
THE RIGHT RECOVERY FOR WRONGFUL BIRTH

ABSTRACT

Wrongful birth claims are negligence actions brought by the parents of a child born with genetic defects or disabilities, alleging they would have avoided conception or terminated an existing pregnancy but for the negligence of the medical professionals charged with prenatal care. The growing prevalence of this cause of action, along with the other closely related prenatal torts, reflects the rapid progress of modern medicine. In recent years, most courts faced with a wrongful birth claim have recognized it as a valid cause of action and have permitted some measure of damages.

A shocking lack of consensus exists in virtually every aspect of this area of law. Courts are divided as to why these actions should be permitted, the nature of the tort, and the proper elements involved. Perhaps the most controversial area is damages, with recoverable elements of damages varying from jurisdiction to jurisdiction and considerable disagreement over what restrictions should be placed on recovery.

The Iowa Supreme Court recently recognized wrongful birth as a cause of action. However, the court declined to address the measure of damages, leaving Iowa district courts without guidance in determining the right recovery for these novel claims.

This Note examines the increasing recognition of the prenatal torts, specifically focusing on the wrongful birth cause of action; the specific elements of wrongful birth within the informed consent framework utilized by most states; and the wide divergence in recoverable damages and their underlying rationales across jurisdictions. Finally, this Note makes a recommendation to Iowa courts on the proper recoverable damages in the state.

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I. INTRODUCTION

In late 2010, Pamela and Jeremy Plowman found out they were expecting their third child.¹ Shortly thereafter, Pamela began seeing an obstetrics and gynecology specialist for her prenatal care at the nearby Fort Madison Community Hospital.²

Approximately 22 weeks into the pregnancy, Pamela underwent an ultrasound to assess the fetus's growth.³ Pamela's obstetrician told her the ultrasound showed "everything was fine."⁴ In reality, however, the ultrasound report indicated the fetus exhibited an abnormally small head

1. Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 396 (Iowa 2017).

2. *Id.*

3. *Id.*

4. *Id.*

circumference and recommended a follow-up.⁵ Neither Pamela nor Jeremy received any information regarding the abnormalities, and Pamela never underwent additional testing to follow up on the ultrasound, despite the recommendation in the report.⁶

Pamela gave birth to a baby boy, Z.P., on August 17, 2011.⁷ Within two months, she became concerned about his development.⁸ Z.P.'s pediatrician referred Pamela to a specialist, who diagnosed Z.P. with small corpus callosum, cerebral palsy, microcephaly, intellectual disability, cortical visual impairment, and a seizure disorder.⁹ His conditions resulted in the need for frequent visits to multiple doctors, physical therapy twice a week, and daily medication for his seizures and reflux condition. Doctors expect that Z.P. will never walk or speak.¹⁰

Pamela and Jeremy brought suit against the hospital and treating physicians for wrongful birth, alleging “the doctors negligently failed to accurately interpret, diagnose, monitor, respond to, and communicate the fetal abnormalities” apparent in the ultrasound, depriving the parents of their right to make an informed decision regarding the pregnancy.¹¹ Pamela and Jeremy claim that if they had been informed of the fetus’s brain abnormalities, they would have chosen to terminate the pregnancy.¹²

The defendants moved for summary judgment, arguing wrongful birth claims were not recognized in Iowa.¹³ The trial court granted the motion for summary judgment, expressly declining to recognize a new cause of action for the reason that such decisions are “more properly left ‘to the legislature

5. *Id.* (“Specifically, the report noted, 1) Suboptimal visualization of the head structure with cavum septum pellucidum not well seen. Recommend follow-up to document normal appearance[;] 2) Single, live intrauterine pregnancy consistent with 22 weeks 3 days by today’s scan[; and] 3) Slightly low head circumference to abnormal circumference ratio without definite etiology. Again, consider follow-up.”).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 397.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

or Supreme Court.”¹⁴ Pamela and Jeremy appealed, and the Iowa Supreme Court agreed to hear the case.¹⁵

As a matter of first impression, the Iowa Supreme Court recognized wrongful birth as a cause of action.¹⁶ Finding “wrongful birth fits within common law tort principles governing medical negligence claims, and no public policy or statute precludes the cause of action,” the Iowa Supreme Court reversed the grant of summary judgment and remanded the case to allow Pamela and Jeremy to go forward with the suit.¹⁷

14. *Id.*

15. *Id.*

16. *Id.* at 398.

17. *Id.* at 398, 414. Following remand from the Iowa Supreme Court, the Plowmans’ case went to jury trial. *Plowman v. Fort Madison Cmty. Hosp.*, No. 08562LALA006220, 2019 WL 586906, at *1 (Iowa Dist. Ct. Jan. 8, 2019). The parties heavily disputed recoverable elements of damages. *Compare* Defendants’ Supplemental Trial Brief, *Plowman v. Fort Madison Cmty. Hosp.*, No. 08562LALA006220, 2018 WL 7287354 (Iowa Dist. Ct. Dec. 10, 2018) (asserting the parents’ damages for medical expenses were not recoverable past the age of majority), *and* Defendants’ Memorandum of Authorities in Support of Motion for Partial Summary Judgment as to Recoverable Damages, *Plowman v. Fort Madison Cmty. Hosp.*, No. 08562LALA006220, 2018 WL 7287365 (Iowa Dist. Ct. Oct. 12, 2018) (requesting the court to enter an order “finding that Plaintiffs’ damages claim shall not include any amounts paid in the past or to be paid in the future by Medicaid nor the ordinary costs of child-rearing”), *with* Plaintiffs’ Trial Brief with Statement of Recoverable Damages, *Plowman v. Fort Madison Cmty. Hosp.*, No. 08562LALA006220, 2018 WL 7287355 (Iowa Dist. Ct. Nov. 21, 2018) (maintaining recoverable damages should consist of “(1) the cost of Z.P.’s extraordinary care required as a consequence of his disabilities, from birth throughout his lifetime; (2) the cost of the ordinary care of raising Z.P. (that would be incurred for any child) from birth to age 18; (3) the mental anguish, suffering, inconvenience and pain, incurred by Pamela [Plowman] and Jeremy Plowman associated with caring for Z.P.; and (4) the loss of income to Mrs. [Plowman] and Mr. Plowman as a consequence of their responsibilities to Z.P.”), *and* Plaintiffs’ Memorandum in Support of Their Resistance to Defendants’ Motion for Partial Summary Judgment as to Recoverable Damages, *Plowman v. Fort Madison Cmty. Hosp.*, No. 08562LALA006220, 2018 WL 7287351 (Iowa Dist. Ct. Oct. 25, 2018) (“For a brain damaged child, the emotional benefits are too speculative to be considered by a jury in countervailing the costs of raising a healthy child.”).

The jury instructions provided, “If you find that Plaintiffs are entitled to recover damages, you shall consider the following items: A. The present value of reasonable and necessary extraordinary medical expenses and services, custodial care and attendant care services, and equipment and adaptive housing for Z.P. which will be incurred in the future[;] B. Pamela [Plowman’s] emotional distress from the date of injury to present[;] C. Jeremy Plowman’s emotional distress from the date of injury to the present[;] D. The present value of Pamela [Plowman’s] future emotional distress[;] E. The present value of Jeremy Plowman’s future emotional distress.” Instructions to the Jury at No. 18,

Pamela and Jeremy, by filing their claim, compelled Iowa courts to consider the validity of wrongful birth causes of action and recoverable damages under such claims; this Note addresses these contemporary legal issues. To begin, Part II of this Note discusses the prenatal torts of wrongful pregnancy or conception, wrongful birth, and wrongful life. Part III provides historical background for the acceptance of wrongful birth claims and the movement toward recognition, specifically focusing on the developments in prenatal medicine and the constitutional right to reproductive decisions. Part IV analyzes the elements of a wrongful birth claim in the context of the informed consent framework taken by most courts, followed by a brief discussion of alternative approaches. Part V outlines the wide divergence in recoverable damages across jurisdictions. Part VI recommends what elements of damages for wrongful birth should be recoverable in Iowa courts.

Plowman v. Fort Madison Cmty. Hosp., No. 08562LALA006220, 2018 WL 7287349 (Iowa Dist. Ct. Dec. 21, 2018). The jury was further instructed:

Any damages which you award for medical care, rehabilitation services, custodial care, or loss of services to be incurred in the future will be reduced by the Court for any such losses which you find have been or will be replaced or paid by insurance, or by governmental, employment, or service benefit programs, or from any other source, except the assets of Plaintiffs, or the members of Plaintiff's immediate family. Defendants have the burden to prove these benefits have been paid or will be available to Plaintiffs.

Id. at No. 20. The instructions limited future damages to “the period of time from the present to the time of [Z.P.’s] death, or the time of the death of both of his parents, whichever is the shorter period of time.” *Id.* at No. 21.

The jury awarded damages for future extraordinary expenses; Pamela’s emotional distress incurred from the date of injury to present, and present value of her future emotional distress; Jeremy’s emotional distress incurred from the date of injury to present, and the present value of his emotional distress. *Plowman v. Fort Madison Cmty. Hosp.*, No. 08562LALA006220, 2019 WL 586906, at *1 (Iowa Dist. Ct. Jan. 8, 2019).

As of the time of this writing, the defendants in the case filed a motion for a new trial, or in the alternative a remittitur, and judgment notwithstanding the verdict. Defendants’ Brief in Support of Their Motion for a New Trial, Alternative for a Remittitur, and for Judgment Notwithstanding the Verdict, *Plowman v. Fort Madison Cmty. Hosp.*, No. 08562LALA006220, 2019 WL 570908 (Iowa Dist. Ct. Feb. 1, 2019). In regard to damages, the defendants contend (1) the jury finding that Medicaid would not cover any amount of Z.P.’s future medical expenses warrants a new trial, or alternatively a remittitur; (2) the jury award of emotional distress damages warrants a judgment notwithstanding the verdict; and (3) the jury award of future medical expenses beyond the age of majority warrants a judgment notwithstanding the verdict. *Id.*

II. WHAT EXACTLY IS A “WRONGFUL BIRTH?”

Advancements in science and modern medicine have made it possible to control or prevent conception, detect pregnancy earlier, and more easily discern the risk of genetic disease or defects.¹⁸ The availability of this information adds new dimensions to decisions regarding parenthood and childbearing.¹⁹ When told their child may be at risk of genetic defects, prospective parents can consider whether to avoid conception or terminate an existing pregnancy.²⁰ However, the parents cannot realize these risks on their own. Instead, they must rely on medical professionals to detect and communicate the risks.²¹

The emergence of prenatal testing, genetic counseling, and in utero diagnostics “coincided with the women’s movement and some of its hallmarks (e.g., the availability of the birth control pill and the constitutional right to abortion).”²² These medical advancements and evolving social attitudes “offered unprecedented reproductive choices for women. With these choices came the freedom to control reproduction, giving women the ability to time childbearing around careers or personal desires.”²³ Consequently, courts were called on to contemplate and analyze legal claims that had not previously required consideration: prenatal torts.²⁴

There are three types of prenatal torts: wrongful pregnancy or conception, wrongful birth, and wrongful life.²⁵ All involve actions in which negligence is alleged to have resulted in the birth of a child.²⁶ Though the claims are closely related, most states distinguish among the prenatal torts.²⁷

18. Pizano *ex rel.* Walker v. Mart, 790 P.2d 735, 737 (Ariz. 1990).

19. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1494 (1978).

20. *Id.*

21. *Id.*

22. Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. & MED. 233, 236 (2002).

23. *Id.*

24. See Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 603–04 (1986).

25. See, e.g., Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., 844 N.E.2d 1160, 1164 (Ohio 2006); Miller v. Johnson, 343 S.E.2d 301, 303–04 (Va. 1986).

26. See, e.g., *Miller*, 343 S.E.2d at 303–04.

27. Mark Strasser, *Yes, Virginia, There Can Be Wrongful Life: On Consistency, Public Policy, and the Birth-Related Torts*, 4 GEO. J. GENDER & L. 821, 821 (2003).

A. Wrongful Pregnancy or Conception

In an action for wrongful pregnancy or conception, the parents of a child born following a negligently performed sterilization procedure,²⁸ negligently performed abortion,²⁹ negligent failure to diagnosis pregnancy,³⁰ or negligence through the provision of ineffective contraception³¹ bring suit against the treating physician or other responsible parties.³² The gravamen of the complaint is that the plaintiffs sought and relied on healthcare professionals after making a deliberate choice not to conceive or to terminate an existing pregnancy, yet a child was born due to negligence in that care.³³ Plaintiffs seek monetary and emotional damages on their own behalf for the birth of an unplanned and unwanted child, usually born normal and healthy.³⁴

28. *E.g.*, *Hartke v. McKelway*, 526 F. Supp. 97, 99 (D.D.C. 1981) (characterizing case as “wrongful conception” where surgeon negligently performed laproscopic cauterization and patient subsequently became pregnant and gave birth); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 171 (Minn. 1977) (holding parents could maintain a cause of action for the birth of an unplanned child proximately caused by negligently performed vasectomy).

29. *E.g.*, *Miller*, 343 S.E.2d at 302–03 (recognizing cause of action for negligently performed tubal ligation and abortion).

30. *E.g.*, *Rinard v. Biczak*, 441 N.W.2d 441, 442 (Mich. Ct. App. 1989) (discussing physician’s failure to diagnose pregnancy), *abrogated by Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. Ct. App. 1999) (holding such legal questions are matters best left to the legislature).

31. *E.g.*, *Tropi v. Scarf*, 187 N.W.2d 511, 513 (Mich. Ct. App. 1971) (finding pharmacist civilly liable for negligently filling a prescription for contraceptives with mild tranquilizers), *overruled by Taylor*, 600 N.W.2d 670.

32. *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 844 N.E.2d 1160, 1164 (Ohio 2006); *see also Taylor*, 600 N.W.2d at 676 (“[A]n action for wrongful conception, also known as wrongful pregnancy, arises where the defendant’s negligent conduct failed to prevent the birth of a child in the following situations: (1) where a physician negligently performs a vasectomy or tubal ligation or when a physician, pharmacist, or other health professional provides any other type of ineffective contraception, the parents conceive, and the birth of a healthy, but unplanned, baby results; (2) where a physician negligently fails to diagnose a pregnancy, thereby denying the mother the choice of termination of the pregnancy at a timely stage, and the birth of a healthy, but unwanted, baby results; and (3) where a physician negligently attempts to terminate the pregnancy and the birth of a healthy, but unwanted, baby results. Of course, the latter two situations do not actually involve a claim that a defendant’s negligence was a factor in the *conception* of the child.” (footnotes omitted)).

33. *See Brown et al.*, *supra* note 24, at 729–30.

34. *See, e.g.*, *C.S. v. Nielson*, 767 P.2d 504, 506 (Utah 1988).

Most jurisdictions recognize wrongful pregnancy or conception as a cause of action.³⁵ This broad acceptance stems, in part, from the similarity of the action to ordinary medical malpractice claims.³⁶ In addition, failure to recognize such claims would leave “a void in the area of recovery for medical malpractice and dilute[] the standard of professional conduct and expertise in the area of family planning, which has been clothed with constitutional protection.”³⁷ Typically, the parents may not recover damages for the costs of raising the child but may recover damages for prenatal care, medical and hospitalization expenses, emotional distress, lost wages, pain and suffering, loss of consortium, and any costs associated with a subsequent corrective sterilization procedure.³⁸

B. *Wrongful Birth*

Wrongful birth is a cause of action brought by the parents of a disabled child, claiming they would have avoided conception or elected to terminate an existing pregnancy through abortion but for the negligence of those responsible for prenatal testing, counseling of risks, or disclosure of abnormalities or defects.³⁹ The parents allege this negligence prevented

35. *Arche v. U.S. Dep't of the Army*, 798 P.2d 477, 478 (Kan. 1990); *Jackson v. Bumgardner*, 347 S.E.2d 743, 748–49 (N.C. 1986) (“At least twenty-nine jurisdictions have considered the issue and have recognized a cause of action in tort. Our research disclosed only one jurisdiction that currently denies a claim in tort, and that jurisdiction allows one in contract.” (footnote and citation omitted)); *Schirmer*, 844 N.E.2d at 1164. *But see* *Nanke v. Napier*, 346 N.W.2d 520, 523 (Iowa 1984) (holding the parents of a “normal, healthy child may not maintain an action to recover the expenses of rearing that child from a physician whose alleged negligence in performing a therapeutic abortion” led to the birth of the child); *Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983) (rejecting wrongful conception as a cause of action, as “parents of a normal healthy child whom they now love have not suffered any injury or damage”).

36. *Brown et al.*, *supra* note 24, at 727.

37. *Kingsbury v. Smith*, 442 A.2d 1003, 1005–06 (N.H. 1982).

38. *Hitzemann v. Adam*, 518 N.W.2d 102, 106 (Neb. 1994).

39. *Nielson*, 767 P.2d at 506; *see also* *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987) (“‘Wrongful birth’ refers to the claim for relief of parents who allege they would have avoided conception or terminated the pregnancy by abortion but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child. The underlying premise is that prudent medical care would have detected the risk of a congenital or hereditary genetic disorder either prior to conception or during pregnancy. As a proximate result of this negligently performed or omitted genetic counseling or prenatal testing, the parents were foreclosed from making an informed decision whether to conceive a potentially handicapped child or, in the event of a

them from making an informed decision regarding termination of the pregnancy, which they would have chosen to do to prevent the birth of a child with a defect or disease.⁴⁰ The majority of states recognize wrongful birth causes of action.⁴¹ These claims have, thus far, been limited to cases

pregnancy, to terminate the same.” (citations omitted)), *overruled on other grounds by* Clark v. Children’s Mem’l Hosp., 955 N.E.2d 1065 (Ill. 2011).

40. See, e.g., Garrison *ex rel.* Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 290 (Del. 1989) (discussing physicians’ delay in completing and reporting results of amniocentesis until the third trimester of pregnancy; upon learning of the presence of the Down syndrome chromosome, the parents sought to terminate the pregnancy but were informed they would not be permitted to do so); Grubbs *ex rel.* Grubbs v. Barbourville Family Health Ctr., P.S.C., 120 S.W.3d 682, 685 (Ky. 2003) (detailing how physician’s misinterpretation of ultrasound results and failure to inform the parents that the fetus had spina bifida and hydrocephalus prevented the parents from making an informed decision regarding whether to continue or terminate the pregnancy); Reed v. Campagnolo, 630 A.2d 1145, 1148 (Md. 1993) (recognizing the cause of action where physician failed to offer or perform routine testing that would have revealed abnormalities causing profound birth defects; had such testing been done and the parents been made aware of the extent of the defects, they would have chosen to terminate the pregnancy); Schirmer, 844 N.E.2d at 1163–64 (discussing how the physician negligently performed and interpreted genetic testing and negligently failed to recommend additional testing that would have revealed abnormalities in the fetus causing severe and permanent disabilities; parents claimed if they had known of the abnormalities, they would have opted to terminate the pregnancy); Naccash v. Burger, 290 S.E.2d 825, 827–28 (Va. 1982) (holding parents suffered legally cognizable injury where the hospital incorrectly labeled blood from the father for testing, resulting in a false negative that he was not a carrier for Tay-Sachs, an invariably fatal disease of the brain and spinal cord; the mother testified that if she had known the true condition, she would have chosen abortion, testifying: “There is nothing on this earth that would have made me have a baby with Tay-Sachs Disease.”).

41. E.g., Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 713–14 (Ga. 1990) (“[I]n answer to the question of whether or not to recognize a ‘wrongful birth’ action, the majority of courts that have addressed the question have answered in the affirmative.”); Siemieniec, 512 N.E.2d at 705 (“The courts which have considered wrongful birth claims have been almost unanimous in their recognition of a cause of action”); Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 399–400 (Iowa 2017) (“A majority of states recognize wrongful-birth claims. At least twenty-three states recognize the claim by judicial decision. Maine allows wrongful-birth claims by statute. A minority of jurisdictions decline to do so. Three state supreme courts have refused to allow wrongful-birth claims. Twelve states have enacted legislation barring wrongful-birth claims. Three of those states had allowed wrongful-birth claims by judicial decision before the legislature barred them.” (footnotes omitted)); Arche v. U.S. Dep’t of the Army, 798 P.2d 477, 479 (Kan. 1990) (noting 20 courts in other jurisdictions have recognized wrongful birth as a cause of action, while 3 courts refused to do so).

where a child is born with severe birth defects.⁴²

C. Wrongful Life

Wrongful life is a cause of action brought by or on behalf of the child suffering from the defect or disease and is equivalent to the parents' suit for wrongful birth.⁴³ The plaintiff child in a wrongful life action alleges that "because of defendants' negligence, [the] parents either decided to conceive them ignorant of the risk of impairment or were deprived of information that would have impelled them to terminate the pregnancy."⁴⁴ In other words, but for the negligence of the physician in failing to advise or inform the parents of the risks, the child would not have been born into a life of pain and suffering resulting from the condition.⁴⁵

Wrongful life actions are not recognized in most jurisdictions,⁴⁶ with courts finding the claims would rest on the theory that the life of a child with

42. See, e.g., *Arche*, 798 P.2d at 480–81; Daniel W. Whitney & Kenneth N. Rosenbaum, *Recovery of Damages for Wrongful Birth*, 32 J. LEGAL MED. 167, 171 (2011) (providing that researchers were unable to find such actions where a child's gender or "minor" negative attributes were discovered and noting that allowing such actions "could slide quickly into applied eugenics").

43. *Miller v. Johnson*, 343 S.E.2d 301, 303 (Va. 1986).

44. *Pizano ex rel. Walker v. Mart*, 790 P.2d 735, 738 (Ariz. 1990).

45. *Siemieniec*, 512 N.E.2d at 695 ("The child claims that the physician or other health-care provider: (1) failed to accurately perform genetic screening tests prior to conception or to correctly inform the prospective parents of the hereditary nature of certain genetic disorders; (2) failed to accurately advise, counsel, or test his parents during pregnancy concerning genetic or teratogenic risks associated with childbirth suggested by maternal age, physical condition, family medical history, or other circumstances particular to the parents; or (3) failed to perform a surgical procedure intended to prevent the birth of a congenitally or genetically defective child. In a wrongful life case, the child does not assert that the negligence of the defendants caused his inherited or congenital abnormality, that the defendants could have done anything that would have decreased the possibility that he would be born with such defects, or that he ever had a chance to be normal. The essence of the child's claim is that the medical professional's breach of the applicable standard of care precluded an informed parental decision to avoid his conception or birth. But for this negligence, the child allegedly would not have been born to experience the pain and suffering attributable to his affliction."); *C.S. v. Nielson*, 767 P.2d 504, 506 (Utah 1988).

46. See, e.g., *Pizano ex rel. Walker*, 790 P.2d at 738 ("At least twenty states have now considered wrongful life claims. In three, the state's highest courts have recognized the action, allowing limited recovery.").

a diseased or birth defect is worth less than an unborn life.⁴⁷ The “threshold problem” is recognizing that the plaintiff child suffered a legally cognizable injury by virtue of existing.⁴⁸ Because the negligence did not actually cause the impairment, but rather allowed the child to come into being, the injury is the child’s life itself.⁴⁹

The measure and calculation of damages also proves problematic, requiring the trier of fact to weigh the child’s life with a disability against the child’s nonexistence.⁵⁰ The purpose of compensatory damages is to put

47. *Arche*, 798 P.2d at 479; *Kassama v. Magat*, 792 A.2d 1102, 1123 (Md. 2002) (“We align ourselves with the majority view and hold that, for purposes of tort law, an impaired life is *not* worse than non-life, and, for that reason, life is not, and cannot be, an injury.”); *Miller*, 343 S.E.2d at 303; *see also* *Grubbs v. Barbourville Family Health Ctr.*, P.S.C., 120 S.W.3d 682, 685 (Ky. 2003) (finding the alleged injury is the child’s life itself and holding it would be “against public policy to weigh a human life, albeit imperfect, against no life at all”).

48. *Siemieniec*, 512 N.E.2d at 697; *see also* *Rich v. Foye*, 976 A.2d 819, 835–36 (Conn. Super. Ct. 2007); *Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065, 1084 (Ill. 2011).

49. *Kassama*, 792 A.2d at 1116 (“The injury sued upon, that *was* allegedly caused by the defendant, is the fact that she was born; she bears the disability and will bear the expenses only because, but for the alleged negligence of Dr. Magat, her mother was unable to terminate the pregnancy and avert her birth.”); *Dumer v. St. Michael’s Hosp.*, 233 N.W.2d 372, 374 (Wis. 1975) (“[The plaintiff’s injury is] a result of the negligence of the defendants she was ‘not aborted’ and ‘was allowed to be born to a wrongful life; that she was born disabled, retarded and crippled; and that her ability to enjoy life has been permanently impaired.’”).

50. *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) (“Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.”); *see also* *Rich*, 976 A.2d at 835–36 (“The traditional tort remedy is compensatory in nature. The basic rule of tort compensation is that the plaintiff be put in the position that he would have been in absent the defendant’s negligence. The damages recoverable on behalf of a child for wrongful life are limited to those necessary to restore the child to the position he would have occupied were it not for the alleged malpractice of the physician or other health-care provider. In a wrongful life case, there is no allegation that but for the defendant’s negligence the child would have had a healthy, unimpaired life. Instead, the claim is that without the defendants’ negligence, the child never would have been born. Thus, the cause of action involves a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all, [a] comparison the law is not equipped to make.” (citation omitted)); *Speck v. Finegold*, 408 A.2d 496, 512 (Pa. Super. Ct. 1979) (Spaeth, J., concurring in part and dissenting in part) (“[I]n essence[, the child] claims that nonexistence never being born would have been preferable to existence in her diseased state. But no one is capable of assessing such a claim. When a jury considers the claim of a once-healthy plaintiff that a defendant’s negligence harmed him for

the plaintiff back in the position the plaintiff would have been in if it were not for the defendant's negligence; in wrongful birth claims, this position would be the child's nonexistence because the mother would have terminated her pregnancy.⁵¹

In addition, courts reject the cause of action for various policy reasons.⁵² Many find allowing the claims would imply nonlife is superior to life with a disability, an intolerable repudiation of the "sanctity of human life."⁵³ Often, courts consider the theological and philosophical nature of the issue beyond judicial administration.⁵⁴

III. THE TREND TOWARD RECOGNITION OF WRONGFUL BIRTH CLAIMS

Early on, courts were reluctant to recognize claims for wrongful birth.⁵⁵

example, by breaking his arm the jury's ability to say that the plaintiff has been 'injured' is manifest, for the value of a healthy existence over an impaired existence is within the experience of imagination of most people. The value of nonexistence its very nature however, is not. If it were possible to approach a being before its conception and ask it whether it would prefer to live in an impaired state, or not to live at all, none of us can imagine what the answer would be. We can only speculate or refer to various religious or philosophical beliefs. We cannot give an answer susceptible to reasoned or objective valuation." (footnote omitted), *aff'd in part, reversed in part*, 439 A.2d 110 (Pa. 1981), *superseded by statute*, 42 PA. STAT. AND CONST. STATE. ANN. § 8305 (West 1988), *held unconstitutional by* Sernovitz v. Dershaw, 57 A.3d 1254 (Pa. Super. Ct. 2012), *rev'd*, 127 A.3d 783 (Pa. 2015); Gregory G. Sarno, Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15, § 3[a] (1978) ("[S]everal courts have refused to award damages in such instances on the ground, generally speaking, that it is extremely difficult, if not absolutely impossible, for the judiciary to evaluate in pecuniary terms the philosophical problem of being versus nothingness." (footnote omitted)).

51. *Rich*, 976 A.2d at 836–37.

52. *See Phillips v. United States*, 508 F. Supp. 537, 543 (D.S.C. 1980) (enumerating public policy grounds frequently cited by courts refusing to recognize wrongful life claims); *Smith v. Cote*, 513 A.2d 341, 352 (N.H. 1986) ("compelling policy reasons militate against recognition of wrongful life claims").

53. *E.g.*, *Phillips*, 508 F. Supp. at 543; *Berman v. Allan*, 404 A.2d 8, 12 (N.J. 1979); *Brown et al.*, *supra* note 24, at 603, 753.

54. *Becker*, 386 N.E.2d at 812; *Speck*, 408 A.2d at 508 ("Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to the philosophers and theologians, a mystery which would lead us into the field of metaphysics, beyond the realm of our understanding or ability to solve. The law cannot assert a knowledge which can resolve this inscrutable and enigmatic issue.").

55. Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 152 (1992).

In the first reported decision on the validity of a cause of action for wrongful birth, the New Jersey Supreme Court rejected the plaintiffs' claims on the grounds that it would be impossible to ascertain damages and that such a claim would contravene the public policy against abortion.⁵⁶ The court reasoned the calculation of damages would entail balancing the intangible benefits of parenthood against alleged financial and emotional injuries.⁵⁷ Though the court sympathized with the parents' plight, it found the child's right to live greater than the parents' right not to suffer financial and emotional injury.⁵⁸ The court noted the defendant's conduct did not give rise to damages cognizable at law and held that even if such damages were cognizable, the claim would be "precluded by the countervailing public policy supporting the preciousness of human life."⁵⁹

In the years that followed, however, courts began recognizing wrongful birth as a cause of action, finding such claims to be a logical and necessary extension of existing tort principles.⁶⁰ These courts held that refusing to recognize these claims "would frustrate the fundamental policies of tort law: to compensate the victim; to deter negligence; and to encourage due care."⁶¹

A. *Movement Toward Recognition*

The trend toward judicial acceptance of wrongful birth claims can be explained by two developments.⁶² First, advancements in prenatal medicine allowed for the accurate detection or prediction of fetal abnormalities and defects.⁶³ Parents may now seek genetic counseling prior to conceiving a child to determine whether their genetic traits increase the risk of their

56. *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967), *abrogated by Berman*, 404 A.2d 8.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 705 (Ill. 1987), *overruled on other grounds by Clark v. Children's Mem'l Hosp.*, 955 N.E.2d 1065 (Ill. 2011); *Smith v. Cote*, 513 A.2d 341, 345 (N.H. 1986); *see also Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 404 (Iowa 2017).

61. *Siemieniec*, 512 N.E.2d at 705; *see also Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981); *Phillips v. United States*, 508 F. Supp. 537, 550 (D.S.C. 1980)

62. *Smith*, 513 A.2d at 345–46.

63. *Id.*; *Siemieniec*, 512 N.E.2d at 705; *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 491 (Wash. 1983) ("[T]he ability to predict the occurrence and recurrence of defects attributable to genetic disorders has improved significantly.").

child suffering from a genetic disorder.⁶⁴ After conception, healthcare professionals can better advise the expectant parents by utilizing a variety of diagnostic and screening tests to identify potential abnormalities in the fetus.⁶⁵

Public policy supports ensuring prenatal testing is properly performed and interpreted.⁶⁶ As one court noted, “Imposing liability on individual physicians [and other healthcare professionals] vindicates the societal interest in reducing the incidence of genetic defects.”⁶⁷ Therefore, courts see the recognition of wrongful birth claims as encouraging diligent performance of prenatal medical procedures.⁶⁸

The landmark decision of the United States Supreme Court in *Roe v. Wade*, along with its progeny, established the second development in the judicial trend toward accepting wrongful birth as a cause of action.⁶⁹ *Roe* “established that public policy now supported, rather than controverted, the proposition that a woman could not be denied a meaningful opportunity to make the decision to have an abortion,” and such claims may arise from “the denial of a woman’s constitutional right to choose whether to terminate her pregnancy.”⁷⁰

The right to prevent the birth of a child is grounded in the parents’ constitutional right to reproductive autonomy.⁷¹ After all, a woman has the right to choose not to carry her fetus to term regardless of whether the child would be born with birth defects.⁷² Healthcare providers owe a correlative

64. *Harbeson*, 656 P.2d at 491.

65. *Id.*

66. *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978).

67. *Blake v. Cruz*, 698 P.2d 315, 318 (Idaho 1984), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 1985), *as recognized in Vanvooren v. Astin*, 111 P.3d 125, 127–28 (Idaho 2005).

68. *Gildiner*, 451 F. Supp. at 696; *Keel v. Banach*, 624 So. 2d 1022, 1026 (Ala. 1993).

69. *Smith v. Cote*, 513 A.2d 341, 346 (N.H. 1986).

70. *Arche v. U.S. Dep’t of the Army*, 798 P.2d 477, 480–81 (Kan. 1990); *see also Roe v. Wade*, 410 U.S. 113, 153 (1973).

71. *Stewart-Graves v. Vaughn*, 170 P.3d 1151, 1159 (Wash. 2007); *see also Roe*, 410 U.S. at 153 (holding the constitutional right to privacy encompasses a woman’s decision whether to continue or terminate her pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding the right to privacy includes the right of married couples to use contraceptives).

72. *See* Mark Strasser, *Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence*, 31 ARIZ. ST. L.J. 161, 172 (1999) [hereinafter Strasser, *Misconceptions*].

duty not to deprive the parents of the opportunity to make a meaningful and informed decision.⁷³ The parents cannot exercise their right to make an informed decision when material information is withheld.⁷⁴ The healthcare professional must provide them with all the information reasonably necessary to make a truly informed decision, including the likelihood the child will be born with a disability or birth defect.⁷⁵

Failure to recognize these claims may impermissibly infringe on the constitutional rights involved in conception and procreation.⁷⁶ Parents may have reasons, safeguarded by the Constitution, for avoiding the monetary and emotional burdens that can accompany the birth of a child with a disability or birth defect.⁷⁷ As one court explained, “Scientific advances in prenatal health care provide the basis upon which the parents may make the informed decisions that *Roe* protects.”⁷⁸ At the very least, refusal to recognize this cause of action “would in effect 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.”⁷⁹

It should be noted, however, the physician or other responsible party must have deprived the parents of the pertinent information which would have caused them to terminate the pregnancy at a stage where abortion was a legal option.⁸⁰ Recovery is precluded where the abortion at issue would be illegal.⁸¹

In addition, courts have rejected the view that ascertaining damages for wrongful birth would be an impossible task, thereby precluding

73. *Blake v. Cruz*, 698 P.2d 315, 318–19 (Idaho 1984), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 1985), *as recognized in* *Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 491 (Wash. 1983).

74. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 403 (Iowa 2017) (quoting *Pauscher v. Iowa Methodist Med. Ctr.*, 408 N.W.2d 355, 358 (Iowa 1987)).

75. *Id.* at 405.

76. *Smith v. Cote*, 513 A.2d 341, 345–47 (N.H. 1986).

77. *Id.* at 347.

78. *Id.*

79. *Berman v. Allen*, 404 A.2d 8, 14 (N.J. 1979).

80. *See* *Eisbrenner v. Stanley*, 308 N.W.2d 209, 213 (Mich. Ct. App. 1981), *abrogated by* *Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. Ct. App. 1999).

81. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 409 (Iowa 2017) (“We conclude Iowa public policy would not permit recovery for wrongful birth if the abortion in question would be illegal.” (footnote omitted)).

recovery.⁸² To deny the plaintiffs in these cases “redress for their injuries merely because damages cannot be measured with precise exactitude would constitute a perversion of fundamental principles of justice.”⁸³ These courts find the difficulty in quantifying the measure of damages should not act as a bar to recovery as juries frequently make complex assessments of damages in a variety of other cases.⁸⁴

IV. ELEMENTS OF A WRONGFUL BIRTH CLAIM

Courts recognizing wrongful birth as a cause of action often do so by concluding the claims fall within the existing principles of medical negligence.⁸⁵ Similar to any other plaintiff in an action alleging negligence, plaintiffs bringing a wrongful birth claim must show the existence of a duty, demonstrated through the applicable standard of care in actions involving medical malpractice, the breach of which proximately caused the plaintiffs’ injury.⁸⁶ In wrongful birth claims, the plaintiffs do not allege the physician actually caused the defect or disorder, rather they allege they were tortiously injured by being deprived of the ability to make an informed decision regarding the pregnancy.⁸⁷

A. Duty

The plaintiffs in a wrongful birth suit must first establish the existence of the physician–patient relationship with respect to the pregnancy. If such a relationship existed, the physician assumed a duty.⁸⁸ In most jurisdictions,

82. *E.g.*, *Berman*, 404 A.2d at 14–15.

83. *Id.* at 15.

84. *See* *Marciniak v. Lundborg*, 450 N.W.2d 243, 246 (Wis. 1990); *see also* *Pizano ex rel. Walker v. Mart*, 790 P.2d 735, 739 (Ariz. 1990) (“The difficult problem of quantifying general damages should not have prevented the courts from awarding such damages if in fact an injury had occurred. It is the genius of the common law that difficult damage questions are left to juries.” (citations omitted)).

85. *E.g.*, *Plowman*, 896 N.W.2d at 403 (“This is analogous to a claim for medical negligence based on lack of informed consent.”); *see also* *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003).

86. *Plowman*, 896 N.W.2d at 401; *Smith v. Cote*, 513 A.2d 341, 346 (N.H. 1986).

87. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 703 (Ill. 1987), *overruled on other grounds by* *Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065 (Ill. 2011).

88. *Smith*, 513 A.2d at 346. Though this section refers to the physician’s duty, the duty applies broadly to all healthcare providers, as discussed in section II.B, *supra*. *See, e.g.*, *Bader v. Johnson*, 732 N.E.2d 1212, 1217 (Ind. 2000) (explaining the duty owed by a healthcare provider); *McQuitty v. Spangler*, 976 A.2d 1020, 1022 (Md. Ct. App. 2009)

the physician owes the duty to both the mother and the fetus.⁸⁹ The duty owed by a physician to his or her patient is to “exercise the ordinary knowledge and skill of [the] profession in a reasonable and careful manner when undertaking the care and treatment of a patient.”⁹⁰ Accordingly, the physician–patient relationship gives rise to an affirmative duty to disclose reasonably accurate information concerning the condition of the unborn child to enable the parents to make an informed decision regarding whether to continue or terminate the pregnancy.⁹¹ “Because the patient’s protectable interest is the personal right of self-determination, the doctor’s duty of disclosure must be sufficient to enable her to make an informed and meaningful decision concerning whether or not to continue the pregnancy.”⁹²

B. Breach

To establish a breach of the duty, the plaintiffs must show a reasonably competent physician or medical professional would have known of or discovered the defect or abnormality and informed the parents of the risks.⁹³ Parties responsible for prenatal care may breach their duty by failing to report material information to prevent the birth of a child with a defect or disease.⁹⁴ This is a question of fact, defined by “the standards and recommended practices and procedures of the medical profession, the training, experience and professed degree of skill of the average medical practitioner, and all other relevant circumstances.”⁹⁵ To establish

(“[I]t is the duty of a health care provider to inform a patient of material information, or information that a practitioner ‘knows or ought to know would be significant to a reasonable person in the patient’s position in deciding whether or not to submit to a particular medical treatment or procedure.’” (quoting *Sard v. Hardy*, 281 Md. 432, 444, 379 A.2d 1014, 1022 (1977))).

89. *Pizano ex rel. Walker*, 790 P.2d at 739.

90. *Plowman*, 896 N.W.2d at 401 (quoting *R.M.H. ex rel. J.A.H. v. Wadle & Assocs.*, 589 N.W.2d 256, 260 (Iowa 1999)).

91. *Naccash v. Burger*, 290 S.E.2d 825, 829 (Va. 1982); *see also Goldberg ex rel. Goldberg v. Ruskin*, 471 N.E.2d 530, 537 (Ill. App. Ct. 1984) (stating physicians owe an affirmative duty to disclose); *Harbeson v. Park-Davis, Inc.*, 656 P.2d 483, 491 (Wash. 1983) (“This duty requires health care providers to impart to their patients material information as to the likelihood of future children’s being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children.”).

92. *Canesi ex rel. Canesi v. Wilson*, 730 A.2d 805, 811 (N.J. 1999).

93. *See Plowman*, 896 N.W.2d at 401–02.

94. *Harbeson*, 656 P.2d at 488.

95. *Smith v. Cote*, 513 A.2d 341, 346 (N.H. 1986).

the physician or other medical professional deviated from the standard of care, the plaintiffs must show a reasonably competent professional would have known of the defect or disability and reported the results to the parents.⁹⁶ Typically, expert medical testimony is required to show the conduct did not meet the applicable standard of care, although in some cases the breach is so egregious that even a layperson could recognize it without expert testimony.⁹⁷

C. Proximate Causation

In regard to causation, the plaintiffs must show that but for the defendants' negligence and failure to timely inform the plaintiffs of the defect or disorder, the parents would have chosen to terminate the pregnancy.⁹⁸

Defendants frequently argue no proximate cause exists because the physician or other healthcare provider "cannot be said to have caused the defect" or disability; the child's condition is genetic and exists at the moment of conception.⁹⁹ Courts reject this argument, finding it misstates the test for proximate cause:¹⁰⁰ "A negligent act need not be the sole cause of the injury complained of in order to be a proximate cause of that injury. Moreover, the cause of action is not based on the injuries to the fetus but on defendant's

96. *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr.*, P.S.C., 120 S.W.3d 682, 688 (Ky. 2003).

97. *Bader v. Johnson*, 732 N.E.2d 1212, 1215 (Ind. 2000). The plaintiffs' first child was born with a severe condition, requiring extensive medical treatment from birth until her death four months later. *Id.* The mother became pregnant again, and the parents consulted with a specialist to ensure they would not bear another child with congenital defects. *Id.* An ultrasound showed the fetus suffered from the same condition, but "[d]ue to an office error," the parents were not notified until 33 weeks gestation, at which point it was too late to terminate the pregnancy. *Id.* The court held no expert testimony was needed to show the healthcare provider breached its duty. *Id.* at 1217.

98. *Plowman*, 896 N.W.2d at 402. *But see Provenzano v. Integrated Genetics*, 22 F. Supp. 2d 406, 416 (D.N.J. 1998) ("In wrongful birth cases, the issue of proximate causation does not conclusively depend upon whether the plaintiff parents would have aborted a fetus with a birth defect, had they been advised of their option to do so. Rather, proximate cause may be established by evidence demonstrating that the defendant's negligence deprived the plaintiffs of their right to accept or reject a parental relationship.").

99. *See Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981); *Keel v. Banach*, 624 So. 2d 1022, 1028 (Ala. 1993); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 536 (N.C. 1985).

100. *See Keel*, 624 So. 2d at 1028–30.

failure to diagnose . . . and inform . . . of the consequences.”¹⁰¹ Legal causation is required; however, medical causation is not.¹⁰²

The appropriate inquiry for proximate cause in a wrongful birth action is whether the physician’s inadequate disclosure deprived the parents of their “deeply personal” right to make an informed decision regarding the pregnancy.¹⁰³ If the birth of a child with a defect or disorder is a probable consequence of the breach of duty, which the physician or healthcare provider should have reasonably foreseen or anticipated, the plaintiffs have made a prima facie claim of causation.¹⁰⁴

D. *Injury*

The injury alleged “is not the birth itself but the effect of the defendant’s negligence on the parents’ physical, emotional, and financial well-being resulting from the denial to the parents of their right . . . to decide whether to bear a child with a genetic or other defect.”¹⁰⁵ Thus, the injury lies in the parents being deprived of their right to make an informed decision whether to continue or terminate the pregnancy.¹⁰⁶ As such, the causal-connection analysis in wrongful birth claims is analogous to the analysis applied in informed consent claims.¹⁰⁷

101. *Robak*, 658 F.2d at 479.

102. *See id.*; *see also* *Canesi ex rel. Canesi v. Wilson*, 730 A.2d 805, 817 (N.J. 1999).

103. *Canesi ex rel. Canesi*, 730 A.2d at 818.

104. *See* *Bader v. Johnson*, 732 N.E.2d 1212, 1218–20 (Ind. 2000).

105. *Viccaro v. Milunsky*, 551 N.E.2d 8, 9 n.3 (Mass. 1990); *see also* *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 704 (Ill. 1987) (“The parents’ claim for wrongful birth rests upon the injury to the mother by virtue of the physician’s or other healthcare provider’s negligence, resulting in the mother’s being deprived of the right to make an informed choice”), *overruled on other grounds by* *Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065 (Ill. 2011); *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 404 (Iowa 2017) (holding the injury is “the parent’s deprivation of information material to making an informed decision whether to terminate a pregnancy of a child likely to be born with severe disabilities”). *But see* *Azzolino v. Dingfelder*, 337 S.E.2d 528, 534 (N.C. 1985) (holding claims for wrongful birth are not cognizable at law because the injury plaintiffs seek to compensate is the existence of human life).

106. *Garrison ex rel. Garrison v. Med. Ctr. of Del., Inc.*, 581 A.2d 288, 290 (Del. 1989).

107. *Reed v. Campagnolo*, 630 A.2d 1145, 1149 (Md. 1993); *see also* *Provenzano v. Integrated Genetics*, 22 F. Supp. 2d 406, 415–16 (D.N.J. 1998) (“Wrongful birth is a distinct cause of action from that of informed consent, but both doctrines share notable similarities.”). *But see* *Cauman v. George Wash. Univ.*, 630 A.2d 1104, 1108 (D.C. 1993) (rejecting the theory of informed consent for a claim of emotional distress damages).

[T]he informed consent and wrongful birth causes of action are similar in that both require the physician to disclose those medically accepted risks that a reasonably prudent patient in the plaintiff's position would deem material to her decision. What is or is not a medically accepted risk is informed by what the physician knows or ought to know of the patient's history and condition. These causes of action, however, have important differences. They encompass different compensable harms and measures of damages. In both causes of action, the plaintiff must prove not only that a reasonably prudent patient in her position, if apprised of all material risks, would have elected a different course of treatment or care. In an informed consent case, the plaintiff must additionally meet a two-pronged test of proximate causation: she must prove that the undisclosed risk actually materialized and that it was medically caused by the treatment. In a wrongful birth case, on the other hand, a plaintiff need not prove that the doctor's negligence was the medical cause of her child's birth defect. Rather, the test of proximate causation is satisfied by showing that an undisclosed fetal risk was material to a woman in her position; the risk materialized, was reasonably foreseeable and not remote in relation to the doctor's negligence; and, had [the] plaintiff known of that risk, she would have terminated her pregnancy.¹⁰⁸

E. *Alternative Approaches to Wrongful Birth Claims*

Some courts recognize the parents have a cause of action for the physician's negligence in testing procedures and failure to report the test results in a timely fashion, but the courts decline to specifically label a cause of action as "wrongful birth."¹⁰⁹ These courts find the wrongful birth label does not add to the analysis of the claim, creates confusion, and implies the

108. *Canesi ex rel. Canesi*, 730 A.2d at 813.

109. *E.g., Garrison ex rel. Garrison*, 581 A.2d at 290 (holding the common law provides an actionable claim for "negligence in performing a medical testing procedure and for negligence in failing to timely report the results of testing. The cause of action need not be characterized as 'wrongful birth' since it falls within the realm of traditional tort and medical malpractice law."); *Bader*, 732 N.E.2d at 1216-17; *Greco v. United States*, 893 P.2d 345, 348 (Nev. 1995) ("[W]e see no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the new name of 'wrongful birth.'" (footnote omitted)); *see also Shelton v. St. Anthony's Med. Ctr.*, 781 S.W.2d 48, 49-50 (Mo. 1989) (holding a statutory prohibition on wrongful birth causes of action applied to the facts of the case but, nonetheless, allowing the claim to proceed on the theory of medical malpractice).

adoption of a new tort.¹¹⁰ In these jurisdictions, the parents' claim may be brought under traditional medical malpractice tort law: "[E]ither [they] state a claim for medical malpractice or they do not."¹¹¹

Other courts find the parents do not have a cause of action in tort law, instead finding a healthcare provider "who contracts and charges for a service, such as a prenatal ultrasound and consequent opinion as to the results of the ultrasound, is liable for any breach of contract in this regard."¹¹² While expressly rejecting claims for wrongful birth, these courts hold that medical professionals cannot be relieved of their contractual responsibilities to report accurate results from diagnostic testing and other similar procedures.¹¹³

Finally, a minority of jurisdictions do not recognize wrongful birth as a cause of action.¹¹⁴ These courts find wrongful birth cannot be viewed through traditional tort analysis and allowing recovery would require the application of an "entirely untraditional analysis by holding that the existence of a human life can constitute an injury cognizable at law."¹¹⁵ As these courts "are unwilling to say that life, even life with severe defects, may ever amount to a legal injury," there is no cause of action.¹¹⁶

110. *E.g.*, *Bader*, 732 N.E.2d at 1216–17; *Greco*, 893 P.2d at 348.

111. *Bader*, 732 N.E.2d at 1216–17; *see also Garrison ex rel. Garrison*, 581 A.2d at 290; *Greco*, 893 P.2d at 348.

112. *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 691 (Ky. 2003); *see also Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 419 (Iowa 2017) (Mansfield, J., dissenting) (asserting a physician assumes a duty to provide competent medical care, including diagnosis of an unborn child's condition, and is therefore liable for breach of contract if that duty is breached).

113. *Grubbs ex rel. Grubbs*, 120 S.W.3d at 691; *Patel v. Game*, No. 2016-CA-000782-MR, 2017 WL 2889536, at *7 (Ky. Ct. App. July 7, 2017).

114. *E.g.*, *Wilson v. Kuenzi*, 751 S.W.2d 741, 745–46 (Mo. 1988); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 533 (N.C. 1985) ("[C]laims for relief for wrongful birth are not cognizable at law in this jurisdiction . . .").

115. *Azzolino*, 337 S.E.2d at 533–34; *see also Grubbs ex rel. Grubbs*, 120 S.W.3d at 689 ("Although the parents in the instant cases allege that their injury was in being deprived of accurate medical information that would have led them to seek an abortion, we are unwilling to equate the loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, with a cognizable legal injury.").

116. *Azzolino*, 337 S.E.2d at 534; *see also Grubbs ex rel. Grubbs*, 120 S.W.3d at 690.

V. DAMAGES FOR WRONGFUL BIRTH

“As in all other cases of tortious injury, a physician whose negligence has deprived a mother of this opportunity should be required to make amends for the damage which [the physician] has proximately caused.”¹¹⁷ On this, the majority of courts agree.¹¹⁸ However, as to what damages are recoverable and the measure of such damages, courts are divided.¹¹⁹ The wide divergence in recoverable damages is “due in part to differing assessments about whether damages . . . are too speculative” and whether the benefits of parenthood should offset recovery.¹²⁰ The “complex legal, moral, philosophical, and social issues” raised in these cases further complicate the measure of damages.¹²¹

A. *Extraordinary Child-Rearing Costs*

Generally, the parents may recover the extraordinary medical, educational, and other costs attributable to the birth defect or disorder.¹²² That is, courts recognizing wrongful birth as a cause of action “permit, at a minimum, damages measured by the extraordinary cost, at least through minority, of supporting the child with severe birth defects as compared to supporting a child who is not so afflicted.”¹²³

The birth of a deformed or disabled child creates an inordinate financial burden that does not accompany the birth of a healthy child and

117. *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979).

118. *Haymon v. Wilkerson*, 535 A.2d 880, 883 (D.C. 1987).

119. *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 713 (Ga. 1990) (“Jurisdictions which have recognized ‘wrongful birth’ actions have all faced the troublesome question of what damages to allow and, despite the concerted efforts of many of the finest legal minds in the country, there is, after more than a decade of wrestling with the issue, no clear consensus as to what approach to take with respect to recoverable damages.”); *Whitney & Rosenbaum*, *supra* note 42, at 173.

120. *See Strasser, Misconceptions*, *supra* note 72, at 182–86.

121. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 706 (Ill. 1987), *overruled on other grounds by Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065 (Ill. 2011).

122. *James G. v. Caserta*, 332 S.E.2d 872, 882 (W. Va. 1985); *see also Keel v. Banach*, 624 So. 2d 1022, 1030 (Ala. 1993) (“The primary element of damages that may be recovered in an action for wrongful birth is the pecuniary loss to the plaintiffs, the child’s parents, resulting from the care and treatment of the child.”). *But see Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1162 (La. 1988) (recognizing wrongful birth as a cause of action but holding “[t]he parents may not recover for the special expenses regarding the child’s deformity”).

123. *Reed v. Campagnolo*, 630 A.2d 1145, 1151 (Md. 1993) (citations omitted).

necessitates extraordinary medical, therapeutic, and custodial expenses.¹²⁴ But for the defendant's negligence, the parents would not be burdened by these extraordinary costs,¹²⁵ which are foreseeable as a result of the wrongful conduct.¹²⁶ Thus, the parents may recover damages for expenses incurred as a result of the child's disability or deformity, such as costs of medical treatment, hospitalization, medication, therapy, and special education.¹²⁷

B. Ordinary Child-Rearing Costs

Courts are divided as to whether ordinary costs of raising a child are recoverable,¹²⁸ but the majority do not allow recovery.¹²⁹ The parents in these cases often intended to conceive and take on the costs associated with raising a healthy child.¹³⁰ If they were to recover the costs they were already prepared to take on, they would receive compensation for expenses not reasonably attributable to their injury.¹³¹ However, while most courts hold that only extraordinary costs are recoverable, a limited number allow for all

124. *Greco v. United States*, 893 P.2d 345, 349 (Nev. 1995); *see also* *Basten v. United States*, 848 F. Supp. 962, 972 (M.D. Ala. 1994) (finding a fair estimate of the medical costs associated with child's neural tube defect to be \$2,500,000); *Chamberland v. Physicians for Women's Health, LLC*, No. CV010164040S, 2006 WL 437553, at *9 (Conn. Super. Ct. Feb. 28, 2006) ("[T]he economic damages, including past and future extraordinary expenses attributable to the [child's] spina bifida, could exceed \$5 million." (footnote omitted)); *Whitney & Rosenbaum*, *supra* note 42, at 174–75 (calculating the extraordinary medical and nonmedical costs for a child with Down syndrome to exceed \$6–\$8 million, depending on survival).

125. *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1207 (Colo. 1988).

126. *Greco*, 893 P.2d at 350.

127. *Keel*, 624 So. 2d at 1030.

128. *Compare* *Smith v. Cote*, 513 A.2d 341, 350 (N.H. 1986) (permitting recovery for only extraordinary child-rearing costs associated with the child's disability), *with* *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (finding if the physicians had not breached their duty, the mother would have obtained an abortion and would not have had to bear any of the normal costs for raising a child and allowing recovery for both ordinary and extraordinary child-rearing expenses).

129. *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 561 (Ga. 1990) ("Courts that have recognized the cause of action have generally allowed recovery of the extraordinary costs of rearing the impaired child. However, these same courts have generally not allowed recovery of the ordinary costs of rearing the child . . ."); *Smith*, 513 A.2d at 349–50.

130. *Haymon v. Wilkerson*, 535 A.2d 880, 884 (D.C. 1987); *Clark v. Children's Mem'l Hosp.*, 955 N.E.2d 1065, 1083 (Ill. 2011).

131. *Azzolino v. Dingfelder*, 337 S.E.2d 528, 539 (N.C. 1985) (Exum, J., dissenting).

child-rearing costs.¹³² The rationale relied on is that but for the physician's negligence, the pregnancy would have been terminated and thus the ordinary costs of raising the child would not have been incurred.¹³³

C. Post-Majority Expenses

Courts are also divided as to whether to allow recovery for future extraordinary costs the parents will incur after the child reaches the age of majority.¹³⁴ Often, the issue hinges on whether state law imposes a continued obligation on parents of a disabled child after the child has reached the age of majority.¹³⁵ If the state imposes such an obligation, the parents usually may recover damages for the child's life expectancy or until such time that the child is no longer dependent on his or her parents.¹³⁶

Conversely, if there is no common law or statutory requirement that the parents support their dependent adult child, the defendant cannot typically be held responsible for the damages beyond the child's age of majority; should the parents choose to continue to support their child, they accept the burden voluntarily.¹³⁷ The parents' willingness to do so cannot overcome the fact that the defendant did not cause the parents to bear that burden, thus precluding recovery of any costs the parents willingly incur for the support of their child as an adult.¹³⁸

Additionally, some courts decline to delineate recoverability on the

132. *E.g.*, *Robak*, 658 F. Supp. at 478–79.

133. *Id.* at 479.

134. *Haymon*, 535 A.2d at 885 (“[Courts] are not in agreement, however, on whether recovery should be limited to those expenses incurred during the child's minority or should extend into majority where a child is incapable of self-caring.”); *Atlanta Obstetrics & Gynecology Grp.*, 398 S.E.2d at 562 (“[C]ourts recognizing ‘wrongful birth’ actions are not in agreement as to whether plaintiffs may recover the extraordinary costs that will be incurred after the child reaches the age of majority.”). *Compare Smith*, 513 A.2d at 350 (allowing recovery for extraordinary costs incurred both before and after the child reaches the age of majority), *with Clark*, 955 N.E.2d at 1081 (holding parents may only recover for extraordinary expenses incurred before the disabled child reaches the age of majority).

135. *Clark*, 955 N.E.2d at 1080–81.

136. *Arche v. U.S. Dep't of the Army*, 798 P.2d 477, 486 (Kan. 1990); *Greco v. United States*, 893 P.2d 345, 350 (Nev. 1995).

137. *Clark*, 955 N.E.2d at 1083.

138. *Id.* at 1084; *Atlanta Obstetrics & Gynecology Grp.*, 398 S.E.2d at 567 (Benham, J., dissenting) (reasoning the defendant cannot be held liable for post-majority expenses, as beyond that point, “the plaintiffs’ obligation to the child is moral rather than legal”).

supporting obligation, finding the parents' injury does not end the day the child reaches the age of majority; the child will, in most cases, never be self-sufficient or be able to make the decisions needed for day-to-day care and survival.¹³⁹ Lifelong medical, custodial, and other extraordinary expenses are a foreseeable result of the defendant's negligence.¹⁴⁰ The only way to fully compensate the plaintiff parents is to allow recovery for all extraordinary damages caused by the condition for the duration of the child's life expectancy.¹⁴¹

D. *Extraordinary Parental Care*

Most courts have not addressed whether the extraordinary expenses attributable to the disease includes so-called extraordinary services rendered by the parents.¹⁴² The courts that have considered extraordinary parental care are split in whether such damages should be recoverable.¹⁴³ One view is that the parents "cannot recover for services that they have rendered or will render personally to their own child without incurring financial expense."¹⁴⁴ At least one court has held that allowing recovery of these costs would be duplicative of the damages for extraordinary child-rearing costs.¹⁴⁵

The opposing view is that the parental obligations to these children—which can include lifelong feeding, bathing, and exercising, among other things—substantially exceed the obligations of the parents of a child who is not disabled.¹⁴⁶ Avoiding such burdens may be one of the primary reasons the parents would have chosen not to carry to term a child likely to suffer from such a defect or disorder, and therefore, the extraordinary time and effort devoted to caring for the child is compensable.¹⁴⁷

139. *Clark*, 955 N.E.2d at 1092 (Freeman, J., concurring in part and dissenting in part).

140. *Id.* at 1093.

141. *Id.* at 1095.

142. Whitney & Rosenbaum, *supra* note 42, at 176–79.

143. *Id.* Compare *Smith v. Cote*, 513 A.2d 341, 350 (N.H. 1986) (holding parents may recover for the burdens imposed on parents of a disabled child, who must devote extraordinary time and effort), with *Schroeder ex rel. Schroeder v. Perkel*, 432 A.2d 834, 841 (N.J. 1981) (disallowing recovery for disabled child's extraordinary care provided by the parents themselves).

144. *Schroeder ex rel. Schroeder*, 432 A.2d at 841.

145. *Clark v. Children's Mem'l Hosp.*, 907 N.E.2d 49, 59 (Ill. App. Ct. 2009), *aff'd in part and rev'd in part*, 955 N.E.2d 1065 (Ill. 2011).

146. See *Smith*, 513 A.2d at 350.

147. See *id.*

In *Smith v. Cote*, the New Hampshire Supreme Court articulated a formula for calculating the measure of damages for extraordinary parental care.¹⁴⁸ The parents may recover for care they provide to their child to the extent that such care is made necessary by the child's condition; is clearly exceeding the care ordinarily rendered by the parents of a healthy child; and is readily susceptible of valuation.¹⁴⁹ Thus, the trial court should not allow the jury to consider damages for extraordinary care unless there is concrete evidence indicating the likely nature and extent of the care required.¹⁵⁰ If the issue is presented to the jury, the court should provide a limiting instruction specifying that damages for extraordinary care may not be awarded out of sympathy.¹⁵¹

At least one court has suggested the measure of these damages should be the fair market value of the extraordinary services and care.¹⁵² Another way to measure damages for extraordinary parental care may be the parent's lost wages as the child may require around-the-clock care that inhibits the parent's ability to work.¹⁵³ Alternatively, lost wages may be recoverable as a separate element of damages.¹⁵⁴

E. Emotional Distress

Whether the parents may recover for emotional distress also widely differs between courts.¹⁵⁵ This is largely due to the different approaches

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Viccaro v. Milunsky*, 551 N.E.2d 8, 11 (Mass. 1990).

153. *See Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 697–98 (Ky. 2003) (Keller, J., concurring in part and dissenting in part) (noting the plaintiffs parents should be able to recover lost wages); *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 844 N.E.2d 1160, 1169 (Ohio 2006) (Moyer, J., concurring) (finding damages should include the mother's lost wages).

154. *See, e.g., Bader v. Johnson*, 732 N.E.2d 1212, 1220 (Ind. 2000); *Troppe v. Scarf*, 187 N.W.2d 511, 520–21 (Mich. Ct. App. 1971), *overruled by Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. Ct. App. 1999); *Schirmer*, 844 N.E.2d at 1170.

155. *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 562 (Ga. 1990) (“Nor are courts in agreement as to whether to allow recovery for the mental pain and suffering of plaintiffs in wrongful birth actions. If recovery is allowed, there are many different reasons given, just as there are many different reasons given for denying recovery of such damages.”). *Compare Garrison ex rel. Garrison v. Med. Ctr. of Del., Inc.*, 581 A.2d 288, 293 (Del. 1990) (denying parents' claim for damages for emotional distress), *with Keel v. Banach*, 624 So. 2d 1022, 1030 (Ala. 1993) (finding emotional

various jurisdictions take in assessing emotional distress damages; these differing approaches include the “physical impact rule,”¹⁵⁶ “the bystander rule,”¹⁵⁷ and the “zone of danger rule.”¹⁵⁸

Under the physical impact rule, some courts hold that, absent a resulting physical injury to the parents, emotional distress damages are not recoverable.¹⁵⁹ Nonetheless, some courts applying the physical impact rule have found that the mother suffered an injury within the meaning of the rule, thereby permitting recovery.¹⁶⁰ The pregnancy itself,¹⁶¹ labor and delivery,¹⁶² a cesarean section performed at birth,¹⁶³ and the parents’ physical manifestations of their distress¹⁶⁴ have all been held sufficient to satisfy the requirement. However, even in jurisdictions that generally follow the physical impact rule, some courts hold the parents’ emotional distress is a direct result of the defendant’s wrongful conduct, and accordingly, the physical impact rule does not apply.¹⁶⁵

distress suffered by parents in a wrongful birth suit compensable).

156. *E.g.*, *Rich v. Foye*, 976 A.2d 819, 829–30 (Conn. Super. Ct. 2007).

157. *E.g.*, *Taylor*, 600 N.W.2d at 693.

158. *E.g.*, *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 707 (Ill. 1987), *overruled by Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065 (Ill. 2011).

159. *See Garrison ex rel. Garrison*, 581 A.2d at 293; *Bader*, 732 N.E.2d at 1221–22. *But see Kush v. Lloyd*, 616 So. 2d 415, 422 (Fla. 1992) (“[W]e are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth.”).

160. *E.g.*, *Gallagher v. Duke Univ.*, 852 F.2d 773, 779 (4th Cir. 1988); *Bader*, 732 N.E.2d at 1222.

161. *Bader*, 732 N.E.2d at 1222 (finding the mother’s “continued pregnancy and the physical transformation her body underwent as a result, satisfy the direct impact requirement of our modified impact rule,” but holding the father did not suffer a direct impact due to the defendant’s negligence).

162. *Gallagher*, 852 F.2d at 778 (finding abdominal pains associated with labor and delivery constituted physical injury).

163. *Basten v. United States*, 848 F. Supp. 962, 973 (M.D. Ala. 1994) (noting the mother underwent a caesarean section and other medical procedures); *Phillips v. United States*, 575 F. Supp. 1309, 1318 (D.S.C. 1983) (ruling the caesarean section performed to deliver the baby met the common law “contact” requirement).

164. *Phillips*, 575 F. Supp. at 1319 (explaining physical symptoms accompanied the parents’ emotional distress).

165. *E.g.*, *Rich v. Foye*, 976 A.2d 819, 828–29 (Conn. Super. Ct. 2007); *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982); *see also Phillips*, 575 F. Supp. at 1319 (“[D]amages for emotional distress would be permissible even assuming *arguendo* that there was no physical manifestation of those damages.”).

Under the bystander rule, damages for emotional distress are recoverable only where the plaintiff witnessed, or arrived on scene shortly thereafter, the severe injury or death of the plaintiff's loved one.¹⁶⁶ Courts following this rule often find emotional distress damages are not recoverable because the parents did not witness the tortious conduct giving rise to the injury.¹⁶⁷ These courts distinguish witnessing the results of the injury—in wrongful birth claims, the disability or deformity—from the wrongful conduct itself.¹⁶⁸ Other courts reject the applicability of the bystander rule, holding it would be “wholly unrealistic to say that the [parents] were mere witnesses to the consequences of the tortious conduct involved” in wrongful birth claims.¹⁶⁹ The parents are not bystanders but rather are directly injured as a result of the negligence.¹⁷⁰

Yet another approach to emotional distress damages is the application of the zone of danger doctrine, a hybrid of the physical impact and the

166. See, e.g., *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968) (adopting a foreseeability analysis for third-party emotional distress claims in which foreseeability is determined by considering “(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.”); *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000) (holding a bystander plaintiff may recover emotional distress damages “by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortuous conduct”); *Colbert v. Moomba Sports, Inc.*, 176 P.3d 497, 500 (Wash. 2008) (en banc) (explaining the rule “allows a family member a recovery for ‘foreseeable’ intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident” (citations omitted)).

167. *Arche v. U.S. Dep't of the Army*, 798 P.2d 477, 482 (Kan. 1990); see also *Taylor v. Kurapati*, 600 N.W.2d 670, 693 (Mich. Ct. App. 1999) (disallowing recovery because parents did not see the child's deformity at or immediately following her birth); *Shull v. Reid*, 258 P.3d 521, 524–25 (Okla. 2011) (holding parents could not recover for emotional distress “as the child's injury in this case occurred without human fault during development of the fetus, and the parents were not aware of the injury at the time”).

168. *Shull*, 258 P.3d at 524–25 (citing *Arche*, 798 P.2d at 482).

169. *Keel v. Banach*, 624 So. 2d, 1022, 1030 (Ala. 1993); *Rich*, 976 A.2d at 828; *Naccash*, 290 S.E.2d at 831.

170. *Rich*, 976 A.2d at 826; see also *Burnette v. Boland*, No. CV085009111S, 2010 WL 2108494, at *3 (Conn. Super. Ct. Apr. 23, 2010) (“[A] mother is not a bystander [with respect to matters] that are incident to prenatal care.”).

bystander rules.¹⁷¹ This approach “allows recovery by bystanders who witness a traumatic event provided they were in the zone of danger, were at high risk of an impact, and developed a physical injury as a result of the psychic trauma.”¹⁷² If the complaint makes no allegations indicating that the negligence endangered the parents in any way, they may not recover for emotional distress.¹⁷³ As with the other approaches, some courts find this rule was designed for a different type of claim and is inapplicable to wrongful birth actions.¹⁷⁴

Other courts, declining to impose any of the foregoing restrictions, hold that the parents’ emotional distress is a foreseeable consequence of the physician’s negligence and should therefore be recoverable.¹⁷⁵ These courts

171. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 707 (Ill. 1987) (“[A] bystander who is in a zone of physical danger and who, because of the defendant’s negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury, or illness as a result of the emotional distress caused by the defendant’s negligence.” (quoting *Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983))), *overturned by Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065 (Ill. 2011) (holding *Siemieniec* erroneously applied the zone of danger doctrine to determine emotional distress damages in a claim of liability for wrongful birth but indicating that the zone of danger doctrine still applies for claims of liability for negligent infliction of emotional distress; parents in wrongful birth claim instead stated a claim for emotional distress as direct victims); *see also Dyson v. Winfield*, 129 F. Supp. 2d 22, 24 (D.D.C. 2001) (“[A] mother claiming emotional distress for an injury to her child must either have sustained physical injury herself, or have been within the zone of danger where the injury to her child occurred.”); *Cauman v. George Washington Univ.*, 630 A.2d 1104, 1106 (D.C. 1993) (applying the zone-of-danger analysis to reject emotional distress damages in plaintiffs’ wrongful birth claim); *Bader v. Johnson*, 732 N.E.2d 1212, 1222 n.9 (Ind. 2000) (setting forth the father’s burden to prevail on his claim for emotional distress damages under the rule).

172. *Kush v. Lloyd*, 616 So. 2d 415, 420 n.4 (Fla. 1992).

173. *Siemieniec*, 512 N.E.2d at 707.

174. *Clark*, 955 N.E.2d at 1087.

175. *Greco v. United States*, 893 P.2d 345, 351 (Nev. 1995) (“[I]t is reasonably foreseeable that a mother who is denied her right to abort a severely deformed fetus will suffer emotional distress, not just when the child is delivered, but for the rest of the child’s life.”); *see also Gallagher v. Duke Univ.*, 852 F.2d 773, 779 (4th Cir. 1988); *Speck v. Finegold*, 439 A.2d 110, 114 (Pa. 1981), *superseded by statute*, 42 PA. STAT. AND CONS. STAT. ANN. § 8305 (West 1988), *held unconstitutional by Sernovitz v. Dershaw*, 57 A.3d 1254 (Pa. Super. Ct. 2012), *rev’d*, 127 A.3d 783 (Pa. 2015).

find that “to apply the restrictions here, or to refuse to recognize an exception to the general rule[s], ‘would constitute a perversion of fundamental principles of justice.’”¹⁷⁶

Still other courts find the damages for emotional distress too speculative to be recoverable.¹⁷⁷ These courts find public policy considerations against imposing “virtually infinite liability” on defendants and find that foreseeability defines the outer limits of recovery.¹⁷⁸ Further, these courts express concerns that allowing for recovery of emotional distress damages may run the risk of penalizing the defendant for merely negligent conduct.¹⁷⁹

Even among courts that do allow recovery for emotional distress damages, however, there is little consensus beyond the fact that such damages should be recoverable.¹⁸⁰ Some courts hold emotional distress damages are recoverable only to the extent that they result in some tangible monetary loss, such as costs for counseling or other medical bills.¹⁸¹ Others do not permit recovery for emotional distress related to the child’s birth defect or deformity, yet allow recovery for emotional distress attributable to a different source, such as the “unexpected restriction upon their freedom to plan their family”¹⁸² or the deprivation of their right to “make an informed decision” regarding whether to bear a disabled child.¹⁸³ Additionally, some

176. *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982) (quoting *Berman v. Allan*, 404 A.2d 8, 15 (N.J. 1979)).

177. *Becker v. Schwartz*, 386 N.E.2d 807, 814 (N.Y. 1978) (rejecting the parents’ claim for emotional distress damages as “calculation of damages for plaintiffs’ emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves”); *see also Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (finding an award of emotional distress damages would be “based upon speculation as to the quality of life and as to the pluses and minuses of parental mind and emotion”).

178. *Cauman v. George Wash. Univ.*, 630 A.2d 1104, 1107 (D.C. 1993) (quoting *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990)); *see also Smith v. Cote*, 513 A.2d 341, 351 (N.H. 1986).

179. *Smith*, 513 A.2d at 351.

180. *See Whitney & Rosenbaum, supra* note 42, at 192.

181. *See, e.g., Smith*, 513 A.2d at 345.

182. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1162 (La. 1988) (holding the plaintiffs could not recover for the emotional distress associated with their child’s deformity but could recover damages for emotional distress associated with the “unexpected restriction upon their freedom to plan their family”).

183. *Liddington v. Burns*, 916 F. Supp. 1127, 1142 (W.D. Okla. 1995) (citations omitted) (noting that three other states have recognized this as a proper cause of action);

courts hold the plaintiff parents are entitled to prove not only the emotional and mental distress they suffered in the past but also the distress they will continue to suffer throughout their lifetimes due to the birth of their disabled child.¹⁸⁴

F. Loss of Consortium

Courts are likewise divided regarding whether damages for the parents' loss of consortium with the child are recoverable.¹⁸⁵ In some jurisdictions, courts hold parents may recover these damages, finding the breach caused the loss of the companionship of the child or injury or loss of the parent-child relationship.¹⁸⁶ It is foreseeable that harm to parents flows from harm to the child, given the nature of the parent-child bond.¹⁸⁷ Several courts have relied on wrongful death statutes when awarding these damages, finding the statutes reflect the policy of compensating parents for both financial and emotional injury, which is equally applicable in wrongful birth

see also Duplan v. Harper, 188 F.3d 1195, 1203 (10th Cir. 1999) (providing emotional distress damages to the extent the parents suffered due to the loss of their ability to decide whether to have a child with birth defects); Basten v. United States, 848 F. Supp. 962, 973 (M.D. Ala. 1994) (awarding emotional distress damages for the parents' anguish of being unable to provide for the child after their deaths; the likely result that the financial resources needed to care for the disabled child will diminish the ability to provide for their other children; the stress of day-to-day care of the child; and the daily reminders of the hurdles the child will face); Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993) (allowing emotional distress damages for the mental and emotional anguish caused by the realization their newborn suffered from severe abnormalities); Rich v. Foye, 976 A.2d 819, 823-25 (Conn. Super. Ct. 2007) (providing emotional distress damages for the parents' diminution in ability "to enjoy life's activities"); Berman v. Allan, 404 A.2d 8, 18 (N.J. 1979) (Handler, J., concurring in part and dissenting in part) (finding that the wrongful denial of the opportunity to learn of and anticipate the birth of a child with birth defects; the difficulty accepting their fate and the child's impairment; and the moral suffering should be recognized and compensated); Naccash v. Burger, 290 S.E.2d 825, 831 (Va. 1982) (awarding emotional distress damages for the "humiliation or embarrassment" resulting from the defect).

184. Greco v. United States, 893 P.2d 345, 350 (Nev. 1995); *Berman*, 404 A.2d at 15.

185. Compare *Viccaro v. Milunsky*, 551 N.E.2d 8, 11 (Mass. 1990) (finding the parents' claim for loss of companionship with their disabled child lacked merit), with *Harbeson v. Park-Davis, Inc.*, 656 P.2d 483, 493 (Wash. 1983) (permitting recovery for damages for loss of the child's companionship).

186. *E.g.*, *Scott v. United States*, 884 F.2d 1280, 1282 (9th Cir. 1989); *Harbeson*, 656 P.2d at 493.

187. *Schroeder ex rel. Schroeder v. Perkel*, 432 A.2d 834, 840 (N.J. 1981).

suits.¹⁸⁸ In some jurisdictions, the parents' recovery for loss of consortium damages is not limited to the period of the child's minority.¹⁸⁹

Other courts disallow recovery for parental loss of consortium.¹⁹⁰ One court reasoned the plaintiff mother should not be allowed to recover such damages because she claimed that "but for the negligence of her physician she would never have carried her pregnancy to term. It follows then, that if the child had not been born, [she] would have had far less in terms of service and companionship than what she can currently expect from her handicapped child."¹⁹¹

Some courts allow recovery for the loss of marital consortium.¹⁹² At least one court allowed recovery for the father's loss of consortium but not the mother's loss.¹⁹³ Loss of marital consortium may be limited to the duration of the pregnancy in some jurisdictions.¹⁹⁴ Additionally, at least one court allowed a minor sibling of the disabled child to recover for loss of parental services.¹⁹⁵ However, other courts considering claims by siblings for loss of consortium have disallowed recovery.¹⁹⁶

G. The Benefits Rule

The "benefits rule" has been another matter of controversy in regard to the calculation of damages.¹⁹⁷ This rule offsets damages caused by the

188. *Blake v. Cruz*, 698 P.2d 315, 320 (Idaho 1984), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 1985), *as recognized in* *Vanvooren v. Astin*, 111 P.3d 125, 127–28 (Idaho 2005); *Harbeson*, 656 P.2d at 493.

189. *Harbeson*, 656 P.2d at 493; *see also* *Shaw v. United States*, 741 F.2d 1202, 1209 n.9 (9th Cir. 1984).

190. *E.g.*, *Viccaro*, 551 N.E.2d at 11; *Greco v. United States*, 893 P.2d 345, 350–51 (Nev. 1995).

191. *Greco*, 893 P.2d at 350.

192. *Keel v. Banach*, 624 So. 2d 1022, 1030 (Ala. 1993); *Shelton v. St. Anthony's Med. Ctr.*, 781 S.W.2d 48, 50 (Mo. 1989). *But see* *Shull v. Reid*, 258 P.3d 521, 525 (Okla. 2011) (holding loss of consortium to be an impermissible measure of damages in wrongful birth actions).

193. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1162 (La. 1988).

194. *See* *P. v. Portadin*, 432 A.2d 556, 559–60 (N.J. Super. Ct. App. Div. 1981); *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 844 N.E.2d 1160, 1170 (Ohio 2006).

195. *Basten v. United States*, 848 F. Supp. 962, 973 (M.D. Ala. 1994).

196. *See* *Aronoff v. Snider*, 292 So. 2d 418, 419 (Fla. Dist. Ct. App. 1974); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 537 (N.C. 1985).

197. *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 562 (Ga.

defendant with benefits the plaintiffs incurred from the breach: “[W]hen the defendant’s tortious conduct has caused harm to the plaintiff . . . and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages.”¹⁹⁸ In wrongful birth actions, “[a]dmittedly, the physician’s negligence may result in both benefits and detriments to the parents; despite the affliction of the child, the ‘parents may yet experience a love that even an abnormality cannot fully dampen.’”¹⁹⁹ Some courts hold the benefits of parenthood, such as the “love and joy” the child will bring them, entirely offset the damages sought and allowing recovery would constitute a windfall for the parents.²⁰⁰

However, the use of the benefits rule to offset actual damages “has been criticized as essentially comparing apples to oranges because it requires the jury to compare pecuniary costs with non-pecuniary benefits and then offset the economic costs of child rearing with these intangible benefits.”²⁰¹ Most courts find “[b]ecause the benefits at issue are essentially emotional in nature, the principle applies [only] to the parents’ mental suffering and emotional distress.”²⁰² Put differently, the harm and the benefit must relate to the same interest.²⁰³

1990) (“Courts in jurisdictions which have recognized ‘wrongful birth’ actions have also ‘been unable to reach anything resembling a consensus as to whether damages . . . should be reduced or offset by any emotional or other benefits accruing to the parents by reason of the life, love and affection of the [impaired] child.’” (citation omitted)); *see also* *Phillips v. United States*, 575 F. Supp. 1309, 1319 (D.S.C. 1983); RESTATEMENT (SECOND) OF TORTS § 920 (AM. LAW INST. 1979).

198. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 406 (Iowa 2017) (quoting RESTATEMENT (SECOND) OF TORTS § 920).

199. *Phillips*, 575 F. Supp. at 1320 (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 814 (N.Y. 1978)).

200. *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979).

201. *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1374 (Ohio 1989) (footnote omitted).

202. *Phillips*, 575 F. Supp. at 1319; *see also* *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982) (“If the ‘benefit rule’ is adopted, it will place the parent in the win-lose situation that if they admit that the child is a welcome addition and that they will love the child and rear it properly, they may get no damages at all.”); *Blake v. Cruz*, 698 P.2d 315, 320 (Idaho 1984) (“In determining damages for emotional injury, countervailing emotional benefits attributable to the birth of the child should also be considered and the award adjusted accordingly.” (citation omitted)), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 1985), *as recognized in* *Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005); *Bader v. Johnson*, 732 N.E.2d 1212, 1217 (Ind. 2000).

203. *See Johnson*, 540 N.E.2d at 1374.

The “extraordinary financial burden” these parents suffer is wholly unrelated to the joys they may derive from parenthood.²⁰⁴ The benefits rule, therefore, should not operate as a complete bar to recovery.²⁰⁵ Rather, the jury should be allowed to “determine and award all past and future expenses and damages incurred by the parent,” and the court should instruct the jury “that it should make a deduction for the benefits, including, for example, the services, love, joy, and affection that the parents will receive by virtue of having and raising the child” in its calculation of damages.²⁰⁶

H. *Duty to Mitigate*

Under the “avoidable consequences” doctrine, plaintiffs have a duty to mitigate and cannot recover damages which could have been avoided through reasonable efforts.²⁰⁷ Rigidly construed, this would require the parents to place the child up for adoption or otherwise terminate their parental rights.²⁰⁸ However, the duty requires only *reasonable* efforts be taken.²⁰⁹ Thus, the duty to mitigate cannot apply in wrongful birth suits as

204. *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1207 (Colo. 1988).

205. *Phillips*, 575 F. Supp. at 1319–20.

206. *Chaffee v. Seslar*, 786 N.E.2d 705, 707 (Ind. 2003); *see also* *Eisbrenner v. Stanley*, 308 N.W.2d 209, 213–14 (Mich. Ct. App. 1981) (holding parents in a wrongful birth suit could “seek damages for medical and hospital expenses, lost wages, costs of rearing the child and pain and anxiety, to be offset by the value to plaintiffs of the child’s services and companionship”), *abrogated by* *Taylor v. Kurapati*, 600 N.W.2d 670, 676 (Mich. Ct. App. 1999).

207. RESTATEMENT (SECOND) OF TORTS § 918 (AM. LAW INST. 1979).

208. *See Arche v. U.S. Dep’t of the Army*, 798 P.2d 477, 486 (Kan. 1990) (noting the plaintiff parents in *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978) reportedly put their handicapped child up for adoption during the course of their wrongful birth action); *Smith v. Cote*, 513 A.2d 341, 349 (N.H. 1986).

209. RESTATEMENT (SECOND) OF TORTS § 918; *see also* *Flowers v. District of Columbia*, 478 A.2d 1073, 1081–82 (D.C. 1984) (“[A]bortion or adoption would not be a ‘reasonable effort’ for a jury to consider in applying the avoidable consequences rule. That rule limits recovery ‘only when [a plaintiff] is unreasonable in refusing or failing to take action to prevent further loss.’ I believe it is unreasonable for a court even to suggest that a woman consider an abortion. It is equally unreasonable to suggest that a woman who, for sound reasons, did not want another child must nonetheless consider putting that child up for adoption once the love inherent in a parent-child relationship has become a reality.” (citations omitted)); *Troppi v. Scarf*, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971) (“The doctrine which requires a plaintiff to take measures to minimize the financial consequences of a defendant’s negligence requires only that reasonable measures be taken.” (footnote omitted)), *overruled by Taylor*, 600 N.W.2d 670.

adoption would not be an ordinary or reasonable measure.²¹⁰ Adoption is, of course, an available option parents may choose, but it cannot be requisite “in order to mitigate the financial consequences of the doctor’s negligence.”²¹¹ Application of the avoidable consequences doctrine would place “unreasonable burdens” on the parents of a child born with disabilities or deformities.²¹²

The argument that the plaintiffs in a wrongful birth case have a duty to mitigate damages has been rejected by most courts: “[C]ourts recognizing this cause of action have rejected the argument that parents should choose among the various methods of mitigation—adoption, abortion, etc.—seeing the moral issues begin to make inroads into an already emotional and speculative process of determining damages.”²¹³ The reasonableness of a plaintiff’s efforts to mitigate damages is ordinarily a question for the jury; however, most courts in wrongful birth cases hold as a matter of law that when the jury is calculating damages, it cannot consider the fact that the plaintiff parents could have chosen to put the child up for adoption.²¹⁴

210. *Chaffee v. Seslar*, 751 N.E.2d 773, 788 (Ind. Ct. App. 2001), *vacated on other grounds*, 786 N.E.2d 705 (Ind. 2003).

211. *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 621 (N.M. 1991).

212. *Greco v. United States*, 893 P.3d 345, 350 (Nev. 1995); *see also Ziemba v. Sternberg*, 357 N.Y.S.2d 265, 269 (App. Div. 1974) (rejecting the defendant’s argument that the plaintiff mother’s failure to undergo an abortion barred her claim for damages because “[t]he right to have an abortion may not be automatically converted to an obligation to have [an abortion.]”); *Marciniak v. Lundborg*, 450 N.W.2d 243, 247 (Wis. 1990) (“In [wrongful pregnancy] cases such as [these], it is usually argued that because parents can avoid the costs of raising the child by aborting the [unplanned] fetus or by giving it up for adoption We do not consider it *reasonable* to expect parents to essentially choose between the child and the cause of action.” (emphasis added)); *Strasser, Misconceptions, supra* note 72, at 197–98.

213. *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982); *see also Wilbur v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982); *Smith*, 513 A.2d at 345 (“Because of our profound respect for the sanctity of the family, we are loathe to sanction the application of the [avoidable consequences] rule in these circumstances.”); *cf. Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983) (barring recovery in a wrongful conception action and noting “in a pure legal sense the parents have failed to mitigate the damages which they charge”).

214. *See, e.g., Jones v. Malinowski*, 473 A.2d 429, 438 (Md. 1984); *see also Morris v. Frudenberg*, 185 Cal. Rptr. 76, 82 (Ct. App. 1982) (“[T]he jury is not to consider, on the issue of mitigation of damages, appellant’s refusal to abort or place her child for adoption.”); *Fassoulas v. Ramey*, 450 So. 2d 822, 829 (Fla. 1984) (Ehrlich, J., dissenting) (“[R]elating to both abortion and adoption, the doctrine relating to mitigation of damages only requires that reasonable measures be taken. Clearly, it should be a matter of law that to require an abortion or adoption is unreasonable.”);

VI. RECOMMENDATION TO IOWA COURTS

Although the Iowa Supreme Court established that parents of a disabled child have a cognizable cause of action for wrongful birth, it declined to address what damages in such an action are recoverable.²¹⁵ The plaintiffs in *Plowman* sought damages for “(1) the cost of past, present, and future extraordinary care required for [the child] as a result of his disabilities; (2) the cost of ordinary care raising the child; (3) [Plaintiffs’] mental anguish; and (4) [Plaintiffs’] loss of income.”²¹⁶ As the preceding discussion illustrates, these are not the only types of damages claimed in wrongful birth actions. Accordingly, the following recommendation to Iowa courts, based on Iowa case law and analysis of holdings in other jurisdictions, addresses all elements of recoverable damages.

A. Extraordinary Child-Rearing Costs

As previously noted, the majority of courts allow parents in wrongful birth suits to recover the extraordinary costs necessary to treat the birth defect or deformity, as well as any other costs, whether medical or educational, attributable to the birth defect.²¹⁷ In *Plowman*, the Iowa Supreme Court suggested it would allow such damages, noting the extraordinary costs of care and education associated with the child’s birth defect or the “relevant injury,” are the direct result of the physician’s violation of the parents’ right to make an informed decision.²¹⁸ The court went on to explain that in wrongful birth cases, the “[p]arents make ‘the difficult decision to sue for wrongful birth because they want[] to recover costs in order to ensure that their [child] would have the best possible medical care.’”²¹⁹ As these damages are the directly foreseeable result of the defendant’s negligence, these extraordinary costs should be recoverable.

Troppe, 187 N.W.2d at 520.

215. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017) (“Because the district court granted defendants’ motion for summary judgment on liability, it did not decide which damage claims can be submitted to the jury. A supreme court is ‘a court of review, not of first view.’ . . . [W]e decline to decide what damages are recoverable.” (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005))).

216. *Id.* at 397.

217. *James G. v. Caserta*, 332 S.E.2d 872, 882 (Va. 1985) (citations omitted).

218. *Plowman*, 896 N.W.2d at 403 (citing *Grubbs ex rel. Grubbs v. Barbourville Family Heath Ctr., P.S.C.*, 120 S.W.3d 682, 694–95 (Ky. 2003) (Keller, J., concurring in part and dissenting in part)).

219. *Id.* at 407 (quoting Cailin Harris, Note, *Statutory Prohibitions on Wrongful Birth Claims & Their Dangerous Effects on Parents*, 34 B.C. J.L. & SOC. JUST. 365, 395 (2014)).

B. Ordinary Child-Rearing Costs

As stated above, the parents in a wrongful birth claim do not allege the defendant actually caused the birth defect itself; rather, they allege they were deprived of material information regarding the fetus's condition, and had they been properly informed, they would have chosen to abort.²²⁰ Stated differently, the knowledge of the birth defect would have induced their decision to terminate the pregnancy.²²¹ Believing the child was normal and healthy, the parents chose to carry the pregnancy to term and, by doing so, chose to incur—at minimum—the ordinary costs associated with raising a child.²²² Such expenses cannot reasonably be attributed to the defendant's conduct.²²³ Limiting recovery of child-rearing expenses in wrongful birth suits to only those extraordinary costs associated with the birth defects addresses the specific injury the parents suffered.²²⁴ Therefore, ordinary child-rearing expenses should not be recoverable.²²⁵

C. Post-Majority Expenses

Whether the parents in a wrongful birth suit can recover for the extraordinary costs they will incur after their child has reached the age of majority will often turn on whether the state imposes a continued obligation on the parents.²²⁶ While the parents' legal responsibility to support their child normally terminates upon the child reaching the age of majority, Iowa recognizes a general exception when “the child because of weak body or mind is unable to care for itself upon attaining majority. The obligation to support such a child ceases only when the necessity for the support ceases.”²²⁷

220. *See id.* at 403.

221. *See id.*

222. *See* Smith v. Cote, 513 A.2d 341, 349 (N.H. 1986).

223. *See* Phillips v. United States, 575 F. Supp. 1309, 1316 (D.S.C. 1983) (declining to allow ordinary child-rearing expenses, as wrongful birth claim “usually involve *planned* children who, coincidentally, were born with congenital defects” (quoting Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981))).

224. Whitney & Rosenbaum, *supra* note 42, at 177.

225. *See, e.g.,* Arche v. U.S. Dep't of the Army, 798 P.2d 477, 481 (Kan. 1990) (“Wrongful birth plaintiffs typically desire a child and plan to support the child. Such support is, of course, the obligation of all parents. It is therefore reasonable to deny those normal and foreseeable costs which accrue to all parents.”).

226. Clark v. Children's Mem'l Hosp., 955 N.E.2d 1065, 1081 (Ill. 2011).

227. Grant *ex rel.* Davis v. Davis, 67 N.W.2d 566, 568 (Iowa 1954). Both parents are liable for “the support of a dependent child eighteen years of age or older, whenever such child is unable to maintain the child's self and is likely to become a public charge.”

The *Plowman* court acknowledged the parents' joint legal obligation to support their disabled child.²²⁸ Consistent with that duty, wrongful birth plaintiffs in Iowa should be allowed to recover damages for post-majority expenses for the life expectancy of the child to the extent the child will remain dependent on one or both parents.²²⁹

D. Extraordinary Parental Care

Extraordinary parental care, along with lost wages, should be considered in determining extraordinary child-rearing expenses.²³⁰ Iowa courts should rely on the formula articulated in *Smith v. Cote*: the parents may recover for care provided to the child that “(1) [is] made necessary by the child’s condition; (2) clearly exceed[s] [the care] ordinarily rendered by the parents of a normal child; and (3) [is] reasonably susceptible of valuation.”²³¹ As previously mentioned, in order to allow the jury to consider damages for extraordinary parental care, there must be concrete evidence of the likely nature and extent of the care required.²³² In addition, the court must instruct the jury that such damages cannot “be awarded as an expression of sympathy.”²³³

IOWA CODE § 252A.3(3) (2017); *see also* State *ex rel.* Moore v. McCampbell, No. 09-1029, 2010 WL 2079701, at *2 (Iowa Ct. App. May 26, 2010) (“[W]e find that chapter 252A demonstrates that the legislature intended that parents support a dependent adult child beyond age eighteen.”). The court may order one or both parents to pay a monthly support obligation, which “may include support for a child of any age who is dependent on the parties to the dissolution proceedings because of physical or mental disability.” IOWA CODE § 598.1(9). In determining whether an adult child is dependent, courts consider “the child’s ability to be gainfully employed and whether the child receives income or benefits from other sources.” *In re* Marriage of Nelson, 654 N.W.2d 551, 553 (Iowa 2002).

228. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 410 (Iowa 2017).

229. *See, e.g., Greco v. United States*, 893 P.2d 345, 350 (Nev. 1995). *But see Arche*, 798 P.2d at 486 (applying Kansas law, under which parents are not required to provide support for an adult incompetent child and thus allowing recovery for the shorter of either the child’s life expectancy or the age of majority).

230. *See Basten v. United States*, 848 F. Supp. 962, 973 (M.D. Ala. 1994).

231. *Smith v. Cote*, 513 A.2d 341, 350 (N.H. 1986).

232. *Id.*

233. *Id.*

E. Emotional Distress

Damages for emotional distress generally are not recoverable in Iowa absent an accompanying physical injury to the plaintiff.²³⁴ An exception to this general rule exists “where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm.”²³⁵ The exception has been recognized in claims alleging negligence in the performance of a service that is likely to evoke “deeply emotional responses” in the event of a breach.²³⁶

The Iowa Supreme Court has found the duty exists in a number of contexts:

[W]e have recognized recovery for emotional distress damages in actions which did not involve an intentional tort when a party negligently performed an act which was “so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering will result from its breach.”²³⁷

The court went on to hold that in a contract dealing with a particularly sensitive or personal subject matter, emotional distress damages can be implied from the terms.²³⁸ The relevant inquiry is not whether parties actually “contemplated emotional distress as a result of a breach during the negotiation and formation of the contract, but whether the subject

234. *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990) (citing *Wambsgans v. Price*, 274 N.W.2d 362, 365 (Iowa 1979)) (involving a breach of contract for medical services where an infant died as the result of the physician’s negligence before, during, and after delivery).

235. *Id.* (citing *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 354 (Iowa 1989)).

236. *Id.* (citing *Mentzer v. W. Union Tel. Co.*, 62 N.W. 1, 5–6 (Iowa 1895)) (allowing emotional distress damages for negligence in the transmission and delivery of telegrams notifying recipient of the death of a close relative); *Meyer v. Nottger*, 241 N.W.2d 911, 920–21 (Iowa 1976) (permitting recovery of emotional distress damages for negligence in funeral and burial services); *see also Miranda v. Said*, 836 N.W.2d 8, 22–24 (Iowa 2013) (discussing the variety of contexts in which Iowa courts have allowed emotional distress damages without physical injury to the plaintiffs).

237. *Miranda*, 836 N.W.2d at 14 (quoting *Lawrence v. Grinde*, 534 N.W.2d 414, 420–21 (Iowa 1995)).

238. *Id.* at 20 (citation omitted).

matter underlying the contractual arrangement was one in which emotional distress was a ‘particularly likely result.’”²³⁹

The existence of the duty of care to refrain from inflicting emotional harm is determined by the nature of the relationship and the nature of the transaction or arrangement which created the relationship.²⁴⁰ That the relationship is a highly emotional one will not by itself give rise to this duty: “Not all negligence is very likely to cause severe emotional distress, and a duty of care to protect against emotional harm does not arise unless negligence is very likely to cause severe emotional distress.”²⁴¹ Thus, an important limiting consideration is whether the relationship is likely to cause severe emotional distress in the event of a breach.²⁴²

In *Oswald v. LeGrand*, the Iowa Supreme Court found such a relationship exists in the medical field and extended the liability for emotional injury to the delivery of medical services.²⁴³ The plaintiffs in *Oswald* brought a medical malpractice action following the death of their newborn daughter.²⁴⁴ The plaintiffs claimed damages for their daughter’s lost chance to live, their loss of her society and companionship, severe emotional distress related to the negligent treatment of both the mother and infant child, and severe emotional distress and mental anguish as a result of witnessing the negligent treatment their newborn daughter received.²⁴⁵ Holding the liability for emotional injury should extend to the delivery of medical services, the Iowa Supreme Court explained, “[T]he birth of a child involves a matter of life and death evoking such ‘mental concern and solicitude’ that the breach of a contract incident thereto ‘will inevitably result in mental anguish, pain and suffering.’”²⁴⁶

239. *Id.*

240. *Id.* at 14 (quoting *Oswald*, 453 N.W.2d at 639).

241. *Id.* at 30.

242. *Id.*

243. *Oswald*, 453 N.W.2d at 638–39.

244. *Id.* at 637. The plaintiffs brought suit against the hospital and treating physicians on theories of negligence, gross negligence, negligent loss of chance of survival, breach of implied warranty, and breach of implied contract. *Id.* The claims alleged violation in “the standard of prenatal care owed to” the plaintiff mother and violation of the standard of care owed to the infant, including failure to recognize her imminent premature birth, failure to prepare for the delivery, and delaying timely and vital treatment upon birth. *Id.*

245. *Id.*

246. *Id.* at 639 (quoting *Meyer v. Nottger*, 241 N.W.2d 911, 920 (Iowa 1976)); *see also Miranda*, 836 N.W.2d at 18.

This rationale equally applies to suits for wrongful birth. The nature of the relationship between the expecting parents and the medical professionals responsible for the prenatal care, the deprivation of the parents' right to make an informed decision regarding the pregnancy, and the birth of a child with an unanticipated defect or disability make severe emotional distress likely and foreseeable in the event of a breach.²⁴⁷ Accordingly, Iowa courts should find emotional distress damages are recoverable in wrongful birth claims.

F. *Loss of Consortium*

Under Iowa law, a person may recover damages for loss of consortium resulting from injury or death of that person's spouse,²⁴⁸ parent,²⁴⁹ or child.²⁵⁰ Loss of consortium claims are limited to these three relationships.²⁵¹ As the Iowa Supreme Court noted, "In each relationship there is the person who suffered bodily harm through the defendant's tort, an 'injured' person. The other person in the relationship is the person who suffered the loss of consortium or services because of the injury, a 'deprived' person."²⁵² It is the deprived party—not the injured party—who has the right to make a claim and recover damages for loss of consortium.²⁵³

Iowa Code § 613.15A²⁵⁴ and Iowa Rule of Civil Procedure 1.206²⁵⁵ govern a parent's claim for loss of consortium. The *Plowman* court addressed the applicability of a parental loss of consortium claim in the context of wrongful birth: "Both Iowa Code section 613.15A and rule 1.206 by their plain language apply to parents seeking to recover expenses resulting from the 'injury . . . of a minor child.' To pursue a claim under those

247. See *Oswald*, 453 N.W.2d at 639–41.

248. See IOWA CODE § 613.15 (2017).

249. See *id.*

250. See *id.*; see also IOWA R. CIV. P. 1.206.

251. *Chapman v. Labone*, 460 F. Supp. 2d 989, 1007 (S.D. Iowa 2006); *Laws v. Griep*, 332 N.W.2d 339, 340 (Iowa 1983).

252. *Madison v. Colby*, 348 N.W.2d 202, 207 (Iowa 1984).

253. *Id.* at 208–09.

254. IOWA CODE § 613.15A ("A parent or the parents of a child may recover for the expense and actual loss of services, companionship, and society resulting from injury to or death of a minor child and may recover for the expense and actual loss of services, companionship, and society resulting from the death of an adult child.").

255. IOWA R. CIV. P. 1.206 provides, "A parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child."

provisions, a parent must establish that the child's injury was wrongfully or negligently caused."²⁵⁶ Noting there were no allegations the defendants negligently caused the child's injuries, the court stated, "There is no injury to the child; rather, the injury is to the *parents*—specifically their right to make an informed choice whether to continue or end a pregnancy. Rule 1.206 and section 613.15A do not govern a wrongful-birth claim."²⁵⁷ Nor can the parents rely on the common law for recovery; there is no common law right to recover damages for the loss of consortium of a child.²⁵⁸ Accordingly, the plaintiffs should not be able to recover for loss of parental consortium in a wrongful birth suit.²⁵⁹

Claims for loss of spousal consortium,²⁶⁰ however, differ from claims for loss of parental consortium.²⁶¹ Iowa Code § 613.15 governs spousal consortium claims and provides, in relevant part, in "any action for damages because of the wrongful or negligent injury or death," a spouse may recover "the value of services and support."²⁶² In order to recover, the spouse must prove he or she suffered damages as the result of the injury.²⁶³ The loss of consortium claim need not be based on a bodily injury to the spouse; it may be an emotional or other nonphysical injury, so long as the trier of fact could find "pain, suffering, and disability on which a claim for lost consortium could be predicated."²⁶⁴ It follows then that the injury to one

256. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 408–09 (Iowa 2017).

257. *Id.* at 409.

258. *Kulish v. W. Side Unlimited Corp.*, 545 N.W.2d 860, 863 (Iowa 1996).

259. *See id.*; *Plowman*, 896 N.W.2d at 409.

260. *Gail v. Clark*, 410 N.W.2d 662, 667 (Iowa 1987) (citations omitted) ("Spousal consortium is the fellowship of [the married couple] and the right of each to the intangible benefits of company, cooperation, affection, and aid of the other in every marital relationship. Spousal consortium also includes the tangible benefits of general usefulness, industry, and attention within the home and family."). It should be noted recovery of spousal consortium is "a right acquired by marriage" and is forfeited upon dissolution of marriage unless specifically preserved. *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 167 (Iowa 1984) (citations omitted). Thus, if the parent plaintiffs were never married or had been married but divorced before the suit, loss of consortium is not recoverable. *See id.*

261. *Shehata v. Landau*, No. 07-1929, 2008 WL 4725150, at *5 (Iowa Ct. App. Oct. 29, 2008).

262. IOWA CODE § 613.15 (2017).

263. *See, e.g., Litterer v. Hy-Vee, Inc.*, No. 07-1600, 2008 WL 2746870, at *4 (Iowa Ct. App. July 16, 2008); *see also Brunson v. Winter*, 443 N.W.2d 717, 720 (Iowa 1989).

264. *DeBurkarte v. Louvar*, 393 N.W.2d 131, 139 (Iowa 1986) (holding the trial court did not err in submitting the husband's loss of consortium claim to the jury in a medical

parent in a wrongful birth suit and the deprivation of the right to make an informed decision may provide the foundation for a loss of consortium claim by the other.²⁶⁵ Provided all elements are met, loss of spousal consortium should be recoverable.²⁶⁶

G. *The Benefits Rule*

The Iowa Supreme Court briefly discussed the applicability of the benefits rule in the *Plowman* opinion:

[T]he extraordinary financial burden the [Plaintiffs] claim to have suffered, and will continue to suffer, is sufficiently unrelated to the pleasure they will derive from raising [their child] as to preclude operation of the benefit rule, at least to the extent that it would require some offset against those particular damages.²⁶⁷

Noting the plaintiff mother in *Plowman* testified to enjoying the time she spends with her disabled son and that he brings her “a lot of happiness,” the court went on to state “that pleasure will be derived in spite of, rather than because of, [the child’s] affliction.”²⁶⁸ The court declined to “monetize the joy of raising a severely disabled child to offset the costs of raising him.”²⁶⁹ While the *Plowman* decision makes clear the benefits rule will not be used to offset the extraordinary child-rearing costs, nothing in the language forecloses the possibility of its use to offset nonpecuniary damages.²⁷⁰ Because any benefits the parents derive from the defendant’s negligence are emotional in nature, the rule should apply to damages for emotional distress.²⁷¹ Thus, in determining damages for emotional distress, the trier of fact should consider any “countervailing emotional benefits attributable to the birth of the child” and adjust the award of damages accordingly.²⁷²

malpractice suit for failure to timely diagnose the wife’s breast cancer); Carolyn Kelly MacWilliam, *Cause of Action for Loss of Marital Consortium*, in 24 CAUSES OF ACTION 2D 427, § 6 (2004).

265. See *DeBurkarte*, 393 N.W.2d at 139.

266. See *id.*

267. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 406 (Iowa 2017) (quoting *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1207 (Colo. 1988)).

268. *Id.* (citation omitted).

269. *Id.* (footnote omitted).

270. See *id.*

271. See *Phillips v. United States*, 575 F. Supp. 1309, 1319–20 (D.S.C. 1983).

272. See *Blake v. Cruz*, 698 P.2d 315, 320 (Idaho 1984) (citation omitted), *superseded*

H. Duty to Mitigate

In Iowa, before the jury can be allowed to consider the plaintiff's failure to mitigate damages, the defendant must produce substantial evidence showing:

(1) [T]here was something the plaintiff could have done to mitigate his loss, (2) requiring the plaintiff to do so was *reasonable* under the circumstances, (3) the plaintiff acted unreasonably in failing to undertake the mitigating activity, and (4) a causal connection exists between the plaintiff's failure to mitigate and the damages claimed.²⁷³

As previously discussed, requiring the parents of a disabled child to put their child up for adoption or otherwise terminate their parental rights would not be reasonable.²⁷⁴ Consequently, the duty to mitigate cannot apply in wrongful birth suits.²⁷⁵

VII. CONCLUSION

Although nearly all states now recognize a cause of action for wrongful birth, it is clearly an unsettled area of law in many aspects. From the characterization of the claim itself to the wide divergence in recoverable damages, the variety of approaches across jurisdictions offers little guidance to courts faced with these claims for the first time.²⁷⁶

Following the *Plowman* decision, Iowa district courts will undoubtedly hear wrongful birth claims in increasing numbers.²⁷⁷ Without guidance from

by statute, IDAHO CODE ANN. § 5-334 (West 1985), as recognized in *Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005).

273. *Vasconez v. Mills*, 651 N.W.2d 48, 53–54 (Iowa 2002) (citing *Greenwood v. Mitchell*, 621 N.W.2d 200, 205 (Iowa 2001)).

274. *Chaffee v. Seslar*, 751 N.E.2d 773, 788 (Ind. Ct. App. 2001), *vacated on other grounds*, 786 N.E.2d 705 (Ind. 2003).

275. *Smith v. Cote*, 513 A.2d 341, 345 (N.H. 1986).

276. *See supra* Part III.

277. Following the *Plowman* decision, the Iowa legislature passed a statute limiting wrongful birth and wrongful life actions. IOWA CODE § 613.15B (2017 & Supp. 2018). The statute provides, “A cause of action shall not arise and damages shall not be awarded, on behalf of any person, based on a wrongful birth claim that, but for an act or omission of the defendant, a child would not or should not have been born,” and “[a] cause of action shall not arise and damages shall not be awarded, on behalf of any person, based on a wrongful life claim that, but for an act or omission of the defendant, the person bringing the action would not or should not have been born.” *Id.* The statute applies “regardless of whether the child is born healthy or with a birth defect or disorder

or other adverse medical condition.” *Id.* However, the statute offers exceptions, permitting civil actions for “damages for an intentional or grossly negligent act or omission” and “intentional failure of a physician to comply with the duty . . . to provide a patient with all information reasonably necessary to make decisions about a pregnancy.” *Id.* Effective for less than a year at the time of this writing, it is unclear whether the law will have any substantial impact on the *Plowman* decision or whether its validity will be challenged. Courts in other states have allowed parents’ claims to go forward, despite their states’ similar statutory prohibitions. *E.g.*, *Thibeault v. Larson*, 666 A.2d 112, 115 (Me. 1995) (reversing the dismissal of a complaint alleging negligence in failure to perform amniocentesis, which would have revealed an incurable genetic defect and caused parents to terminate the pregnancy; the trial court granted the dismissal based upon a statutory prohibition of wrongful birth causes of action); *Cichewicz v. Salesin*, 854 N.W.2d 901, 910 (Mich. Ct. App. 2014) (finding plaintiffs could characterize their claim as one for wrongful conception, which had not been specifically barred by the legislature); *Molloy v. Meier*, 679 N.W.2d 711, 722–23 (Minn. 2004) (finding the statute did not bar the mother’s cause of action where the mother testified that if the diagnosis of Fragile X syndrome had been properly made, she would have sought a tubal ligation and avoided conception); *Shelton v. St. Anthony’s Med. Ctr.*, 781 S.W.2d 48, 50 (Mo. 1989) (“The allegations of the petition state a breach of duty to inform the patient sufficiently to enable her to make a judgment, as well as damages flowing from such breach. Such damages are readily separable from damages arising from the possibility that but for the negligent conduct of defendants, the child would have been aborted. Plaintiff has alleged mental distress, and counsel asserts that some mental distress followed from the shock of discovering the defects in the baby at birth without being adequately advised of the deformities and prepared for this catastrophe. Therefore harm is attributable to defendants’ negligence regardless of whether plaintiff would have had an abortion, and the pleading states a viable malpractice claim outside the provisions of [the statutory prohibition on wrongful birth claims]. . . . When the petition is liberally construed, the claims of loss of consortium and the right to lead a normal life may also be interpreted to allege some damage occurring after the birth and as a result of the shock of not being adequately informed and prepared for the birth of the deformed child, and to that extent such damages are barred neither by the statute nor by [case law].”). *Catlin v. Hamburg*, 56 A.3d 914, 924 (Pa. Super. Ct. 2012) (reversing the dismissal of complaint alleging negligence in a sterilization operation that resulted in an aborted pregnancy, despite a statutory prohibition on wrongful birth and life claims, and finding the case “more akin to traditional medical malpractice actions”); *Sejpal v. Corson, Mitchell, Tomhave & McKinley, M.D.’s., Inc.*, 665 A.2d 1198, 1201 (Pa. Super. Ct. 1995) (holding the plaintiff mother’s informed consent claim was not barred by a statutory prohibition on wrongful birth and life claims). Additionally, it should be noted that wrongful birth causes of action which accrued prior to the Iowa statute’s effective date of June 1, 2018, will not likely be barred. *See Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015) (“There is a general presumption that newly enacted statutes apply only prospectively.” (citing IOWA CODE § 4.5 (2015))); *see also Wilson v. Kuenzi*, 751 S.W.2d 741, 742 (Mo. 1988) (finding no legislative intent for a statutory prohibition of wrongful birth and life actions to apply retroactively); *Shull v. Reid*, 258 P.2d 521, 524 (Okla. 2011) (holding a statutory prohibition on wrongful birth claims did not apply retroactively and thus did not bar the parents’ cause of action); *Jenkins v. Hosp. of Med.*

the Iowa Supreme Court on the proper measure of damages, there is bound to be a lack of consistency. However, precedent in other areas of law, along with careful analysis of jurisprudence from other states, can offer guidance and promote uniformity.

In sum, recoverable damages in Iowa should consist of the following three categories.

- (1) Extraordinary child-rearing costs, medical expenses, educational expenses, and any other expenses attributable to the disability or birth defect, beyond the ordinary costs of raising a normal, healthy child. These costs should not be limited to the period of child's minority age because Iowa imposes a continued obligation on the parents of an adult dependent child. If the parents render extraordinary care necessitated by the child's condition, damages for such care, along with lost wages, should be taken into account in determining the measure of damages.
- (2) Emotional distress damages—the emotional harm suffered as a result of the parents being deprived of their right to make an informed decision involving the pregnancy. The nature of the relationship between the parents and the medical professionals responsible for prenatal care is such that severe emotional distress is particularly likely in the event of a breach. However, any emotional benefits the parents receive from their child should be considered in calculating these damages.
- (3) Loss of spousal consortium—the loss of services, companionship, and other intangible benefits in the marital relationship, as well as the tangible benefits within the marital home and family, suffered as a result of the injury to the spouse.

Wrongful birth cases invoke strongly held beliefs about the sanctity of life and reproductive decisions. The undeniable, exorbitant costs of caring

Coll. of Pa., 634 A.2d 1099, 1105 (Pa. 1993) (allowing a wrongful birth claim to go forward because the statutory prohibition did not apply retroactively); *Jenkins v. Hosp. of Med. Coll. of Pa.*, 585 A.2d 1091, 1102 (Pa. Super. Ct. 1991), *aff'd*, 634 A.2d 1099 (Pa. 1993) (ruling a retroactive application of a statute banning causes of action for wrongful birth was unconstitutional; plaintiffs' cause of action accrued before the effective date of statute and the cause of action was a recognized one under case law).

for an individual with a severe disability, the emotional toll on parents, the countervailing emotional benefits of parenthood, and the effect on the marital relationship are all complex factors to be weighed in the measure and calculation of damages. Courts must carefully consider what damages to allow as the proper measure of recovery is essential to promoting justice and vindicating the underlying purposes of tort law.

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* B.A., Grand View University, 2016; J.D., Drake University Law School, 2019. I would like to thank my fiancé, Justus, for his unconditional love and unwavering support. I would also like to thank my mother, Kim, for the innumerable ways she has helped me throughout my law school career. Most of all, I would like to thank my son, Clark, for being my motivation and biggest cheerleader and for putting up with Mama being in school all these years. Without your love and support, this would have never been possible.