pharm. Corp., 135 Misc.2d 750-756, 516 N.Y.S.2d 856, 861 (Sup. Ct. N.Y. County 1987) (holding physician's knowledge of harmful effects of IUD device did not constitute intervening cause relieving manufacturer of liability); Van Derhoef, *supra* note 93, at 666 (stating almost anything could be superseding cause); Suzann M. Weber, *Pay Me Now or Pay Me Later? The Question of Prospective Damage Claims for Genetic Injury in Wrongful Life Cases*, 23 IND. L. REV. 753, 788 (1990) (listing various superseding causes).

[130] *See Walker*, 604 N.E.2d at 596 (stating superseding, intervening cause must be foreseeable at time of injury to break causal link between wrongful conduct and injury); *Id.* (citing Elder v. Fisher, 217 N.E.2d 847, 852 (Ind. 1966) (discussing effect of superseding, intervening cause on causal connection between conduct and injury)); *see also Yonce*, 680 A.2d at 576 (finding negligent or non-negligent intervening force may break chain of causation); Graham v. Keuchel, 847 P.2d 342, 348 (Okla. 1993) (finding superseding cause must be independent of original act, adequate of itself to bring about result and not reasonably foreseeable to actor). *But see Lynch*, 72 N.Y.2d at 636-37, 532 N.E.2d at 1241 536 N.Y.S.2d at 13-14 (recognizing intervening act not foreseeable, or independent of or far removed from defendant's conduct to be superseding act); *Id.* (citing Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 314, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169 (1980) (noting there are situations where superseding act is not foreseeable)).

seding cause.[131] For an intervening cause to supersede a defendant's wrongful conduct, the cause must meet three criteria.[132] First, the intervening cause must be independent of the original act.[133] In wrongful life actions, the defendant is usually a health care provider who treated the mother in relation to her pregnancy.[134] It is submitted that the pregnancy, and thus the conception, are not independent of the physician's treatment of a pregnant mother, or any wrongful conduct on the defendant's part. Next, the intervening cause must also be adequate in itself to bring about the result.[135] While conception is adequate to bring about birth,[136] it is not adequate to bring about impaired birth.[137] An impairment depends on numerous factors, including negligent treatment,[138] inaccurate tests[139] and genetic factors.[140] If a mother relied upon the fact that she tested negative for HIV,[141] both those inaccurate test results and the conception contributed

[131] *See* BLACK'S, *supra* note 1, at 820 (defining intervening cause as "independent cause which intervenes between the original wrongful act or omission and the injury"); *see also Derdiarian*, 51 N.Y.2d at 314, 414 N.E.2d at 670 434 N.Y.S.2d at 169 (stating that acts of third person intervening between defendant's conduct and plaintiff's injury do not necessarily sever causal connection). *But see* Excelsior Ins. Co. of N.Y. v. State Liverpool & London & Globe Ins. Co. of Liverpool, Eng., 296 N.Y. 40, 45, 69 N.E.2d 553, 555 (1946) (finding that mental capacities of patient supersede duty mental institution owes to community).

[132] *See Yonce*, 680 A.2d at 577 (setting forth factors necessary to show that intervening cause has risen "to the magnitude of a supervening cause").

[133] *See Graham*, 847 P.2d at 348 (stating three criteria for superseding cause).

[134] *See, e.g.*, Siemieniec v. Lutheran Gen. Hosp., 480 N.E.2d 1227, 1228 (Ill. App. Ct. 1985) (suing defendant doctors who plaintiffs consulted as to whether prospective child would be hemophiliac); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1153 (La. 1988) (suing physician who negligently performed tubal ligation); Becker v. Schwartz, 46 N.Y.2d 401, 405-06 386 N.E.2d 807, 808-09, 413 N.Y.S.2d 895, 896-97 (1978) (suing defendants who treated mother prior to her pregnancy and failed to recommend amniocentesis test); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (suing doctors who prescribed Dilantin to patient to treat epilepsy during her treatment for pregnancy).

[135] *See Graham*, 847 P.2d at 348 (stating three criteria for superseding cause).

[136] This Note assumes the mother does not terminate the pregnancy or miscarry prior to birth.

[137] It is submitted that conception is a factor in and of itself. This Note considers genetic factors of the respective parents as factors unto themselves.

[138] *See, e.g.*, *Pitre*, 530 So. 2d at 1153 (negligently performing tubal ligation); *Harbeson*, 656 P.2d at 486 (negligently prescribing prescription drugs).

[139] *See, e.g.*, R.J. and P.J. v. Humana of Fla., 625 So. 2d 116, 116 (Fl. Dist. Ct. App. 1993) (negligently informing patient of HIV test result); *Mother Sues*, *supra* note 22, at A41 (failing to inform mother of test results).

[140] *See, e.g.*, Reed v. Campagnolo, 630 A.2d 1145, 1146 (Md. 1993) (failing to inform of existence of and need for prenatal testing to reveal genetic birth defects); Becker v. Schwartz, 46 N.Y.2d 401, 405-06, 386 N.E.2d 807, 808-09, 413 N.Y.S.2d 895, 896-97 (1978) (failing to recommend amniocentesis test to mother over 35 years of age).

[141] *See Mother Sues*, *supra* note 22, at A41 (noting mother assumed physician would tell her of her test results and subsequently conceived).

to the birth of an HIV-positive infant. New York courts will not impute an affirmative duty upon a mother to abort a fetus that may be born with an impairment.[142] A woman has a legal right to choose whether to abort[143] and failure to do so does not supersede the physician's negligent conduct.[144]

The last factor is whether the original actor reasonably could have foreseen the intervening occurrence.[145] In a wrongful life action, a health care provider may argue that he or she was unaware that a mother was planning to conceive.[146] The argument is countered with a contention that he or she should have known that his or her patient may become pregnant,[147] especially if the defendant was the patient's gynecologist or primary physician. In any event, whether an intervening cause supersedes the defendant's wrongful act is a question of fact for the jury.[148] As a result, it seems that an HIV-positive infant seeking recovery for wrongful life may be able to prove causation.

[142] *See* Lynch v. Bay Ridge Obstetrical & Gynecological Assoc., P.C., 72 N.Y.2d 632, 637, 532 N.E.2d 1239, 1242, 536 N.Y.S.2d 11, 12-13 (1988) (finding plaintiff's choice to have abortion not superseding cause, as matter of law). *See, e.g.*, Walker v. Rinck, 604 N.E.2d 591, 596 (Ind. 1992) (finding that conceiving child is not superseding, intervening cause, so court could not decide whether mother should have aborted). *But see* Roseberry v. Brooks, 461 S.E.2d 262, 267 (Ga. Ct. App. 1995) (finding that mother's decision to have abortion allowing her to undergo surgery that would save her own life was superseding, intervening cause in death of unborn child).

[143] *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding Ninth Amendment encompasses woman's decision whether or not to terminate pregnancy).

[144] *See, e.g.*, Blair v. Hurtzel Hosp., 552 N.W.2d 507, 512 (Mi. Ct. App. 1996) (holding doctor has duty to ensure woman has information to decide her procreative options, including abortion); *Lynch*, 72 N.Y.2d at 634-35, 532 N.E.2d at 1239-41, 536 N.Y.S.2d at 12-13 (finding choice not to abort fetus is not superseding cause); Karen A. Bussel, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661, 683 (1991) (discussing fetal rights and women's rights and noting judiciary should not order procedures to protect fetus while violating woman's autonomy).

[145] *See* Graham v. Keuchel, 847 P.2d 342, 348 (Okla. 1993) (stating three criteria for superseding cause); *see also Walker*, 604 N.E.2d at 596 (noting that for intervening act to break causal chain it must not be one that is foreseeable).

[146] *See* McNulty v. McDowell, 613 N.E.2d 904, 907 (Mass. 1993) (noting physician's knowledge that mother intended to conceive was critical factor in determination of duty to child, but refusing to hold physician liable for possibility that any woman of child-bearing age may conceive).

[147] *See Walker*, 604 N.E.2d at 596 (finding it was foreseeable that defendant's patient would become pregnant again). *But see McNulty*, 613 N.E.2d at 907 (rejecting notion that physician owes duty to later-conceived child based solely on fact that woman was capable of becoming pregnant).

[148] *See Graham*, 847 P.2d at 352 (noting superseding-cause elements are interwoven with mother's conduct and should be determined by fact-finder); *see also* O'Neill v. City of Port Jervis, 253 N.Y. 423, 431, 171 N.E. 694, 697 (1930) (noting "legal or proximate cause is always dependent upon the facts of a particular case").

3. Solving the Mystery: A Legally Cognizable Injury

The final, and most problematic, element of a negligence action is damages.[149] In a wrongful life action, New York courts consistently deny recovery on the grounds that the impaired child did not suffer an injury.[150] There are two strands to this argument.[151] First, New York courts do not want to make a determination that an impaired life is worse than nonexistence.[152] Even if courts could make such a determination, calculation of damages remains speculative.[153] Second, negligence law seeks to place an injured party in the position he or she would have occupied but for the defendant's negligence.[154] New York courts deem it impossible to calculate damages when the alternative is nonexistence.[155]

[149] *See* Becker v. Schwartz, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (arguing wrongful life infant does not suffer legally cognizable injury); *see also* PROSSER, *supra* note 27, at 131 (setting forth "actual loss or damage resulting to the interests of another" as last element of negligence); Kelly, *supra* note 76, at 514 (noting "[c]ourts balk" at claim that impaired birth is loss for which an infant deserves compensation).

[150] *See* Alquijay v. St. Luke's-Roosevelt Hosp. Ctr., 63 N.Y.2d 978, 979, 473 N.E.2d 244, 245-46 483 N.Y.S.2d 994, 996 (1984) (denying recovery for wrongful life claim because it "'demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence,' which the law is not equipped to make") (quoting *Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (denying wrongful life on grounds that there was no injury to plaintiff)); *see also* Hernandez, *supra* note 9, at 403 (discussing "fundamental stumbling block" in determining difference in value between life with HIV and no life at all). *See, e.g.*, Kush v. Lloyd, 616 So. 2d 415, 423-24 (Fla. 1992) (denying recovery that requires weighing value of impaired life against nonexistence); Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980) (following majority rule that "'benefits' of parenthood far outweigh any of the mere monetary burdens"); *Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 811-12, 413 N.Y.S.2d at 900 (denying recovery for failure to prove injury).

[151] *See Becker*, 46 N.Y.2d at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (discussing two flaws to wrongful life action).

[152] *See Alquijay*, 63 N.Y.2d at 979, 473 N.E.2d at 245-46, 483 N.Y.S.2d at 995-96 (denying recovery for wrongful life claim because calculation of damages depends upon comparison between choice of life in impaired state and nonexistence); *Becker*, 386 N.E.2d at 812 (denying wrongful life claim on grounds that there in no injury to plaintiff); Weber, *supra* note 129, at 758 (discussing how courts weigh defected life over nonexistence).

[153] *See Becker*, 46 N.Y.2d at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 901 (noting there is "theoretical hurtle" in ascertaining damages).

[154] *See* PROSSER, *supra* note 27, at 508 (noting courts award compensatory damages as "closest possible financial equivalent" of injury); *see also* New York Transit Auth. v. State Div. of Hum. Rts., 78 N.Y.2d 207, 214-15, 577 N.E.2d 40, 44, 573 N.Y.S.2d 49, 53 (1991)(explaining goal of tort law is to make victim whole); Sharapata v. Town of Islip, 56 N.Y.2d 332, 334 437 N.E.2d 1104, 1105, 452 N.Y.S.2d 347, 348 (1982) (declaring primary purpose of compensatory damages is to make victim whole again); *Becker*, 46 N.Y.2d 411-12 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (discussing that remedy in negligence is designed to place that party in position he would have occupied but for negligence of defendant).

[155] *See Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (finding that damages are too speculative to ascertain in wrongful life context); *see also*, Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. Super. Ct. App. Div. 1966) (finding that it was for courts to measure impaired infant's damages); *Alquijay*, 63 N.Y.2d at 979, 473 N.E.2d at 245-46, 483 N.Y.S.2d at 995-96 (determining calculation of damages in wrongful life is impossible).

Neither of these two contentions are unresolvable and public policy concerns[156] compel a resolution.

In declaring that an impaired life is not worse than nonexistence,[157] all courts instinctively preserve the value of human life above all else.[158] While successfully evading comparisons between impaired life and nonexistence in wrongful life actions,[159] other jurisdictions, nonetheless, have supported choices for death over lives full of suffering, in right-to-die cases.[160] Even when a patient is incapable of choosing termination of life-sustaining treatment,[161] these courts permit withdrawal of the treatment.[162] Al-

[156] *But see* Bopp, *supra* note 25, at 496-502 (discussing concerns of imposing liability on physicians, including intrusion with medical and professional judgment, possibility that physicians be required to administer every available test during prenatal care and violation of objections based on conscience). *See, e.g.*, Kelly, *supra* note 76, at 508 (noting deterrence is reason for awarding damages in genetic counseling wrongful life actions).

[157] *See Gleitman*, 227 A.2d at 693. The *Gleitman* court found that human intuition leads to the conclusion that an infant would choose life with defects over no life at all. *Id.* This conclusion is based on the fact that society instinctively values human life, with or without handicaps, above all else. *Id.*

[158] *See id.* Humanity seeks life and holds on to it, despite its heavy burdens. *Id.* The right to life is inalienable and courts cannot say what defects should prevent an embryo from living, precluding the claim that denial of the opportunity to terminate the existence of a defective embryo was an injury. *Id.*; *see also* Kush v. Lloyd, 616 So. 2d 415, 423 (Fla. 1992). The problem is an "existential conundrum," baffling the wisest people in history, including Shakespeare's Hamlet. *Id.*

[159] *See Kush*, 616 So. 2d at 423 (denying any attempt to make fact-finder weigh value of impaired life against nonexistence); *see also Becker*, 46 N.Y.2d at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (deferring question of measurement of infant's damages to legislature).

[160] *But see* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 286-87 (1990) (finding, in plurality opinion, that state cannot substitute judgment of parents for that of comatose patient in deciding whether to terminate life-sustaining treatment). *See, e.g.*, Guardianship of Barry, 445 So. 2d 365, 372 (Fla. Dist. Ct. App. 1984) (allowing courts to use substituted judgment in addressing whether there was clear and convincing evidence that comatose patient will not recover in determining whether to terminate life-sustaining treatment); *In re* Quinlan, 355 A.2d 647, 671-72 (N.J. 1976) (allowing withdrawal of life-sustaining equipment from patient in persistent vegetative state, as long as medical committee agreed there was no possibility for patient to recover).

[161] *See generally* Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 375-79 (1988) (discussing legal standards in right to die cases and analyzing several cases). *See, e.g.*, *Guardianship of Barry*, 445 So. 2d at 367 (discussing patient's "chronic permanent vegetative coma, absent brain function" condition); *In re* L.H.R., 321 S.E.2d 716, 718 (Ga. 1984) (allowing termination of life-sustaining treatment for infant who lacked 85-90% of her brain tissue and had no hope for recovery); *In re* C.A., 603 N.E.2d 1171, 1173 (Ill. App. Ct. 1992) (discussing case where parents sought 'do not resuscitate' order for infant experiencing interventricular hemorrhaging); *Quinlan*, 355 A.2d at 651 (describing patient's condition as "debilitated and allegedly moribund").

[162] *See Guardianship of Barry*, 445 So. 2d at 372 (allowing termination of life-sustaining treatment); *see also In re* L.H.R., 321 S.E.2d at 723 (allowing family member to make decision to terminate life-sustaining treatment of adult in vegetative state); *In re* C.A., 603 N.E.2d at 1184 (allowing withdrawal of life-sustaining equipment based on family member's consent); Care and Protection of Beth, 587 N.E.2d 1377, 1383 (Mass. 1992) (allowing parents to put 'do not resuscitate order' on infant's charts when infant was in persistent vegetative state); Kelly, *supra* note 76, at 537-38 (noting even when patient does not ex-

lowing for the termination of life,[163] even when a patient cannot competently choose that termination,[164] while denying wrongful life actions, is inconsistent.

New York courts also hold that calculation of damages is too speculative in wrongful life actions.[165] The underlying principle is that negligence seeks to place a wronged plaintiff in the position he or she would have occupied but for the defendant's negligence.[166] For an impaired infant, he or she would not have been

pressly desire to withdraw life-sustaining treatment, health care providers may withdraw such treatment).

[163] *See* Turpin v. Sortini, 643 P.2d 954, 961-62 (Cal. 1982) (rejecting state policy that "as a matter of law—that under all circumstances 'impaired life' is 'preferable' to 'nonlife'"); Smith v. Cote, 513 A.2d 341, 352-53 (N.H. 1986) (arguing issue in wrongful life was not child's right to choose non-life over impaired life, but whether doctor caused an injury); Kelly, *supra* note 76, at 539 (noting judicial recognition of inconsistency between recognizing right-to-die claims, but rejecting child's claim in genetic counseling torts).

[164] *See* Quill v. Vacco, 80 F.3d 716, 719-20 (2d Cir.), *cert. granted*, Vacco v. Quill, 117 S. Ct. 36, 36-37 (Oct. 1, 1996). The Supreme Court of the United States reviewed the constitutionality of New York's right-to-die statute. *Quill v. Vacco*, 117 S. Ct. 2293, 2296 (1997); *see also* N.Y. PEN. LAW §§ 120.30, 125.15(3) (McKinney 1995). These statutes collectively charge a physician assisting with suicide with manslaughter. §§ 125.15(3) & 120.32; *Id.* In 1994, three defendants, two dying of AIDS, filed suit against their physicians seeking medical assistance in hastening their death and for an injunction enjoining enforcement of the Penal Law against these physicians. *Quill*, 80 F.3d at 719-20. The District Court denied the injunction and dismissed the case. *Id.* at 720. The Second Circuit held there was no fundamental right to assisted suicide, but the laws prohibiting assisted suicide violated the Constitution. *Id.* at 725, 731; *see also* U.S. CONST. amend. XIV, § 1. The statutes violated the Equal Protection Clause, which provides no State shall "deny to any person within its jurisdiction the equal protection of the laws". *Id.*; *Quill*, 117 S. Ct. at 36-37. The Supreme Court granted certiorari in this case on October 1, 1996. *Id.*

Daniel Wise, *High Court Hears Assisted Suicide Case*, N.Y. L.J., Jan. 9, 1997, at 1. Oral arguments were held before the Supreme Court on January 8, 1997, with Attorney General Dennis C. Vacco defending a ban on physician-assisted suicide. *Id.* Vacco tried to draw a distinction between administration of life-ending drugs and withdrawal of life-sustaining treatment. *Id.* at 1. Professor Laurence Tribe, arguing in favor of physician assisted suicide, said there was little distinction, as many patients already refuse life-extending procedures. *Id.* at 1.

Vacco, 117 S. Ct. at 2296. As expected, on June 26, 1997, the Supreme Court ruled that terminally-ill patients have no constitutional right to medically-assisted suicide. *Id.*; William Goldschlag, *Suicide's Not a Right, Say Justices*, DAILY NEWS, June 26, 1997, at 2. However, Rehnquist indicated that discussions on the debate should continue. *Id.*; Sheryl Galy Stolberg, *The Good Death: Embracing a Right to Die Well*, N.Y. TIMES, June 29, 1997, at E1. A still unsettled issue is the fact that modern medicine has made the dying process worse. *Id.* It is submitted that the Court's determination only highlights the fact that a short life of suffering, with a prolonged, painful death, is an injury.

[165] *See* Becker v. Schwartz, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899 (1978) (discussing "theoretical hurdle" in ascertaining damages); *see also* Kush v. Lloyd, 616 So. 2d 415, 423 (Fla. 1992) (denying wrongful life recovery because calculation of damages was impossible); Alquijay v. St. Luke's-Roosevelt Hosp. Ctr., 473 N.E.2d 244 63 N.Y.2d 978, 979, 473 N.E.2d 244, 245, 483 N.Y.S.2d 994, 995 (1984) (finding calculation of damages in wrongful life to be impossible).

[166] *See Becker*, 46 N.Y.2d at 410, 386 N.E.2d at 811, 413 N.Y.S.2d at 899 (discussing remedy afforded to plaintiff in negligence).

born but for the defendant's negligence.[167] While calculation of injury to an impaired infant is difficult,[168] it is certainly not impossible. New York courts may deduce certain aspects of the recovery,[169] such as food, clothing and medical care.[170] Courts need not address some pecuniary losses, such as loss of income, since a person never born would never hold a job.[171] Further, a wrongful life plaintiff cannot claim that he or she enjoyed a benefit having been born.[172] Thus, calculation of an offset for such a benefit is unnecessary.[173] Finally, juries award pain and suffering to plaintiffs in various other tort actions.[174] While certainly a subjective determi-

167 *See id.* (explaining negligence principles).

168 *See* Kelly, *supra* note 76, at 515 (discussing that traditional damages rules afford plaintiffs ways of demonstrating loss).

169 *See id.* at 516. These aspects of damages are pecuniary losses. *Id.*

170 *See id.* Any child requires

> food, clothing, shelter, medical care and other necessities of life,["] easily ascertained. Further, to truly determine the 'quality' of life in question, consideration should also be given to the life span, available treatment, the potential for medical advances within the child's lifetime, the socio-economic status of the parents and their ability to cope with the handicap and afford treatment, and the societal attitude toward the disability.

Id.

171 *See id.* (noting that if plaintiff never was born, he or she never would hold job, precluding need to calculate lost income).

172 *See id.* at 519. "[B]enefits rule" offsets the benefits the defendant confers upon the plaintiff against recoverable damages. *Id.* This author rejects the benefits rule in genetic counseling wrongful life cases for four reasons. *Id.* First, it thrusts unwanted benefits upon a plaintiff, who never wanted to be born to begin with. *Id.* While the child lacks the capacity to make such a determination, the defendant should not determine this either. *Id.* at 519-520. Second, speculation as to benefits should not obscure certainty of the loss. *Id.* at 520. Third, the benefits rule will not produce a total offset, it just may limit pain and suffering recovery. *Id.* at 521. Finally, the benefits rule should not be used to deny support to children. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS §920, cmt. f (1979). This section provides an explanation of the benefits rule. *Id.*

173 *See* Kelly, *supra* note 76, at 521 (noting that benefits rule is ineffective). *See generally* Joel Feinberg, Comment, *Wrongful Conception and the Right Not to be Harmed*, 8 HARV. J.L. & PUB. POL'Y 57, 58-59 (1985) (discussing normal calculation of harm and benefits in wrongful life). *See, e.g.*, Ochs v. Borrelli, 445 A.2d 883, 886 (Conn. 1982) (finding benefits test is no more speculative in wrongful birth cases than in wrongful death or loss of consortium cases).

174 *See* Kelly, *supra* note 76, at 518 The author discusses pain and suffering awards in various tort actions; *Id. see also* Chung v. New York Transit Auth., 213 A.D.2d 619, 619, 624 N.Y.S.2d 224, 225 (2d Dep't 1995). The Supreme Court awarded $1,300,000 for pain and suffering in a personal injury action where plaintiff fell from a subway platform and was hit by a train. *Id. But see* Snover v. McGraw, 667 N.E.2d 1310, 1317 (Ill. 1996). The court found evidence of pain and suffering insufficient to support a pain and suffering award in a personal injury, motor vehicle, action. *Id. See, e.g.*, Thalman v. Owens-Corning Fiberglas Corp., 676 A.2d 611, 615 (N.J. Super. Ct. App. Div. 1996). The court modified the pain and suffering award to $285,000 in a products liability action. *Id.*; *See generally* Payton v. Abbott Labs, 437 N.E.2d 171, 178-81 (Mass. 1982) This case discusses emotional distress cases where injury is not provable and is thus subjective. *Id.*

nation,[175] inclusion of pain and suffering in other negligence awards[176] necessitates its inclusion in a wrongful life award.[177] Further, difficult assessment of injury in wrongful life actions should not outweigh the various public policy reasons supporting these claims.[178] As previously discussed,[179] deterrence is an important policy concern.[180] Negligence principles also require shifting the cost of an accident to the party responsible for that accident.[181] Finally, tort law seeks to compensate victims of negligent conduct,[182] while spreading the cost[183] to those at fault.[184]

175 *See* Kelly, *supra* note 76, at 518. (discussing speculative nature of pain and suffering awards); *see also* Bopp, *supra* note 25, at 506-07 (noting that determination of quality of life rests on consideration of life span, available treatment, potential for medical advances within child's lifetime, socio-economic status of parents and their ability to cope with handicap and treatment, and societal attitudes toward disability); Renna, *supra* note 10, at 438 (finding causes of pain and suffering for HIV-positive person include confrontation of "painful and ultimately fatal disease" and fear of unauthorized disclosure, both causing stress that accelerates disease). *But see* Weissman v. Wells, 267 S.W. 400, 406 (Mo. 1924) (noting that mere emotional distress without accompanying physical injury precludes recovery).

176 *See generally* Kelly, *supra* note 76, at 518 (discussing wrongful life awards).

177 *See, e.g.*, Ramey v. Fossoulas, 414 So. 2d 198, 200-01 (Fla. Dist. Ct. App. 1982) (noting that raising impaired child was used in calculation of damages award); Mears v. Alhadeff, 88 A.D.2d 827, 827, 451 N.Y.S.2d 133, 133-34 (1st Dep't. 1982) (allowing damages for education, but not for embarrassment to unwed mother); Mason v. Western Pennsylvania Hosp., 453 A.2d 974, 977 (Pa. 1982) (O'Brien, J., dissenting) (finding that law of negligence should not turn on "fortuitous considerations" and benefit of raising child does not outweigh physician's negligence) (quoting Howard v. Lecher, 42 N.Y.2d 109, 112, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365 (1977)).

178 *See* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (noting that recognition of duty acts as comprehensive and consistent deterrent to malpractice); *see also* Turpin v. Sortini, 643 P.2d 954, 961 (Cal. 1982) (recognizing extension of duty discourages malpractice); Hernandez, *supra* note 9, at 405 (arguing approval of wrongful life claim deters medical malpractice); Kelly, *supra* note 76, at 508 (arguing in genetic counseling wrongful birth claims, deterrence is reason for tort law advances).

179 *See* Kelly, *supra* note 76, at 510 (noting deterrence entails imposition of full societal cost of careless mistakes on those who make them).

180 *See id.* at 510 (finding that legal principles support placing cost of accident on one who creates excessive risks, rather than innocent victim); *see also* Hernandez, *supra* note 9, at 406 (arguing wrongful life action appropriately shifts costs to defendant).

181 *See* Kelly, *supra* note 76, at 511 (noting tort law seeks to compensate victims); *see also Turpin*, 643 P.2d at 961 (noting plaintiff's compensatory remedy intends to restore injured person as nearly as possible to position he or she would have been in had the wrong not been done); Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. Super. Ct. App. Div. 1966) (discussing that determination of compensatory damages wass necessary).

182 *See* William C. Way, *The Problem of Economic Damages: Reconceptualizing the Moorman Doctrine*, 1991 U. ILL. L. REV. 1169, 1197 (1991) (proposing new approach to spreading risks for economic damages in tort actions). *But see* Nicole A. Cunitz, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 661 (1995) (discussing tort reform in effort to reduce malpractice insurance costs in legal field); Jack K. Kilcullen, *Groping for the Reins: ERISA, HMO Malpractice, and Enterprise Liability*, 22 AMER. J.L. & MED. 7, 48 (noting problem with spreading risk in health care delivery is feeling of undue burden on physicians).

183 *See* Kelly, *supra* note 76, at 511 (discussing cost of defendant's negligence may be spread among purchasers of malpractice insurance and those purchasers' patients); *see also*

An infant who is HIV-positive due to inaccurate administration or disclosure of an HIV-test[185] does suffer an injury, as an impaired infant. As in right-to-die cases,[186] the infant's nonexistence is better than a life of prolonged suffering from HIV or AIDS-related diseases.[187] Calculation of damages is also possible, relying on vast evidence of the costs of raising a child infected with HIV.[188] Finally, policy concerns support recovery for the HIV-positive infant.[189] As in any malpractice action, negligence principles support shifting the cost of the child's impairment to the physician who negligently administered the HIV test[190] and deterring[191]

Hernandez, *supra* note 9, at 406 (arguing recovery in wrongful life makes funds available to infant "in his own right," reducing risk that child will become dependent upon society).

184 *See, e.g.*, R.J. and P.J. v. Humana of Florida, Inc., 625 So. 2d 116, 116 (Fla. Dist. Ct. App. 1993) (discussing case where healthcare provider falsely told patient that he was HIV-positive); *Mother Sues*, *supra* note 22, at A41 (discussing Newman case where mother not informed of test results).

185 *See* Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 375-79 (1988) (discussing legal standards in right to die cases and analyzing several cases). *See, e.g.*, Guardianship of Barry, 445 So. 2d 365, 372 (Fla. Dist. Ct. App. 1984) (allowing courts to use substituted judgment in addressing whether there is clear and convincing evidence that comatose patient will not recover in determining whether to terminate life-sustaining treatment); *In re* L.H.R., 321 S.E.2d 716, 718 (Ga. 1984) (allowing termination of life-sustaining treatment for infant who lacked 85-90% of her brain tissue and had no hope for recovery); *In re* Quinlan, 355 A.2d 647, 671-72 (N.J. 1976) (allowing withdrawal of life-sustaining equipment from patient in persistent vegetative state).

186 *See* Scarlatti, *supra* note 3, at 863. The author notes that children infected with HIV suffer symptoms in a rapid downhill course. *Id.* The symptoms include severe immunodeficiency, hepatosplenomegaly, persistent fever, parotitis, gastroenteritis, lymphadenopathy, diarrhea and AIDS-defining secondary infections. *Id.* Young infants commonly develop pneumocystis carinii pneumonia (PCP). *Id.*; *see also Fighting Fatigue Requires Battle on Many Fronts: Be Aggressive in Seeking Treatment, Experts Say*, AIDS ALERT, Oct., 1996, at S1(2). This article notes that fatigue is a common symptom of AIDS. *Id.* It often goes untreated, however, and leads to other symptoms, including depression. *Id.*

187 *See* Renna, *supra* note 10, at 437 (estimating cost of treating HIV-positive person at $10,000 per year; for treating person with AIDs at $38,800 per year, and, for treating person with AIDS at $102,000 for lifetime); *see also Medical Care Costs*, *supra* note 1, at 1901 (estimating average lifetime medical care costs of nine children dying from AIDS and treated average of 129 days at Harlem Hospital Center was $90,347).

188 *See, e.g.*, *R.J. and P.J.*, 625 So. 2d at 116 (informing patient incorrectly that he was HIV-positive).

189 *See* Turpin v. Sortini, 643 P.2d 954, 961 (Cal. 1982) (noting plaintiff's compensatory remedy intends to restore injured person as nearly as possible to position he or she would have been in had wrong not been done); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (noting recognition of duty acts as comprehensive and consistent deterrent to malpractice); Kelly, *supra* note 76, at 510 (finding that legal principles support placing cost of accident on one who creates excessive risks, rather than innocent victim).

190 *See Harbeson*, 656 P.2d at 496 (recognizing duty provides deterrent to malpractice); *see also* Hernandez, *supra* note 9, at 405 (arguing approval of wrongful life claim deters medical malpractice); Kelly, *supra* note 76, at 508 (arguing in genetic counseling wrongful claims, deterrence is reason for tort law advances).

191 *See* PROSSER, *supra* note 27, at 594 (noting courts do not favor assumption of risk because of potential for defense to reduce otherwise valid recovery); Kelly, *supra* note 76, at 511 (discussing assumption of risk on behalf of plaintiff in submitting to genetic testing).

negligent conduct. While plaintiffs may accept the risk that the test could be wrong, they do not assume the risk that a defendant will make a mistake.[192] Thus, the negligent physician should pay the cost of the child's extraordinary care.[193] Without such remedy,[194] a child would be forced to shift this burden to the community[195] or his or her family.[196] Thus, it is argued that an HIV-positive infant can prove damages in a wrongful life action.

II. LACK OF INFORMED CONSENT: A VIABLE REMEDY

Another type of tort action arises when a doctor fails to recommend that a patient take an HIV test, given the doctor's knowledge of the patient's history. For example,[197] two Maine doctors[198] knew their pregnant patient, Barbara Anastosopoulos,[199] was a former prostitute and intravenous drug user,[200] but never advised

[192] *See* Renna, *supra* note 10, at 437 (estimating cost of care of HIV and AIDS patients); *see also* Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1992) (allowing recovery for extraordinary expenses of infant's genetic impairment); *Medical Care Costs*, *supra* note 1, at 1901 (estimating cost of care of HIV-positive infants).

[193] *See generally* Vernellia R. Randall, *Managed Care, Utilization Review, and Financial Risk Shifting: Compensating Patients for Health Care Costs Containment Injuries*, 17 U. PUGET SOUND L. REV. 1, 72 (1993) (noting one goal of current tort system is to spread cost of injuries); Note, *Developments in the Law—Nonprofit Corporations—VI. Special Treatment and Tort Law*, 105 HARV. L. REV. 1677, 1690-91 (1992) (discussing problems with spreading loss in tort actions).

[194] *See* Bopp, *supra* note 25, at 506-07 (discussing evaluation of socio-economic status of child's parents); Kelly, *supra* note 76, at 511 (discussing spreading costs of negligence among members of medical community); *see also HIV Infection*, *supra* note 3, at 2416 (noting HIV's disproportionate effect on disadvantaged women and children of color).

[195] *See* Hernandez, *supra* note 9, at 406 (discussing that HIV-positive infants become burden upon social institutions).

[196] *See* N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1996) (providing lack of informed consent is failure of person providing professional treatment to disclose to patient alternatives, reasonably foreseeable risks and benefits); *see also* Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) (stating informed consent doctrine was based on premise that everyone has right to determine what can be done to his or her body); ZeBarth v. Swedish Hosp. Med. Ctr., 499 P.2d 1, 8-9 (Wash. 1972) (defining informed consent as patient's balancing of risks of treatment against benefits of treatment); BLACK'S, *supra* note 1, at 779 (defining informed consent as "person's agreement to allow something to happen (such as surgery) that is based on a full disclosure of facts needed to make the decision intelligently").

[197] *See Claim by Boy*, *supra* note 22, at A1 (explaining that former prostitute and intravenous drug user filed claim against her physicians in 1991 alleging that their failure to test her for HIV resulted in her son's HIV-positive status).

[198] *See id.* Dr. Perakis was her primary doctor from 1982 to 1987 and Dr. Pollard her obstetrician. *Id.*

[199] *See* David Sharp, *Former Prostitute with AIDS Sues Over Son's Birth-Woman Blames Doctors for Not Urging HIV Tests*, BANGOR DAILY NEWS, Aug. 25, 1993, at A1. Ms. Anastosopoulos was formerly a prostitute and intravenous drug user, but stopped prostituting and using drugs, married and became pregnant. *Id.*

[200] *See id.* (discussing facts of Anastosopoulos case).

her to take an HIV test.[201] Ms. Anastosopoulos subsequently gave birth to an HIV-positive infant.[202] Her claim, brought under Maine's wrongful life statute,[203] alleged her physicians denied her the information necessary to decide whether to carry her baby to term.[204] The Superior Court of York County granted summary judgment to the defendants,[205] holding they did not violate any standards of care.[206] Had this case been in New York, Ms. Anastosopoulos could seek a remedy under lack of informed consent.[207]

In New York, lack of informed consent is a negligence action.[208] This requires a showing that a health care provider did not fully

[201] *See* John Ripley, *Maine Lawsuit Raises Social, Legal, Medical Issues*, BANGOR DAILY NEWS, May 17, 1994, at A4. Ms. Anastosopoulos actually sought treatment from Dr. Perakis for venereal diseases as early as 1981. *Id.*

[202] *See* Ripley, *supra* note 201, at A4. Christopher Anastosopoulos was born in 1988, developed AIDS, and his health declined rapidly. *Id.*

[203] ME. REV. STAT. ANN. tit. 24, § 2931 (West 1990). The statute allows recovery "for the birth of an unhealthy child born as a result of professional negligence . . . [and damages] shall be limited to damages associated with the disease, defect, or handicap suffered by the child." *Id.* at § 2931(3); *see also* Ripley, *supra* note 201, at A4. The Maine statute was enacted to answer claims about children conceived after failed sterilization. *Id.*

[204] *See* Anastosopoulos v. Perakis, 644 A.2d 480, 481 (Me. 1994). Ms. Anastosopoulos also sued for wrongful birth, on her own behalf, and for infliction of emotional distress. *Id.*

[205] *See id.*, 644 A.2d at 481. The Superior Court first reported the case to the Supreme Judicial Court in 1994 on the grounds that it "involved 'questions of sufficient importance and doubt'," particularly as to the interpretation of the wrongful life statute. *Id.* The Superior Court denied ruling on the case because there was no option available to dispose of the action, as required by Rule 72 of the Maine Rules of Civil Procedure. *Id.* at 482; *see also* ME. R. OF CIV. PROC., Rule 72 (West 1996). This statute regulates appeals to the Superior Court of Maine. *Id.*; Wolfe, *supra* note 98, at 1A. Ms. Anastosopoulos died of complications in 1995. *Id.* The court dismissed her wrongful birth claim in February of 1996 on the grounds that the statute of limitations had run before commencement in 1991. *Id.*

[206] *See* Wolfe, *supra* note 98, at 1A. In 1988, the HIV test was not reliable until four to six months after birth. *Id.* Failure to test Christopher between his fourth month and his tenth month, when he was diagnosed, made no difference in his health. *Id.*

[207] *See* Renna, *supra* note 10, at 421 (noting patient must give informed consent prior to medical procedures under law of every state, requiring physician to disclose all pertinent information); *see also* N.Y. PUBLIC HEALTH LAW § 2805-d (McKinney 1996) (setting forth tort action of lack of informed consent); Yonce v. Smithkline Beecham Clinical Lab., Inc., 680 A.2d 569, 583 (Md. Ct. Spec. App. 1996) (providing that lack of informed consent imposes duty on physician to disclose material risks and available alternatives); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 490 (Wash. 1983) (characterizing informed consent as imposing duty on physician to disclose risks associated with treatment to patient).

[208] *See* Hughson v. St. Francis Hosp., 92 A.D.2d 131, 137-38, 459 N.Y.S.2d 814, 818-19 (2d Dep't 1983) (compelling medical practitioner to disclose available alternatives, risks and benefits prior to treatment); *see also* N.Y. PUB. HEALTH LAW § 2783(4) (McKinney 1996) (stating that cause of action based on failure to provide information, explanations, or counseling prior to obtaining written informed consent, or based on lack of informed consent in ordering or performance of HIV related test are governed by section 2805-d of New York Public Health Law); N.Y. PUB. HEALTH LAW § 2785-a(2) (McKinney 1996) (stating when public health officer communicates test results to subject of test, officer shall directly provide test subject with counseling, or referrals for counseling, with regard to HIV disease and testing and appropriate health care and support services, or referrals to such services); N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1996) (setting forth cause of action for lack of informed consent). *See also, e.g.*, Reed v. Campagnalo, 630 A.2d 1145, 1146 (Md. 1993)

inform an injured party of medical risks prior to treatment[209] or diagnosis.[210] As to the elements of breach, causation and damages,[211] an impaired infant faces the same problems faced in a wrongful life action,[212] while different considerations apply to the standard of care.[213]

An additional obstacle for the New York plaintiff is the availability of several defenses to a lack of informed consent claim.[214] A defendant may show the risk involved was not commonly known,[215] or the defendant could not obtain consent from the plaintiff.[216] A defendant may also show the plaintiff indicated she did not want to know of the risks,[217] or would have undergone treatment regardless of the risks.[218] Finally, the defendant may

(alleging doctors failed to inform mother of need for prenatal testing that would reveal birth defects); Bani-Esraili v. Wald, 127 Misc.2d 202, 203 485 N.Y.S.2d 708, 709 (Sup. Ct. N.Y. County 1985) (claiming doctors misinformed mother of risk that child would develop Thalassemia major).

209 *See* N.Y. PUB. HEALTH LAW § 2805-d(3) (McKinney 1996) (providing person bringing cause of action for lack of informed consent must establish reasonably prudent, fully informed, patient would not have undergone treatment); *see also* Flores v. Flushing Hosp. and Med. Ctr., 176 A.D.2d 843, 848, 490 N.Y.S.2d 770, 771 (1st Dep't 1995) (listing elements of informed consent action in New York).

210 N.Y. PUB. HEALTH LAW § 2805-d(3) (McKinney 1996) (providing that cause of action requires proof lack of informed consent was be proximate cause of injury).

211 *See generally* PROSSER, *supra* note 27, at 121 (defining elements of negligence action). *See, e.g.*, Moore v. Blanchard, 43 So. 2d 599, 601 (La. 1949) (discussing element of damages).

212 This Note concludes that a wrongful life plaintiff can prove there is a duty to an unborn child, that a health care provider breached that duty and that a jury may ascertain damages. These conclusions also apply in a lack of informed consent action.

213 *See* Yonce v. Smithkline Beecham Clinical Lab., Inc., 680 A.2d 569, 583 (Md. Ct. Spec. App. 1996) (noting lack of informed consent is based on negligence principles); *see also Bani-Esraili*, 127 Misc.2d at 203, 485 N.Y.S.2d at 709 (analyzing lack of informed consent in negligence context); *Harbeson*, 656 P.2d at 490 (noting failure to depart information as to risks of proposed treatment is negligence).

214 N.Y. PUB. HEALTH LAW § 2805-d(4) (McKinney 1996) (establishing that certain defenses are available to defendant).

215 N.Y. PUB. HEALTH LAW § 2805-d(4)(a) (McKinney 1996) (allowing defense if "risk not disclosed is too commonly known to warrant disclosure").

216 N.Y. PUB. HEALTH LAW § 2805-d(4)(c) (McKinney 1996) (allowing defense if "consent by or on behalf of the patient was not reasonably possible").

217 N.Y. PUB. HEALTH LAW § 2805-d(4)(b) (McKinney 1996) (allowing defense if patient indicated he or she did not want to learn risks).

218 *See* N.Y. PUB. HEALTH LAW § 2805-d(4)(b) (McKinney 1996) (allowing defense if patient assures health care provider he or she would undergo treatment, regardless of risk involved); *see also* Bernard v. Block, 176 A.D.2d 843, 848, 575 N.Y.S.2d 506, 511 (2d Dep't 1991) (stating that for doctor to be liable for failure to obtain patient's informed consent to procedure, plaintiff must sustain burden of proof on three issues, including that reasonable person in plaintiff's condition would have opted against procedure); Sollazzo v. Edelman, 142 A.D.2d 572, 573, 529 N.Y.S.2d 907, 908 (2d Dep't 1988) (stating that defenses in N.Y. Public Health Law 2805-4 are affirmative defenses); Grossman v.Osteopathic Hosp. & Clinic of New York, 121 Misc.2d 533, 534, 468 N.Y.S.2d 327, 328 (Sup. Ct. Queens County 1983) (stating that defense to any action for medical malpractice based upon failure to obtain informed consent that patient assured medical practitioner he would undergo treat-

show he or she used reasonable discretion when evaluating the effect of disclosure of risks on the patient's condition.[219] Each of these defenses addresses breach of a standard of care,[220] which a plaintiff must defeat. It is submitted that an HIV-positive infant has a cause of action for lack of informed consent[221] if the infant's injury stems from a health care provider's failure to recommend that her mother take an HIV test.[222]

A. *Recommending an HIV Test: A Standard of Care*

Courts are undecided as to what constitutes a reasonable standard of care in lack of informed consent cases.[223] In many HIV-

ment, procedure or diagnosis regardless of risk involved, or patient assured medical practitioner that he did not want to be informed of matters to which he would be entitled to be informed). *See generally* Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639, 643-68 (1996) (discussing adequacy of informed consent for objective determination and noting ultimate factual, and subjective, question will be whether reasonable person in plaintiff's situation would have undergone abortion if physician properly informed her of probability of psychological harm to her).

219 *See* N.Y. PUBLIC HEALTH LAW § 2805-d(4)(d) (McKinney 1996) (allowing defense if health care provider, after considering all attendant facts and circumstances, used reasonable discretion to decide whether to disclose these alternatives or risks because practitioner reasonably believed disclosure could be expected to adversely and substantially affect patient's condition); *see also Grossman*, 121 Misc.2d at 534, 468 N.Y.S.2d at 328 (stating defense to lack of informed consent action may be that medical practitioner used reasonable discretion in disclosing considered alternatives or risks because of reasonable belief that disclosure could adversely and substantially affect patient's condition). *See generally* Eller, *supra* note 218, at 643-68 (discussing informed consent and physician's obligations to disclose information).

220 *See, e.g.*, Blair v. Hutzel Hosp., 552 N.W.2d 507, 508 (Mich. Ct. App. 1996) (holding failure to inform mother of option of abortion breached standard of care); Monusko v. Postle, 437 N.W.2d 367, 369 (Mich. Ct. App. 1988) (finding it is foreseeable that failure to immunize may result in rubella in pregnant patient, resulting in child with rubella syndrome); Gleitman v. Cosgrove, 227 A.2d 689, 691 (N.J. Super. Ct. App. Div. 1966) (discussing that expert testimony established physicians had duty to inform mother of possibility of defects to child when mother contracted German measles during her first trimester); Khan v. HIP Hosp., 127 Misc.2d 1063, 1067-68 487 N.Y.S.2d 700, 704 (Sup. Ct. Queens County 1985) (holding duty does not extend to unborn infant).

221 *See* N.Y. PUB. HEALTH LAW § 2805 (McKinney 1996) (setting forth lack of informed consent action).

222 *See, e.g.*, Anastosopoulos v. Perakis, 644 A.2d 480, 481 (Me. 1994) (discussing case where physicians knew of patient's history of sexually transmitted disease, but never recommended HIV test); *AIDS Educator Dies, But Son's Lawsuit Against Doctors Still On*, BANGOR DAILY NEWS, June 3, 1995 [hereinafter *AIDS Educator Dies*] (reporting on Ms. Anastosopoulos' death in 1995 and her claim that she led risky lifestyle before her pregnancy); Ripley, *supra* note 201 (reporting on Anastosopoulos case).

223 *See, e.g.*, Reed v. Campagnalo, 630 A.2d 1145, 1148-49 (Md. 1993) (questioning whether offering or performance of amniocentesis test was standard practice); *Blair*, 552 N.W. at 512 (finding when abortion is option by law, physician must furnish patients with adequate information for them to be able to decide whether to abort); Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 819, 364 N.E.2d 1340, 1341, 396 N.Y.S.2d 647, 648 (1977) (concluding use of amniocentesis test was not standard practice in 1969); Duffey v. Fear, 121 A.D.2d 928, 930-31, 505 N.Y.S.2d 136, 139 (1st Dep't 1986) (questioning what was standard of care as to removal of IUD, or disclosure of risks associated with IUD); Azzolino v. Dingfelder,

related cases, the performance of an HIV test[224] was not a common standard of care at the time of treatment.[225] Medical risks relating to the virus were too speculative to hold a physician liable for failure to disclose them to patients.[226] In all medical malpractice actions, courts also were concerned that expanding liability would result in physicians performing a battery of unnecessary tests to avoid risk of liability.[227] New York[228] requires a physician

337 S.E.2d 528, 530 (N.C. 1985) (dealing with standard of care regarding genetic counseling and availability of amniocentesis test). *But see* Randall R. Bovbjerg et al., *Defensive Medicine And Tort Reform: New Evidence in an Old Bottle*, 21 J. HEALTH POL. POL'Y & L. 267, 279 (1996) (stating that routine fetal monitoring is now standard of care).

[224] *See* Renna, *supra* note 10, at 412-15. There are several tests available to test for HIV. *Id.* The first are the Enzyme-Linked Immunosorbent Assay (ELISA) and the Western Blot. *Id.* at 413-14. Both of these tests detect for the presence of antibodies to HIV in the blood stream and are highly accurate. *Id.* The second is the polymerase chain reaction (PCR) test. *Id.* at 414. This test amplifies small quantities of HIV DNA to a detectable level and cannot result in a false positive. *Id.* The p24 antigen test detects proteins found in the core of HIV. *Id.* at 414-15. Finally, the IgA test detects for antibodies, like ELISA and the Western blot tests. *Id.* at 415; *see also* Martha A. Field, *Pregnancy and AIDS*, 52 MD. L. REV. 402, 424 n.82 (1993). This article describes different tests for AIDS. *Id. See generally* Marianne Burgard et al., *The Use of Viral Culture and P24 Antigen Testing to Diagnose Human Immunodeficiency Virus Infection in Neonates*, 327 NEW ENG. J. MED. 1192, 1194 (1992). The authors offer a discussion of AIDS testing. *Id.*; Steven A. Miles et al., *Rapid Serologic Testing with Immune-Complex- Dissociated HIV P24 Antigen for Early Detection of HIV Infection in Neonates*, 328 NEW ENG. J. MED 297, 299-300 (1993). This article offers a description of HIV testing on infants. *Id.*

[225] *See* Chambarry v. Mt. Sinai Hosp., 161 Misc.2d 1000, 1002-03 615 N.Y.S.2d 830, 833 (Sup. Ct. N.Y. County 1994) (refusing to consider what reasonable standards of HIV testing and disclosure of results were in 1981); *see also* Hoemke v. New York Blood Ctr., 912 F.2d 550, 552 (2d Cir. 1990) (reasoning that in assessing medical negligence claim, court must determine whether defendant acted in accordance with state of medical knowledge at time of transfusion and not with benefit of hindsight or knowledge of subsequent developments); Estate of Doe v. Vanderbilt Univ., 824 F. Supp. 746, 750 (D.D.C. 1993) (discussing applicable standards for disclosure of HIV test results in 1987 and 1988); Wolfe, *supra* note 98, at 1A (commenting that victory in *Anastosopoulos* case was ruling based on medical standard of care).

[226] *See* Williams v. Chameides, 603 A.2d 1211, 1214 (Conn. App. Ct. 1992) (noting, in case where father claims physician negligently timed surgical procedure, plaintiff must produce expert evidence sufficient to allow jury to determine applicable standard of care); *see also* Evans v. Bernhard, 533 P.2d 721, 724 (Az. 1975) (stating that general practitioner's testimony as to his usual personal practice was not sufficient to establish general medical standard); Downer v. Veilleux, 322 A.2d 82, 88 (Me. 1974) (finding personal and individualistic method of practice of doctor is not sufficient to establish reasonable basis for any inference that he has departed from general medical custom and practice in community, nor can it support conclusion that he was negligent in any regard by not following his own usual procedure). *See generally* Lynn, *supra* note 104, at 388-89 (explaining that plaintiff in medical malpractice case must present expert testimony to establish applicable standard of care and deviation from that standard of care); Robert G. Miceli, M.D., J.D., *Deprivation of Due Process for Physicians the "Failure to Diagnose" Cause of Action*, 33 ST. LOUIS U. L.J. 859, 887-98 (1989) (discussing standards of care and medical malpractice).

[227] *See* Bopp, *supra* note 25, at 486 (noting physicians tend to use defensive medicine in face of increasing tort liability); *see also* Closen, *supra* note 82, at 476 (noting doctors have been held liable for failing to warn others of contagious or dangerous conditions of patients); Boruschewitz v. Kirts, 554 N.E.2d 1112, 1113 (Ill. 1990) (discussing case where husband sued wife's psychiatrist for doctor's detrimental treatment of wife, where she

to disclose all reasonably foreseeable risks relating to medical treatment to his or her patient.[229] Whether a risk is reasonable depends on whether competent health care providers in the medical community are generally aware of that risk.[230]

Limiting the discussion to when a physician is aware that his or her patient is at higher risk for HIV,[231] it is reasonably foreseeable to that physician that the patient may be infected with HIV. It is well known that certain behavior, such as promiscuity, intravenous drug use and unprotected intercourse,[232] heightens the risk for HIV-infection.[233] It is also foreseeable that an HIV-posi-

eventually killed two people). *See generally* Michael Rustad and Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters"*, 47 RUTGERS L. REV. 975, 1018 (1995) (discussing fear of liability and physicians' reactions).

[228] N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1996).

> Lack of informed consent means the failure of the person providing professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

Id. See generally Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 128-29 105 N.E. 92, 93-94 (N.Y. 1914) (discussing patient's right to physical integrity).

[229] *See* N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1996) (setting forth lack of informed consent action); *see also* Blair v. Hutzel Hosp., 552 N.W.2d 507, 511 (Mich. Ct. App. 1996) (noting physician must disclose enough information to allow mother choice as to whether she will terminate pregnancy); Harbeson v. Parke-Davis, Inc., 656 P.2d 489, 490 (Wash. 1993) (discussing duty imposed upon physician to disclose information regarding risks); RESTATEMENT (SECOND) OF TORTS § 282 (1965) (defining negligence).

[230] *See* N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1996) (setting forth lack of informed consent action); *see also* Reed v. Campagnalo, 630 A.2d 1145, 1154 (Md. 1993) (finding what is appropriate in any situation does not depend solely on plaintiffs, but requires expert testimony and evaluation of all circumstances surrounding genetic counseling); *see also, e.g.*, McNeely v. M & M Supermarkets, Inc., 269 S.E.2d 483, 484-85 (Ga. 1980) (presupposing standard of behavior under negligence); Stewart v. Jefferson Plywood Co., 469 P.2d 783, 785 (Or. 1970) (discussing reasonable care).

[231] *See, e.g.*, Anastosopoulos v. Perakis, 644 A.2d 480, 481 (Me. 1994) (discussing case where physicians knew of patient's history of sexually transmitted disease, but never recommended HIV test); *Aids Educator Dies*, *supra* note 222 (reporting on Ms. Anastosopoulos' death in 1995 and her claim that she led risky lifestyle before her pregnancy); Ripley, *supra* note 201, at A4 (reporting on Anastosopoulos case). *But see* Trowell v. United States, 526 F. Supp. 1009, 1013 (M.D. Fla. 1981) (noting that plaintiff's own negligence is not reasonable risk subject to compensation in negligence action).

[232] *See* DuRant, *supra* note 2, at 59 (discussing knowledge of high school students as to perceived risks of AIDS); *see also Preventing HIV/AIDS*, *supra* note 2, at 39 (addressing various behavioral, social and economic forces that make adolescents more vulnerable to AIDS epidemic).

[233] *See* Durant, *supra* note 2, at 59. While generally the public is aware that certain factors such as unprotected intercourse and intravenous drug use increase the risk for HIV there are various misconceptions that certain harmless activity, such as mosquito bites and donating blood, does increase the risk. *Id.*; *see also* Renna, *supra* note 10, at 411. The author discusses transmission of HIV from mothers to unborn infants. *Id.*

tive mother will pass the virus to her child.[234] Public concern in stopping the spread of AIDS[235] compels physicians to recommend that their patients take an HIV test when the patient is at high risk for the virus.

B. Defending Against the Lack of Informed Consent Action

New York provides four defenses to the lack of informed consent action.[236] First, the defendant may claim the risk was too commonly known to warrant disclosure.[237] Despite the attention focused on HIV and AIDS in the last decade,[238] public knowledge has not reached the level that the risks are too well known to warrant disclosure.[239] Additionally, a defendant may argue the patient indicated he or she would have undergone medical treatment regardless of the risks,[240] or he or she did not want to know the risks.[241] This is a factual issue[242] dependent upon whether a

[234] *See HIV Infection*, *supra* note 3, at 2416 (noting most HIV-infected infants acquired virus through vertical transmission from their mothers); *see also Estimated Timing*, *supra* note 10, at 1330 (discussing transmission of HIV-1 from mother to child can occur during pregnancy and at delivery, but frequency is unknown, though this study estimates that one-third of infected infants are infected in utero and remaining are infected on day of birth); Renna, *supra* note 10, at 411 (noting in 93% cases of HIV-positive children, transmission was perinatal).

[235] *See Condoms Are All the Rage*, *supra* note 83, at 44 (discussing controversial giveaway plans for condoms in hopes of preventing spread of AIDS); *see also* Closen, *supra* note 82, at 458 (discussing efforts by Surgeon General to inform Americans of AIDS and HIV risk); *Preventing HIV/AIDS*, *supra* note 2, at 39 (recommending governmental leadership, integrated adolescent programs, school staff training, health and education collaboration, health care reform, research on adolescent health and media participation to increase awareness of AIDS in adolescents).

[236] *See* N.Y. PUB. HEALTH LAW § 2805-d(4) (McKinney 1996) (providing that there are several defenses to lack of informed consent action).

[237] *See* N.Y. PUB. HEALTH LAW § 2805-d(4)(a) (McKinney 1996) (allowing defense if "risk not disclosed is too commonly known to warrant disclosure").

[238] *See* Durant, *supra* note 2, at 59 (discussing public's awareness and misconceptions about HIV-risk factors); *see also* Renna, *supra* note 10, at 411 (discussing transmission of HIV from mothers to unborn infants).

[239] *See Preventing HIV/AIDS*, *supra* note 2, at 39 (addressing numerous factors that create barrier to effective AIDS prevention and recommending ways to combat problem).

[240] *See* N.Y. PUB. HEALTH LAW § 2805-d(4)(b) (McKinney 1996) (allowing defense if patient assured health care provider he or she would undergo treatment, regardless of risk involved, or he or she assured practitioner that he or she did not want to know risks or benefits).

[241] *See* N.Y. PUB. HEALTH LAW § 2805-d(4)(b) (McKinney 1996) (allowing defense if patient assured health care provider he or she would undergo treatment, regardless of risk involved, or he or she assured practitioner that he or she did not want to know risks or benefits).

[242] *See generally* Baltimore and Ohio R.R. Co. v. Taylor, 589 N.E.2d 267, 271 (Ind. Ct. App. 1992) (comparing role of jury as factfinder in different types of negligence actions); Olivier v. Allstate Ins. Co., 663 So. 2d 207, 209 (La. Ct. App. 1995) (noting jury is factfinder whose determinations can only be reversed if there was no reasonable factual basis for finding or record establishes finding was clearly wrong); Vedros v. Massiha, 646 So. 2d

mother wanted to know of her HIV status, or stated she would conceive regardless of the test result. Third, a defendant may claim consent was not possible,[243] allowing a contention that an unborn child was unable to consent to his or her own birth.[244] Courts, however, have invalidated this defense, as they accept a mother's consent on behalf of an infant.[245] Finally, New York law[246] permits the defendant to use reasonable discretion[247] in determining whether disclosure of the risks would adversely affect the patient.[248] It is submitted that any adverse effects to a woman who is told she is at high risk for HIV does not outweigh the tragic consequences if the woman were to give birth to an HIV-infected infant. Therefore, assuming a plaintiff proves the defendant had no factually based defenses, lack of informed consent is an appropriate remedy for the HIV-positive infant.[249]

CONCLUSION

An infant infected with HIV due to the negligent administration of an HIV test deserves a legal remedy in New York. Other juris-

1120, 1122 (La. Ct. App. 1994) (discussing that when there are two permissible views of evidence, factfinder's view cannot be erroneous).

243 N.Y. PUB. HEALTH LAW § 2805-d(4)(c) (McKinney 1996) (allowing defense if patient did not reasonably consent).

244 *See* Hughson v. St. Francis Hosp. of Port Jervis, 92 A.D.2d 131, 134-35, 459 N.Y.S.2d 814, 817 (2d Dep't 1983) (discussing case where defendants claimed fetus in utero could not give legal consent); *see also* Keselman v. Kingsboro Med. Group, 156 A.D.2d 334, 335, 548 N.Y.S.2d 287, 288-89 (2d Dep't 1989) (denying recovery for infant when there was no physical injuries to mother).

245 *See Hughson*, 92 A.D.2d at 134-135, 459 N.Y.S.2d at 817 (finding since adult patients may have treatment authorized by other competent individuals, pregnant mother may provide unborn child's consent). *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (demonstrating mother's control over fetus); Guardianship of Barry, 445 So. 2d 365, 371 (Fla. Dist. Ct. App. 1984) (showing parents have right to disconnect baby in vegetative state from ventilator).

246 *See* N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1996) (providing cause of action for lack of informed consent).

247 *See* N.Y. PUB. HEALTH LAW § 2805-d(4)(d) (McKinney 1996) (noting physicians may use reasonable discretion).

248 *See* N.Y. PUB. HEALTH LAW §2805-d(4)(d) (McKinney 1996) (allowing defense if health care provider, after considering all attendant facts and circumstances, used reasonable discretion to decide whether to disclose alternatives or risks, considering how such disclosure could reasonably, adversely and substantially affect patient's condition); *see also* Yonce v. Smithkline Beecham Clinical Lab., Inc., 680 A.2d 569, 583-84 (Md. Ct. Spec. App. 1996) (acknowledging right to withhold information under certain circumstances).

249 *See generally* Olivier v. Allstate Ins. Co., 663 So. 2d 207, 209 (La. Ct. App. 1995) (discussing strict standards of review necessary to reverse factfinder's determinations); Vedros v. Massiha, 646 So. 2d 1120, 1122 (La. Ct. App. 1994) (noting when there is conflict in testimony, appellate court will not disturb fact-finder's reasonable review of credibility); Byrne v. Bercker, 501 N.W.2d 402, 412 (Wis. 1993) (discussing that role of jury is to determine facts, credibility of witnesses and validity of evidence).

dictions would allow such infants to recover extraordinary expenses under a wrongful life action. In New York, the wrongful life plaintiff may prove the elements of negligence, including calculation of damages, necessary to support a wrongful life claim. Public policy concerns over the spread of AIDS compel resolution of the traditional arguments against wrongful life claims in favor of the HIV-positive infant.

Further, if a physician is aware a patient is at high risk for HIV, yet fails to recommend the patient take an HIV test, a subsequently born HIV-positive infant should have a cause of action under New York's lack of informed consent statute.

A court's refusal to examine anew the traditional arguments against wrongful life and lack of informed consent actions in light of the AIDS epidemic would be contrary to public policy concerns. This devastating epidemic claims numerous victims daily, the most innocent of which are HIV-infected infants. These infants are not responsible in any way for their illness and suffer short, tortured lives. If a health care provider is the party responsible for causing the illness, he or she is less innocent than the infant and should not be relieved of liability.

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