

2021

Prenatal Tort Slippage

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Mark Strasser, *Prenatal Tort Slippage*, 31 Health Matrix 221 ()

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PRENATAL TORT SLIPPAGE

Mark Strasser[†]

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INTRODUCTION

States differ about whether to recognize wrongful pregnancy, wrongful birth, and wrongful life, some recognizing none of these prenatal torts, others recognizing only one or two, while still others recognizing all three. Even if two states recognize one of these torts, those states may differ about the kinds of damages recoverable by a plaintiff bringing that cause of action.¹ These differences notwithstanding, the states as a general matter agree about how to distinguish the prenatal torts from other kinds of torts involving prebirth medical negligence.² Regrettably, some courts have lost sight of what distinguishes these prenatal torts from other torts involving medical negligence, which may have important implications both for these prenatal torts in particular and for tort law more generally.

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1. See *infra* notes 30–33 (noting differences among states with respect to compensable damages for wrongful pregnancy).
2. See *infra* notes 11–17 and accompanying text (distinguishing between the more general tort where a physician is sued because of negligence resulting in a harmful condition or resulting in the loss of an opportunity to correct a particular impairment and a prenatal tort where the negligence results in the loss of an opportunity to abort or to avoid conception in the first place).

Part I discusses the prenatal tort jurisprudence, discussing some of the differences among the states with respect to whether the causes of action will be recognized and which kinds of damages are recoverable. Part II discusses other kinds of prebirth medical negligence and why it is important not to conflate these different kinds of cases. The article concludes that conflation of these different kinds of torts will have regrettable consequences both for individual families and for tort jurisprudence more generally, and that courts must not only be careful not to confuse these different kinds of claims but must also correct some of the mistakes that have already been made.

I. THE PRENATAL TORTS

Jurisdictions vary both with respect to how particular prenatal torts are defined and to which prenatal torts will be recognized. Nonetheless, certain elements of these torts are almost universally recognized and, further, have played an important role in determining which damages, if any, will be recoverable. Understanding these commonalities and the roles they play will not only help clarify the jurisprudence but will also help prevent limitations on damages in ways that would adversely impact even more families in an ever-increasing number of contexts.

A. *Wrongful Birth*

Many states recognize wrongful birth claims.³ As the Iowa Supreme Court explained, “In a wrongful-birth action, parents of a child born with a detectable birth defect allege that they would have avoided conception or terminated the pregnancy but for the physician’s negligent failure to inform them of the likelihood of the birth defect.”⁴ The medical professional did not cause the undesirable condition.⁵

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3. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 399 (Iowa 2017) (“A majority of states recognize wrongful-birth claims.”).
 4. *Id.* (citing *Keel v. Banach*, 624 So.2d 1022, 1024 (Ala. 1993)).
 5. *Willis v. Wu*, 607 S.E.2d 63, 67 (S.C. 2004) (“Wrongful . . . birth actions differ from a typical medical malpractice action because the negligent act or omission of the health care provider did not actually cause the impairment or defective condition.”); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 698 (Ill. 1987), *overruled on other grounds by Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065 (Ill. 2011). The court noted:

[T]he Siemieniecs do not assert that the defendants either caused Adam’s inherited genetic disorder or increased the risk that Adam, if born, would be afflicted with hemophilia. Rather, they allege that they were tortiously injured because Mrs. Siemieniec was deprived of the option of making an informed and meaningful decision either to abort the already existing and defective fetus . . . or to give birth to a potentially genetically defective child.

Rather, in this kind of case, there has been a “failure to diagnose or failure to advise the parents . . . so that the parents can make an informed decision about the risks of pregnancy and childbirth.”⁶

The Iowa Supreme Court explained the elements of a traditional case involving medical negligence to show why wrongful birth claims fit within that class of claims. “The traditional elements of a medical negligence action are (1) an applicable standard of care, (2) a violation of this standard, and (3) a causal relationship between the violation and injury sustained.”⁷ In wrongful birth cases, a medical professional allegedly acted negligently (i.e., failed to meet the applicable standard of care) and that negligence (which somehow involved a failure to accurately communicate important information in a timely way) resulted in the birth of a child who would not have been born but for that negligent failure to communicate.⁸

The Iowa court noted that in the more traditional torts there is no requirement that the alleged tortfeasor caused the disease or impairment in order for that individual to be liable. The court had “previously allowed patients to sue for a physician’s negligent failure to diagnose health problems the physician did not cause.”⁹

A negligent professional need not have caused a disease in order to be liable, at least in part, because the failure to diagnose in a timely way might cause a patient to lose the opportunity to be cured or to have the condition mitigated.¹⁰ In the more standard medical negligence

Id. *Provencio v. Wenrich*, 261 P.3d 1089, 1093 (N.M. 2011) (“[W]rongful birth . . . claims are unlike other, more traditional claims for pre-natal medical malpractice. In the more typical prenatal medical negligence case, it is the child or the child’s representative who asserts a claim for damages against a health-care provider, generally a doctor, for the child’s own injuries.”). *Cf.* Patricia Howlett, *Compensation for Drug Induced Fetal Deformities in Common and Civil Law Systems*, 2 *TOURO J. TRANSNAT’L L.* 243, 246 (1991) (“[O]ver a period of several years, certain specific deformities began to appear in children whose mothers took Bendectin: most notably deformities of the hands and feet, especially club foot.”).

6. *Provencio*, 261 P.3d at 1094.
7. *Plowman*, 896 N.W.2d at 401 (citing *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001)).
8. *See id.* at 399 (“In a wrongful-birth action, parents of a child born with a detectable birth defect allege that they would have avoided conception or terminated the pregnancy but for the physician’s negligent failure to inform them of the likelihood of the birth defect.”) (citing *Keel v. Banach*, 624 So.2d 1022, 1024 (Ala. 1993)).
9. *Id.* at 402.
10. *Cf.* *Sullins v. Univ. Hosp. of Cleveland*, 2003-Ohio-398, at § 10 (Ohio Ct. App.) (“He alleged that the combination of the nursing care and the consult delayed detection of and, therefore, the treatment for, tuberculosis until it was too late to be effective.”); *Greco v. United States*, 893 P.2d 345, 349 (Nev. 1995) (“Even though the physician did not cause the cancer, the physician can be held liable for damages resulting from

claim, the person with the affliction is suing because that person would have been better off if only the negligence had not occurred.

This more standard kind of medical negligence claim can arise in the context of a pregnancy. For example, a fetus negligently exposed to X-rays or dangerous substances might thereby be harmed.¹¹ Or, a failure to diagnose a fetal condition might result in the fetus not undergoing treatment in utero that would have prevented or corrected some of the negative effects associated with a particular condition or disease.¹² In the more standard case of medical negligence, the imagined comparator is what life would have been like for the child without the impairment attributable to the negligence.¹³ In wrongful birth cases, the imagined comparator (as far as the child is concerned) is in not having been born¹⁴ rather than in having lived without a particular affliction.¹⁵

the patient's decreased opportunity to fight the cancer, and for the more extensive pain, suffering and medical treatment the patient must undergo by reason of the negligent diagnosis.”).

11. See Caroline W. Jacobus, *Legislative Responses to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 WOMEN'S RTS. L. REP. 153, 192 (1995) (discussing “potential harm to the pregnancy from exposure to chemical substances or radiation”).
12. See Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 330 (2003). Pollard explained:

It is now sometimes the case that early detection of genetic defects provides an opportunity for the mother and/or fetus to undergo medical treatment to prevent the defect's manifestation at birth. In these cases, the claim is not that life itself was wrongful but rather that but for the doctor's negligent failure to detect the defect, medical intervention could have minimized or could have prevented the defect from manifesting at birth.

Id.

13. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 698 (Ill. 1987), *overruled on other grounds by Clark v. Children's Mem'l Hosp.*, 955 N.E.2d 1065 (Ill. 2011) (“In an ordinary prenatal-injury case, if the defendant had not been negligent, then the child would have been born healthy.” (citing *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250 (Ill. 1977))).
14. For a discussion of the claim that it would have been better for a particular child never to have lived at all than to have lived with a particular condition, see *infra* notes 52–65 and accompanying text (discussing wrongful life claims).
15. *Provencio v. Wenrich*, 261 P.3d 1089, 1093–94 (N.M. 2011) (“At the other end of the negligence spectrum is wrongful birth In jurisdictions recognizing these claims, wrongful birth is generally brought ‘by the parents of a child born with birth defects alleging that due to negligent medical advice or testing they were precluded from making an informed decision about whether to conceive a potentially handicapped child, or, in the event of pregnancy, to terminate it.’”).

In many wrongful birth cases, the parents lost the chance to abort,¹⁶ and the focus of the wrongful birth action is the harm done to the parent for having been deprived of the opportunity to avoid having the child with the serious affliction.¹⁷ To be successful in a wrongful birth action, the parent must assert that if informed of the relevant information in a timely way, the parent either would have aborted the pregnancy or, perhaps, would not have conceived in the first place.¹⁸ Unless willing to make one of those assertions, the parent will be unable to establish that the negligent failure to provide accurate information in a timely way was causally responsible for the birth of the child.¹⁹

Even if causation can be established, the parent in addition must establish harm.²⁰ Regrettably, some courts have been confused about the proper comparator in the wrongful birth context. For example, the Florida Supreme Court reasoned that “[i]n the context of wrongful birth, this means the situation that would have existed had the child actually been born in the state of health parents were led to believe would occur. Damages are not gauged against the state of affairs that would have existed had the child never been born, because parents always assume the costs of healthy children born to them, even if unplanned.”²¹ But if the negligence was in failing to provide in a timely way the information that would have led to the parent’s not having the child,²² then the harm attributable to the medical professional is in

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16. *Willis v. Wu*, 607 S.E.2d 63, 66 (S.C. 2004) (“The parent alleges that the negligence of those charged with prenatal testing or genetic counseling deprived them of the right to make a timely decision regarding whether to terminate a pregnancy because of the likelihood their child would be born physically or mentally impaired.”).
 17. *Provencio*, 261 P.3d at 1094 (“Wrongful birth is appropriately characterized as a claim-based failure to diagnose or failure to advise the parents. The duty owed is part of the doctor’s obligation to provide adequate care so that the parents can make an informed decision about the risks of pregnancy and childbirth; adequate care includes adequate notice.”).
 18. See Sofia Yakren, “*Wrongful Birth*” *Claims and the Paradox of Parenting a Child with a Disability*, 87 *FORDHAM L. REV.* 583, 590 (2018) (discussing “the need for a mother to testify that she would have aborted her child”).
 19. *Cf. Wilson v. Kuenzi*, 751 S.W.2d 741, 745–46 (Mo. 1988) (“In the wrongful birth action, the right to recovery is based solely on the woman testifying, long after the fact and when it is in her financial interest to do so, that she would have chosen to abort if the physician had but told her of the amniocentesis test.”).
 20. *Kush v. Lloyd*, 616 So. 2d 415, 424 (Fla. 1992) (“[T]he central policy of all tort law is to place a person in a position nearly equivalent to what would have existed had the defendants’ conduct not breached a duty owed to plaintiffs, thereby causing injury.”).
 21. *Id.*
 22. *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993). The court reasoned:

having deprived the parents of the opportunity not to live with the child with the disability at issue. There was never a possibility that the parents would have a child who was born without the affliction, so it is difficult to see why the damages should be construed as if that had been a possibility.²³

Jurisdictions recognizing wrongful birth actions tend to permit the parents to recover the extraordinary costs of raising their child.²⁴ As a general matter, those asserting a wrongful birth claim had been hoping to have a child, albeit without a debilitating condition. In contrast, a parent suing because of a negligently performed sterilization had been hoping not to have more or any children at all.²⁵ The parent bringing the latter suit is bringing a wrongful pregnancy claim.

The nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant's negligence was the proximate cause of the parents' being deprived of the option of avoiding a conception or, in the case of pregnancy, making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child.

Id.

23. *Cf.* Jillian T. Stein, *Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims*, 40 SETON HALL L. REV. 1117, 1130 (2010). Stein explained:

In wrongful birth and wrongful life suits, the doctor's negligence led to the *birth* of a disabled child—a child that allegedly would not have been born at all if the doctor had properly warned the parents. This is quite distinguishable from the prenatal-injury tort where the doctor's negligence causes the fetus to suffer some harm *in utero*—but for the doctor's negligence, the child would have been born 'with a sound mind and body.'

Id.

24. *See, e.g.*, *Garrison v. Med. Ctr. of Del. Inc.*, 581 A.2d 288, 292 (Del. 1989) ("We hold that the parents may be able to recover damages to the extent the extraordinary expenses of caring for, maintaining and educating the child exceed the usual costs of raising an unimpaired child."); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1208 (Colo. 1989). The court held:

[T]he Liningers' complaint sufficiently states a cause of action upon which relief may be granted, and they are entitled to prove and to recover at least the extraordinary medical and education expenses they have incurred, and will incur, in raising Pierce, if they are able to establish that those expenses were proximately caused by defendants' negligence.

Id.

25. *See Etkind v. Suarez*, 519 S.E.2d 210, 213 (Ga. 1999) (making this distinction).

B. Wrongful Pregnancy

A wrongful pregnancy or wrongful conception claim is predicated on a medical professional's having been negligent when providing sterilization or abortion services or, perhaps, on a manufacturer's having provided a faulty contraceptive prescription or device.²⁶ Typically, in these kinds of cases, the child is born healthy²⁷ but the parents claim to have been harmed, e.g., because they cannot afford to raise another child.²⁸

Jurisdictions recognizing this cause of action²⁹ differ about the kinds of damages that are recoverable.³⁰ The Indiana Supreme Court

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26. *Willis v. Wu*, 607 S.E.2d 63, 66 (S.C. 2004) (internal citation omitted). A "wrongful pregnancy" or "wrongful contraception" action is brought by the parent of a healthy but unplanned child, seeking damages from a health care provider who allegedly was negligent in performing a sterilization procedure or abortion, or from a pharmacist or pharmaceutical manufacturer who allegedly was negligent in dispensing or manufacturing a contraceptive prescription or device.
27. *See Kassama v. Magat*, 792 A.2d 1102, 1115 (Md. 2002) (suggesting that such an action is "brought by 'parents of a normal but unplanned child [seeking] damages either from a physician who allegedly was negligent in performing a sterilization procedure or abortion, or from a pharmacist or pharmaceutical manufacturer who allegedly was negligent in dispensing or manufacturing a contraceptive prescription or device.'" (citing *Walker v. Pizano v. Mart*, 790 P.2d 735, 737 (Ariz. 1990)).
28. *See Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 612 (N.M. 1991) ("[T]he Mendezes' interest in the financial security of their family was a legally protected interest which was invaded by Lovelace's negligent failure properly to perform Maria's sterilization operation (if proved at trial).")
29. *See Kimberly D. Wilcoxon, Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation*, 69 U. CIN. L. REV. 1023, 1031 (2001) ("Thirty-five states recognize wrongful conception.").
30. *See, e.g., Arche v. U.S. Dep't of Army*, 798 P.2d 477, 478 (Kan. 1990) ("The majority of states addressing the question, including Kansas, have recognized a cause of action for limited damages for wrongful pregnancy."); *M.A. v. United States*, 951 P.2d 851, 852 (Alaska 1998). The court noted [referring to Keel]:

We conclude that negligent failure to diagnose a pregnancy gives rise to a cause of action for medical malpractice and is compensable to the extent that damages are ordinarily allowable in medical malpractice cases, but that no recovery may be awarded for expenses of rearing a healthy child born as a result of the misdiagnosis.

Id. *Emerson v. Magendantz*, 689 A.2d 409, 412 (R.I. 1997). The court explained:

Under the limited-recovery rule the foregoing jurisdictions frequently grant compensation to the plaintiffs for the medical expenses of the ineffective sterilization procedure, for the medical and hospital costs of the pregnancy, for the expense of a subsequent sterilization procedure, for loss of wages, and

explained that “parents of healthy children born after an unsuccessful sterilization procedure involving medical negligence are entitled to pregnancy and childbearing expenses, but not child-rearing expenses.”³¹ The court suggested that this limitation on damages was justified because “the value of a child’s life to the parents outweighs the associated pecuniary burdens as a matter of law.”³² A few jurisdictions are unwilling to impose this limitation on damages, instead permitting parents to recover childrearing expenses in addition to pregnancy and childbearing expenses.³³

Often, courts list several factors when characterizing what distinguishes wrongful birth cases from wrongful pregnancy/conception cases. But such an approach makes classification difficult if a case involves one or more factors normally associated with one tort *and* one or more factors normally associated with a different tort. For example, a child born after a negligently performed sterilization may have a severe impairment, and courts must decide whether such a case should be analyzed in light of the wrongful pregnancy jurisprudence (because the parents had not wanted to have any more children at all) or the wrongful birth jurisprudence (because the parents now have a child with a possibly serious affliction who would not have been born but for the medical professional’s negligence).

In *Williams v. University of Chicago Hospitals*, Alice Williams sought damages after never having been told that her tubal ligation had been unsuccessful.³⁴ She later became pregnant and gave birth to a child.³⁵ Because her son had “attention deficit hyperactivity disorder and [would] require psychological treatment and special educational

sometimes for emotional distress arising out of the unwanted pregnancy and loss of consortium to the spouse arising out of the unwanted pregnancy. They also generally include medical expenses for prenatal care, delivery, and postnatal care.

Id. Tatiana Elizabeth Posada, Note, *Whose Sperm Is It Anyways in the Wild, Wild West of the Fertility Industry?*, 34 GA. ST. U. L. REV. 847, 854 (2018) (“Where wrongful conception is recognized, damages usually include the mother’s medical expenses and ‘emotional distress damages associated with pregnancy and childbirth,’ but most courts have declined to expand ‘such damages to the costs of raising the unexpected child to adulthood.’”).

31. *Chaffee v. Seslar*, 786 N.E.2d 705, 708 (Ind. 2003).
32. *Id.*
33. *See Marciniak v. Lundborg*, 450 N.W.2d 243, 245 (Wis. 1990); *See also Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990); *Mendez*, 805 P.2d at 603.
34. *Williams v. Univ. of Chi. Hosp.*, 688 N.E.2d 130, 131 (Ill. 1997).
35. *Id.* at 132 (“Mrs. Williams learned in May 1991 that she was pregnant, however, and she gave birth in October 1991 to the child who is the subject of the instant appeal, Emmanuel.”).

training in the years ahead,”³⁶ she sought “recovery of those extraordinary expenses.”³⁷ The Illinois Supreme Court refused to allow recovery of those damages, reasoning that the parents could not “establish that the defendant’s conduct was a proximate cause of their injury, for under the allegations in this case the . . . injury cannot be said to be of such a character that an ordinarily prudent person should have foreseen it as a likely consequence of the alleged negligence.”³⁸ Allegedly, there was no allegation of “any act or omission by the defendants [that] caused the child’s condition”³⁹ nor “that the defendants knew of the possibility that a child conceived in the wake of a failed operation would suffer from a particular defect”⁴⁰ nor “even that the parents were seeking to avoid a specific risk and that the defendants were aware of that.”⁴¹ Yet, there is reason to doubt the court’s analysis of the facts—the patient’s medical history included that she had already had a child with certain difficulties,⁴² so the medical professionals would have been on notice that an additional child might have similar difficulties, assuming that those difficulties were due to a genetic condition.⁴³ In any event, the court rejected that the child’s condition was sufficiently foreseeable to justify the imposition of liability for extraordinary childrearing damages.⁴⁴

Courts focusing on whether the medical professional was on notice about the foreseeability of a particular condition might consider what the parents revealed about their motivations for seeking a sterilization.⁴⁵

36. *Id.*

37. *Id.*

38. *Id.* at 134.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 131 (citation omitted) (“[H]er medical history included a possible ectopic pregnancy in 1979, a stillborn child in 1982, a premature birth in 1984, and ‘at least one hyperactive and learning disabled child.’”).

43. *See id.* (“The plaintiffs allege that the child has attention deficit hyperactivity disorder, a congenital condition.”).

44. *Id.* at 134 (“[W]e do not believe that proximate cause can be established in the absence of allegations forging a closer link between the defendant’s negligence and the eventual birth of the defective child.”).

45. *Emerson v. Magendantz*, 689 A.2d 409, 414 (R.I. 1997). The court explained:

[W]hen a physician is placed on notice, in performing a sterilization procedure, that the parents have a reasonable expectation of giving birth to a physically or a mentally handicapped child or if the physician should be placed on notice, by reason of statistical information of which he/she is or should be aware in the practice of his/her profession, then the entire cost

For example, when analyzing which damages were recoverable in a case involving a negligently performed sterilization, the Supreme Judicial Court of Massachusetts reasoned that the recovery of childrearing expenses (minus the value of the benefits received by the parents' having had the child⁴⁶) was permitted where the parents sought the sterilization for financial reasons.⁴⁷ However, parents who sought the sterilization for eugenic reasons would not be entitled to childrearing expenses,⁴⁸ even though such parents might have worried about *both* the financial *and* the psychological costs associated with their child having a feared condition.⁴⁹

Both wrongful birth and wrongful pregnancy actions are brought by the parent on her own behalf.⁵⁰ In both kinds of cases, it is alleged that but for a medical professional's negligence, the parent's child would not have lived either because the child would never have been conceived or because the pregnancy would have been aborted.⁵¹ Similarly, in a

of raising such a child would be within the ambit of recoverable damages.

Id.

46. *Burke v. Rivo*, 551 N.E.2d 1, 6 (Mass. 1990) ("In such a situation, the trier of fact should offset against the cost of rearing the child the benefit, if any, the parents receive and will receive from having their child.").
47. *Id.* ("[P]arents may recover the cost of rearing a normal, healthy but (at least initially) unwanted child if their reason for seeking sterilization was founded on economic or financial considerations.").
48. *Id.* at 5 ("If the parents' desire to avoid the birth of a child was founded on eugenic reasons (avoidance of a feared genetic defect) . . . , the justification for allowing recovery of the costs of rearing a normal child to maturity is far less.").
49. James N. Zartman, *Discretionary Trusts for Disabled Beneficiaries*, 81 ILL. B.J. 516, 517 (1993) ("The costs, both psychological and financial, for the family of a child who suffers serious mental illness or developmental disability are enormous.").
50. *Willis v. Wu*, 607 S.E.2d 63, 66 (S.C. 2004) ("A 'wrongful birth' action is brought by the parent of a child born with an impairment or birth defect."); *id.* ("A 'wrongful pregnancy' or 'wrongful contraception' action is brought by the parent of a healthy but unplanned child[.]").
51. *Keel v. Banach*, 624 So. 2d 1022, 1024 (Ala. 1993). The court offered the following clarification:

[A] "wrongful birth action" refers to a claim for relief by parents who allege they would have avoided conception or would have terminated the pregnancy 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.

Id. *Williams v. Univ. of Chi. Hosp.*, 688 N.E.2d 130, 132 (Ill. 1997) (internal citations omitted). The court explained:

wrongful life action, the plaintiff argues that but for the medical professional's negligence, the child would never have been born.⁵² However, the wrongful life case is dissimilar from the wrongful birth or wrongful pregnancy claim in that a wrongful life action is brought by or on behalf of the child herself.⁵³

C. Wrongful Life

A child bringing a wrongful life claim argues that she or he would have been better off never having lived than having lived with her or his debilitating conditions. While the devastating conditions were not caused by the medical professional, the professional's failure to inform the child's parents in a timely way resulted in the child being born and forced to endure great hardship.⁵⁴ Very few states recognize wrongful life actions.⁵⁵

Many states refuse to recognize wrongful life actions regardless of the child's condition. For example, the Colorado Supreme Court

An action for "wrongful pregnancy" or, as it has also been termed, "wrongful conception"—the action involved here—may be brought by parents following a negligently performed sterilization procedure. In an action for wrongful pregnancy, the parents seek to recover compensation for the expenses of the pregnancy they sought to avoid.

Id.

52. *Willis*, 607 S.E.2d at 66. The child alleges, because of the defendant's negligence, his parents either decided to conceive him ignorant of the risk of an impairment or birth defect, or were deprived of information during gestation that would have prompted them to terminate the pregnancy. The child alleges, but for the defendant's negligence, he would not have been born.

53. *Id.* ("A 'wrongful life' action is brought by or on behalf of the child himself.").

54. *Id.* The court explained:

The child alleges, because of the defendant's negligence, his parents either decided to conceive him ignorant of the risk of an impairment or birth defect, or were deprived of information during gestation that would have prompted them to terminate the pregnancy. The child alleges, but for the defendant's negligence, he would not have been born. The birth defect or impairment itself occurred naturally, i.e., it was not directly caused by an act or omission of the defendant health care provider.

Id.

55. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv. C.R.- C.L. L. Rev. 141, 162 (2005) ("United States courts and legislatures have almost universally refused to recognize wrongful life actions."); Michael B. Laudor, *In Defense of Wrongful Life: Bringing Political Theory to the Defense of a Tort*, 62 *FORDHAM L. REV.* 1675, 1688 (1994) ("Only California, New Jersey, and Washington recognize wrongful life as a cause of action.").

suggested that an individual's "life, however impaired and regardless of any attendant expenses, cannot rationally be said to be a detriment to him when measured against the alternative of his not having existed at all."⁵⁶ The Maryland Court of Special Appeals offered a different reason—"it is an impossible task to calculate damages based on a comparison between life in an impaired state and no life at all."⁵⁷ The Missouri Supreme Court offered yet another reason:

The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. In addition it is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's handicap is an inexorable result of conception and birth.⁵⁸

Whether the reason for barring the cause of action is because the preferability of non-life to a life with severe disabilities "is a mystery more properly to be left to the philosophers and the theologians"⁵⁹ or because "the physician did not actually cause the congenital impairment or defect,"⁶⁰ many jurisdictions treat such claims as noncognizable. Parents in such jurisdictions will be barred from

56. *Linger v. Eisenbaum*, 764 P.2d 1202, 1212 (Colo. 1899).

57. *Kassama v. Magat*, 767 A.2d 348, 369 (Md. Spec. App. 2001), *aff'd*, 792 A.2d 1102 (Md. 2002). *See also* *Hester v. Dwivedi*, 733 N.E.2d 1161, 1166 (Ohio 2000) ("Judges and jurors are no more able to judge the value of a life with disabilities versus nonbeing than they are able to judge the value of life in a 'normal' condition (however that might be defined) versus nonbeing."); *see also* *Garrison v. Med. Ctr. of Del. Inc.*, 581 A.2d 288, 293 (Del. 1989) ("We adopt the view of many jurisdictions that have denied wrongful life claims due to the impossible task of identifying damages based on a comparison between life in the child's impaired state and nonexistence."); *Willis*, 607 S.E.2d at 69. The court summarized:

Most courts refusing to recognize a wrongful life action have done so primarily for two reasons. First, these courts reason being born is not a legally cognizable injury, regardless of the severity of the defective condition afflicting the infant or child. Such courts believe it is asking too much to expect any court or jury to weigh the fact of being born with a defective condition against the fact of not being born at all, i.e., non-existence. Therefore, it is legally and logically impossible to calculate damages allegedly suffered by the child.

Id.

58. *Wilson v. Kuenzi*, 751 S.W.2d 741, 744-45 (Mo. 1988).

59. *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978).

60. *Willis*, 607 S.E.2d at 70.

receiving proceeds from a wrongful life action to help pay for the services their desperately handicapped child needs.

Consider a state that recognizes wrongful life actions. A plaintiff bringing such an action in that jurisdiction must establish that his or her particular condition is sufficiently burdensome to fall within the limited class of conditions providing the basis for such a claim. Many individuals might wish that they were taller⁶¹ or shorter⁶² or more beautiful (however defined),⁶³ but dissatisfaction with one's appearance or athletic prowess will not suffice to establish that it would have been better never to have lived at all.⁶⁴ Rather, the plaintiff will have to establish that his or her existence was so unbearable that it would have been better never to have existed.⁶⁵

Even if the courts have not barred wrongful life claims as a matter of public policy,⁶⁶ there might still be other stumbling blocks to the recognition of such a cause of action. A state might as a matter of public policy view with a jaundiced eye⁶⁷ any birth-related causes of

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61. M. Dittman, *Standing Tall Pays Off, Study Finds*, AM. PSYCH. ASS'N (July-Aug. 2004), <https://www.apa.org/monitor/julaug04/standing> [<https://perma.cc/QPM9-29Y4>] (“When it comes to height, every inch counts—in fact, in the workplace, each inch above average may be worth \$789 more per year, according to a study in the *Journal of Applied Psychology* (Vol. 89, No. 3).”).
 62. Nicola Davis, *Tall People at Greater Risk of Cancer ‘Because They Have More Cells,’* THE GUARDIAN, (Oct. 23, 2018), <https://www.theguardian.com/science/2018/oct/24/tall-people-at-greater-risk-of-cancer-because-they-have-more-cells> [<https://perma.cc/57Q3-NTNE>] (“Taller people have a greater risk of cancer because they are bigger and so have more cells in their bodies in which dangerous mutations can occur, new research has suggested.”).
 63. See Joss Fong, *The Economic Benefits of Being Beautiful*, VOX (July 16, 2014, 1:30 PM), <https://www.vox.com/2014/7/16/5905533/the-benefits-of-beauty> [<https://perma.cc/8UH3-N9HC>] (“Researchers from the fields of psychology, sociology and economics have repeatedly found that attractive people benefit from widespread biases that can translate into big bucks over the course of a lifetime.”).
 64. See *Turpin v. Sortini*, 643 P.2d 954, 962 (Cal. 1982) (“In this case, in which the plaintiff’s only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all.”).
 65. See I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1208 (2012) (“A life not worth living is a life so full of pain and suffering, and so devoid of anything good, that the individual would prefer never to have come into existence.”).
 66. Hensel, *supra* note 55, at 143–44.
 67. Cf. Dennis A. Rendleman, *Pogo Professionalism: A Call for A Commission on Truth and Professionalism*, 2012 J. PROF. LAW. 181, 194 (2012) (“Many states continue to view lawyer advertising with a very jaundiced eye.”); *see e.g.* William H. Lewis Jr. & Hunter L. Prillaman, *Reasonably Available Control Technology under the Clean Air*

action that provide damages in cases in which an individual has been precluded from exercising her abortion rights.

D. Abortion

Abortion remains a constitutional right protected under the right to privacy.⁶⁸ Nonetheless, states have very different approaches to the role that the right to abortion should play in prenatal tort jurisprudence.

Consider the plaintiff's duty of mitigation.⁶⁹ It might seem that a plaintiff seeking damages for a prenatal tort would have a duty to mitigate damages by seeking an abortion or, perhaps, putting her child up for adoption.⁷⁰ However, courts as a general matter have rejected that the duty to mitigate includes the duty to seek an abortion, because the duty to mitigate only requires that "reasonable" actions be taken.⁷¹

Act: is EPA Following its Statutory Mandate? 16 HARV ENVTL. L. REV. 343, 357 (1992) ("[T]he existence of the presumptive norm derived from the CTGs [Control Technique Guidelines] encourages states to view requests for a deviation with a jaundiced eye . . .").

68. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) ("[T]he right to abortion has been described in our opinions as one element of a more general right of privacy" (citing *Roe v. Wade*, 410 U.S. 113, 152–153 (1973))).
69. Adi Yucht, *The Plasticity of the Body, the Injury, and the Claim: Personal Injury Claims in the Era of Plastic Surgeries*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 353, 372 (2019) ("A basic principle in tort law is that the plaintiff does not deserve compensation for damages which she or he could have prevented, and that a duty to mitigate damages is imposed on him or her.").
70. See *Girdley v. Coats*, 825 S.W.2d 295, 297 (Mo. 1992) (en banc), ("In the case of a pregnancy caused by a negligent sterilization procedure, either adoption or abortion would clearly mitigate the expense of raising the child. These options illustrate the difficulty in applying strict tort principles to damages from wrongful conception.").
71. *Marciniak v. Lundborg*, 450 N.W.2d 243, 247 (Wis. 1990) ("We do not agree that the refusal of the Marciniaks to abort the unplanned child or give it up for adoption should be considered as a failure of the parents to mitigate their damages. The rules requiring mitigation of damages require only that reasonable measures be taken."); *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1377 (Ohio 1989) ("[I]n a 'wrongful pregnancy' action, the mother need not mitigate damages by abortion or adoption since a tort victim has no duty to make unreasonable efforts to diminish or avoid prospective damages."); *Sorkin v. Lee*, 434 N.Y.S.2d 300, 301 (App. Div. 1980) ("On the facts of this case, however, abortion was a legitimate medical option. Plaintiffs were free to elect it or not, but their decision should not affect defendant potential liability."); *Morris v. Frudenberg*, 185 Cal. Rptr. 76, 80 (Cal. Ct. App. 1982) ("[I]n a case of 'wrongful birth,' such as the case at bench, a mother, married, or unmarried, cannot be required, under the legal doctrine that a plaintiff take reasonable measures to mitigate damages, to undergo an abortion or place her unwanted child for adoption.").

That said, one court has suggested that whether an abortion would be reasonable might “rest on a number of factors, including the stage to which pregnancy has progressed, the health and condition of the woman at that time and the professional judgment and counsel received.”⁷²

Abortion has played an important role within the prenatal tort jurisprudence in another respect. Some states have barred recovery by statute if the plaintiff is basing her claim on her having been wrongfully denied the opportunity to abort her pregnancy.⁷³ The headings or subheadings of these statutes sometimes expressly state that wrongful life or wrongful birth actions are prohibited.⁷⁴ But a closer look at the language of the statute itself may reveal that the legislature was trying to prohibit a particular kind of wrongful life or wrongful birth action, namely, one in which the plaintiff claims that she was harmed in that but for the defendant’s negligence, an abortion would have obtained and the child would never have been born. The difficulty pointed to here is that a wrongful birth (or wrongful life) action might also be

72. *Ziembra v. Sternberg*, 357 N.Y.S.2d 265, 269 (N.Y. App. Div. 1974).

73. *See* OKLA. STAT. ANN. TIT. 63, § 1-741.12(C) (2019) (“In a wrongful life action or a wrongful birth action, no damages may be recovered for any condition that existed at the time of a child’s birth if the claim is that the defendant’s act or omission contributed to the mother’s not having obtained an abortion”); KAN. STAT. ANN. § 60-1906(a) (2020). The statute reads:

No civil action may be commenced in any court for a claim of wrongful life or wrongful birth, and no damages may be recovered in any civil action for any physical condition of a minor that existed at the time of such minor’s birth if the damages sought arise out of a claim that a person’s action or omission contributed to such minor’s mother not obtaining an abortion.

Id. MINN. STAT. ANN. § 145.424, subdiv. 1-2 (West 2019). The statute states:

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

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.

Id. IDAHO CODE § 5-334(1) (2020) (“A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.”).

74. *See* MINN. STAT. ANN. § 145.424 (2) (“Wrongful birth action prohibited”); MINN. STAT. ANN. § 145.424 (1) (“Wrongful life action prohibited”); MO. REV. STAT. § 188.130 (1986) (“No cause of action for wrongful life”); KAN. STAT. ANN. § 60-1906 (“Wrongful life or wrongful birth claims; prohibited”); N.D. CENT. CODE ANN. § 32-03-43 (West) (“Wrongful life action prohibited”).

premised on a claim that but for the negligence of a professional, the plaintiff would never have gotten pregnant—the couple would never have conceived if the genetic counselor had correctly apprised them that they were both carriers of a particular disease.⁷⁵ Because wrongful life or wrongful birth actions might be predicated on the defendant’s alleged negligence having resulted in the conception of a child, a statute precluding damages where the alleged harm is in the lost opportunity to abort does not bar wrongful birth or wrongful life actions as a general matter but only bars a subset of them.

In *Molloy v. Meier*, the Minnesota Supreme Court emphasized that the Minnesota law at issue barred wrongful birth actions based on that claim that but for the medical professional’s negligence an abortion would have been secured.⁷⁶ Because the plaintiffs were instead claiming that their child would never have been conceived but for defendants’ negligent failure to diagnose a genetic disorder in a previous child,⁷⁷ the court characterized the suit as involving wrongful conception rather than wrongful birth and held that the statute did not bar the cause of action.⁷⁸

In Minnesota, plaintiffs bringing a cause of action for wrongful conception may be awarded the reasonable expenses of raising the child with an offset for the benefits that the parents have accrued by having the child.⁷⁹ Suppose, however, that another jurisdiction limits wrongful

75. See, e.g., *Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc.*, 117 A.3d 200, 207 (N.J. Super. Ct. App. Div. 2015), *aff’d*, *Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc.*, 147 A.3d 434 (N.J. 2016) (“In essence, plaintiffs contend that defendants each erred in the health care, genetic testing services, or genetic counseling they provided before the couple conceived their daughter upon a mistaken belief that the father was not a Tay-Sachs carrier.”).

76. *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004) (“The statute bars claims that but for the negligence, the pregnancy would have been aborted. Molloy makes no claim that she would have aborted M.M. if she had more accurate information about S.F.’s genetic condition.”).

77. *Id.* at 713. The court explained:

Kimberly Molloy (Molloy) and her husband, Glenn Molloy, brought a medical malpractice action against appellants Dr. Diane Meier, Dr. Reno Backus, and Dr. Kathryn Green, claiming they were negligent in failing to diagnose a genetic disorder in Molloy’s daughter and their negligence caused Molloy to conceive another child with the same genetic disorder.

Id.

78. *Id.* at 723 (“Molloy’s action is properly characterized as one for wrongful conception rather than wrongful birth.”).

79. *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 170–71 (Minn. 1977). The court explained:

We hold that in cases such as this an action for ‘wrongful conception’ may be maintained, and that

conception/pregnancy damages so that the extraordinary expenses associated with raising a child with severe impairments are not recoverable.⁸⁰ Suppose further that the parties anticipated and explained that they were seeking sterilization precisely because they feared that any child they produced would have a terrible disease. If the sterilization were negligently performed in this kind of case and their cause of action were characterized as a wrongful pregnancy case rather than a wrongful birth case, then they might not be able to recover the monies that they needed to adequately provide for their severely impaired child.

II. OTHER KINDS OF MEDICAL NEGLIGENCE IN THE PREBIRTH CONTEXT

The prenatal torts are predicated on a state's recognizing that a plaintiff might be worse off by virtue of a child having been born than that person would have been had the child never lived. In other kinds of cases, the plaintiff asserts that but for defendant's negligence, their child would have lived a better life. This difference is viewed by many courts and legislatures as important—it may affect what damages are recoverable or, perhaps, whether liability will be imposed at all. Regrettably, courts sometimes conflate these different types of tort actions, and plaintiffs are wrongly denied recovery.

A. *Distinguishing Among Torts*

Courts sometimes suggest that the prenatal torts are not really special causes of action but instead are simply shorthand ways of

compensatory damages may be recovered by the parents of the unplanned child. These damages may include all prenatal and postnatal medical expenses, the mother's pain and suffering during pregnancy and delivery, and loss of consortium. Additionally, the parents may recover the reasonable costs of rearing the unplanned child subject to offsetting the value of the child's aid, comfort, and society during the parents' life expectancy.

Id.

80. *See, e.g.,* *Simmerer v. Dabbas*, 733 N.E.2d 1169, 1171 (Ohio 2000). The court clarified in the following way:

The question raised by this case is whether damages associated with parenting a child born with a birth defect are recoverable in a wrongful pregnancy action stemming from a negligently performed sterilization procedure, when the doctor who performed the unsuccessful sterilization procedure could not have reasonably foreseen the birth defect. We hold that they are not.

Id.

describing a kind of medical negligence.⁸¹ Yet, in practice that is not how many courts and legislature are treating these causes of action, which is why it is important to understand and prevent the kinds of conflation that sometimes occur.

The Ohio Supreme Court suggested that “overreliance on terms such as ‘wrongful life’ or ‘wrongful birth’ creates the risk of confusion in applying principles of tort law to actual cases.”⁸² That confusion may arise because the terms are used in different ways in different jurisdictions,⁸³ for example, a particular set of facts might be treated as involving wrongful pregnancy in one jurisdiction⁸⁴ and wrongful birth in another.⁸⁵

When courts try to explain how the prenatal torts differ from other kinds of prebirth medical negligence, they often focus on the role played by the negligence. The South Carolina Supreme Court explained, “Wrongful life and wrongful birth actions differ from a typical medical malpractice action because the negligent act or omission of the health care provider did not actually cause the impairment or defective condition.”⁸⁶ The Indiana Supreme Court made a similar point when noting that the plaintiffs did “not claim that the negligence of Healthcare Providers ‘caused’ their child’s defects . . . [but] that Healthcare Providers’ negligence caused them to lose the ability to terminate the pregnancy and thereby avoid the costs associated with carrying and giving birth to a child with severe defects.”⁸⁷ By

81. *See* C.S. v. Nielson, 767 P.2d 504, 506 (Utah 1988) (“Courts essentially view wrongful pregnancy actions as indistinguishable from ordinary medical malpractice actions where a plaintiff alleges a physician’s breach of duty and injury resulting therefrom.”).

82. *Hester v. Dwivedi*, 733 N.E.2d 1161, 1163–64 (Ohio 2000).

83. *See* Willis v. Wu, 607 S.E.2d 63, 65 (S.C. 2004) (“The terms are used to describe a variety of cases arising under different factual circumstances, and courts have recognized the terms are somewhat misleading and not always used in a consistent manner.”).

84. *See generally* Molloy v. Meier, 679 N.W.2d 711 (Minn. 2004).

85. *See* Willis, 607 S.E.2d at 66 (“A ‘wrongful birth’ action is brought by the parent of a child born with an impairment or birth defect.”).

86. *Id.* at 67.

87. *Bader v. Johnson*, 732 N.E.2d 1212, 1219 (Ind. 2000) . *See also* *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993). The court explained:

The nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant’s negligence was the proximate cause of the parents’ being deprived of the option of avoiding a conception or, in the case of pregnancy, making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child.

Id.

emphasizing that nature (or the parents' genes) rather than the alleged tortfeasor had been responsible for the debilitating condition, courts have sometimes indicated their unwillingness to award damages when the tortfeasor was not causally responsible for the existence of the condition itself, even if causally responsible for the child not having been aborted and thus in some sense responsible for the child living in the world with the condition.⁸⁸

Several state legislatures have made clear that their refusal to permit wrongful birth or wrongful life actions does not preclude cases where the negligence resulted in harm such that the child's life would have been better but for the negligence. Idaho's barring causes of action predicated on having lost the opportunity to abort does "not preclude causes of action based on claims that, but for a wrongful act or omission, . . . disability, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual."⁸⁹

States so distinguishing implicitly claim that there is an important difference between the prenatal torts and other kinds of torts involving prebirth negligence. Parents can seek damages if their child's life is made worse by a medical professional's negligence but cannot seek damages if the negligence resulted in the child's birth,⁹⁰ even though in both cases the parents might need the support to relieve their child's suffering.

Some legislatures have a different concern in mind, namely, that medical professionals should not be liable for their prenatal torts based on negligence but may be held liable for their prenatal torts that are intentional or, perhaps, reckless.⁹¹ The Michigan Legislature enacted

88. *See, e.g.,* Grubbs *ex rel.* Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 689 (Ky. 2003) (as amended Aug. 27, 2003). The court recognized:

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.

Id. *See also* Empire Cas. Co. v. St. Paul Fire & Marine Ins. Co., 764 P.2d 1191, 1195 (Colo. 1988) ("In the usual wrongful life case, the defendant's negligence does not create the impaired condition, but it is a cause of the child's birth.").

89. CODE § 5-334(2) (2020); *see also* OKLA. STAT. ANN. TIT. 63, § 1-741.12(D) (2019), KAN. STAT. ANN. § 60-1906 (b) (West 2013), and ME. REV. STAT. ANN. tit. 24, § 2931 (4) (2020).

90. *See* IDAHO CODE § 5-334(2). *See also* OKLA. STAT. ANN. tit. 63, § 1-741.12(D); KAN. STAT. ANN. § 60-1906(B); ME. REV. STAT. ANN. tit. 24, § 2931(4).

91. MICH. COMP. LAWS § 600.2971 (4) (2020). The statute states:

such a law⁹² after a Michigan intermediate appellate court had held that the state did not permit wrongful birth actions.⁹³ Unsurprisingly, an important issue to resolve in cases implicating such a statute is whether the professional's wrongful act was merely negligent rather than reckless or intentional.⁹⁴

B. Which Kinds of Scenarios Should Not Fall within Prenatal Tort Jurisprudence?

There are a number of kinds of scenarios in which a defendant's negligence results in the birth of a child with severe handicaps.

The prohibition stated in subsection [precluding actions for wrongful birth, wrongful life, or wrongful conception/pregnancy] . . . applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition. The prohibition . . . does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code, 1931 PA 328, MCL 750.1 to 750.568.

Id. IOWA CODE § 613.15 B(3)(a)(b) (2020). The statute states:

[T]he prohibitions specified in this section shall not apply to any of the following: A civil action for damages for an intentional or grossly negligent act or omission, including any act or omission that constitutes a public offense. A civil action for damages for the intentional failure of a physician to comply with the duty imposed by licensure pursuant to chapter 148 to provide a patient with all information reasonably necessary to make decisions about a pregnancy.

Id. ARIZ. REV. STAT. ANN. § 12-719 (D) (2020) (“This section [precluding damages for wrongful life, wrongful birth or wrongful pregnancy/conception] does not apply to any civil action for damages for an intentional or grossly negligent act or omission, including an act or omission that violates a criminal law.”).

92. *See* *Wilson v. Mercy Hosp.*, 2003 WL 245823, at *1 (Mich. Ct. App. 2003) (“[P]laintiff cited M.C.L. § 600.2971, in which the Legislature codified the abolition of the wrongful birth cause of action with regard to ordinary negligence but indicated that a cause of action based on gross negligence was permissible.”). *See also* *Messenger v. Heos*, 2008 WL 5158901, at n.3 (Mich. Ct. App. 2008) (“The Legislature has since abolished claims for wrongful birth, wrongful life, and wrongful conception, except in cases involving an intentional or grossly negligent act or omission. MCL 600.2971. Though not mentioned by counsel, the general effective date for the legislation was March 28, 2001.”).
93. *Taylor v. Kurapati*, 600 N.W.2d 670, 673 (Mich. Ct. App. 1999) (“[T]his case revolves around the wrongful birth tort. In this opinion, we address the basic question whether, absent legislative action, such a tort has a rightful place in our jurisprudence. We conclude that it does not.”).
94. *See Cichewicz v. Salesin*, 854 N.W.2d 901, 904 (Mich. Ct. App. 2014) (discussing whether a physician inaccurately telling a patient that “her fallopian tubes were blocked and, therefore, it was no longer necessary for her to use contraceptives” was negligent rather than reckless behavior).

Sometimes, the negligence is in the failure to give or interpret tests, and sometimes in the failure to communicate test results in a timely way. These kinds of negligence are paradigmatic prenatal tort cases because the medical professional neither does anything to bring about the existence of the handicap nor does anything to prevent the correction or amelioration of the condition.⁹⁵ Instead, the professional fails to communicate to the parent important, time-sensitive information that would have affected her decision to conceive or to carry a pregnancy to term.⁹⁶

Other kinds of negligence play a different causal role in the process by which a child is born into the world with a disability. Suppose that a pregnant woman is negligently exposed to X-rays⁹⁷ or to a drug⁹⁸ that negatively impacts the developing fetus. The child later has the difficulties associated with that harmful exposure.⁹⁹ In this kind of case, the fetus is alive at the time of exposure and the harm may manifest after birth.¹⁰⁰ When the child (or a next friend) sues for damages, the claim is that but for the alleged negligence, the child would have lived his or her life without the debilitating condition resulting from the exposure to the harmful substance. In these kinds of cases, the focus is not on the particular mechanism by which the tortfeasor's negligence

95. *See, e.g.*, *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 409 (Iowa 2017).

96. *See, e.g., id.* at 399.

97. *See, e.g.*, *Complete Family Care v. Sprinkle*, 638 So. 2d 774 (Ala. 1994) (malpractice case involving negligent exposure to X-rays during pregnancy).

98. *See, e.g.*, *Bichler v. Eli Lilly & Co.*, 436 N.E.2d 182, 184 (N.Y. 1982) (“[P]laintiff alleged that her 1953 prenatal exposure to DES, ingested by her mother while pregnant with plaintiff, was the proximate cause of the cancer that developed 17 years after her birth in 1954.”).

99. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. 1984) (en banc) (“In 1971, researchers reported a statistical link between fetal exposure to DES during pregnancy and the subsequent development of cancer of the reproductive organs in the female offspring.”).

100. A separate issue involves the conditions under which a fetus (by her next friend) may sue for wrongful death. *See Jarvis v. Providence Hosp.*, 444 N.W.2d 236, 238 (Mich. App. 1989). The court offered the following analysis:

The crucial issue presented in this case is whether a wrongful death action may be maintained on behalf of a fetus that was not viable at the time of the tortfeasor's negligent conduct but which was viable at the time of the resulting injury. We conclude that such an action is appropriate.

Id. *Martin v. St. John Hosp. & Med. Ctr. Corp.*, 517 N.W.2d 787, 788 (Mich. App. 1994) (“A negligence action may also be maintained if the fetus was viable at the time of the injury.”) (citing *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971)).

brings about harm, for example, whether the exposure to X-rays causes an alteration in fetal genes leading to the child's suffering some affliction. Instead, the focus is on whether the child born would have lived a better life but for the negligence.

When assessing damages, the jury is not asked to contemplate the allegedly imponderable question of whether it would have been better never to have lived at all than to have lived with a particular condition or, perhaps, how much a child was harmed by having been forced to live with a particular condition rather than never having lived at all.¹⁰¹ Instead, the jury is asked to assess the harm in a child's having been forced to endure a particular condition rather than in having lived life without that condition.¹⁰²

While juries may have some difficulty¹⁰³ in assessing in dollar terms how much an individual should be compensated for these harms, e.g., possibly severe mental impairment,¹⁰⁴ juries are nonetheless assigned that task.¹⁰⁵ If juries were thought unable to make these kinds of judgments, then they would be precluded from awarding damages in a variety of kinds of cases.¹⁰⁶ Further, were the difficulties posed by calculating the "correct" assessment of damages enough to justify precluding recovery, tortfeasors would reap a windfall because they would not be forced to pay for the harm that they had negligently caused.¹⁰⁷

101. See *supra* notes 54–58 and accompanying text.

102. See Hensel, *supra* note 55, at 160.

103. Cf. *Walker by Pizano v. Mart*, 790 P.2d 735, 740 (Ariz. 1990) ("If defendants' negligence caused physical injury to the fetus, our cases would require the jury to compare the unknowable value of the child's life without affliction against its almost equally unknowable future value with the affliction").

104. See *McNulty v. McDowell*, 613 N.E.2d 904, 905–06 (Mass. 1993) ("On January 4, 1978, she gave birth to Keri Ann. Keri Ann was born with numerous congenital defects attributable to congenital rubella syndrome, including deafness, blindness, severe mental retardation and heart defects.").

105. *Walker by Pizano*, 790 P.2d at 739 ("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.").

106. See, e.g., *Stelma v. Juguilon*, 597 N.E.2d 523, 532 (Ohio Ct. App. 1992) (discussing jury award for medical negligence resulting in quadriplegia); *Drust v. Drust*, 113 Cal. App. 3d 1, 8 (1980) ("At bench the jury rendered a general verdict in favor of plaintiff awarding him damages in the sum of \$1,436,000. In view of the catastrophic injuries and losses disclosed by the evidence, including the resulting permanent blindness, we cannot say that as a matter of law the award is excessive merely because it is large.").

107. See Gregory L. Ash, *Toxic Torts and Latent Diseases: The Case for an Increased Risk Cause of Action*, 38 U. KAN. L. REV. 1087, 1097 (1990)

Some of the prebirth negligence cases do not involve fetal exposure to toxic substances but, instead, conduct that occurs prior to the victim's conception. For example, a physician might fail to timely administer RhoGAM¹⁰⁸ to an Rh-negative mother who delivers an Rh-positive child.¹⁰⁹ Future Rh-positive children born to such a woman will be at risk for a variety of conditions,¹¹⁰ and the potential harm caused by the failure to administer the RhoGAM in a timely way will not be removed by a later injection.¹¹¹

A number of points might be made about causes of action involving a failure to administer RhoGAM at the correct time. The woman herself is unlikely to be harmed by the failure to administer RhoGAM,¹¹² and the individual who is likely to be harmed does not exist at the time the

(“The tortfeasors enjoy a windfall, in that they are not forced to pay damages for the full extent of the harm that their actions have caused.”). See also *Pollicina v. Misericordia Hosp. Med. Ctr.*, 187 A.D.2d 217, 220, *aff'd as modified*, N.E.2d 974 (N.Y. 1993) (“To enable . . . a tortfeasor to achieve an unjustified windfall at the expense of the injured plaintiff is simply unacceptable.”).

108. See Theodore R. LeBlang, *Medical Malpractice and Physician Accountability: Trends in the Courts and Legislative Responses*, 3 ANNALS HEALTH L. 105, 111 n.21 (1994) (“RhoGAM is used to prevent the formation of antibodies in situations where an Rh-negative pregnant woman gives birth to a child with Rh-positive blood.”).

109. See *James v. Phoenix Gen. Hosp., Inc.*, 744 P.2d 695, 698 (Ariz. 1987) (“The malpractice allegedly occurred when the doctor failed to administer RhoGAM to the wife within seventy-two hours after delivering her first child.”).

110. See *Walker v. Rinck*, 604 N.E.2d 591, 592 (Ind. 1992) (“In 1980, she became pregnant again and, in May 1981, gave birth to Nathan, who had Rh positive blood. Nathan alleged that he suffered anemia and respiratory problems as a result of the defendants' negligence in improperly interpreting his mother's blood type and in failing to administer RhoGAM following the birth of his older sibling.”); *id.* The court noted:

In 1984, Mrs. Walker became pregnant and, in February 1985, delivered Kathy and Jennifer. Kathy has Rh positive blood and alleges that the defendants' negligence caused her to have hearing impairments, motor skill deficiencies and possible mental retardation. Jennifer has Rh negative blood and alleges that the defendants' negligence has caused her to suffer asthma.

Id.

111. *Id.* (“[S]he had already formed the antibodies following the birth of her first child; once formed, the administration of RhoGAM does nothing to remove the antibodies.”).

112. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 240 (Tenn. 2015) (discussing testimony that “the health risks to an Rh-sensitized woman are ‘extremely remote’”).

negligent behavior occurs.¹¹³ Further, the identity or even DNA of the possible victim is not known. For example, once the Rh-negative woman becomes sensitized, any Rh-positive child she later carries will be at risk.

The Missouri Supreme Court offered an analogy to show why the fact that the negligent act occurred prior to the victim's existence need not foreclose recovery:

Assume a balcony is negligently constructed. Two years later, a mother and her one-year-old child step onto the balcony and it gives way, causing serious injuries to both the mother and the child. It would be ludicrous to suggest that only the mother would have a cause of action against the builder but, because the infant was not conceived at the time of the negligent conduct, no duty of care existed toward the child.¹¹⁴

The fact that the child was not in existence at the time of the negligence would not prevent the harm from occurring later. Further, the analogy suggests that liability would be imposed whether the one-year-old child on the balcony was the woman's biological child or instead someone she was babysitting. But this means that the important consideration is not which child in particular is harmed by this negligent failure to administer RhoGAM, but that any Rh-positive child she carries in the future will be at risk for severe harm. The physician will still be liable even if the child is conceived by the woman

113. See *Walker*, 604 N.E.2d at 595 (“[T]he only reason for the administration of RhoGAM was for the benefit of future children who may be born.”).

114. *Lough by Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 854 (Mo. 1993). *Martin v. St. John Hosp. & Med. Ctr. Corp.*, 517 N.W.2d 787, 789–90 (Mich. App. 1994). The court offered the following hypothetical:

[A]ssume a party had his furnace repaired and the work was defective so that the next heating sea-son fumes are released killing a newborn child. We would conclude that the injury occurred when the fumes were released, not when the furnace was repaired. Nor would the infant be denied a cause of action because it was not in existence at the time of the negligent repair.

Id. *Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237, 240 (10th Cir. 1973). The court reasoned:

If the view prevailed that tortious conduct occurring prior to conception is not actionable in behalf of an infant ultimately injured by the wrong, then an infant suffering personal injury from a defective food product, manufactured before his conception, would be without remedy. Such reasoning runs counter to the various principles of recovery which Oklahoma recognizes for those ultimately suffering injuries proximately caused by a defective product or instrumentality manufactured and placed on the market by the defendant.

Id.

and someone she did not even know at the time she failed to receive the RhoGAM injection.

A physician who fails to timely administer RhoGAM may not in fact cause harm, for example, because the patient does not even try to have any more children. But the possibility that the negligence might not have resulted in harm to another person does not relieve the tortfeasor from liability if in fact the negligence causes harm. Similarly, a builder who negligently constructs a balcony might not cause anyone harm because the entire building might be destroyed to make room for a high rise before the balcony can give way and cause serious injury. But the mere fact that it might not have caused injury would not immunize the negligent builder if in fact the balcony collapsed and resulted in injury or death.

There are other kinds of cases in which the negligent act occurs prior to the victim's conception. In *Monusko v. Postle*, a Michigan appellate court held that a physician who failed to administer a rubella test and who failed to immunize a woman against rubella was liable for harm to a later-conceived child who suffered from rubella syndrome.¹¹⁵ The court reasoned “[t]he tests and immunization, relatively simple and straight-forward to administer, are designed specifically to alleviate the sort of injuries we have in this case. It is readily foreseeable that someone not immunized may catch rubella and, if pregnant, bear a child suffering from rubella syndrome.”¹¹⁶

Monusko should be distinguished from a case in which a physician negligently failed to diagnose rubella in a pregnant woman and negligently failed to advise the woman about the potential harm that rubella posed to the developing fetus.¹¹⁷ In the latter case, the physician did not do anything to cause the pregnant woman to contract rubella nor did the failure to warn prevent the developing fetus from receiving ameliorative care.¹¹⁸ The latter case would involve a wrongful birth claim,¹¹⁹ but would not involve the claim that the child would have lived a better life but for the negligent action of the physician. In *Monusko*, the claim was that but for the physician's negligence in failing to immunize the woman against rubella, the later-conceived child would have lived and would not have suffered from the conditions associated with rubella syndrome. Here, too, it does not matter whether the child subject to the rubella syndrome is a particular child, e.g., is later

115. See *Monusko v. Postle*, 437 N.W.2d 367, 369–70 (Mich. App. 1989).

116. *Id.* at 369.

117. *Smith v. Cote*, 513 A.2d 341, 342 (N.H. 1986).

118. *Id.* at 343 (“The plaintiffs do not allege that the defendants caused Linda to conceive her child or to contract rubella, or that the defendants could have prevented the effects of the disease on the fetus.”).

119. *Id.* at 348 (“We hold that New Hampshire recognizes a cause of action for wrongful birth.”).

conceived by the unvaccinated woman and her first husband or, instead, is conceived with a subsequent mate.

C. Negligence in the ART Context

Courts have had some difficulty in deciding whether tortious conduct in the context of assisted reproductive techniques is more appropriately analyzed in terms of the prenatal tort jurisprudence or, instead, in terms of the jurisprudence involved other kinds of prebirth negligence. That uncertainty is regrettable because it has resulted in tortfeasors escaping responsibility for the harms they have imposed on innocent victims.

There are a variety of ways that negligence can undermine would-be parents' hopes and expectations in the ART context, as should be clear when one considers that individuals having difficulty conceiving a child might use in vitro fertilization (IVF) to increase the probability that they can create a viable embryo with their own gametes. Or, in the alternative, couples might make use of donated eggs or sperm to help them create a child genetically related to one of them. Or, the couple might use both donated eggs and sperm.¹²⁰ Precisely because various individuals' gametes might be used, there is the possibility that someone will make a mistake and fertilization will involve the wrong gametes.

Consider *Andrews v. Keltz*.¹²¹ The plaintiffs, Nancy and Thomas Andrews, contracted with the defendants to perform an IVF procedure so that Nancy's eggs would be fertilized with Thomas's sperm in the hopes that the couple could have a child genetically related to both of them, but the defendants allegedly fertilized Nancy's eggs with the wrong sperm.¹²²

The focus in *Andrews* was on the possible harm to the Mr. and Mrs. Andrews and to their child, Jessica. There was no evidence that Jessica suffered from any affliction as a result of the alleged negligence, and many of the cases cited in the opinion precluded recovery for negligence resulting in the birth of a healthy child.¹²³ But the cases cited involved

120. States have taken into account that couples might make use of donated gametes to help grow their families. *See, e.g.*, ALA. CODE § 26-17-702 (2019) ("A married couple who, under the supervision of a licensed physician, engage in assisted reproduction through use of donated eggs, sperm, or both, will be treated at law as if they are the sole natural and legal parents of a child conceived thereby.").

121. *Andrews v. Keltz*, 838 N.Y.S.2d 363 (Sup. Ct. 2007).

122. *Id.* at 365.

123. *See id.* at 367.

wrongful pregnancy claims where a healthy child had been born after an unsuccessful tubal ligation,¹²⁴ vasectomy,¹²⁵ or abortion.¹²⁶

Using the prenatal torts jurisprudence to analyze whether there should be recovery in *Andrews* is problematic, at least in part, because the parents did not claim that they were harmed by virtue of having Jessica rather than in not having any child at all. On the contrary, they wanted to have a child, but they wanted the child to be genetically related to both of them rather than to only one of them.¹²⁷

One of the complicating issues in *Andrews* was that there was a racial element to the claim. The Andrews were a bi-racial couple and they claimed to have been alerted to the negligence because their daughter Jessica had physical characteristics that they had not expected.¹²⁸ When denying their claim, the court may well have been suggesting that a tort action based on the child having been born of the “wrong” racial makeup simply is not cognizable.¹²⁹

124. *See* O’Toole v. Greenberg, 477 N.E.2d 445, 446 (N.Y. 1985) (“According to plaintiffs’ verified complaint, on January 11, 1980, a tubal ligation procedure was negligently performed upon plaintiff Susanne O’Toole while under the care of defendants, Benjamin Greenberg, M.D., Arthur Leber, M.D., and the Jamaica Hospital and Family Practice Clinic.”).

125. *Weintraub v. Brown*, 470 N.Y.S.2d 634, 636 (N.Y. App. Div. 1983) (“Plaintiffs further alleged that defendants Brown, Pappu, and Lawrence Hospital performed the vasectomy and subsequent studies in a negligent manner, and that the negligence was compounded by Dr. Brown’s failure to arrange for a postsurgical sperm count.”).

126. *Jean-Charles v. Planned Parenthood Ass’n of Mohawk Valley, Inc.*, 471 N.Y.S.2d 622, 623 (N.Y. App. Div. 1984) (“The complaint alleges that as a consequence of the defendants’ negligent performance of an abortion upon plaintiff Marie Danielle Jean-Charles, she gave birth to a healthy baby.”).

127. *See Andrews*, 838 N.Y.S.2d at 369 (discussing the “plaintiffs’ assertion that they have stated a cause of action for emotional distress based upon having a child who is not the biological child of Mr. Andrews and who is a different race and color than the Andrews . . .”).

128. *Id.* at 365. The court explained:

According to plaintiffs, shortly after their daughter Jessica was born in October 2004, they knew something was amiss based upon Jessica’s physical characteristics. Mrs. Andrews “was born in the Dominican Republic and has a complexion, skin coloration and facial characteristics typical of that region” while Mr. Andrews is Caucasian. (Andrews’ affidavit, ¶ 11). The Andrews describe Jessica “darker skinned” than both of them, with “skin, facial and hair characteristics more typical of African, or African–American descent.”

Id.

129. In *Cramblett v. Midwest Sperm Bank*, 2014 WL 4853400 (Ill. Cir. Ct.), the plaintiff sued because she had been given the wrong sperm by a sperm bank, and the child born was “a beautiful, obviously mixed race, baby girl.” *Id.* at ¶ 22. The plaintiff claimed harm because the family lived in

The Andrews argued that they had been harmed because the defendant's negligence had prevented their both being genetically related to their child. The court rejected that claim as too "speculative,"¹³⁰ relying on *Cohen v. Cabrini Medical Center*,¹³¹ where an individual who had been having great difficulty fathering a child was denied recovery for "wrongful nonbirth."¹³² But Cohen was alleging negligence in the performance of a procedure that might have increased his chances of fathering a child.¹³³ Given the difficulties that Cohen and his wife had previously had in conceiving,¹³⁴ the court's refusing to find that but for the negligence the couple would have been able to conceive coitally was unsurprising.

Yet, unlike in *Cohen*, there was no suggestion in *Andrews* that the husband would have had difficulty in fathering a child. Indeed, the court suggested that the Andrews were not barred from recovery for the possibility that his genetic material had been used by a different couple to create a child.¹³⁵ But if that is so, then the court was not suggesting that it was too speculative to assert that the use of Andrews' sperm might have led to a live birth, for example, because a very low

a conservative community where the child, Payton, would not be welcomed. *Id.* at ¶¶ 26–27. The suit was ultimately dismissed. *See Cramblett v. Midwest Sperm Bank, LLC*, No. 2–16–0694, 2017 WL 2800062, at *1 (Ill. App. Ct. June 27, 2017). It may be that the *Cramblett* court was refusing *sub silentio* to base liability upon the private biases of others. *See* Dov Fox, *Making Things Right When Reproductive Medicine Goes Wrong: Reply to Robert Rabin, Carol Sanger, and Gregory Keating*, 118 COLUM. L. REV. ONLINE 94, 107 (2018) (“[R]ecovery could dignify those ‘private biases’ to which, the Supreme Court has held in the custody context, ‘the law cannot, directly or indirectly, give . . . effect.’”) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

130. *Andrews*, 838 N.Y.S.2d at 369.

131. *See Cohen v. Cabrini Med. Ctr.*, 30 N.E.2d 949 (N.Y. 2000).

132. *Id.* at 950–53.

133. *See id.* at 950 (“Cohen decided to undergo a bilateral varicolectomy, a surgical procedure to enhance his fertility.”).

134. *Id.* (discussing the couple's “unsuccessful efforts to conceive”).

135. *Andrews*, 838 N.Y.S.2d 363, 369 (Sup. Ct. 2007). The court noted:

But plaintiffs also claim that there is continuing uncertainty and distrust as to whether the genetic material of either or both of them has been inappropriately used for others and that they may have natural children or half children that they are unaware of . . . Such a claim is not barred by any public policy consideration.

Id.

sperm count would have been unlikely to lead to impregnation.¹³⁶ But if the latter claim was not too speculative, it is difficult to see why the Andrews' claim that they might have had a child genetically related to both of them was too speculative.

A separate issue involves the calculation of damages. Many couples raise children who are not genetically related to both of them,¹³⁷ so the alleged harm involved in both parties' not being genetically related to the child they were raising might not be thought great. Nonetheless, merely because many couples are elated to raise a child who happens to be genetically related to only one of them or, perhaps, to neither of them does not establish a lack of harm to the Andrews when each of them had fervently hoped to be genetically related to the child.¹³⁸

Suppose that the *Andrews* example is modified. Suppose that Nancy and Thomas Andrews make use of IVF. The medical professional uses the correct sperm to fertilize the eggs, but performs the procedure negligently. Jessica has various handicaps attributable to this negligence. This kind of case is relatively straightforward. But for the negligence, the law will presume that Jessica would have been born, and without the handicaps.¹³⁹

It might be thought too speculative to assume that Jessica would in fact have been born at all, and even more speculative that she would have been born without the affliction.¹⁴⁰ After all, many IVF attempts do not lead to a live birth.¹⁴¹ Nonetheless, “[i]n an ordinary prenatal-

136. *Cf.* *Rucinski v. Rucinski*, 431 N.W.2d 241, 242 (Mich. Ct. App. 1988) (discussing an individual who “had a very low sperm count and a correspondingly low likelihood of impregnating”).

137. *See* James Herbie DiFonzo, *Toward A Unified Field Theory of the Fam.: The Am. Law Inst.’s Principles of the Law of Fam. Dissolution*, 2001 BYU L. REV. 923, 927 (2001) (discussing “explosions in the number of children raised in households with a stepparent”).

138. *Cf.* John Lawrence Hill, *What Does It Mean to Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 389 (1991). Hill explained:

It is beyond dispute that an important aspect of parenthood is the experience of creating another in one’s “own likeness.” Part of what makes parenthood meaningful is the parent’s ability to see the child grow and develop and see oneself in the process of this growth. Through this process, the parent views himself or herself as a creative agent in nature.

Id.

139. *Contra* *Andrews v. Keltz*, 838 N.Y.S.2d 363 (N.Y. Sup. Ct. 2007) (citing *Weintraub v. Brown*, 470 N.Y.S.2d 634, 641 (N.Y. App. Div. 1983)).

140. *See supra* notes 129–137 and accompanying text (discussing the Andrews’ “speculative” non-birth claim).

141. *Cf.* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L.

injury case, if the defendant had not been negligent, then the child would have been born healthy.”¹⁴² Further, it should not matter that the negligence did not occur post-conception, just as it was not necessary for the negligence to occur post-conception in the cases involving the negligent failure to administer RhoGAM.¹⁴³

Suppose that the *Andrews* case is modified yet again. This time, Jessica has a debilitating disease as a result of the medical professional negligently using the wrong sperm to fertilize Nancy’s eggs. The Andrews family sues, claiming that Jessica would have been born without the handicaps but for the negligence and thus that the medical professional is liable. The Andrews would not be claiming that the harm was in the child’s having the wrong eye color, hair color, or DNA, but in the child’s having severe deficits that the child would not have had but for the defendant’s negligence.¹⁴⁴ It is not true in the relevant sense that “the same negligent preconception conduct that harmed him also accounts for the overall benefit of his existence,”¹⁴⁵ because the non-negligent preconception conduct would (presumably) have afforded the overall benefit of existence without the harm attributable to the negligence.¹⁴⁶

REV. 55, 59 (1999) (“In 1996, the average live birth rate per ovarian stimulation procedure at IVF programs nationwide was 25.9 percent.”).

142. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 698 (Ill. 1987), *overruled on other grounds by* *Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065 (Ill. 2011)_(citing *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250 (Ill. 1977)).

143. *See supra* notes 108–14 and accompanying text. Indeed, the child harmed in a RhoGAM case might have been born years after the negligence took place. *See also* *Walker v. Rinck*, 604 N.E.2d 591, 592 (Ind. 1992) (“[A]t the time of the birth of her first child in June 1976, no RhoGAM injections were given to Mrs. Walker.”); *id.* The court explained:

In 1980, she became pregnant again and, in May 1981, gave birth to Nathan, who had Rh positive blood. Nathan alleged that he suffered anemia and respiratory problems as a result of the defendants’ negligence in improperly interpreting his mother’s blood type and in failing to administer RhoGAM following the birth of his older sibling.

Id.

144. *Cf.* Matthew Browne, *Preconception Tort Law in an Era of Assisted Reproduction: Applying a Nexus Test for Duty*, 69 *FORDHAM L. REV.* 2555, 2592 (2001) (discussing “a case in which the tortfeasor is responsible, through preconception negligence, for both conception and specific injury.”).

145. Dov Fox, *Interest Creep*, 82 *GEO. WASH. L. REV.* 273, 301 (2014).

146. *See* Browne, *supra* note 144, at 2587 (“In preconception tort cases, the plaintiff would have enjoyed existence without impairment if not for the defendant’s negligence.”).

Here, two different scenarios might be imagined. In one scenario, the tortfeasor negligently uses the wrong sperm and in addition negligently performs the procedure, thereby causing the child to have a devastating disease. In the other scenario, the negligence lies in the tortfeasor's using the wrong sperm, resulting in the child having the very serious condition because of a defective gene. It is not clear why liability should be imposed in one of these and not in the other. If the tortfeasor negligently performs the process thereby causing the child to have a catastrophic condition, liability should be imposed whether or not the child had the "correct" genes—it would be quite surprising that the tortfeasor would be immune from liability because he not only performed the procedure negligently but, in addition, negligently chose the wrong gametes. Yet, if the tortfeasor is liable when negligently performing the procedure when helping to create someone using the wrong gametes, it would be surprising if the tortfeasor's negligent choice of the wrong gametes (thereby causing the child to have the devastating condition) was not itself the basis for a suit by the child. We do not restrict who can sue by closely examining the DNA in other prebirth torts; else, the tortfeasor would be immune from suit by his victim as long as the negligence resulted in a detrimental change to fetal DNA or, perhaps, to the DNA of the later-conceived child. Further, it is not as if removing the requirement that the child have a particular DNA would open up the floodgates to lawsuits,¹⁴⁷ because in *Andrews*, for example, the mother was genetically related to the child and, in addition, had given birth to her.¹⁴⁸

B.F. v. Reproductive Medicine Associates of New York, LLP involved a fertility clinic that allegedly inadequately screened the eggs of a donor,¹⁴⁹ notwithstanding the clinic's promise that it "screened donor candidates for all known genetic conditions for which testing is

147. See *Albala v. City of New York*, 429 N.E.2d 786, 788 (1981) Thus, were we to establish liability in this case, could we logically preclude liability in a case where a negligent motorist collides with another vehicle containing a female passenger who sustains a punctured uterus as a result of the accident and subsequently gives birth to a deformed child? Unlimited hypotheses accompanied by staggering implications are manifest. The perimeters of liability although a proper legislative concern, in cases such as these, cannot be judicially established in a reasonable and practical manner.

148. See *Andrews*, 838 N.Y.S.2d at 365.

149. *B.F. v. Reprod. Med. Assocs. of New York, LLP (B.F. I)*, 136 A.D.3d 73, 75 (2015), *aff'd*, 30 N.Y.3d 608 (2017) ("[I]t is alleged that defendants' failure to perform adequate genetic screening of an egg donor for an in vitro fertilization resulted in the conception and birth of plaintiffs' impaired child.").

available.”¹⁵⁰ Regrettably, the child born as a result of the use of the unscreened donor eggs suffered from severe disabilities.¹⁵¹

The *B.F.* court rejected that there could be any cause of action on behalf of the son, reasoning that “any cause of action brought against them on behalf of M.F. [the son] would amount to a ‘wrongful life’ claim not cognizable under New York law, since the harm alleged by the complaint is M.F.’s conception and birth.”¹⁵² The case cited in support had been one in which the defendant had not caused the child’s impairment;¹⁵³ rather, the defendant either failed to advise that a test be performed in utero¹⁵⁴ or failed to determine that an earlier child had an inherited condition.¹⁵⁵ If there had been no negligence, one couple

150. *B.F. v. Reprod. Med. Assocs. of New York, LLP (B.F. II)*, 92 N.E.3d 766, 768 (N.Y. 2017), *reh’g denied*, 31 N.Y.3d 991 (2018), and *reh’g denied*, 31 N.Y.3d 991 (2018).

151. *B.F. I*, 136 A.D.3d at 84 (Manzanet-Daniels, J., concurring in part and dissenting in part). Manzanet-Daniels explained:

Infant M.F.’s full Fragile X mutation requires “intensive physical, occupational, speech and behavioral therapies for several hours a day, five times per week.” According to plaintiffs, he will require special education services for the rest of his life, and will most likely never live independently.

Id. See also *Donovan v. Idant Lab’s.*, 625 F. Supp. 2d 256 (E.D. Pa. 2009), *aff’d sub nom. D.D. v. Idant Lab’s.*, 374 F. App’x 319 (3d Cir. 2010) (denying recovery to child suffering from Fragile X Syndrome, notwithstanding the lab’s (alleged) negligent failure to discover that the sperm donor was a Fragile X carrier). See *id.* at 263 (“On February 16, 1998, plaintiffs’ allege that SmithKline reported that Donna Donovan was not a Fragile X carrier. On May 6, 1998, it determined that Donor G738 was a carrier.”).

152. *B.F. I*, 136 A.D.3d at 76 (citing *Becker v. Schwartz*, 46 N.Y.2d 401, 408–412 (1978)).

153. *Becker v. Schwartz*, 386 N.E.2d 807, 811 (N.Y. 1978). (“It is not contended that the defendant physicians’ treatment of Dolores Becker and Hetty Park caused the abnormalities in their infants”).

154. *Id.* at 808–09. The court identified:

It is plaintiffs’ contention that throughout the period during which Dolores Becker was under the care of defendants plaintiffs were never advised by defendants of the increased risk of Down’s Syndrome in children born to women over 35 years of age. Nor were they advised, allege plaintiffs, of the availability of an amniocentesis test to determine whether the fetus carried by Dolores Becker would be born afflicted with Down’s Syndrome.

Id.

155. *Id.* at 809 (“[D]efendants are alleged to have informed plaintiffs that inasmuch as polycystic kidney disease was not hereditary, the chances of their conceiving a second child afflicted with this disease were ‘practically nil.’”).

would not have conceived a second child¹⁵⁶ and the other couple would have obtained an amniocentesis and then aborted the pregnancy.¹⁵⁷ Basically, if there had been no negligence, these parents would simply not have had the children who were the subjects of the suit. But that is where the wrongful life cases and *B.F.* diverge, because in *B.F.* a child might well have been born if there had been no negligence.¹⁵⁸

In *B. F.*, the clinic failed to diagnose the presence of the relevant gene and in addition, with the parents' *uninformed* consent, fertilized the eggs (with the undiagnosed condition) with the husband's sperm and then implanted the created embryos in the wife.¹⁵⁹ Had different eggs (without the chromosomal abnormality¹⁶⁰) been used to create the embryos and had the implantation of the embryos resulted in a live birth, the child born would not have been afflicted with the devastating conditions.

The *B.F.* court construed the plaintiff mother's claim as one for wrongful birth, because "the child would not have been conceived but for the defendant's malpractice."¹⁶¹ After explaining why the court would allow the wrongful birth claim to go forward, the court dismissed various other claims, reasoning that they were "all essentially redundant of the medical malpractice claim,"¹⁶² and "the injury for which recovery is sought is identical to the injury alleged in support of the medical malpractice claim."¹⁶³ Basically, the court treated the other causes of action as "legally redundant."¹⁶⁴

Yet, *B.F.* is not a typical wrongful birth case because the alleged negligence was not limited to failing to apprise the plaintiff of important

156. *Id.* at 811 ("Had Hetty and Steven Park been accurately advised by their physicians of the chances that a future child of theirs would suffer from polycystic kidney disease, they allege that they would not have chosen to conceive a second child.").

157. *Id.* at 812 ("[H]ad Dolores and Arnold Becker been accurately advised of the chances that their already conceived child would be born afflicted with Down's Syndrome, and of the availability of an amniocentesis test, they allege that they would have undergone that test, and had it indicated the presence of Down's Syndrome in their child, that they would have terminated the pregnancy").

158. *B.F. I*, 136 A.D.3d at 84 (Manzanet-Daniels, J. concurring in part and dissenting in part) ("Plaintiffs allege that they would have insisted on using an egg from a different donor had they known that their donor was a carrier of Fragile X.").

159. *Id.* at 75 (majority opinion).

160. *Id.* at 76.

161. *Id.* at 77.

162. *Id.* at 79–80.

163. *Id.* at 77.

164. *Id.* at 81.

information that would have affected the plaintiff's decision to abort or to refrain from conceiving.¹⁶⁵ The additional factor in *B.F.* was that the reason an abortion might have been sought was itself due to the tortfeasor's negligence. Had there been no negligence in *B.F.*, the child born would not have been afflicted with the debilitating conditions, whereas in the typical wrongful birth case, no child would have been born had there been no negligence.

Suppose that because of the negligence of a medical provider, a child is caused to have Attention Deficit Hyperactivity Disorder, suicidal and homicidal ideations, and other conditions.¹⁶⁶ Suppose further that the medical provider became aware of its own negligence at the beginning of a client's pregnancy and failed to apprise the client of the negligence in time for the client to obtain an abortion should she so desire.¹⁶⁷ Were the negligence to come to light after the child had been born, one might expect the mother to sue for wrongful birth (assuming that she would have aborted the pregnancy had she been timely apprised of the relevant information) and the child (or her next friend) to have sued for the harms associated with having ADHD, suicidal and homicidal ideation, and any other harmful conditions caused by the negligence.

Perhaps the child would be unable to establish that the alleged negligence in fact caused the harm.¹⁶⁸ In that event, the mother might still be able to proceed, assuming that wrongful birth actions were cognizable in the jurisdiction.¹⁶⁹ Or, perhaps the child could establish causation but the jurisdiction in question did not recognize wrongful birth actions. One would not expect the court to dismiss the child's cause of action merely because the state did not permit wrongful birth actions.¹⁷⁰ In this case, the child would be alleging that but for the

165. *See id.* at 79–80.

166. *Norman v. Xytex Corp.*, 830 S.E.2d 267, 268 (Ga. Ct. App. 2019) (“[T]he complaint alleged that A. A. was diagnosed with Attention Deficit Hyperactivity Disorder at age nine, and with Thalassemia Minor, ‘an inherited blood disorder[.]’ Further, A. A. had ‘suicidal and homicidal ideations[.]’ and had been prescribed various medications including anti-depressants and an anti-psychotic.”).

167. *See Custodio v. Bauer*, 251 Cal. App. 2d 303, 308 (1967) (“The first cause of action is predicated upon negligent treatment in the performance of the operation. The second cause of action is predicated upon negligent treatment in failing to correctly apprise plaintiff of the consequences of the operation.”).

168. *Cf. Canesi ex rel. Canesi v. Wilson*, 730 A.2d 805, 814 (N.J. 1999) (“The record discloses that plaintiffs presented insufficient proof of a causal relationship between the drug and the defect that afflicts their son.”).

169. *See id.* at 820 (reversing summary judgment for defendant and remanding wrongful birth claim for trial).

170. *Cf. Norman*, 830 S.E.2d at 268–69. The court noted:

negligence she would have been born without the debilitating conditions and thus that she deserved compensation.

When the Kentucky Supreme Court was deciding whether the state recognized wrongful birth actions, it did so in a context in which a physician had allegedly been negligent in “failing to correctly diagnose and/or inform [the plaintiffs] of the fetal medical condition in time for an abortion.”¹⁷¹ The court rejected that “physicians should be relieved of any proven contractual responsibility to report to patients the accurate results of diagnostic procedures, even if the condition is ‘incurable.’”¹⁷² Nonetheless, the court was 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.”¹⁷³

An important difference between the Kentucky case and one in which the tortfeasor’s negligence causes the child to have adverse conditions is that in the latter the child was worse off as a result of what the defendant allegedly did, whereas in the Kentucky case the child’s harm was not attributable to any negligence on the part of the doctors.¹⁷⁴ Various state courts have emphasized that in the wrongful birth context the physician did not cause the harm to the child. The Alabama Supreme Court explained:

The nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant’s negligence was the proximate cause of the parents’ being deprived of the option of

The Appellants brought suit against the Appellees for fraud, negligent misrepresentation, products liability and/or strict liability, products liability and/or negligence, breach of express warranty, breach of implied warranty, battery, negligence, unfair business practices, specific performance, false advertising, promissory estoppel, and unjust enrichment, seeking various damages, including punitive damages, and attorney fees. The Appellees filed a motion to dismiss arguing, inter alia, that the complaint alleged claims for ‘wrongful birth,’ which is not a legally recognized claim in Georgia.

Id. at 269 (“The trial court granted in part and denied in part the Appellees’ motion, dismissing all the claims with the exception of the claim for specific performance.”); *Id.* at 270 (affirming trial court).

171. Grubbs *ex rel.* Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 684 (Ky. 2003).

172. *Id.* at 691.

173. *Id.* at 689.

174. *See id.* (footnote omitted) (“The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor.”).

avoiding a conception or, in the case of pregnancy, making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child.¹⁷⁵

The high courts of Kentucky and Alabama both emphasized the importance of the lack of connection between the negligence and the child's impairment.

D. ART and Public Policy

Negligence in the ART context has much "to do with whether a defendant caused the injury or harm to the child."¹⁷⁶ Where the lab is negligent in failing to screen for certain characteristics and that failure results in a child's having severe deficits, the negligence has caused the harm to the child. If the lab had performed its job correctly, the screening would have revealed that certain gametes should not be used, which would have meant that other gametes would have been used and the child born would not have had the terrible condition.

175. *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993). *See also* *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1372 (Ohio 1989); *C.S. v. Nielson*, 767 P.2d 504, 506 (Utah 1988); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1204 (Colo. 1899); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987), overruled on other grounds by *Clark v. Children's Mem'l Hosp.*, 955 N.E.2d 1065 (Ill. 2011). The court explained:

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 pregnancy, to terminate the same.

Id. A separate issue is whether the harm alleged in the wrongful birth context should be compensable. *Compare* *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 560 (Ga. 1990) ("An analysis of traditional tort law principles, even as applied in an age of ever advancing medical technology, simply does not authorize a finding that a physician, who has provided postconception prenatal care to an expectant mother, should be held liable, even to a limited extent, for an impairment which the child unquestionably inherited from her parents and an impairment which was already in existence when the parents first came into contact with the physician.") *with* *Haymon v. Wilkerson*, 535 A.2d 880, 883 (D.C. 1987) ("In a wrongful birth action such as the instant case, a parent of an abnormal, unhealthy child claims that the physician's negligent advice or treatment deprived the parent of the right to decide whether to avoid the birth of a child with congenital defects. The courts that have been presented with this issue are virtually unanimous in concluding that some measure of recovery should be permitted in wrongful birth cases.")

176. *Keel*, 624 So. 2d at 1029.

It is accurate to suggest that the child would have been a different person if different DNA had been used.¹⁷⁷ But there are several reasons that liability should not be precluded merely because the child would have been a different person (with different DNA) but for the negligence.¹⁷⁸ The focus of the RhoGAM and rubella cases was not on whether the negligence would cause harm to a child who had certain DNA but, instead, on whether the negligence would foreseeably cause harm to a child born to the woman who had become sensitized or who had not been immunized.¹⁷⁹ The same analysis might be used here. The reason to require the sperm or eggs to be tested is precisely to prevent this kind of foreseeable harm from occurring. Precluding liability because but for the negligence the child who would be free of the debilitating condition would in addition have had different DNA is to immunize the negligent or even intentional mishandling of DNA.

Suppose that the child with the unscreened DNA who is living with a devastating condition is precluded from suing because it would not have been possible for a person *with this DNA in particular* to have lived without that condition--in order not to have had this condition, the individual would had to have been a different person (with different DNA). An analogous argument might be used to preclude many suits—there is no reason that DNA in particular should be privileged in this way. There are other criteria that are essential to making the person what she is, for example, an individual’s personality¹⁸⁰ or her concept of self.¹⁸¹ But if that is so and if the allegedly negligent conduct changed those essential elements, then an individual caused to have severe mental deficits would be precluded from suing—had the negligence not occurred, the unharmed individual without the mental deficits would have had a different personality and concept of self and thus would have been someone else. *Ex hypothesi*, this individual was not harmed

177. See Fox, *supra* note 145, at 301 (“For that child, ‘with his particular biological composition, deriving from the unique pair of germ cells from which he, and not another person, was conceived,’ the only alternative to his having been exposed to the preconception conduct was never having existed at all.”) (quoting Dov Fox, *Luck, Genes, and Equality*, 35 J.L. MED. & ETHICS 712, 713 (2007)).

178. See Cohen, *supra* note 65 at 1210–11 (“[I]f we want to know whether the person that results from the particular sperm and egg combination would be harmed, we cannot say that it would further the welfare of that person if we instead substituted a different sperm and egg combination.”).

179. See *supra* notes 108–19 and accompanying text.

180. See Jennifer Nadler, *Unconscionability, Freedom, and the Portrait of a Lady*, 27 YALE J.L. & HUMAN. 213, 229 (2015) (discussing “human personality as an abstract, essential self”).

181. See Jane English, *Abortion and the Concept of a Person*, 5 CAN. J. PHIL. 233, 235 (1975) (discussing the theory that a “‘person’ is a cluster of features, of which rationality, having a self-concept and being conceived of humans are only part.”).

because but for the negligence the individual would have been a different person.

Such a policy would represent surprising priorities. There would be no liability for negligence resulting in catastrophic loss, e.g., a severe mental functioning impairment precluding the person from ever having a sense of self or from functioning in the world,¹⁸² but there might well be liability for something much less harmful, e.g., a fractured wrist.¹⁸³ Further, victims as a general matter would be barred from suing whenever the harm included a modification of their DNA or other essential characteristics.¹⁸⁴

Which characteristics would qualify as so essential to individual personhood that their significant alteration would not be compensable because resulting in a different person? That issue is precisely the sort that one would expect courts to say is “more properly to be left to the philosophers and the theologians.”¹⁸⁵ Further, one would expect that a state policy specifying that negligent action resulting in the loss of essential attributes of personhood was not compensable would have important implications for tort actions. If personality or self-concept are essential elements of personhood, then a tortfeasor who negligently obliterates a person’s personality or self-concept would in effect have created a different person and would be immune from suit (at least with respect to several causes of action).

Suppose that an individual, Alice, is in a terrible auto accident and is now in a persistent vegetative state.¹⁸⁶ Alice is now qualitatively

182. *Cf.* *Merrill by Merrill v. Albany Med. Ctr. Hosp.*, 512 N.Y.S.2d 519, 520 (N.Y. App. Div. 3d Dept. 1987) (“The consequences were catastrophic, causing plaintiff to suffer severe and diffuse brain damage with marked difficulty with both intellectual and motor functions.”).

183. *See* *Marcellus v. Nathan Littauer Hosp. Ass’n*, 535 N.Y.S.2d 224, 224 (N.Y. App. Div. 1988) (upholding damages award of about \$115,000 for fractured wrist).

184. *Cf.* *Chiropractic Ass’n of New York, Inc. v. Hilleboe*, 228 N.Y.S.2d 358, 360 (N.Y. App. Div. 1962), *aff’d*, 187 N.E.2d 756 (N.Y. 1962). The court explained:

It was found upon adequate evidence that when X rays of the full spine are taken, the gonads or reproductive organs of the male or female patient are in the direct primary beam and susceptible to damage affecting the reproductive cells by producing deleterious changes in the genes and chromosomes of those cells, leading to mutations and resulting in serious abnormalities in the offspring in future generations; that leukemia may also be a consequence of X-ray exposure; and that the effects of a patient’s exposures are additive and cumulative.

Id.

185. *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978).

186. *Cf.* *Cruzan by Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 266 (1990) (“She now lies in a Missouri state hospital in what is commonly

different from what she had been like when thinking, feeling, and experiencing the world. Alice's family members might recover for loss of consortium,¹⁸⁷ but Alice, herself (now a different person), would not be entitled to compensation because that "new" person had never *not been* in a persistent vegetative state. Alice's family might be able to bring other causes of action as well. If one takes seriously that the severely injured individual is now a different person because an essential element of the (prior) individual's personhood had been changed, then wrongful death statutes might have to be reinterpreted—the prior person would no longer be living so the tortfeasor might be thought responsible for that individual's death,¹⁸⁸ even though there is now a different person living who had an important physical/genetic/historical connection to the previous individual. A further surprising implication of such a position is that while the family might be able to sue the tortfeasor for having caused the "prior" person to cease to exist, the "new" individual in the permanent vegetative state would be barred from recovery and thus the individual most in need of the compensation would be barred from receiving it.

Some courts reasoned that wrongful birth actions should not be recognized because the physician's negligence did not cause the harm,¹⁸⁹ even though the negligence (failure to communicate important information in a timely way so that an abortion might be obtained or conception avoided) might have caused a child with particular

referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function."). *See also* Ann MacLean Massie, *Withdrawal of Treatment for Minors in A Persistent Vegetative State: Parents Should Decide*, 35 ARIZ. L. REV. 173, 174 (1993) (discussing "the condition that has come to be described as a 'persistent vegetative state' (PVS)—a death-in-life, where vital organs may continue to function, but consciousness has been irretrievably lost, and the brain has ceased to function on all but the most primitive level").

187. *See* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994 (Alaska 1987) Precluding minor children from maintaining a cause of action for loss of parental consortium arising from their parent's injury would, in our view, be inconsistent with the legislature's authorization of such recovery when the parent dies, and with our prior holding in *Fruit* that a husband or wife may recover damages for loss of consortium when an injured spouse survives.

188. *See, e.g.*, MINN. STAT. § 573.02 (2020). The statute states:

When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.

Id.

189. *See, e.g.*, Willis v. Wu, 607 S.E.2d 63 (S.C. 2004).

disabilities to be brought into the world. In the ART cases, courts deny the child compensation,¹⁹⁰ notwithstanding that the negligence not only causes the harm but brings about a child's living in the world with an onerous (and avoidable) condition. Such a policy choice is difficult to justify.¹⁹¹

CONCLUSION

States differ about whether to recognize prenatal torts and about the damages that are potentially recoverable for these causes of action. Those differences may be due in part to the difficulties inherent in comparing the preferability of never having lived to having lived with a devastating condition or to a reluctance to impose liability on a physician who failed to timely report but did not cause a serious condition.

When minimizing the role played by the tortfeasor in prenatal torts, courts often suggest that nature rather than the tortfeasor is responsible for the harm to the child. In many ART cases, the choice is not nature (genes) or the tortfeasor. Rather, because the negligence is in the choice of genes to be used, the harm to the child may be attributable to nature and the tortfeasor. Because of this important difference, the prenatal tort jurisprudence is often the wrong model to use when analyzing ART negligence.

In many torts, the law presumes that if the tortfeasor's negligence had not occurred, the victim allegedly harmed by that negligence would have been the same in all relevant respects except for the claimed harm. That way, the trier of fact can assess the damage. In ART cases where the tortfeasor's negligence results in the use of gametes causing the child born to have a debilitating condition, the alternative (where the negligence did not occur) is not simply the nonexistence of a child but instead the existence of a child without the debilitating condition.

In many cases where donated gametes are used, the particular DNA of the child is not relevant. Instead, what is relevant is that the child should not be saddled with a devastating condition that the child born would not have had but for the negligence.

The prenatal torts are not helpful to determine whether or how much liability should be imposed precisely because the relevant comparator (where the negligence had not occurred) is not childlessness but a child to be loved. States permitting the victim to recover in these kinds of cases would not be opening the door to suits merely because

190. See, e.g., *B.F. v. Reprod. Med. Assocs. of New York, LLP (B.F. I)*, 136 A.D.3d 73, 76 (2015), *aff'd*, 30 N.Y.3d 608 (2017).

191. See Fox, *supra* note 145, at 301 (“[T]he government, with its broader concern for the population-wide health of future citizens, should have a legitimate interest that the cohort of children born into the next generation suffer from fewer preventable diseases and disabilities.”).

the child was not perfect but would instead be imposing liability on individuals whose negligence results in eminently foreseeable, significant harm.

The difference between prenatal torts and other kinds of prebirth negligence might be especially important in states where prenatal torts are barred insofar as the plaintiff claims to have been impeded in her exercise of her abortion rights. While the exercise of abortion rights based on accurate and timely information should be protected, negligence in the ART context may implicate additional concerns because the negligence causes a child to live a much worse life than would otherwise have been lived. For the sake of these children and for the sake of other victims whose rights to compensation might be compromised by the specious rationales used to deny recovery in the ART cases, states must act quickly to correct the mistakes that will otherwise occur even more frequently as more and more people seek to make use of ART to fulfill their procreative needs.