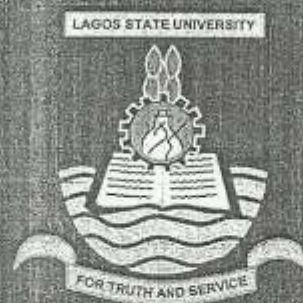


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VII.

Introducing the Tort of Wrongful Birth and Wrongful Life into Nigerian Law: The Impact of Section 17(1) of Child Rights Act 2003 on Reproductive Technology

F. A. R. Adeleke / Lateef Ogboye¹

1.0 Abstract

In the Child Rights Act of 2003,² there is a unique provision which aims at expanding the frontier of Nigerian tort law, with respect to medical professional negligence or recklessness that is likely to occur in reproductive medicine. The provision is s.17(1) of the Act, which provides:

A child may bring an action for damages against a person for harm or injury caused to the child wilfully, recklessly, negligently or through neglect before, during or after the birth of that child.

THE ACT, BY THIS PROVISION, IS CREATING a new law of tort in favor of a child to protect it against any legal injury from any person when such injury occurs before, during or after its birth. It is trite to note that the law of delict, otherwise commonly referred to as law of tort in Nigerian legal jurisprudence, is an incontrovertibly organic and dynamic aspect of law that continues to accommodate new areas of legal recognition and enforce-

¹ F. A. R. Adeleke, LL.B., B.L., LL.M., LL.D., Faculty of Law, Lagos State University, Ojo, Lagos; and Lateef Ogboye, Department of Jurisprudence, Lagos State University, Ojo.

² Hitherto, the only law that has direct application to a child in Nigeria is the Children and Young Persons Act. The said law was not only obsolete but grossly inadequate to deal with contemporary issues on human rights with respect to a child. On July 31, 2003, The President signed into law the Child's Rights Act, which gives comprehensive protection to a child from abuses, exploitation, neglect and violence of any kind. Part of the protections is that a child is entitled to bring an action for damages for injury he suffered from any person while he was in the womb, which is the focus of this paper.

ment. Generally, the objective of the law of tort includes the protection of persons and property from unjust injury by providing legally enforceable rights in favor of the victims and also to compensate such victims by holding accountable the persons responsible for causing harm to them. In this manner, section 17 (1) of the Child Rights Act concurs with the fundamental aim of the law of tort.

By the same reasoning, the law of tort regulates human conduct in their social or professional relationship in society. This extends to the professional conduct of medical personnel who render medical services to their patients. As such, the law of tort has recognized medical malpractice as a legitimate cause of action for many years where such physician breaches his duty of care to a patient under his or her supervision.

This paper does not concern itself about an action which a child may bring for any injury caused to him after his birth by medical practitioners; rather, we intend to discuss the legal injury that may be caused to a child prior to his birth, for which he could take up a legal action against the tortfeasor in damages. Discussion is therefore centered on two of such actions, namely: wrongful birth or conception and wrongful life. It is our submission that the above provision of s.17 (1) of the CRA ultimately recognizes both legal actions to be taken against any medical practitioner and/or lab technologist who may be involved in reproductive technology or genetic testing.

2.0 Definition of Terms: Reproductive Medicine and Genetic Testing

Reproductive medicine means the use of reproductive technology to provide prospective parents necessary information about a future child and to avoid having a child with a genetic abnormality.³ Similarly, genetic testing refers to a situation whereby doctors or lab techs carry out certain genetic tests in order to determine whether a child/fetus is a carrier of any disease that may lead to medical disorder. Modern science, through genetic testing, has made it possible to determine through proper tests if a prospective baby has a potential to develop certain common ailments such as heart disease, Down syndrome, deafness, sickle cell anemia, among others. Such testing can also be used to alert couples to possible genetic problems that can result if they were to conceive. Since mistakes can be made in the genetic testing process, the law of tort readily creates a remedy for patients whenever he or she suffers any injury arising from negligent performance or mis-performance of the physicians or the laboratory technologists.⁴ This paper therefore suggests that s.17(1) of the Child Rights Act creates a legal redress in favor of the child and parents who may fall victim of such negligent performance or professional mis-performance of medical practitioners.

In many jurisdictions of advanced medical knowledge and practice, the law of tort will automatically hold physicians liable even where they fail to inform patients of the availability of any medical test necessary to detect serious health disorders or where they give wrong advice to the parents in the course of carrying the pregnancy. It is also possible for a child to be born out of the doctor's negligence or improper treatment of

³ A publication of Genetics and Public Policy Center, 1717 Massachusetts Ave. N.W. Suite 530, Washington, by Susan Crockin Esq.

⁴ Doctors and lab technologists are usually involved in reproductive medicine and genetic testing. The law expects both of them and any other person performing similar functions to be up to the task, using utmost competence and skill required in the medical field.

the mother. For instance, a doctor may give prescriptions aimed at preventing pregnancy, which eventually fails and consequently, the woman becomes pregnant. He may also misread some scan results or lab tests. Parents too may be screened to determine if they carry any genetic disease that may be transferable to their children when born. With these tests or medical investigations, the doctors are in a position of trust and owe a duty of care to parents to advise them appropriately about their expected babies right from the womb and necessary medical precaution or treatment may be embarked upon in order to prevent those children from genetic abnormalities. In carrying out such actions, care must be taken by the medical practitioner involved to bring his expertise to bear so that the parents or the expected child do not sustain any injury as a result of negligence or omission. Otherwise, parents or the child (after being born) may sue for wrongful birth/conception or wrongful life, as the case may be. These forms of legal actions are discussed *infra*.

3.0 Medical Malpractice and Practitioners' Duty of Care

Medical malpractice occurs in various forms. It can be the result of a failure to provide informed consent to a patient, failure to properly perform a surgery, or a physician's negligent handling of a patient's medical problems. With advancement in the field of medical science and technology, the physician's duty to his or her patients has increased greatly.⁵ The law expects a physician, surgeon or any other person undertaking medical practice to render his professional services in a way that does not breach the duty owed to the patients. In the first place, the physician must possess the degree of professional learning, skill and ability that others similarly situated ordinarily possesses. Second, the medical practitioner must exercise reasonable care and diligence in the application of his or her knowledge and skill to the patient's case.⁶ The physician must also use his or her best judgment in the treatment and care of his or her patients.⁷

It has been suggested that a physician should be held responsible for providing care in accordance with the standards of practice among members of the same health-care profession with similar training and experience, situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.⁸ Failure to perform up to the expected standard definitely gives rise to legal actions. In instituting such legal actions against the practitioners, the burden is on the plaintiff to prove such negligence or want of skill and that it resulted in injury to the plaintiff.

4.0 Action for Wrongful Birth or Wrongful Conception

Wrongful conception or wrongful birth claims are those claims brought by parents alleging that, but for the defendant's negligence, they would have aborted or never have con-

⁵ In writing on wrongful birth and wrongful conception, Sullivan gives an insight into the categories of acts of omission that may constitute medical malpractice to include situations where medical practitioner is negligent in performing sterilization procedures, a failure to maintain or insert intrauterine devices, incorrect interpretation of ultrasounds, including his negligence or failure to inform patients of possible genetic diseases that could affect their children when born. See Mary Sullivan, "Wrongful Birth and Wrongful Conception: A Parent's Need for a Cause of Action," *Journal of Law and Health*, 15/1 (2000), 105.

⁶ This was the position of the court in the case of *Hunt v. Bradshaw*, 88 S.E. 2d 762 (N.C. 1955).

⁷ *Ibid.*

⁸ *Jackson v. Bumgardner*, 347 S.E.2d 743, 745 (N.C. 1986).

ceived the child. These types of claims are most often brought against physicians who performed a sterilization procedure or any family planning method aimed at prevention of pregnancy, but which later failed and resulted in the woman being pregnant. The cause of action is that the parents of such unplanned child bring an action against the physician for causing them to have a baby they did not plan to have, and which they could not have had but for the negligent performance of the doctor or the lab technologists.

Wrongful birth or wrongful conception may also be brought against the manufacturer of a contraceptive drug or device who lends itself out or has assured the user of the drug of its potency to prevent conception but the drug failed to prevent the pregnancy.⁹ In some jurisdictions, the term wrongful birth and wrongful conception may be used interchangeably as they mean the same thing; the difference exists only in nomenclature.¹⁰ However, other jurisdictions do create a thin line of difference between wrongful birth and wrongful conception. It may be reasonable to infer from numerous cases that in situations where the parents maintain an action against a physician, who as a result of his action or omission, a child is born which child could have been prevented, and said child is born with some genetic defects or is impaired or has any form of disability, the action is better classified as wrongful birth. In wrongful conception, the child may be born healthy and need not have any genetic defect. The basic harm of this tort is the actual conception of the child, which could have been prevented but for the negligent act or omission of the medical practitioners.¹¹

Without prejudice to those jurisdictions where abortion is a crime, as in Nigeria, the fact still remains that even in the limited situations under which Nigerian law allows abortion, an action for wrongful conception may still be taken against a negligent doctor who failed in his professional capacity to prevent a pregnancy that the couple did not want for some lawful reasons that are within the contemplation of the law. In an action for wrongful conception, it does not matter the type of family planning or birth control chosen by the woman, neither does it matter if it is a temporary or permanent one, it suffices to establish that the woman relied on the method prescribed for her by the doctors which eventually failed and an unwanted child results. Thus in a U.S. case of Jackson,¹² the court stated as follows:

We find no rational basis for distinguishing between temporary and permanent methods of birth control for the purpose of determining whether a complaint states a cause of action for medical malpractice resulting in wrongful conception.

Wrongful conception has been recognized in many countries of advanced medical jurisprudence. The United States case of Mr. and Mrs. Rouse presents a typical example of the tort of wrongful conception. The couple was receiving medical care from one

⁹ *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981).

¹⁰ Wrongful conception claims are generally filed by parents against the physician (and the hospital or medical practice employing him or her) who performed the negligent sterilization or abortion, or who failed to diagnose a pregnancy.

¹¹ According to Sullivan (note 5 above), the basic theory of a wrongful conception claim is that the physician failed to discover a birth defect and failed to advise the parents of the defect so that they could intelligently decide whether to have the child or to terminate the pregnancy. The burden is on the plaintiff to prove that the defendant was negligent or was not skillful enough, which had resulted in injury to the plaintiff.

¹² 347 S.E. 2d at 749.

Dr. Wesley, who assured that they would not be able to conceive. Wesley informed Mrs. Rouse that she would undergo a surgery procedure which would result in her being permanently unable to conceive a child. Wesley did not, however, inform Mrs. Rouse that the surgery was unsuccessful and that she could become pregnant. In 1988, Rouse became pregnant and was delivered of her sixth child. Even though Rouse's child was born healthy, the couple successfully sued Dr. Wesley for wrongful conception.¹³

It is necessary to restate the fact that some jurisdictions do not necessarily differentiate between wrongful birth and wrongful conception, as the philosophy behind both claims are in most cases interwoven, only that in wrongful birth, the child may suffer some medical defects as a result of medical negligence. In both cases, it is the parents who sue the practitioners.

4.1 Wrongful Life

The second type of birth-related tort claim which may be accommodated under s.17(1) of the CRA under review is called wrongful life. This refers to a claim brought by a defective child or action taken on behalf of such a defective child against the physician.¹⁴ Here, the child alleges that because of the physician's negligent treatment or counseling to his or her parents, he was born with certain defects. In the language of Mark Strasser, the basic claim of a wrongful-life action is that the child would have been better off never having been born.¹⁵ Unlike action in wrongful birth or conception, a wrongful life suit is brought by the disabled child himself or on his behalf by his next friend. Though parents may bring the action on behalf of their handicapped children for the "damages" those children suffer by being brought into the world, the fact remains, however, that the child is the actual complainant in wrongful-life cases.

It is pertinent to mention that in spite of the legal recognition accorded to this tort, courts have been reluctant to recognize wrongful-life claim as a legitimate cause of action for which the court may grant relief. The reason being that some courts are moralistic by considering it abnormal for anybody to claim that it would have been better for him not to have been born at all. As a result, it is common for such courts to grant damages for wrongful birth while rejecting wrongful life claim.

In the state of Virginia case of *Ashley Glascock v. Laserna*,¹⁶ a disabled child brought an action of wrongful life claim against her mother's physician. She alleged that during her mother's pregnancy the physician whose service was retained by her mother should have tested for fetal malfunctions and should have apprised her parents of potential birth defects. The physician actually failed to request the tests and told the parents that everything was normal. As a result, the child was born with severe genetic defects. The court recognized a claim for wrongful birth in this case but rejected the claim for wrongful life.

13 See *Rouse v. Wesley*, 494 N.W.2d 7 (Mich. Ct. App. 1992).

14 Azzolino, 337 S.E.2d at 528, 529.

15 Mark Strasser, "Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?" 64 *Univ. of Missouri Law Review*, 29 (1999).

16 *Glascock v. Laserna*, No. L93-101, 1993 WL 946053, at *1 (Va. Cir. Ct. May 3).

5.0 Possible Defense of the Medical Practitioner in the Wrongful-Life suit

Arguments are usually canvassed on behalf of the physicians that they ought not to be held liable for the deformities suffered by the child because such deformities or abnormalities was not caused by the physicians. In other words, it is argued that the child would still have been born with the abnormalities even if the doctors had taken all possible measures medically to prevent it, or had actually informed the parents of the possibility of their child being born with defects. It therefore follows that since the defect is genetic and not due to an error on the part of the medical practitioner, he ought not to be legally liable. It is only when the defect is the result of negligence of the medical practitioner that he becomes liable. His failure to detect the defect and inform the parents cannot be considered a cause of the deformities. It is an elementary principle of the law of tort that if the defendant has not caused the injury, then he is not liable for the injury suffered by the plaintiff. Failure to detect or to inform is not the same as causing the injury. As convincing as this argument may be, it is submitted that even where the court accepts this argument, an action for wrongful life may still succeed as the defendant may be found liable on the basis of breach of his contractual relationship to the patient.

6.0 The Problematic Nature of Wrongful Birth and Wrongful Life Suits

As simple as these torts may appear to be in theory, the same is not the case in practice. The philosophical underpinnings of wrongful-life action have great implications on culture and moral corpus of the society. Also, the process of its legal recognition and enforcement *vis-a-vis* some fundamental requirements of the law of tort and some other existing jurisprudence are problematic. Few of such are discussed below:

6.1 The Issue of Fetal Personhood

The tort of wrongful life and wrongful birth raise a very troubling question which is yet unsettled both in national and international law. Since the basis of action here is that a wrong has been done to a fetus due to negligent act or omission of a medical practitioner, then the question is whether such a child, while in the womb, is a person capable of being injured legally. In other words, is a fetus recognized as a person by law? There is no uniformity in the legal recognition of fetus as a person. In some jurisdictions, it appears that a child, right from the time of its conception, is regarded as a person, but many other jurisdictions have statutes that have been interpreted by courts to the effect that a fetus is not a person in law. It is therefore important that we consider the position of few jurisdictions concerning personhood of an unborn child/fetus.

a. Judicial Interpretation of Fetal Personhood

Judicial interpretations of fetal personhood or protection vary from one jurisdiction to another.¹⁷ In Canada, attempts to gain judicial recognition of fetal personhood have been unsuccessful as courts have refused to recognize a fetus as a person that is capable of legal recognition. In *R. v. Sullivan*,¹⁸ the main contention arose from the

17 See generally F. A. R. Adeleke, "Do the Unborn have the Right to Life? A Review of Some Municipal Case Laws and International Human Rights Instruments," *UNIZIK Law Journal*, 8/1, 2011, 253-271.

18 *R. v. Sullivan*, (1991) 1 S.C.R., 502.

b. Is an Unborn a Person in International Law?²³

Even under the international human rights instruments, the legal recognition of a fetus as a person is not of legal certainty.²⁴ A perusal into few of such instruments may drive home our point that the legal personality of a fetus has always been that of legal uncertainty. For instance, the Universal Declaration of Human Rights (UDHR) in article 1 states that "all persons are born free and equal in dignity and rights." The reference to being born here suggests that the rights accrue only to a human being who has been born. There is no inference to suggest otherwise, considering the language of the instrument in accordance with the popular rule of interpretation (without any exterior consideration). This principle of interpretation was laid down in the case of *Bank of England v. Vagliano Brothers*,²⁵ where Lord Herschel formulated what is generally accepted to be the proper canon or rule for the interpretation of a statute by stating as follows:

I think the proper course is in the first instance to examine the language of the statute and to ask what its natural meaning is, uninfluenced by any consideration derived from the previous state of the law and not to start with enquiring how the law previously stood . . . the purpose of such a statute surely was that on any point specifically dealt with by it, the language be ascertained by interpreting the language used. . . .²⁶

Going by this rule of interpretation, it is submitted that "all persons are born free and equal in dignity and rights." Article 1 of UDHR therefore refers to persons already born and does not refer to unborn/child or fetus.

Construing the provision of article 2 of the European Commission of Human Rights, which provides that "everyone's right to life shall be protected by law," the court, in the case of *Paton v. United Kingdom*,²⁷ considered the word "everyone" to mean persons actually born. Since the word "life" is not further defined in the instrument, the Commission could not reason otherwise.

The African Charter on Human and People's Rights, which was adopted in 1981, also declares in its article 4 thus:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be deprived of this right.

Since the Charter in other articles refers to the individual, it is not clear whether the Charter in this article 4 could be interpreted as applying to an unborn child.

Notwithstanding the above, few instruments have attempted to confer legal personality on the unborn. Example of such instruments include the Declaration of the

security and control over their bodies, the right to human dignity, life, privacy, religion, belief and opinion, and health and care.

²³ See Adeleke, note 17 above.

²⁴ *Ibid.*

²⁵ (1891) A.C.107.

²⁶ Per Lord Herschel, *Ibid.* 144-145 (emphasis added).

²⁷ *Paton v. United Kingdom* 3 EHRR 408 1980.

Rights of the child, which was adopted by the General Assembly in 1959, and it states in its preamble as follows:

The child shall, by reason of his physical and mental immaturity, need special safeguards and care, including appropriate legal protection, before as well as after birth.

It therefore follows that the issue of legal personality of the fetus is unsettled both in national judicial decisions and in statutes of international repute. We therefore concur with the submission of Gillian Douglas that there is yet little international consensus on any need to protect the unborn child and therefore the onus lies on individual States to work out their own positions.²⁸ Thus, it is not wrong for Nigeria, in promulgating the rights of the child, to have chosen to grant legal protection to the child right from the womb till he is born and afterwards.²⁹ We therefore assert that section 17(1) of the Child Rights Act under discussion no doubt is suggestive of the fact that a child right from the womb for the purpose of this tort is recognized to be *a person in law with protectable rights, though without corresponding duties*.³⁰ This assertion nonetheless raises another jurisprudential question that is obviously beyond the scope of this paper.³¹

6.2 Wrongful Life and the Fundamental Requirement of the Law of Tort

Apart from the unsettled question of fetal personhood, the wrongful-life suit which section 17(1) intends to incorporate into Nigeria appears to be in contradiction to the fundamental principle of the law of tort. Generally, before an action could be successfully taken against a tortfeasor, the plaintiff must establish three things: first, that there is in existence a legal duty owed to the plaintiff by the defendant; second, that the defendant breached the said duty of care; and third, the said breach eventually results in the injury to the plaintiff. In the same manner, going by these legal requirements under the law of tort, in order to bring an action in wrongful life, the court must first determine whether there is in existence any legal duty owed the child by the doctor. Second, was there a breach of that duty? And third, did the breach cause any actionable injury? The problematic aspect of the wrongful-life claim is that even where the answers to the first two questions are in the affirmative, the third question needs not be answered in affirmative. This is because, in most cases of wrongful life, the child is not claiming that it is the medical doctor that caused his genetic disorder but that the doctor became liable due to the fact that he failed to prevent the child from being born. Therefore, this type of tort can be founded on the first two legs; that is, that the doctor owes a legal duty of care to the child or parents, that the said duty of care was breached but the breach is not

28 Gillian Douglas, *Law, Fertility and Reproduction*, London: Sweet & Maxwell (1991), 38.

29 This position of Nigeria is in accord with its stance on abortion. Abortion is a criminal offense punishable with 14 years' imprisonment. It is a fact that the philosophy behind permitting abortion essentially stems from the notion that a fetus is not a human being capable of being protected. In Nigeria fetus is regarded as a person.

30 Italics for emphasis.

31 See the concept of jural opposite as contained in one of the treatises written by Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale Law Journal* 16 (1913). See also "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) *Wisconsin Law Review* 975, 1049 (1982).

the real cause of the injury. Nevertheless, an action for wrongful life may still hold. Thus this is unique in view of the requirements of the law of tort with respect to negligence.

7.0 Objection on Moral Ground and/or the Public Policy

As briefly indicated above, the claim of a defective or disabled child is that it is better for him not to have been born at all. In other words, he considers not being born to be better than being born, as a result of which he claims damages. This raises other germane questions. First, can the court evaluate and actually weigh the reality of being born and not being born at all for it to determine which is better? Second, is this legal action not offensive to the moral corpus of society? Third, does awarding damages to a person because he was born not have serious implication on public policy? From our study, we realize that in view of the fact that the underlying philosophy behind wrongful-life claim is that a child is better off not being born at all, the court always feels reluctant to award damages on the premises that "life," with or without deformities, is more precious than no life at all.³² One of the arguments usually canvassed in court by the defendants in wrongful-life cases can be said to be sociocultural. It is asserted that in many cultures, the birth of a baby is considered a blessing, a thing of joy and ought not to be a cause of action. Some courts do get persuaded by this argument thereby declining to award damages to the child who brings the action. However, other courts do reject the argument and continue to award damages. A South African court, reacting to this type of argument as a defense to wrongful-life suit, made the following remark:

I do not find attractive the proposition that the birth of a normal child is a blessing which in law cannot constitute a wrong. Parents who cannot afford a further child may well be overjoyed by the birth of another (though unwanted sibling) . . . however such parents will naturally be dismayed by the additional financial burden cast upon them. It is, after all, that burden and not the child as such which is unwanted.³³

Another argument against wrongful-life action is in form of what one can term as policy objection. This argument is that the benefits that parenthood usually brings will have to be set-off against the loss and that as a matter of law, these benefits of having babies are always considered to be greater than the losses. In other words, that the benefit of a child outweighs the potential harm the bringing up of such child can cause. Accept-

³² See the following works, Mary Sullivan, 105; Janice Richardson, "The Concept of Harm in Actions for Wrongful Birth: Nature and Pre-modern Views of Women," *The Australian Feminist Law Journal*, Vol. 35, 2011.

³³ Per Justice van Heerden in a case of wrongful conception in South Africa where the plaintiff's wife was enrolled in the defendant's hospital. There was an agreement that when the wife was having her third baby, she was to be sterilized in order to prevent further pregnancy due to socioeconomic reasons. The sterilization operation, in clear breach of the contractual agreement, was never carried out. Four months later the woman became pregnant and, consequently, another child was born. An action for wrongful conception was brought against the physician. The action was premised on the breach of contract leading to the unwanted pregnancy which the woman carried, the inherent discomfort and ensuing obligation to maintain the child. All these were argued as direct and natural consequences of the breach of contract, and were within the contemplation of the parties as being likely consequences of the breach. The defendants raised a defense on ground of public policy, in that the plaintiff is not entitled to any damages since the birth of a child should be seen as a blessing rather than a legal injury. The Appellate Division dismissed this argument. It pointed out that the "wrong" being complained about was the breach of contract, not the birth of the child.

ing this argument in the U.S. case of *Terrell v. Garcia*,³⁴ the court asked the questions:

Who can place a price tag on a child's smile or on the parental pride in a child's achievement? . . . Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child.³⁵

Similarly, in the English case of *Udale v. Bloomsbury Health Authority*,³⁶ the court accepted the argument and said that the birth of a child is the conferral of a benefit, and not a legal injury. And that a plaintiff who contracts for sterility but obtains a child has contracted for lead but has received gold.³⁷ The crux of our discussion here is that courts, more often than not, are unwilling to award damages to litigants who claim that it is better if he had never been born at all. This attitude of the courts is informed by sociocultural reason and public policy.

7.2 Paradigm Shift in Public Policy in United States

However, since abortion had been held to be a constitutional right of women by *Roe v. Wade* in 1973,³⁸ our research has shown that many courts have been recognizing wrongful-life claims. In a court action for wrongful life, the court sang a completely different tune thus:

Public policy now supports, rather than militates against, the proposition that the plaintiff not be impermissibly denied a meaningful opportunity to make that decision to abort . . . we will not immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which if born would suffer from genetic defects.³⁹

8.0 The Challenge of Awarding Damages in Wrongful Birth / Life

Writers have identified various theories of recovery for wrongful-birth and wrongful-life claims. The first is *full recovery* theory, where courts award damages to the plaintiff to cover the emotional, psychological and physiological trauma he experiences as a result

34 496 SW 2d (1973).

35 Similarly, in England, it was argued, first, that the birth of a child is "an occasion for the popping of champagne corks rather than the preferring of a claim for damages."

36 *Udale v. Bloomsbury Health Authority*, 12. [1983] 1 W.L.R. 1098.

37 Emphasis added. In a similar manner the court remarked thus: "The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life, such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause of action. . . . A child need not be perfect to have a worthwhile life. . . . It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort."

38 See *Roe v. Wade* U.S. 410 (1973) where the U.S. Supreme Court held that abortion is a reproductive choice which ought to be available to every woman or girl, exercisable by her based on her implied right of privacy. Here, abortion is essentially a woman's choice, unfettered by the application of any law or rule. However the U.S. government and certain states do not fund abortion, so the citizens bear the cost privately.

39 658 F.2d 471 (1981). *Robert and Anna Robak v. U.S.*, Nos. 81-1038, 81-1099, Court of Appeals, Seventh Circuit. Quoted in Jay Webber, "Better off Dead," *A Monthly Journal of Religion and Public Life*, May 2002, 17.

of the practitioners' negligent performance or mis-performance. Under this type of recovery, the parents are able to recover the expenses of rearing a child, usually to the age of majority. The second theory is called *benefit rule*. The basic idea of this rule is that in awarding damages, the benefits of having the child will be weighed against the harm that is caused by the negligence of the physicians. In the third category, the courts decline to award damages at all, hence this is referred to as *non-recovery* theory. The underlying philosophy behind non-recovery is that awarding damages for being born into the world would morally offend the fundamental concept of human life. Nigerian courts may have to take any of these positions with respect to award of damages in actions for wrongful birth and wrongful life.

It is our submission, however, that refusal of court to grant any damages at all would merely enhance the harm caused by the physician, especially in wrongful birth and wrongful conception cases. This theory may ultimately allow medical practitioners to escape responsibility for their negligence and professional misconduct. Under this theory, the parents would be made to bear the burden of the physicians' negligence. Nevertheless, it is our opinion that in action for wrongful life, no recovery argument may be plausible in Nigerian courts on the premises that being born into the world cannot be equated with not being born at all.

9.0 Section 17(1) and Statute of Limitations

The operation of section 17(1) may be hindered by few existing laws in Nigeria. One of such laws is statute of limitation which operates to render unenforceable any legal action which accrues but is not enforced within a stipulated time by law. The computation of time may be crucial to timely filing of a claim by the complainant in a wrongful-life case. This is so because an action that is founded in tort usually starts counting when the harm occurs. By virtue of section 1 of the Child Rights Act, a child is defined as any person below the age of 18 years. The combined interpretation of section 1 and section 17(1) of the act therefore is to the effect that a child may bring up wrongful-birth or wrongful-life action at any time before 18, after which he would no longer be a child. For instance, in the case of wrongful life, the injury occurred when the physician did the act or omission which caused the injury to the child while he was still in the womb. A child who brings an action in tort 10 years thereafter may definitely be caught up with the statute of limitation. It is therefore necessary that a law be made to permit bringing such action at any reasonable stage of the child's life. It is hereby recommended that the statute should not be made applicable to any of such actions, as rendering the action statute-barred will have the tendency of defeating the essence and aim of the section under study and may undermine the objective of the CRA in general.

10.0 Need for Specific Legislation in Nigeria

Though we have submitted that section 17 (1) imports into Nigeria the tort of wrongful birth and wrongful life, its impact may be minimal, unlike what obtains in other jurisdictions where abortion is legal or permitted. Since abortion is not permitted in Nigeria, cases involving wrongful birth or life may not be worthwhile where it is shown that the doctors could not have done anything to prevent or correct those defects in the

child other than to order an abortion of the child which would have been illegal for him to do.⁴⁰ In the same vein, parents of a disabled child in Nigeria could not have opted for the termination of the pregnancy since defective fetus is not covered under the circumstances for which abortion is permitted. This therefore necessitates the need for a definite legislation on this area of law in Nigeria to guide the courts appropriately in adjudicating over such matters. For instance, in a North Carolina case in the United States,⁴¹ where Mr. and Mrs. Azzolino brought an action for wrongful birth, alleging that the defendant-physician's negligent failure to inform them of the availability of amniocentesis and genetic counseling prevented the termination of Mrs. Azzolino's pregnancy and resulted in a child afflicted with Down syndrome. The court refused to allow relief for the claim of wrongful birth in the absence of a definite legislation on the subject matter. The court was of the opinion that it would be unreasonable to rely on precedents from other jurisdictions for damages.

Taking a cue from the above, it is appropriate to suggest that Nigerian legislature must give a clear legislative mandate and guidelines on the subject matter. Such a law must be detailed and unambiguous enough to provide insight into what may constitute defects in a human being or injury caused to a child in the womb for which a medical practitioner could be liable. What will be the limit of recognition that should be given to wrongful-life without encouraging abortion of defective child right in the womb? In view of the fact that wrongful-life has tendency to impair on the moral and public policy, apart from encouraging free abortion and devaluation of human life, Nigerian lawmakers may impose necessary restrictions that would be in line with Nigeria sociocultural perspectives, morality and public policy. An example of such legislative restriction was made in the state of Michigan statute in 2000, which provided thus:

1. A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.
2. A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.⁴²

The state of Minnesota created similar statutory response to the wrongful birth and life actions in 1982.⁴³ We suggest that a restriction of this nature may be appropriate in the Nigerian circumstance, considering its stance with regards to abortion. Such restric-

40 Section 228 of the Criminal Code states: "Any person who, with an intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years." Section 229 provides as follows: "Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits such thing or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years."

41 *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985).

42 Mich. Comp. Laws Ann. 600.2971.

43 The law provides: "No person shall maintain a cause of action or receive an award of damages on behalf of that person based on the claim that but for the negligent conduct of another, the person would have been aborted. Wrongful birth action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted."

tion would not in any way affect an action taken against the medical practitioner in negligence based on any other grounds.

11.0 Conclusion

One of the notable areas where the law of tort in Nigeria is greatly lagging behind is in medical jurisprudence. In most countries of advanced legal practice, medical negligence is being extended to recognize actions in wrongful birth, wrongful life and wrongful conception. Subject to the restriction highlighted and relevant arguments made in this paper concerning wrongful life, we advocate the inclusion and recognition of these torts with respect to medical negligence by relying on the provision of section 17(1) of the Child Rights Act. This will ultimately lead to a better regulation of Nigerian medical practice and a healthy development in the law of tort. ☺

