THE LAW OF TORTS

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CHAPTER 18

PRENATAL AND BIRTH-RELATED INJURY

§ 288. Prenatal Injury

The Traditional Rule and Its Passing

The early no-duty rule. Until about the middle of the 20th century, a tortfeasor whose impact upon a pregnant woman resulted in harm to the later-born child was protected against liability in the United States. Expressed in terms of duty, the tortfeasor owed a duty to the mother but not to the child. One reason was that the causal connection was difficult to trace. The other was the purely formal argument that the fetus was not a person to whom any duty could be owed.[1]

Rejection of the rule. The causal argument justifies scrutiny of causal proof, which depends upon facts and evidence; but it does not justify a flat rule that prohibits the very proof that would establish causation in particular cases. The formal argument, bereft of either policy or human concern, was just as inadequate if not worse. Both arguments were rejected in 1946 in *Bonbrest v. Kotz*,[2] after which courts reversed course. They now universally hold that no one is to be denied compensation for injury merely because the harm was inflicted before that person's birth.[3] A few courts at one time may have implied that the action for prenatal injury would not be entertained if injury was inflicted before the fetus was viable. But courts have not adopted that rule. So long as the living plaintiff can prove the elements of a tort claim, the fact that the harm was initially done to a pre-viable fetus does not defeat the claim.[4] Wrongful death cases are another matter.

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1. Dietrich v. Northhampton, 138 Mass. 14 (1884) (emphasizing lack of personhood at the time of injury).

2. Bonbrest v. Kotz, 65 F.Supp. 138 (D.D.C.1946). The dissent of Justice Boggs in Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900) presaged this shift, as did the Canadian decision in Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337 (Sup. Ct. 1933).

3. E.g., Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691, 27 A.L.R.2d 1250 (1951); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Restatement § 869 (1). The reversal was complete by about 1972. See Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972); Roland F. Chase, Annotation, Liability for Prenatal Injuries, 40 A.L.R.3d 1222 (1972). As to harm inflicted before conception, however, see § 290 below.

4. Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) ("we are unable logically to conclude that a claim for an injury inflicted prior to viability is any less meritorious than one sustained after.... With us the test will not be viability but causation")

Wrongful Death Cases

Death claim issues. Death claims for loss of a fetus or a child injured before birth are more complicated, partly because of the way damages are calculated in death actions,[5] partly because death statutes require the "death" of a "person," and partly because other means may be available to redress the loss to parents. In determining whether injury to a fetus was followed by "death of a person"[6] as required by statute, courts have considered separately or together two potentially critical questions: (1) Was the fetus viable at the time of injury? (2) Was the child born alive, with death occurring at some moment after birth?

Fetus not born alive. Some states reject the action altogether in the absence of a live birth.[7] The effect of this rule is that if the defendant does enough damage to terminate life of the fetus before birth, he simply is not liable. Another group of states reject the wrongful death action in the absence of a live birth but permit the mother or parents to recover for mental anguish or emotional harm.[8] Most courts, however, now recognize that an action lies for wrongful death of a stillborn infant or of a fetus not born alive, at least where injury occurred when the fetus was viable.[9] In such cases, a real loss has occurred as a result of the defendant's tort even though death occurred before birth.

Born alive after pre-viable injury. A different pattern occurs if the fetus is injured before viability, but the child is then born alive. In that case, the child could maintain a personal injury action if it lived, so there seems no objection to a wrongful death claim if the born-alive child dies, although a few courts have insisted that viability at injury is essential to any action.[10] If the reality of a tort-caused loss is the essential question, then this view may be too restrictive. Perhaps, as some authority holds, *either* (a) viability at time of injury *or* (b) live birth (with later death) should suffice as a basis for liability.[11] Consistent with this view, some

5. See § 296 below.

6. E.g., Miccolis v. AMICA Mutual Ins. Co., 587 A.2d 67 (R.I.1991).

7. Chatelain v. Kelley, 322 Ark. 517, 910 S.W.2d 215 (1995); Peters v. Hospital Authority of Elbert County, 265 Ga. 487, 458 S.E.2d 628 (1995) (stating rule without reference to viability that live birth is required; facts recited by the court did not reveal whether fetus was viable or not).

8. Tanner v. Hartog, 696 So.2d 705 (Fla. 1997); Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988); Krishnan v. Sepulveda, 916 S.W.2d 478 (Tex.1995). The father as bystander who is not himself a victim of medical malpractice or other tort, may be denied any emotional harm recovery unless he witnessed the malpractice and the resulting injury under the rule applied in some states. See Carey v. Lovett, 132 N.J. 44, 622 A.2d 1279 (1993); § 312 below.

9. Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985); Moen v. Hanson, 85 Wash.2d 597, 537 P.2d 266 (1975) (death action); Cavazos v. Franklin, 73 Wash.App. 116, 867 P.2d 674 (1994) (survival action permitted). See Sheldon R. Shapiro, Annotation, Right to Maintain Action or to Recover Damages For Death of Unborn Child, 84 A.L.R.3d 411 (1978).

10. Miller v. Kirk, 120 N.M. 654, 905 P.2d 194 (1995).

11. McKinstry v. Valley Obstetrics–Gynecology Clinic, 428 Mich. 167, 405 N.W.2d 88 (1987) (claim may proceed "if the fetus is born alive, subsequent to the claimed injury, or if the fetus was viable at the time of the alleged injury"); Hudak v. Georgy, 535 Pa. 152, 634 A.2d 600 (1993).

courts have allowed the claim to proceed if the child is born alive, even if injury occurred before the fetus was viable.[12]

Neither viability at injury nor live birth. The most extreme case occurs when injury is inflicted before viability and no live birth occurs. From one viewpoint, the defendant should not escape liability merely because his acts occurred early rather than late in fetal development, much less because the harm was sufficient to terminate life before birth occurred. With some such view in mind, a few recent decisions have allowed recovery in this situation.[13] This opens the door to wrongful death claims when the mother was pregnant for only a week or a day, or possibly even for a claim of death if an egg fertilized *in vitro* is destroyed before it is ever implanted in the mother.

These possibilities suggest that some degree of caution might be appropriate. Although the stage of fetal development at injury seems irrelevant, courts might plausibly require that, regardless when injury was inflicted, either live birth or some substantial fetal development in the mother's womb would be a prerequisite to the wrongful death action. On the other hand, without resorting to a wrongful death action at all, courts could appropriately redress the mother's own claim for emotional injury without restrictions as to live birth or the stage of fetal development.

What is and is not important. Courts have sometimes emphasized viability of the fetus for purely formal or conceptual reasons that are quite divorced from the purposes of tort law. The idea is that until the fetus is viable, there is no "person" apart from the mother. Any harm done is harm to the mother. In personal injury cases, however, that argument misses the point entirely. Whatever may have been the case when injury was inflicted, it set in motion a chain of events that caused injury to a living and suffering human being. Both compensation and deterrence goals of tort law counsel a rule allowing the child to recover for the tort in personal injury cases and one allowing the parents, or at least the mother to recover when the fetus does not survive or the child dies of the injury. The status of the fetus at the time of injury has no bearing on the status of the plaintiff, who is a living human being, harmed by the defendant's torts.

It is not necessarily so, however, that wrongful death actions represent the best way to redress the real loss suffered by the parents. The losses are not much like those at which the traditional death statute was aimed—the loss of pecuniary advantage. Instead, the losses are usually emotional and intangible. An action for emotional harm to parents, or at

12. Kalafut v. Gruver, 239 Va. 278, 389 S.E.2d 681 (1990); see Miccolis v. AMICA Mutual Ins. Co., 587 A.2d 67 (R.I.1991).

13. Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D.1996); Farley v. Sartin, 195 W.Va. 671, 466 S.E.2d 522 (W.Va. 1995) (emphasizing, however, that the decision did not necessarily apply to cases of conception outside the mother's body). Some of the cases are based upon construction of the statute.

least to the mother, may be a more manageable and suitable form of redress and may also provide a better vehicle for deterrence.[14]

§ 289. Toxic Fetal Injuries and Parental Liability

Fetal Toxic Harm Cases

Toxic torts and mass torts often go together. Separately or together, they represent large topics that require specialized books. While traditional fetal injury claims were usually based on physical impact upon the mother, as in automobile collision cases and simple falls,[1] most fetal harms today are likely to be the results of licit and illicit drugs, environmental toxins, workplace exposures, or contaminants in water or food. Courts are now facing claims of fetal injury from some such exposures and no doubt more will follow.

Yet toxic torts frequently involve low dosages over time, often with a long latency period before harm appears. Unlike an automobile accident, a medical mishap, or a punch in the nose, no one can see the toxic tort happen. A fetus may be peculiarly susceptible to some toxins which can pass from the mother directly to the fetus.[2] But in the case of toxic fetal injuries, many toxic fetal injuries can be inflicted that are not dramatic enough to be identified immediately or with certainty by the use of existing technology. Studies may show, for example, that carbon monoxide, a well-known danger, is harmful to the fetus, but they may be inconclusive about the nature of the harms when exposure is not great.[3] Some effects remain hidden because they operate on the central nervous system of the fetus and leave behind intelligence and learning ability deficits rather than distorted appendages or chemicals in the urine. For instance, even a mother's moderate ingestion of alcohol during pregnancy may lead to substantial deficits in learning ability of her child,[4] but unless the child is a part of a scientific study, her lifelong learning

14. Emotional distress claims, at least when asserted by those to whom no direct duty is owed, do present problems. See § 312 below.

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1. E.g., Cushing v. Time Savers Stores, Inc., 552 So.2d 730 (La.App.1989) (brain damages to child resulting from fetal impact that caused abruption of the placenta).

2. A good introduction to the methods by which prenatal toxic harm can occur is Steven S. Paskal, Liability for Prenatal Harm in the Workplace: the Need for Reform, 17 U. PUGET SOUND L. REV. 283 (1994). Many potential toxic agents are described in various articles in GIDEON KOREN (ED.), MATERNAL-FETAL TOXICOLOGY: A CLINICIAN'S GUIDE (2d ed. 1994); see also SAM KACEW AND GEORGE H. LAMBERT, ENVIRONMENTAL TOXICOLOGY AND PHARMACOLOGY OF HUMAN DEVELOPMENT (1997).

3. The difficulties of producing a conclusive carbon monoxide study are summarized, along with limited conclusions, in Gideon Koren, Teresa Sharav, and Anne Pastuszak, A Multicenter, Prospective Study of Fetal Outcome Following Accidental Carbon Monoxide Poisoning in Pregnancy,in GIDEON KOREN, supra n. 2 at 253.

4. See Ann Pytkowicz Streissguth, Paul D. Sampson, Helen M. Barr, Fred L. Bookstein, Heather Carmichael Olson, The Effects of Prenatal Exposure to Alcohol and Tobacco: Contributions from the Seattle Longitudinal Prospective Student and Implications for Public Policy, in HERBERT L. NEEDLEMAN AND DAVID BELLIGENER, PRENATAL EXPOSURE TO TOXICANTS—DEVELOPMENTAL CONSEQUENCES 148 (1994). Possibly the father's use of alcohol, too. See Gladys Friedler, Developmental Toxicology: Male-mediated Effects, in MAUREEN PAUL, OCCUPATIONAL AND ENVIRONMENTAL REPRODUCTIVE HAZARDS, A GUIDE FOR CLINICIANS 52 (1993).

difficulties may never be understood, much less attributed to her mother's drinking. The same seems to be true if the mother is exposed to lead.[5] For these and associated reasons, lawyers will find it quite difficult—and very expensive—to prove scientific causation.[6]

Quite possibly an enormous number of fetal injuries result in destruction of the fetus at such an early date that the mother is unaware of pregnancy or miscarriage.[7] Even toxic injuries that are recognized because they are dramatic may go unredressed because of doubts about causation and because of the difficulties and expense of securing evidence. These difficulties with toxic torts generally have led many authors to propose rules to make the road easier for the toxic plaintiff,[8] even as others propose to tighten causal rules to provide more protection for defendants.[9] Whatever course the law takes on those issues, however, the number of children damaged in the womb and the even greater number of fetal demise cases appears to be very large indeed, with a corresponding potential for legal response.

Workplace Injury to Fetus and the Workers' Compensation Limit

When the fetus is exposed to hazardous materials because of the mother's or father's exposure in the workplace, workers' compensation laws are potentially implicated. Those laws generally provide for standardized compensation to workers injured on the job as the exclusive remedy; tort claims are forbidden.[10] When a child asserts a claim that she was injured in utero by her mother's exposure to hazardous materials on the mother's job, the question is whether the child's claim in tort should

5. See David Bellinger and Herbert L. Needleman, The Neurotoxicity of Prenatal Exposures to Lead: Kinetics, Mechanisms and Expressions, in HERBERT L. NEEDLEMAN AND DAVID BELLINGER, PRENATAL EXPOSURE TO TOXICANTS—DEVELOPMENTAL CONSEQUENCES 89 (1994) (noting, however, that although the most statistically important study provided evidence that prenatal exposure to lead affects a child's development, other studies do not provide such evidence).

6. Mass studies showing an increased risk of harm to fetuses from particular substances may still fall short. A good illustration is Turpin v. Merrell Dow Pharmaceuticals, Inc., 959 F.2d 1349 (6th Cir.1992). Limitations imposed upon "scientific" testimony in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) may add to the difficulty. See generally, Michael Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation, 86 NW. U. L. REV. 643 (1992). Kaye, Is Proof of Statistical Significance Relevant?, 61 WASH. L. REV. 1333 (1986); Cohen, Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge, 60 N.Y.U. L. REV. 385 (1985).

7. See Steven S. Paskal, Liability for Prenatal Harm in the Workplace: the Need for Reform, 17 U. PUGET SOUND L. REV. 283 (1994). Some estimate that one fetus is aborted for every child born. See GIDEON KOREN, supra n. 2 at vii.

8. Thus some advocate changes in the requirements of causal evidence in toxic tort cases, see Margaret A. Berger, Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts, COLUM. L. REV. 2117 (1997), while others advocate changes in regulation and compensation systems. See Anita Bernstein, Formed by Thalidomide: Mass Torts as a False Cure For Toxic Exposure, 97 COLUM. L. REV. 2153 (1997).

9. See Eisenberg & Henderson, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. REV. 479 (1990). Professor Boston proposed a demanding standard for mass tort cases, less for individualized injuries. Gerald W. Boston, A Mass-exposure Model of Toxic Causation: the Content of Scientific Proof and the Regulatory Experience, 18 COLUM. J. ENVTL. L. 181 (1993).

10. See § 395 below.

be barred by the workers' compensation rules. The answer in the handful of cases on point has uniformly been that the claim is not barred by the workers' compensation exclusive remedy rules.[11]

To eliminate the exclusive remedy rule is not to impose liability upon employers for fetal injury. The child, like anyone else claiming tort damages against the employer, will be required to show negligence or, possibly, abnormally dangerous activities. The fact that an employer's business uses dangerous chemicals does not necessarily mean that the employer is negligent. Only if dangerous chemicals are unnecessary or feasible precautions against injury are ignored, is negligence established. In addition, federal antidiscrimination law requires employers to allow women equal access to jobs, including jobs that may endanger a fetus.[12] If the employer's only supposed negligence is in permitting a fully informed pregnant woman to work around dangerous materials, the federal antidiscrimination rule probably protects the employer against tort liability.[13]

Workplace exposure of the father may also cause fetal harm. Besides the possibility of chromosome damage by radiation,[14] some studies, still at the early stage, indicate that fetal harm of anomalies are often associated positively with the father's occupation.[15] The hypothesis is that toxic agents associated with particular occupations may affect chromosome structure, or that the father may inadvertently carry home toxins on his body or in this clothes, exposing the mother during pregnancy. As with so many potential claims of toxic harm, however, proof of causation may have to await generations of study.

Product and Environmental Injuries to Fetus

A number of substances in the environment or in products may cause fetal harm. Lead is famously dangerous to the developing fetus as well as to children.[16] Second-hand smoke is probably a toxin to the fetus.[17] So are some products used by pregnant women. In such a case, if

11. Namislo v. Akzo Chemicals, Inc., 620 So.2d 573 (Ala.1993); Snyder v. Michael's Stores, Inc., 16 Cal.4th 991, 945 P.2d 781, 68 Cal.Rptr.2d 476 (1997); Pizza Hut of America, Inc. v. Keefe, 900 P.2d 97 (Colo.1995) (wrongful death claim); Hitachi Chemical Electro–Products, Inc. v. Gurley, 219 Ga.App. 675, 466 S.E.2d 867 (1995) (alleging that both parents were exposed to dangerous workplace materials). In all the cited cases, the children were born alive.

12. International Union, United Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991).

13. See 499 U.S. at 208, 111 S.Ct. At 1208.

14. As claimed in cases like Hinkie v. United States, 715 F.2d 96 (3d Cir.1983) (exposure to radioactivity); Mondelli v. United States, 711 F.2d 567 (3d Cir., 1983) (genetic damage by service member's exposure to nuclear explosion causing cancer to child); Monaco v. United States, 661 F.2d 129 (9th Cir.1981). See § 265.

15. Andrew F. Olshan, Kay Teschke, and Patricia A. Baird, Paternal Occupation and Congenital Anomalies in Offspring, 20 AM. J. OF INDUS. MED. 447 (1991).

16. E.g., Kim N. Dietrich, Kathleen M. Kraft, Robert L. Bornschein, Paul B. Hammond, Omer Berger, Paul A. Succop and Mariana Bier, Low–Level Lead Exposure Effect on Neurobehavioral Development in Early Infancy, 80 PEDIATRICS 721 (1987).

17. See H. Westley Clark & Meryle Weinstein, Chemical Dependency in MAUREEN PAUL, OCCUPATION AND ENVIRONMENTAL REPRODUCTIVE HAZARDS 344, 347–48 (1993); see also Julie E. Lippert, Comment, Prenatal Injuries from Passive Tobacco Smoke:

exposure is demonstrated and harm results, liability may be established.[18] As already indicated, however, proof of causation has failed in many claims for prenatal injury against pharmaceutical manufacturers, either on the ground that the evidence of experts was insufficient or on the ground that it was inadmissible altogether as insufficiently accepted among scientists.[19]

The problem of mass exposure—including fetal exposure—to hazardous substances is sometimes addressed through regulation or even through injunctions. For example, a New York court enjoined sandblasting of a bridge to remove lead paint because the resulting dust created substantial risks of exposure to lead, which in turn could lead to limitations on cognitive development and disorders of the nervous and reproductive systems.[20]

Parents' Duty to Fetus

A father whose genetic material is injured may pass along serious birth defects from the moment of conception. A mother may intentionally or unintentionally ingest alcohol—the "teratogen of choice" one authority called it[21]—or harmful agents such as cocaine, alcohol, or lead. Use of these and other drugs in pregnancy is quite common and cuts across social and racial lines.[22] Some, perhaps all of those and other ingested substances may harm the fetus and permanently damage the child. If parents are not protected by an immunity,[23] the question is whether a child has a good claim against her own mother or father for fetal injuries of this kind.

Few cases deal with the parents' duty to the fetus. In non-toxic cases, one claim consistently denied is the claim for dissatisfied life brought by a child against a parent for causing his birth as an illegitimate child.[24] Illinois, in an automobile accident case, refused to entertain a child's action against the mother based upon the mother's negligence during pregnancy;[25] New Hampshire, also in an auto case, thought if the mother owed reasonable care to a child once it was born, a duty of care should be imposed for the fetus as well.[26] Although neither case was a toxic tort case, the Illinois Court's reasoning seemed most significantly

Establishing a Cause of Action for Negligence, 78 Ky. L. J. 865 (1989/90).

18. Hogle v. Hall, 112 Nev. 599, 916 P.2d 814 (1996) (product Accutane, known to be teratogenic if used during pregnancy, physician liable for prescription).

19. See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) (reviewing the sufficiency and admissibility holdings in the Bendectin cases where plaintiffs asserted that children suffered limb reduction defects because of fetal exposure through mothers' ingestion of Bendectin).

20. Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d 64, 644 N.Y.S.2d 252 (1996).

21. See Ann Pytkowicz Streissguth, et al. supra n. 4 at 174.

22. See Ira J. Chasnoff, Harvey J. Landress, and Mark E. Barrett, The Prevalence of Illicit Drug or Alcohol Use During Pregnancy, 322 NEW ENG. J. MED. 1202 (1990).

23. See § 280 supra.

24. E.g., Slawek v. Stroh, 62 Wis.2d 295, 215 N.W.2d 9 (1974).

25. Stallman v. Youngquist, 125 Ill.2d 267, 531 N.E.2d 355, 126 Ill.Dec. 60, 78 A.L.R.4th 1071 (1988).

26. Bonte v. Bonte, 136 N.H. 286, 616 A.2d 464 (1992).

addressed to cases involving the mother's use of substances that could harm the fetus. It reasoned that the mother's right of autonomy, bodily integrity, and privacy would make it inappropriate for courts to require a duty of reasonable care. The court left open the possibility for liability based on intentional tort theories. A Texas court has also rejected any duty by a pregnant woman that would impose liability for ingesting cocaine during pregnancy.[27] So far only one mother-ingestion case has actually recognized a potential liability, but it did not discuss the central issue of the mother's own rights, and its authority is clouded by later decisions.[28]

The problem of a mother's potential responsibility for treatment of her own body, or her fetus, depending on the viewpoint adopted, mirrors the problem much-debated in the criminal field, whether it is just or permissible to punish a mother whose drug or alcohol abuse during pregnancy permanently damages or kills the fetus or the later-born child.[29] In addition, the lifestyle of both parents may contribute to toxic and other harms to children in many ways. From the social service viewpoint that is so much of family law, responsibility in tort may be the least desirable of all approaches to a massive problem.[30]

§ 290. Harm from Preconception Negligence

When the plaintiff is injured by negligent acts that occur before the plaintiff was conceived, courts are somewhat divided.[1] Such injuries have occurred in several ways. For example the defendant might damage genetic material of either parent before the plaintiff was conceived, with resulting genetic defects in the plaintiff once conception and birth took place.[2] Or the defendant may negligently harm the mother before conception, resulting in oxygen deprivation of the fetus much later[3] or early termination of pregnancy and damage to the child.[4] Or health care providers, acting before the plaintiff's conception, may negligently fail to

27. Chenault v. Huie, 989 S.W.2d 474 (Tex.App.1999) (doubting whether a workable standard of care could be developed; "The 'reasonable person' standard ... is simply not design to apply to matters involving intimate, private, and personal decisions").

28. Grodin v. Grodin, 102 Mich.App. 396, 301 N.W.2d 869 (1980).

29. Whitner v. State, 492 S.E.2d 777, 328 S.C. 1 (1997) authorizes criminal conviction of a mother who used crack cocaine to the injury of the fetus in the third trimester.

30. Cf. Ira J. Chasnoff (ed), Drugs, Alcohol, Pregnancy and Parenting (1988).

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1. See generally, Julie A. Greenberg, Reconceptualizing Preconception Torts, 64 TENN. L. REV. 315, 349 ff. (1997); Annotation, Liability for Child's Personal Injuries or Death Resulting from Tort Committed Against Child's Mother Before Child Was Conceived, 91 A.L.R.3d 316 (1980).

2. Some such claims against the government for harms resulting from exposure to nuclear radiation have been dismissed under the *Feres* rule. See § 265, supra.

3. Albala v. City of New York, 54 N.Y.2d 269, 445 N.Y.S.2d 108, 429 N.E.2d 786 (1981).

4. Hegyes v. Unjian Enterprises, Inc., 234 Cal.App.3d 1103, 286 Cal.Rptr. 85 (1991).

New York, however, has issued a blanket rejection of any duty of care for the benefit of an unconceived child.[12] New York stands virtually alone as a clear authority for the complete rejection of a duty of care.[13]

People ordinarily owe a duty of reasonable care. On the face of things, such a duty would be owed in the preconception tort case. The arguments against liability begin with a metaphysical abstraction: the plaintiff was not a person in existence when the defendant was negligent; hence the defendant could owe no duty. This is the argument that is now rejected in the other prenatal tort cases when the plaintiff was born alive and suffers foreseeable harm as a result of the defendant's tort. Its thrust is also rejected or ignored in other kinds of cases. If the defendant negligently manufactures a dangerous product, no one asks whether the harm it causes was done to a person who was in existence when the product was manufactured. If the defendant negligently constructs a balcony so that two years later it falls upon a one-year old child, no one believes that the child should be denied recovery on the ground that she was not in existence when the defendant's negligent acts took place.[14]

A quite different argument against the preconception duty is that as applied to health care professionals, it might present them with a conflict of interest because due care for the unconceived child might be harmful to the mother. The facts do not support the argument in any of the cases brought so far because the mother's well-being and the prospective child's well-being call for identical treatment. It is possible to imagine that a drug needed by the mother might be harmful to either a fetus already carrier or one that might be carried in the future, but a conflict like that is not limited to preconception duties and in any event is usually resolved by giving the mother full information and allowing her to make the choice.[15]

12. Albala v. City of New York, 54 N.Y.2d 269, 445 N.Y.S.2d 108, 429 N.E.2d 786 (1981); cf. Park v. Chessin, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978) (preconception genetic counseling not actionable by child born with genetic defects).

13. On the basis of a one-line per curiam order of a divided court in Loerch v. Eli Lilly & Co., 445 N.W.2d 560 (Minn. 1989), Minnesota is said to oppose the duty, but as no facts are given in the opinion it seems impossible to guess at the scope of the Minnesota rule from that case alone. The few remaining cases are not in courts of last resort and their authority is uncertain for various reasons. Sorrells v. Eli Lilly and Company, 737 F.Supp. 678 (D.D.C. 1990) attempted to apply Maryland law to a DES grandchild case in a single, conclusory sentence, but as DES grandchildren would probably be denied relief in any case, the decision may not mean much about preconception torts in general. Morgan v. United States, 143 F.Supp. 580 (D.N.J.1956) rejected a duty on viability rules under Pennsylvania law; but Pennsylvania thereafter eliminated the viability requirement in Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960), leaving *Morgan* dangling from a premise that has been removed. Michigan cases have gone both ways. See Carr v. Wittingen, 182 Mich.App. 275, 451 N.W.2d 584 (1990) (rejecting the duty, relying on general viability/born alive rules rather than on any specific rule about preconception torts) rev'd on other grounds, 435 Mich. 856, 456 N.W.2d 713 (1990); Monusko v. Postle, 175 Mich.App. 269, 437 N.W.2d 367 (1989) (recognizing a duty).

14. See Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851 (Mo.1993) (giving a version of this hypothetical).

15. See Julie A. Greenberg, Reconceptualizing Preconception Torts, 64 TENN. L. REV. 315, 347 ff. (1997).

The final argument against a duty of care derives from the nonspecific fear of liability in general or the specific fear of unlimited liability that would result if injury caused genetic damage that might be perpetuated from generation to generation throughout all time. This argument cannot logically lead to a blanket rule against a duty. By its own terms the argument should not eliminate most claims because those claims show no potential for perpetuated harm throughout the generations. Nor is it necessary to bar all claims in order to bar the claim for infinitely perpetuated harm. Where the defendant's conduct does in fact create a potential for harm that will pass on to each generation, the court can eliminate that particular claim, as Ohio did, without barring all preconception torts.[16]

These comments suggest that the blanket rule is inappropriate because it obscures differences among preconception cases. Even on a purely formal analysis without concerns of policy, it is possible to distinguish preconception tort cases according to the time of injury—whether it is after birth, at the moment of birth, injury in utero, or injury before conception.[17] It is also possible to distinguish between those preconception injuries that could be reproduced indefinitely in succeeding generations and those that could not. Because duties most significantly vary with the relationships and undertakings of the parties, another line of distinction is between the duty of care owed by health care workers who undertake to protect the well-being of mother and child and the duty owed by strangers driving automobiles. All these distinctions point to the conclusion that a blanket rule against the duty treats too many disparate cases as if they were alike. They also suggest that while a blanket rule in favor of a duty of care fits well with the usual tort rules—liability for negligence is the norm—courts can find plenty of room to shape duties to their sense of policy and justice without barring all cases.

§ 291. Liability for Interfering with Mother's Opportunity to Avoid or Terminate a Pregnancy

Claims for interference with a mother's opportunity to avoid pregnancy, or to terminate it, have taken three distinct forms. All three forms have in common the assertion that, but for the defendant's negligence, the mother could have avoided giving birth to a child who is either unwanted or who suffers terrible birth defects. The claim is typically brought against a physician with the allegation that he negligently failed to perform a birth control surgery, or that he negligently failed to inform the mother that she was carrying a child with genetic defects, and that, but for the physician's negligence, the mother would have avoided giving birth to the child.

16. Grover v. Eli Lilly and Company, 63 Ohio St.3d 756, 591 N.E.2d 696 (1992).

17. See Julie A. Greenberg, Reconceptualizing Preconception Torts, 64 TENN. L. REV. 315, 349 ff. (1997).

Wrongful life. The three kinds of claims are usually labeled differently. The wrongful life claim is one asserted by a child suffering birth defects such as a painful and debilitating disease. The claim is definitely not that the physician caused the disease or defect. It is rather that the physician negligently allowed the child to be born at all and that the child has a claim for the suffering he must undergo as a result. Most courts reject this claim altogether,[1] partly because they are unwilling to say that life itself is harm, or that compensation can be measured for the harm of living as compared to never having lived at all.[2]

A few courts, however, have allowed the child to recover. These have largely limited the child to recovery for medical expenses that otherwise would have been recovered by the parent in the wrongful birth claim discussed below.[3] But there is one difference. Allowing the wrongful life claim logically permits recovery of the extraordinary expenses for the child's entire life expectancy; if the claim is allocated to the parent, some courts limit the expense recovered to the period of the child's minority, leaving uncompensated expense for the remainder of the child's life.[4] Allocation of the medical costs recovery to the child herself may also provide the child slightly better protection against waste or misuse of the recovery, since the recovery will be in the child's name and some formal supervision of the recovery may be required.

Wrongful birth. The wrongful birth claim is asserted by the mother, not the child. The mother typically claims that, but for the defendant's negligence in testing or counseling, the mother would have terminated a pregnancy to avoid birth of a child with serious genetic defects. The claim was initially rejected in 1967,[5] but since a mother's constitutional right to an early-pregnancy abortion was recognized,[6] almost all of the courts considering the question have allowed some kind of recovery in these cases.[7] A closely analogous case arises when an adoption agency negligently or fraudulently places a genetically defective child with adoptive parents, who learn only much later of the difficulty and the

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1. E.g., Walker v. Mart, 164 Ariz. 37, 790 P.2d 735 (1990); Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind.1991).

2. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). The same view has been taken when a living adult with the right to die has been resuscitated against his express will. Anderson v. St. Francis–St. George Hospital, Inc., 77 Ohio St.3d 82, 671 N.E.2d 225 (1996)

3. Turpin v. Sortini, 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954 (1982); Harbeson v. Parke–Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

4. See, e.g., Arche v. United States, 247 Kan. 276, 798 P.2d 477 (1990) (limiting the parents' recovery of damages to the period of the child's minority). Most courts apparently would not impose such a limit. See Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986).

5. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 22 A.L.R.3d 1411 (1967).

6. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

7. E.g., Lininger v. Eisenbaum, 764 P.2d 1202 (Colo.1988); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978); see Thibeault v. Larson, 666 A.2d 112 (Me.1995) (under a statute); cf. Arche v. United States, 247 Kan. 276, 798 P.2d 477 (1990) (claim is cognizable only when the "child has such gross deformities, not medically correctable, that the child will never be able to function as a normal human being").

expense. Consistently with the wrongful birth cases, courts here again allow parental recovery.[8]

The wrongful birth claim can be viewed as a species of informed consent claim, protecting essential values of individual choice, autonomy, and self-determination. But there is difference of sorts. The wrongful birth plaintiff does not recover for the genetic defect itself but for the loss of the choice to terminate the pregnancy and the damages that flow from that loss. It has been held enough, therefore, if she proves that, given appropriate testing and information, she would have terminated the pregnancy, even if the genetic harm to the child arose from risks separate from those of which she should have been warned.[9]

A small number of courts has denied the wrongful birth claim on the assertion that existence of human life cannot be permitted to count as legal damages, or on the ground that parents would be tempted to perjure themselves to establish their willingness to terminate the pregnancy.[10] In addition, some states, a handful at this writing, have passed statutes as anti-abortion legislation.[11] These statutes, if constitutional,[12] will curtail or eliminate the wrongful birth action. Some advocates for the disabled also dislike the wrongful birth action because they believe that it perpetuates the "disability hierarchy" of values in which the disabled are regarded as worth less.[13]

Wrongful conception or pregnancy. The claim for wrongful pregnancy or conception typically asserts that the defendant physician was negligent in performing a medical procedure to prevent conception and that as a result the mother bore a child, with the added expense of child rearing. The claim differs from the wrongful birth in two important respects. First, it does not rest on a claim that the mother had a right to terminate her pregnancy. The claim thus escapes the bar of those statutes that prohibit suits based upon the mother's loss of opportunity for an abortion.[14] Perhaps partly for this reason, some of the few courts

8. See Meracle v. Children's Serv. Soc. of Wis., 149 Wis.2d 19, 437 N.W.2d 532 (1989); Burr v. Board of County Comn'rs of Stark County, 23 Ohio St.3d 69, 491 N.E.2d 1101, 56 A.L.R.4th 357 (1986).

9. Canesi v. Wilson, 158 N.J. 490, 730 A.2d 805 (1999).

10. See Wilson v. Kuenzi, 751 S.W.2d 741 (Mo.1988); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985).

11. E.g., IDAHO CODE § 145.424; MINN. STAT. § 5–334.

12. See Note, Wrongful Birth Actions: The Case against Legislative Curtailment, 100 HARV. L. REV. 2017 (1987); Julie F. Kowitz, Note, Not Your Garden Variety Tort Reform: Statutes Barring Claims For Wrongful Life And Wrongful Birth Are Unconstitutional Under The Purpose Prong of Planned Parenthood V. Casey, 61 BROOK. L. REV. 235 (1995) (arguing that statutes deny the constitutional rights recognized in Roe v. Wade and later cases); Stephanie S. Gold, an Equality Approach to Wrongful Birth Statutes, 65 FORDHAM L. REV. 1005 (1996) (arguing the statutes engage in gender discrimination); Julie Gantz, State Statutory Preclusion of Wrongful Birth Relief: a Troubling Re–Writing of a Woman's Right to Choose And The Doctor-patient Relationship, 4 VA. J. SOC. POL'Y & L. 795 (1997).

13. See Allan H. Macurdy, Disability Ideology And The Law School Curriculum, 4 B.U. PUB. INT. L.J. 443 (1995).

14. E.g., MINN. STAT. ANN. § 145.424 ("No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted", also specifically preserving the wrongful pregnancy claim).

few have rejected this limitation.[5] A few courts have also limited the recovery to the costs of rearing the child to the age of majority, leaving uncompensated the period of time from majority to the child's death.[6]

Emotional harm. The normal damages rules permit the victim of personal injury tort to recover the attendant emotional harm as a normal element of damages. Emotional harm claims may be rejected or limited, however, in two particular situations. First, emotional harm claims may be denied when the courts wish to treat the tort as primarily an economic tort. Misrepresentation cases are ordinarily like this. Second, emotional harm claims may be subjected to special conditions when emotional harm is asserted as a stand-alone tort rather than as an element of damages flowing from some other tort.[7]

The tort to the mother in the wrongful birth claim inescapably involves the mother's body and intimate rights of autonomy. When the suit is against the mother's physician, it also involves a direct duty on the part of the defendant to the mother herself.[8] For these reasons, the tort probably should be treated as a personal injury tort, so that emotional harms resulting from it should be recoverable as a part of the total damages as they are in other personal injury cases. Some courts take this rather straightforward view, allowing recovery of emotional harm for both parents, or at least for the mother.[9]

However, other courts have been unwilling to permit emotional harm damages at all,[10] and still others have limited the recovery, not only under the offset rules[11] but also by invoking the special bystander rules often applied to the rather different case of stand-alone emotional harms. The stand-alone emotional harm claim typically arises when a child is injured and the parent claims emotional harm. The special bystander rule applied in those cases rejects the emotional harm claim unless the parent actually witnessed the child's injury. But that rule only

Lutheran General Hosp., 117 Ill.2d 230, 111 Ill.Dec. 302, 512 N.E.2d 691 (1987); Arche v. United States, 247 Kan. 276, 798 P.2d 477 (1990); Smith v. Cote, 128 N.H. 231, 513 A.2d 341, 348–49 (N.H. 1986) (including the need for added maternal care as one of the extraordinary costs).

5. Contra: Robak v. United States, 658 F.2d 471 (7th Cir.1981).

6. Arche v. United States, 247 Kan. 276, 798 P.2d 477 (1990) (but noting that the state would be responsible for the disabled child after the child reached adulthood); Bani–Esraili v. Lerman, 69 N.Y.2d 807, 505 N.E.2d 947, 513 N.Y.S.2d 382 (1987). Contra: Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995).

7. See § 302 below.

8. See § 312 below.

9. Phillips v. United States, 575 F.Supp. 1309 (D.S.C.1983); Keel v. Banach, 624 So.2d 1022 (Ala.1993); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Eisbrenner v. Stanley, 106 Mich.App. 357, 308 N.W.2d 209 (1981); Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995). Cf. Gallagher v. Duke University, 852 F.2d 773 (4th Cir.1988) (handicapped child, but court analyzed case as wrongful conception or wrongful pregnancy case on the facts; emotional distress damages allowed based on distress at having handicapped child). See Annotation, Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Tortiously Causing Another's Birth, 74 A.L.R.4th 798 (1989).

10. Siemieniec v. Lutheran General Hosp., 117 Ill.2d 230, 111 Ill.Dec. 302, 512 N.E.2d 691 (1987); Smith v. Cote, 128 N.H. 231, 513 A.2d 341, 348–49 (N.H. 1986); Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978).

11. § 293 below.

that reject the wrongful birth action actively support the wrongful pregnancy claim.[15]

The wrongful pregnancy claim also differs from the wrongful birth claim because does not necessarily involve an unhealthy or genetically damaged child. Instead, the mother or the parents had decided against enlarging the family for personal or economic reasons. One or two states reject the wrongful pregnancy action altogether.[16] The great majority now recognize the claim,[17] but subject it to some unusual limitations on damages recoverable discussed in the next section.

§ 292. Limiting the Wrongful Birth and Pregnancy Claims by Special Damages Rules

Although wrongful birth and wrongful pregnancy claims are accepted in most courts, they are often undermined by unusual damages rules. The normal compensatory damages rules would award damages for emotional harm and economic costs inflicted by the tort. In the case of wrongful birth or pregnancy, that would mean a recovery for emotional harm to the mother and perhaps to the father and also the costs of rearing the child—two harms that would have been avoided if the physician had not been negligent. Courts have been struck, however, by the idea that a child, healthy or not, would give the parents pleasure and that the parents' putative pleasure should somehow be taken into account.[1] The result has been not only the usual variation among judicial approaches but a series of special rules that do not appear to comport with ordinary rules of damages or evidence.

Damages in Wrongful Birth Claims Generally

Expenses of child rearing. Where the claim for wrongful birth is recognized, most courts allow recovery of some, but usually not all the child-rearing expenses that would have been avoided by a timely termination of the pregnancy.[2] The same rule has been applied to claims based upon an adoption agency's misrepresentations of a prospective adoptive child's health.[3] The cases usually permit recovery of less than all of the costs inflicted by the tort by limiting the recovery to the "extraordinary" expenses, those over and above the ordinary expenses of child rearing.[4] A

15. E.g., Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

16. See Schork v. Huber, 648 S.W.2d 861 (Ky.1983) (healthy child is not an injury); Thibeault v. Larson, 666 A.2d 112 (Me. 1995).

17. E.g., Emerson v. Magendantz, 689 A.2d 409 (R.I.1997) (reviewing the cases).

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1. § 293 below.

2. Phillips v. United States, 575 F.Supp. 1309 (D.S.C.1983); Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (N.H. 1986); Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981); Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981); Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Harbeson v. Parke–Davis, Inc., 98 Wn.2d 460, 656 P.2d 483 (1983); James G. v. Caserta, 175 W.Va. 406, 332 S.E.2d 872 (W.Va.1985). See Proffitt v. Bartolo, 162 Mich.App. 35, 412 N.W.2d 232, 236 (1987) ("medical expenses").

3. Meracle v. Children's Serv. Soc. of Wis., 149 Wis.2d 19, 437 N.W.2d 532 (1989).

4. E.g., Phillips v. United States, 575 F.Supp. 1309 (D.S.C.1983); Keel v. Banach, 624 So.2d 1022 (Ala.1993); Siemieniec v.

few have rejected this limitation.[5] A few courts have also limited the recovery to the costs of rearing the child to the age of majority, leaving uncompensated the period of time from majority to the child's death.[6]

Emotional harm. The normal damages rules permit the victim of personal injury tort to recover the attendant emotional harm as a normal element of damages. Emotional harm claims may be rejected or limited, however, in two particular situations. First, emotional harm claims may be denied when the courts wish to treat the tort as primarily an economic tort. Misrepresentation cases are ordinarily like this. Second, emotional harm claims may be subjected to special conditions when emotional harm is asserted as a stand-alone tort rather than as an element of damages flowing from some other tort.[7]

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However, other courts have been unwilling to permit emotional harm damages at all,[10] and still others have limited the recovery, not only under the offset rules[11] but also by invoking the special bystander rules often applied to the rather different case of stand-alone emotional harms. The stand-alone emotional harm claim typically arises when a child is injured and the parent claims emotional harm. The special bystander rule applied in those cases rejects the emotional harm claim unless the parent actually witnessed the child's injury. But that rule only

Lutheran General Hosp., 117 Ill.2d 230, 111 Ill.Dec. 302, 512 N.E.2d 691 (1987); Arche v. United States, 247 Kan. 276, 798 P.2d 477 (1990); Smith v. Cote, 128 N.H. 231, 513 A.2d 341, 348–49 (N.H. 1986) (including the need for added maternal care as one of the extraordinary costs).

5. Contra: Robak v. United States, 658 F.2d 471 (7th Cir.1981).

6. Arche v. United States, 247 Kan. 276, 798 P.2d 477 (1990) (but noting that the state would be responsible for the disabled child after the child reached adulthood); Bani–Esraili v. Lerman, 69 N.Y.2d 807, 505 N.E.2d 947, 513 N.Y.S.2d 382 (1987). Contra: Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995).

7. See § 302 below.

8. See § 312 below.

9. Phillips v. United States, 575 F.Supp. 1309 (D.S.C.1983); Keel v. Banach, 624 So.2d 1022 (Ala.1993); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Eisbrenner v. Stanley, 106 Mich.App. 357, 308 N.W.2d 209 (1981); Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995). Cf. Gallagher v. Duke University, 852 F.2d 773 (4th Cir.1988) (handicapped child, but court analyzed case as wrongful conception or wrongful pregnancy case on the facts; emotional distress damages allowed based on distress at having handicapped child). See Annotation, Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Tortiously Causing Another's Birth, 74 A.L.R.4th 798 (1989).

10. Siemieniec v. Lutheran General Hosp., 117 Ill.2d 230, 111 Ill.Dec. 302, 512 N.E.2d 691 (1987); Smith v. Cote, 128 N.H. 231, 513 A.2d 341, 348–49 (N.H. 1986); Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978).

11. § 293 below.

applies to bystanders; it has no logical application when the parent herself is a victim of the defendant's tort. When the parent (or anyone) is herself a victim, she recovers emotional harm damages "parasitically," as merely one element of damages for the tort done to her.[12] Nevertheless, some courts have, mistakenly or not, applied the bystander rule to deny the emotional harm claim to the mother, who was a direct victim of the physician's tort.[13]

Damages in Wrongful Pregnancy or Conception Generally

Child rearing expenses. Wrongful pregnancy cases are usually based upon failed sterilization procedures intended to prevent conception. The parents in such cases may face many years of expense in child rearing. Nevertheless, most courts have disallowed recovery for cost of rearing a healthy child.[14] Some say it is no injury at all, although anyone who has reared a child knows that the financial and sometimes the emotional costs can be enormous. Certainly they are the costs the parents sought to avoid by employing the defendant.[15] The "no injury" assertion is, then, in reality a way of asserting a judicial policy, not a fact.[16] Other courts assert that the claim is speculative. Almost all of the decisions are influenced in part by the idea that some kind of offset should apply because the parents will enjoy the child, even if the child is also an expense.[17]

A few courts in important decisions have allowed the jury to award child-rearing costs, at least where the parents sought to avoid having children in part for economic reasons.[18] However, even many of these more liberal courts may reduce the award by imposing offsets.

Emotional and other damages. In the wrongful pregnancy or conception cases, courts have allowed recovery for the mother's pain in delivery

12. Thus emotional harm damages are routinely recovered by the personal injury plaintiff. Except for loss of consortium claims, however, the father is not usually a direct victim of medical malpractice committed against the mother. Consequently, some courts deny the father's claim for emotional harm resulting from death of or injury to a fetus. See Edinburg Hospital Authority v. Trevino, 941 S.W.2d 76 (1997). Cf. Tanner v. Hartog, 696 So.2d 705 (Fla. 1997) (Florida, still requiring an actual "impact" to the emotional harm claimant, does not apply that requirement to emotional harm claims resulting from an independent tort to the mother).

13. Cauman v. George Washington University, 630 A.2d 1104 (D.C.App.1993).

14. See Cockrum v. Baumgartner, 95 Ill.2d 193, 69 Ill.Dec. 168, 447 N.E.2d 385 (1983); Schork v. Huber, 648 S.W.2d 861 (Ky.1983); O'Toole v. Greenberg, 64 N.Y.2d 427, 477 N.E.2d 445, 488 N.Y.S.2d 143 (1985); Johnson v. University Hospitals of Cleveland, 44 Ohio St.3d 49, 540 N.E.2d 1370 (1989); Smith v. Gore, 728 S.W.2d 738, 751 (Tenn.1987); Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986); James G. v. Caserta, 175 W.Va. 406, 332 S.E.2d 872 (W.Va.1985); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo.1982).

15. See Burke v. Rivo, 406 Mass. 764, 551 N.E.2d 1 (1990).

16. See Cf. Kelly, The Rightful Position in "Wrongful Life" Actions, 42 Hast. L. J. 505, 525–535 (1991).

17. § 293 below.

18. University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984); Burke v. Rivo, 406 Mass. 764, 551 N.E.2d 1 (1990); Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991); Zehr v. Haugen, 318 Or. 647, 871 P.2d 1006 (1994); Marciniak v. Lundborg, 153 Wis.2d 59, 450 N.W.2d 243 (1990).

of the child and emotional distress at having an unplanned, unwanted, or unaffordable child,[19] the expenses of the negligently performed pregnancy-avoidance procedure,[20] or the cost of repeating the procedure later,[21] pregnancy-related medical expenses, including wages lost because of pregnancy or delivery,[22] and expenses or wage lost in the post-natal period in appropriate cases.[23] The father is entitled to recover for loss of consortium.[24] Perhaps most courts allow recovery of emotional distress damages,[25] but predictably enough, some courts have refused to permit any emotional distress recovery at all,[26] or have limited the recovery of all forms of pain and suffering, including emotional harm, to the period of time from discovery of pregnancy until recovery from childbirth.[27]

Genetic defects in wrongful pregnancy cases. In contrast to the wrongful birth claim, wrongful pregnancy claims usually involves birth of a normal, healthy child, albeit one that the mother sought to avoid bearing. The defendant's negligent failure to prevent the plaintiff's pregnancy may, however, lead happenstantially to the birth of a child suffering genetic defects. If the reason for seeking to prevent pregnancy in the first place was a risk of genetic defects, there seems no reason to deny recovery for the extraordinary expense of rearing the child.[28] On the other hand, if the reasons for preventing pregnancy were not based on genetic risks but on financial, emotional or personal considerations of the parents, the risk the doctor creates by a negligent sterilization procedure is the risk of a normal pregnancy and a healthy child, not the risk of a child suffering genetic defects. In that kind of case, the defendant may not be regarded as a legal or proximate cause of the damages resulting from the genetic problems, even though he is a legal cause of other harms. Some courts have taken this view.[29] Although this approach sounds like a normal application of proximate cause or scope-of-risk rules, that is not clearly the case. The parents sought to avoid having *any* child and the defendant's obligation was to use reasonable care to prevent conception that would lead to birth of any child. No greater care is required to perform the sterilization procedure when its purpose is to prevent a genetically damaged child. This line of reasoning

19. Pitre v. Opelousas General Hosp., 530 So.2d 1151 (La.1988); Burke v. Rivo, 406 Mass. 764, 551 N.E.2d 1 (1990).

20. Smith v. Gore, 728 S.W.2d 738, 751 (Tenn.1987).

21. Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

22. Pitre v. Opelousas General Hosp., 530 So.2d 1151 (La.1988) (expenses of pregnancy and delivery).

23. Smith v. Gore, 728 S.W.2d 738, 751 (Tenn.1987).

24. Pitre v. Opelousas General Hosp., 530 So.2d 1151, 1161–62 (La.1988); Burke v. Rivo, 406 Mass. 764, 551 N.E.2d 1 (1990); Smith v. Gore, 728 S.W.2d 738, 751 (Tenn. 1987).

25. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986)

26. Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991); Emerson v. Magendantz, 689 A.2d 409 (R.I.1997).

27. Smith v. Gore, 728 S.W.2d 738, 751 (Tenn.1987).

28. Cf. Gallagher v. Duke University, 852 F.2d 773 (4th Cir.1988) (pregnancy would have been prevented if doctor had correctly diagnosed genetic problem, extraordinary costs recoverable).

29. Williams v. University of Chicago Hospitals, 179 Ill.2d 80, 227 Ill.Dec. 793, 688 N.E.2d 130 (1997); Pitre v. Opelousas General Hosp., 530 So.2d 1151, 1161–62 (La.1988).

suggests that the limitation is not appropriate. At least when the physician is on notice that genetic defects are possible, liability for the extraordinary expenses of child-rearing has been permitted.[30]

§ 293. Offsets and Offset Reasoning in Wrongful Pregnancy

Offset for Parents' Emotional Benefits

The benefits rule generally. Benefits to the plaintiff that result directly from a tort must be offset against the damages otherwise due.[1] Almost all of the limitations on the damages recovery in wrongful birth and wrongful pregnancy actions[2] are derived in part from the idea that if the parents suffer economic and emotional harm as a result of having a child, they also gain benefits which should somehow be taken into account. Frequently, the judges assume or declare that benefits must exist and then use the supposed benefits as ground for denying some of the damages altogether.

Wrongful pregnancy and benefit offsetting child-rearing costs as a matter of law. In wrongful pregnancy cases, a number of courts simply declare as a matter of law that the parents' emotional benefits in having an unwanted child is necessarily in excess of all child-rearing costs.[3] The effect is to say that, except in very few states,[4] the cost of rearing the child cannot be recovered in wrongful pregnancy cases.[5] The offsets reasoning and the rule against recovery produced by that reasoning is peculiar for several reasons. First the rule determines the supposed benefit as a matter of law rather than through assessment of the facts. Second, the benefit offset is applied to bar recovery of child-rearing costs but not applied to bar recovery of the costs of pregnancy and delivery.[6] Third, the rule uses one kind of supposed benefit to reduce or bar

30. E.g., Emerson v. Magendantz, 689 A.2d 409 (R.I.1997).

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1. See 1 DAN B. DOBBS, REMEDIES § 3.8 (2) and 2 Id. § 8.6 (2).

2. § 292 supra.

3. This may be coupled with arguments that the amount of the benefit is unknowable because the child may turn out to be an infamous criminal or President of the United States. See McKernan v. Aasheim, 102 Wash.2d 411, 419–420, 687 P.2d 850, 855 (1984). If the burden is on the defendant to support the offset, however, this argument suggests that no offset should be entertained. Further, unknowable changes that might affect future subjective values would presumably be altogether unimportant in other kinds of cases. For example, it is difficult to imagine that a court would speculate that when a seller reneges on a promise to sell you a house, that you should not recover on the contract because the different house you find as a substitute might turn out to be even more satisfactory.

4. E.g., Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991); Marciniak v. Lundborg, 153 Wis.2d 59, 450 N.W.2d 243, 249 (1990) ("It was precisely to avoid that 'benefit' that the parents went to the physician in the first place".... it hardly seems equitable to not only force this benefit upon them but to tell them they must pay for it as well as by offsetting it against their proven emotional damages).

5. See Schork v. Huber, 648 S.W.2d 861, 862 (Ky.1983) ("The benefits conferred by the child's existence clearly outweigh any economic burden involved"); Pitre v. Opelousas General Hosp., 530 So.2d 1151, 1162 (La.1988); Emerson v. Magendantz, 689 A.2d 409 (R.I.1997).

6. Pitre v. Opelousas General Hosp., 530 So.2d 1151, 1161–62 (La.1988).

recovery for an entirely different kind of loss. The legal rule that benefits must be ascribed to having an unwanted child, coupled with the compulsory offset reflect a policy decision, not a measurement of damages.

Wrongful pregnancy and assessment of actual benefits to offset against child-rearing costs. A few courts have allowed child-rearing costs.[7] In those courts, no presumption is indulged that benefits of having an unwanted child exceed the costs of rearing the child. Instead, the trier may reduce that recovery by the amount of emotional benefits the trier estimates will actually accrue to the parents. In these cases the trier must estimate the intangible benefits on the basis of the facts of the case, and similarly must estimate the intangible costs in the form of mental distress.

Wrongful pregnancy and the offset of emotional benefits against economic loss? The supposed benefits used to bar the claim for child-rearing costs are intangible benefits such as the emotional pleasure of having the (unwanted) child. This approach seemingly violates the normal rules that benefits from a tort are to be offset only against losses to the same "interest."[8] The idea of the normal rule is that if the defendant negligently burns down your trees, reducing the value of your land, he does not get any credit for the pleasures you might get because your view is enhanced at the same time your shade is lost. Although those pleasures might be real, they do not diminish the economic loss. Yet in the wrongful pregnancy cases, the decisions have usually concluded that the economic losses and the emotional harm were "inextricably related to each other," and that the trier should be allowed to offset emotional benefits against both emotional distress and economic costs.[9] New Mexico has cut across the grain of these decisions, applying the offset for emotional benefits only to the claim for emotional harm, with the result that child-rearing expenses are allowed but emotional harm claims are not.[10]

Wrongful birth. In wrongful birth cases and even in wrongful pregnancy cases resulting in the birth of a genetically damaged child,[11] the courts appear to be more willing to award the extraordinary costs of child-rearing without an automatic and total offset for the parents'

7. See note 18.

8. Restatement § 920 & Comments a & b (1979) ("benefit to the interest of the plaintiff that was harmed"). The offset itself, in any form, is to some extent a violation of or exception to the rule that one person may not force benefits upon another.

9. University of Ariz. Health Sciences Center v. Superior Court (Heimann), 136 Ariz. 579, 667 P.2d 1294, 1299 n. 4 (1983); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429, 435 (1984) (child rearing costs to the age of the child's majority, offset by the benefits derived from the child's aid, society and comfort). Cf. Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982) (trial court so instructed with concurrence of plaintiff, perhaps with tacit approval on appeal). See Note, One More Mouth To Feed, 25 Ariz. L. Rev. 1069 (1983).

10. Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

11. Emerson v. Magendantz, 689 A.2d 409 (R.I.1997). But some courts hold that genetic harm is outside the risk and therefore not compensable in wrongful pregnancy cases. Williams v. University of Chicago Hospitals, 179 Ill.2d 80, 227 Ill.Dec. 793, 688 N.E.2d 130 (1997).

supposed emotional benefits.[12] Put differently, some authority in damaged child cases might reject any offset altogether;[13] at most the offset of supposed emotional benefits applies only against emotional harms, not against child-rearing costs. That result seems correct. It is in line with the general rule that offsetting gains must be of the same general kind as the losses they reduce.[14] If the rule were otherwise, the expense recovery aimed primarily at providing medical and related attention for the child would be absorbed by the purely non-economic "benefit" to the parents.[15]

Avoidable Consequences—"Mitigation" of Damages

The avoidable consequences rule excludes recovery for any damages that could have been reasonably avoided by the plaintiff.[16] This rule has raised the question whether a plaintiff suffering from an unwanted pregnancy as the result of the defendant's negligence must seek an abortion to minimize damages. Although courts have sometimes played with the idea as an argument for severely limiting the claim or denying it altogether, almost no court seems to have actually applied such an idea.[17] As the Tennessee Court observed, any such requirement might "infringe upon Constitutional rights to privacy in these matters," and in addition would fail the reasonableness test which is built into the avoidable consequences rule.[18]

In wrongful birth cases, the nature of the case is that there is no opportunity for terminating the pregnancy, but there remains the possi-

12. Phillips v. United States, 575 F.Supp. 1309 (D.S.C.1983) (wrongful birth, judge as trier of fact offset emotional benefits only against emotional distress damages); Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (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"); Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995).

13. See Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995).

14. Note 8, supra.

15. Where "wrongful life" claims have been recognized, this error is automatically avoided because the child would recover the extraordinary economic costs in his own name; the parents' joys could not, presumably, be offset against the child's loss.

16. See 1 DAN B. DOBBS, REMEDIES § 3.9 and 2 Id. § 8.7.

17. The possibility of abortion to minimize damages has been suggested as a ground for denying recovery of normal child-rearing expenses. See Robak v. United States, 658 F.2d 471, 479, n. 23 (7th Cir. 1981) ("Because they freely chose not to have an abortion, they should be responsible for the costs of a normal child"); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980) (normal child-rearing expenses were avoidable because abortion was possible, but "We do not suggest that the mother was obliged to terminate the pregnancy"). These cases appear to adopt a rule of damages that excludes the normal costs of child-rearing for the very purpose of *avoiding* the issue of minimizing damages and some of the decisions have spelled this point out in detail. See Flowers v. District of Columbia, 478 A.2d 1073 (D.C.App.1984). In Cowe by Cowe v. Forum Group, Inc., 541 N.E.2d 962 (Ind.App.1989) the child-plaintiff had in fact been adopted. His wrongful life claim for support was denied from the time of adoption on the ground that the adoptive parents assumed the liability; but the adoptive parents were not parties and were not themselves asserting a claim.

18. Smith v. Gore, 728 S.W.2d 738, 751–52 (Tenn.1987). See also Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883, 885 (1982) (constitutional rights of mother require allowance of child-rearing costs, too); Marciniak v. Lundborg, 153 Wis.2d 59, 450 N.W.2d 243, 247 (1990) (not reasonable under ordinary rules to require abortion to minimize damages)

bility, also open in wrongful pregnancy cases, that damages could be minimized by relinquishing the child for adoption. Relinquishment might indeed work a sound economic result, but the tort is not in the exclusively an economic tort. The defendant, having deprived the mother of one choice, has no right to force upon her another choice she does not want to make. With these ideas in mind, it seems unlikely that courts will require a mother to give up her legitimate claim or her child, one or the other.[19]

19. Courts have sometimes emphasized the plaintiff's probable pleasure in keeping the normal child, and that it would outweigh the costs of rearing, by pointing out that the parents had not or would not put the child up for adoption, even though there would be many available adoptive parents. E.g., Rieck v. Medical Protective Co. of Fort Wayne, Ind., 64 Wis.2d 514, 219 N.W.2d 242, 245 (1974); Ball v. Mudge, 64 Wash.2d 247, 391 P.2d 201, 204 (1964). Those cases seem only to use the usual rule that the "benefits" of the unwanted child outweigh the doctor's potential liability; adoption or lack of adoption is mentioned only a means of demonstrating a basis for that conclusion.

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THE LAW OF TORTS

2004 Pocket Part

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Volume 1

Chapters 1–18

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CHAPTER 18

PRENATAL AND BIRTH-RELATED INJURY

§ 288. Prenatal Injury

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Revise Note 7 to read as follows:

7. Peters v. Hospital Auth. of Elbert County, 265 Ga. 487, 458 S.E.2d 628 (1995) (stating rule without reference to viability that live birth is required; facts recited by the court did not reveal whether fetus was viable or not); Bolin v. Wingert, 764 N.E.2d 201 (Ind. 2002) (construing statute to require live birth, but in fact fetus in that case would not have been viable); Shaw v. Jendzejec, 717 A.2d 367 (Me. 1998). In Chatelain v. Kelley, 322 Ark. 517, 910 S.W.2d 215 (1995), Arkansas required a live birth to support the claim; but in Aka v. Jefferson Hosp. Ass'n, Inc., 344 Ark. 627, 42 S.W.3d 508 (2001), that case was overruled on the ground that an antiabortion amendment to the state's constitution expressed a policy of protecting the life of unborn children to the extent permitted by federal law.

Add in Note 8 following Tanner citation:

8. ... Smith v. Borello, 370 Md. 227, 804 A.2d 1151 (2002) (permitting the mother to recover for emotional distress whether stillborn fetus was viable or not, but not permitting consortium-type damages, which must be recovered in a death action or not at all);....

Revise fourth sentence, second full paragraph, add to Note 9 after Summerfield citation and at end respectively, and add a new footnote, as follows:

Most courts, however, now recognize that an action lies for wrongful death of a stillborn infant or of a fetus not born alive, at least where the fetus was viable at the time of injury[9] or became viable before stillbirth.[9.05] In such cases, a real loss has occurred as a result of the defendant's tort even though death occurred before birth.

9. ... Shelton v. DeWitte, 271 Kan. 831, 26 P.3d 650 (2001);.... Parvin v. Dean, 7 S.W.3d 264 (Tex. App. 1999) held that it would be unconstitutional to deny recovery for injury to a viable child who was stillborn.

9.05. See Nealis v. Baird, 996 P.2d 438 (Okla. 1999).

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Add at end of Note 12:

12. ... In Nealis v. Baird, 996 P.2d 438 (Okla. 1999), the child was arguably born alive but lived only a short time. The court held that even if the child had never become viable (able to sustain existence apart from the mother), live birth established that the child was a person so that a wrongful death action would lie.

Add new text and footnote following first sentence in first full paragraph:

Most courts reject liability in such cases.[12.05]

12.05. See Coveleski v. Bubnis, 535 Pa. 166, 634 A.2d 608 (1993); Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 532 S.E.2d 856 (2000); Baum v. Burrington, 119 Wash.App. 36, 79 P.3d 456 (2003).

Add new footnote at end of second sentence in second full paragraph, as follows:

.... either live birth or some substantial fetal development in the mother's womb would be a prerequisite to the wrongful death action.[13.05]

13.05. Nealis v. Baird, 996 P.2d 438 (Okla. 1999) supports a requirement that the wrongful death plaintiff must establish *either* a live birth *or* viability achieved at any point before stillbirth. This rule eliminates concerns that a test tube broken in the course of an in vitro fertilization would lead to a wrongful death action.

Add new footnote at end of last sentence in second full paragraph as follows:

.... redress the mother's own claim for emotional injury without restrictions as to live birth or the stage of fetal development.[13.10]

13.10. Bolin v. Wingert, 764 N.E.2d 201 (Ind. 2002) (construing statute to require live birth, but in fact fetus in that case would not have been viable);

§ 289. Toxic Fetal Injuries and Parental Liability

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Add at end of Note 11:

11. ... The same problem arises with other work-related injuries and the same answer is appropriate. See, e.g., Meyer v. Burger King Corp., 144 Wash.2d 160, 26 P.3d 925 (2001) (worker fell, fetus injured).

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Strike last paragraph and substitute the following:

Few cases deal with the parents' duty to the fetus. In non-toxic cases, one claim consistently denied is the claim for dissatisfied life brought by a child against a parent for causing his birth as an illegitimate child.[24] At least two courts in automobile accident cases, refused to entertain a child's action against the mother based upon the mother's negligence during pregnancy.[25] Other courts in automobile cases have held that since the mother owed reasonable care to a child once it was born, a duty of care should be imposed for the fetus as well.[26] The argument against liability seems most significantly addressed to cases involving the mother's use of substances that could harm the fetus. Liability in substance abuse cases, which could include excessive consumption of coffee or use of tobacco, might conflict with the mother's right of autonomy, bodily integrity, and privacy. These mother-autonomy reasons do not obviously apply to auto cases. Nevertheless, the Massachusetts court thought liability of mother to a child born injured because

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Add at end of Note 13:

13. ... The most extreme claim was asserted in Rivera Concepcion v. Pepsi Cola of Puerto Rico, 288 F.Supp.2d 167 (D. P.R. 2003) and received the most extreme answer. There, a child born six years after the wrongful death of her siblings asserted a loss of sibling consortium claim and a claim that she suffered because her parents, still grieving, could not give her full love and care. The court held that, with exceptions not relevant, Puerto Rico law treated one who had not been conceived as something other than a legal person who could have rights. The judge added an admonishment for the parents: "[W]e believe that they [the parents] should view Valerie's birth as a wonderful opportunity that life has provided them to pour all the love they had for their previous children into this little angel that has been sent from up above to bring back joy and happiness into their lives."

Revise the last sentence in third full paragraph to read in part as follows:

It is possible to imagine that a drug needed by the mother might be harmful to either a fetus already carried....

§ 291. Liability for Interfering with Mother's Opportunity to Avoid or Terminate a Pregnancy

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Add footnote at end of first sentence:

.... three distinct forms.[0.05]

0.05. Analogous problems arise when the plaintiff bears a child as a result of a rape, see Doe v. Westfall Health Care Ctr., Inc., 303 A.D.2d 102, 755 N.Y.S.2d 769 (2002) (grandparents who adopted child could not recover cost of raising child from caretaker whose staff member raped vegetative patient).

Add new text and footnote following first paragraph of section:

The three kinds of claims are usually labeled differently, although some authority discards the labels, emphasizing that the claim is merely a negligence claim subject to the ordinary negligence rules.[0.05] The labels are used here for convenience in identifying the various claims.

0.05. Bader v. Johnson, 732 N.E.2d 1212 (Ind. 2000).

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Add at end of Note 1:

1. ... Kassama v. Magat, 368 Md. 113, 792 A.2d 1102 (2002) ("an impaired life is *not* worse than non-life, and, for that reason, life is not, and cannot be, an injury").

Add at end of Note 3:

3. ... In Johnson v. Superior Court, 101 Cal.App.4th 869, 124 Cal.Rptr.2d 650 (2002), the defendants allegedly supplied defective sperm for artificial insemination knowing that the donor's family had a history of polycystic kidney disease likely to be inherited. Brittany, the child born of this arrangement, suffered the disease as a result. In her suit against these suppliers, the court held that she could not recover for emotional distress because this was essentially a wrongful life claim. Although California recognizes wrongful life claims, it does not permit damages awards in those claims for emotional distress. The plaintiffs argued that defendants *caused* the harm by supplying defective sperm; but the parents' only choice would be that the sperm would

not be used, in which case Brittany would not have been born; that makes this a wrongful life claim, subject to the damages limit.

Add new footnote at end of last sentence in second full paragraph as follows:

. . . since the recovery will be in the child's name and some formal supervision of the recovery may be required.[4.05]

4.05. See Moscatello v. University of Med. & Dentistry of N.J., 342 N.J.Super. 351, 776 A.2d 874 (2001) (emphasizing the formalities of guardianship).

Add new footnote in second sentence of "Wrongful birth" paragraph as follows:

. . . The mother typically claims that, but for the defendant's negligence in testing[4.10] or counseling. . . .

4.10. Galvez v. Frields, 88 Cal.App.4th 1410, 107 Cal.Rptr.2d 50 (2001) (negligence may be established by application of the negligence per se rule when defendant fails to order a screening test required by regulation).

Replace period with comma in text at footnote 7 and add new text and footnote as follows:

. . . have allowed some kind of recovery in these cases,[7] although a claim by siblings of the genetically damaged child has been rejected.[7.05]

7. [As in Main Volume.]

7.05. Moscatello v. University of Med. & Dentistry of N.J., 342 N.J.Super. 351, 776 A.2d 874 (2001) ("the significance of the wrongful-life and birth case is that the defendant's breach of duty deprived the mother of the choice to terminate her pregnancy," and the duty did not extend to others who had no right of choice).

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Add at beginning of Note 10:

10. Grubbs v. Barbourville Family Health Ctr., P.S.C., 120 S.W.3d 682 (Ky. 2003) (involving pregnancies of 22 and 24 weeks at the time information about fetal condition was acquired; although rejecting the tort action for lack of injury, the court approved a breach of contract action against physicians who breach contract obligations to diagnose and report correctly);. . . .

Revise first sentence of "Wrongful conception or pregnancy" paragraph and add new footnotes to read in part as follows:

The claim for wrongful pregnancy or conception typically asserts that the defendant physician was negligent in giving genetic advice[13.05] or in performing a medical procedure to prevent conception[13.10]. . . .

13.05. E.g., Didato v. Strehler, 262 Va. 617, 554 S.E.2d 42 (2001) (alleged failure to advise parents after first child that future children would likely suffer serious genetic harm); McAllister v. Ha, 347 N.C. 638, 496 S.E.2d 577 (1998).

13.10. E.g., Chaffee v. Seslar, 786 N.E.2d 705 (Ind. 2003).

§ 292. Limiting the Wrongful Birth and Pregnancy Claims by Special Damages Rules

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Add at end of Note 10:

10. ... Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., 155 Ohio App.3d 640, 802 N.E.2d 723 (2003) (denying mother's emotional distress damages on the ground that to permit such a recovery would entail weighing the value of life versus the value of no life, a process forbidden by the decisions against wrongful life claims).

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Add in Note 14 following Cockrum citation:

14. ... Chaffee v. Seslar, 786 N.E.2d 705 (Ind. 2003);....

Add at end of Note 18:

18. ... In Burns v. Hanson, 249 Conn. 809, 734 A.2d 964 (1999), the court adhered to its ruling in *Ochs,* supra, saying there was no distinction between negligent sterilization procedures and negligent advise to a patient that she was infertile or negligent failure to diagnose a pregnancy in time to permit abortion. The court also noted that damages would remain the same whether the plaintiff's reason for wanting to avoid pregnancy was based on economics or on her own health needs.

†