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Making Preconception Tort Theory Crisper

Mark Strasser

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MAKING PRECONCEPTION TORT THEORY
CRISPER

MARK STRASSER*

More and more individuals seeking to expand their families make use of someone else’s gametes to help create a child. Unsurprisingly, those considering the use of donated or purchased gametes often seek reassurance that the use of those gametes will not create an increased risk that a child thereby produced will have a severe disease. Sometimes, because of negligence or recklessness, gametes are used that result in children having severe disease where that outcome would have been avoided though the use of reasonable care. Regrettably, courts addressing whether liability may be imposed in such cases have sometimes misunderstood and misapplied the prevailing reproductive torts jurisprudence and denied recovery, thereby promoting the very practices that public policy should discourage. This Article offers courts an approach that is more likely to promote both individual interests and good public policy.

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I. INTRODUCTION

More and more couples enlarge their families by making use of donated or purchased gametes. These couples can acquire gametes from a variety of sources, although a separate issue involves whether states afford a remedy in cases involving compromised gametes the use of which results in foreseeable harm. Courts have struggled when analyzing such cases, all too often offering rationales and reaching conclusions that are both surprising and disappointing in light of the existing reproductive torts jurisprudence. Recent scientific developments help shed light on a more appropriate way to allocate the benefits and burdens associated with the use of foreseeably compromised gametes.

Part II of this Article discusses two of the prenatal torts—wrongful birth and wrongful pregnancy. States differ about whether to recognize these causes of action and about which kinds of damages may be awarded to a successful plaintiff. Nonetheless, important lessons can be learned from these cases because the differing states make clear which factors are important to consider when deciding which kinds of reproductive harms are compensable.

Part III considers other kinds of reproductive torts. These other kinds of reproductive torts are more closely analogous to the kinds of torts that are the focus of discussion here—negligent testing and implantation of compromised gametes—and thus should be used to provide the framework for deciding whether such harms should be compensable. Regrettably, courts have misapplied the lessons to be learned from the wrongful birth and wrongful pregnancy jurisprudence and have thus been led astray when analyzing whether, or to what extent, recovery is permissible when the negligent use of compromised gametes results in foreseeable harm. Courts’ rationales limiting or denying recovery in the compromised gametes context would, if taken seriously, imply that a whole host of cases has been wrongly decided. Courts must reexamine their reluctance to permit full recovery in cases involving the negligent use of compromised gametes.


2. Camille Gear Rich, Contracting Our Way to Inequality: Race, Reproductive Freedom, and the Quest for the Perfect Child, 104 MINN. L. REV. 2375, 2386 (2020) (discussing “the broad reproductive choices Americans are offered in the ART market . . .”).

II. WRONGFUL BIRTH AND WRONGFUL PREGNANCY CLAIMS

States recognize a variety of torts in the reproductive context, and these torts help provide the backdrop for the kinds of reproductive negligence that should be considered actionable. Wrongful birth and wrongful pregnancy claims are of special relevance, because they can include allegations that negligence occurring prior to pregnancy led to foreseeable, compensable harm. A close examination of these kinds of cases, including the rationales for when and why damages may be awarded, helps illustrate the kinds of rationales that have been thought to carry weight in limiting or precluding recovery. None of these rationales support limiting damages in a context where compromised gametes are used to bring about foreseeable harm.

A. Wrongful Birth

Plaintiffs in a wrongful birth action seek damages from a medical provider whose alleged negligence played a causal role in the birth of a child with possibly severe handicaps. That negligence might have occurred pre- or post-conception.

The Alabama Supreme Court explained wrongful birth in the following way:

[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.


The negligent act may occur in utero, depriving the mother of the right to abortion, or prior to conception, interfering with the parental exercise of a right to prevent pregnancy. Regardless of the timing of the act, the eventual harm is the same. These cases are generally considered pure “wrongful birth.”

Id. (footnotes omitted).

In many cases, the negligence occurs during the pregnancy, for example, a medical provider fails to detect that the fetus has a particular condition, and the parents would have aborted the pregnancy had they been apprised of the fetal condition in a timely fashion.\(^8\) Or, a medical professional might have failed to advise his patient about the dangers posed to the fetus if the patient had rubella during her pregnancy, and the patient would have aborted her fetus if only she had been given the relevant information.\(^9\) Or, the medical professional might have made an error when performing a test or reporting the test results, which led to the parents’ decision to continue the pregnancy rather than seek an abortion.\(^10\) In all of these cases, a medical professional’s negligence resulted in a pregnant woman not having important information that would have affected her decision about whether to carry her pregnancy to term.

Some couples, fearing what they might pass on to their child, seek genetic testing to find out if they are carriers of a particular disease.\(^11\) The testing might occur relatively early in the pregnancy—a positive result would cause the couple to abort the pregnancy.\(^12\) Or, the couple might have the test performed preconception\(^13\)—individuals advised that they were at risk of having a child with a feared disease might take steps to avoid that outcome, e.g., pursue other paths to parenthood such as adoption or, perhaps, using in vitro fertilization

\(^8\) Kate Wevers, *Prenatal Torts and Pre-Implantation Genetic Diagnosis*, 24 HARV. J.L. & TECH. 257, 267 (2010) (“Most wrongful life and wrongful birth suits allege post-pregnancy negligence.”). Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 399 (Iowa 2017) (“In a wrongfull-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)).


\(^10\) Garrison v. Med. Ctr. of Delaware Inc., 581 A.2d 288, 289 (Del. Supr. 1989) (“Plaintiffs allege that defendants improperly performed a medical procedure known as amniocentesis and negligently delayed informing the plaintiff parents of the results of the chromosome study so that plaintiffs did not learn of the test results until the third trimester of the pregnancy.”).

\(^11\) Naccash v. Burger, 290 S.E.2d 825, 827 (Va. 1982) (“Ms. Green reported to the Burgers that the test results showed Mr. Burger was not a Tay-Sachs carrier. Satisfied with the report, Mrs. Burger ‘went ahead and had’ her baby.”).

\(^12\) See id. ("Both Joseph and Trudy Burger testified that, had they known they were Tay-Sachs carriers, they would have insisted upon an amniocentesis and, if that test showed the fetus was afflicted with Tay-Sachs, Mrs. Burger would have had an abortion.").

\(^13\) See Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc., 117 A.3d 200, 210 (N.J. App. Div. 2015) (both husband and wife tested for Tay-Sachs prior to conceiving child, and father wrongly told that he was not a carrier for the disease), aff’d, 147 A.3d 434 (N.J. 2016).
(IVF) and then testing the pre-embryo\textsuperscript{14} prior to implantation to make sure that the genetic difficulty had been avoided.\textsuperscript{12} Or, the couple might make use of someone else’s gametes to avoid the genetic difficulties that would be posed were the couple to use their own.\textsuperscript{16}

Suppose that a patient takes medication to alleviate symptoms that she experiences. She tells her doctor that she and her husband are considering having children, so she wants to know whether her taking the medication during pregnancy would pose any dangers to a developing fetus. Suppose further that she is misinformed about the dangers posed by her taking the medication during pregnancy, and that she and her husband have children with severe handicaps attributable to the drug.\textsuperscript{17} Had the couple been correctly advised of the dangers posed by the medication, they simply would have avoided conception.\textsuperscript{18}

In the cases described above, the parents are not claiming that the medical provider did something during the pregnancy that harmed the growing fetus, e.g., exposed the fetus to X-rays.\textsuperscript{19} Rather, the parents are claiming that the

\textsuperscript{14}. In re Marriage of Rooks, 429 P.3d 579, 582 (Colo. 2018) (“[W]e use the term ‘pre-embryos’ in this opinion to refer to eggs that have been fertilized using the IVF process but not implanted in a uterus.”).


Dr. Joi M. Findley-Smith’s negligent failure to advise the patient of the possible transmission of hydrocephalus to her baby and negligent failure to perform genetic testing to rule out the risk deprived the patient of the opportunity to utilize alternative paths to motherhood, such as adoption or in-vitro fertilization with pre-implant genetic testing.

\textit{Id.}


\textsuperscript{17}. Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (“Each of the three doctors responded that Dilantin could cause cleft palate and temporary hirsutism.”). See also \textit{id.} at 487 (“An adequate literature search, or consulting other sources, would have yielded such information of material risks associated with Dilantin in pregnancy that reasonably prudent persons in the position of the Harbesons would attach significance to such risks in deciding whether to have further children.”). \textit{Id.} at 487 (“Each of the four Harbeson Plaintiffs has sustained permanent and severe damages and injuries past, present and future, as a direct and proximate result of the negligence of the Madigan physicians.”). See also Viccaro v. Milunsky, 551 N.E.2d 8, 10 (Mass. 1990) (upholding cause of action for negligent preconception genetic counseling).

\textsuperscript{18}. Harbeson, 656 P.2d at 494 (“The court made a finding of fact that had the Harbesons been informed of those risks they would not have had any other children.”).

\textsuperscript{19}. See Cox v. Dela Cruz, 406 A.2d 620, 621 (Me. 1979) (malpractice case involving doctor who exposed pregnant woman to X-rays).
medical provider deprived the parents of the opportunity either to make an informed decision about whether to secure an abortion or about whether to avoid conception in the first place. Further, the parents assert that they would have acted differently had they been apprised of the relevant information in a timely way.

Merely because some couples would have chosen to abort a fetus had they known that the fetus had a particular condition does not establish that all couples would do so. For those parents who would not have acted any differently even if they had known that the fetus had a particular condition, a medical professional’s failure to provide the information early in the pregnancy would not have provided the basis for a wrongful birth action. The negligent failure to provide the information would not have caused the parents to forego obtaining an abortion.

Consider a couple inalterably opposed to abortion. Such a couple might seek genetic counseling preconception, precisely because information at that


A “wrongful birth” action is brought by the parent of a child born with an impairment or birth defect. 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. 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.


22. See, for example, Thornhill v. Midwest Physician Ctr. of Orland Park, 787 N.E.2d 247, 253 (Ill. App. 2003) (“Plaintiff testified that if she had been informed of the correct AFP test results in July 1996, she would have terminated the pregnancy.”).


24. Cf. Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 408 (Iowa 2017) (“[P]roof of causation will depend on a ‘counterfactual,’ or what the plaintiffs would have done if they had been properly informed by their physicians.”); See also Darpana M. Sheth, Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act, 73 TENN. L. REV. 641, 666 (2006) (stating recovery is limited to cases where parents testify that they would have aborted the child).


Mrs. Marciniak was asked at her deposition why she did not have an abortion. She replied: “I could not kill a baby.” She was asked if there was anything in her
point might affect whether they would try to conceive or instead try to adopt. Misininforming such a couple prior to conception might provide the basis for a wrongful birth action, whereas misinforming that couple during the pregnancy would not. In both cases, the medical professional might have misinformed the couple, but only in the preconception scenario would the couple have acted differently had the professional not been negligent.

i. On Promoting Stigma

Some commentators suggest that the legal recognition of wrongful birth actions is stigmatizing either to the child born or to the disabled community as a whole. The child himself or herself is allegedly stigmatized because the wrongful birth tort requires the parent to affirm that (1) she would have avoided conception or would have sought an abortion but for someone else’s negligence, and (2) the parent had been harmed by the birth of the child. The religion that disapproves of an abortion, and she replied: “I am Catholic.” She did not consider giving the child up for adoption: “It was my child.”

Id.

26. Id. at 69–70.

27. Id.


The imposition of wrongful-birth liability could further validate the idea that “a congenitally defective child [is] ‘take[ing] up’ a place in a family that would otherwise be filled by a ‘normal child.’” Rather than acting as a positive moral force, in such circumstances wrongful-birth liability would be promoting stigmas based on genetic differences . . . .

Id. (footnotes omitted). Cf. Sheth, supra note 24, at 659 (“[A]lthough wrongful birth and wrongful life claims provide some financial assistance to individual litigants, the overall impact of these claims is negative because they threaten individuals with disabilities, as well as the larger disability community.”); Wendy F. Hensel, The Disabling Impact of Wrongful Birth and Wrongful Life Actions, 40 HARY C.R.-C.L. L. REV. 141, 164 (2005) (“[A]ny benefits that wrongful birth and wrongful life actions secure for the individual plaintiff come at the cost of demeaning and demoralizing anti-therapeutic messages delivered to the community of people with disabilities and to greater society.”).

29. Yakren, supra note 28, at 596 (discussing “the very assertion the law requires: that, but for the medical provider’s negligence, they would have aborted their child”). Id. at 587 (“What is unique, and controversial, about a wrongful birth claim is that the parents’ alleged injury is inextricably linked to the existence of their child.”).
child aware of such testimony might feel grossly undervalued, notwithstanding the parent’s protestation of love for her child. The child might further feel that she or he was taking up a spot in the family that the parent wished had been filled by a different (more perfect) child.

Yet, a parent bringing this cause of action is unlikely to be trying to make her child feel unloved. Instead, the parent is probably trying to obtain additional funds to help provide for that very child.

The child who is the subject of a wrongful birth action may well be unable to understand the alleged implications of the suit if only because of the child’s inability to engage in sophisticated thinking. Even a child capable of conceptualizing stigma might nonetheless view her parent bringing such an action as seeking to secure additional resources rather than as attempting to impose stigma. Finally, even were the child to feel stigmatized by the parent bringing the cause of action, a separate question would be whether those feelings of stigma would outweigh the therapeutic benefits afforded by the treatment made possible by the money damages awarded.

30. Sheth, supra note 24, at 660.
   To establish causation for a wrongful birth or wrongful life claim, a mother must testify that she would not have chosen to carry the child to term if she had been informed of the defect in a timely manner. Such testimony is emotionally crippling not only to the child suffering from physical or mental infirmities . . . .
   Id.

31. Yakren, supra note 28, at 596 (“[P]arents seeking to recover for wrongful birth are condemned for allegedly failing to love their children ‘unconditionally.’”). See, for example, id. at 586 (“In the months after A.J.’s birth, the Brancas traveled an emotionally fraught path—even as they ‘came to love A.J. deeply,’ they also filed ‘a multimillion-dollar lawsuit claiming that Donna Branca’s obstetrician’s poor care deprived her of the right to abort him.’”).


33. Yakren, supra note 28, at 598 (describing parents who had brought a wrongful birth action who nonetheless had “loved[d] their child more than anything”).

34. See Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 407 (Iowa 2017) (suggesting that affording compensation may help parents be able to provide for their child’s needs); Sheth, supra note 24, at 659 (discussing the possible financial benefit that might accrue from such a suit); Hensel, supra note 28, at 164 (same). See also Yakren, supra note 28, at 601 (“[M]ost parents who launch wrongful birth suits do so ‘to guarantee care for their children.’”).

35. Yakren, supra note 28, at 593 (noting that “the child at issue in a wrongful birth suit . . . [may be] unable to comprehend the nature of the claim due to youth or impairment . . . .”).


37. Id. (“We fail to see how the parents’ recovery of extraordinary medical and educational expenses, so as to minimize the detrimental effect of the child’s impairment, is outweighed by any speculation about stigma that he might suffer.”).
Some commentators suggest that whether or not the child feels stigmatized by his or her parents bringing such an action, the state’s recognition of wrongful birth actions stigmatizes the disabled community as a whole. This criticism might be understood in at least two different ways: (1) by recognizing a separate cause of action for wrongful birth, the state sends a stigmatizing message, or (2) by permitting the recovery of damages at least partially based on a child having been born with a disability, the state sends a stigmatizing message.

The first way of understanding the criticism—the state sends a stigmatizing message by recognizing a separate tort for negligence resulting in the birth of a child with handicaps—seems accurate and captures something important. The state does not have to create a separate tort for negligence resulting in a child with disabilities but could instead include the kinds of alleged wrongdoing at issue in wrongful birth actions within medical negligence claims as a general matter. That way, the state would not be suggesting that negligence resulting

38. See Plowman, 896 N.W.2d at 406-07 (“Defendants argue that allowing wrongful-birth claims will stigmatize the disabled community.”); Sheth, supra note 24, at 659 (suggesting that whatever financial benefits are accrued is outweighed by the overall impact of the recognition of such claims); Hensel, supra note 28, at 164; Yakren, supra note 28, at 587 (“Scholars have argued that the ‘wrongful birth’ message, openly voiced by the mother of a living child, is stigmatizing to the entire disability community.”).

39. James Bopp, Jr., Barry A. Bostrom & Donald A. McKinney, The “Rights” and “Wrongs” of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts, 27 DUQ. L. REV. 461, 515 (1989) (“It is this implicit inescapable prejudice against individuals with disabilities in particular . . . that pervades the wrongful birth/life rationale . . . . [T]his categorical judgment of the worth of others . . . should [not] be clothed with the dignity of law through the recognition of wrongful birth and wrongful life claims.”).

40. Meghan Boone, Reproductive Due Process, 88 GEO. WASH. L. REV. 511, 564 (2020) (“[C]ourts are often very reluctant to award tort damages for wrongful birth or similar claims, for fear of what such damages might say about the value of human life.”).

41. Billauer, supra note 6, at 93 (suggesting that both wrongful births and wrongful pregnancy should be understood to fall within medical negligence actions more generally). See Garrison by Garrison v. Med. Ctr. of Delaware Inc., 571 A.2d 786, *2 (Del. 1989).

Rather than describing the parents’ claim as a cause of action for “wrongful birth,” we choose to characterize the alleged tort as an act or acts of negligence or medical malpractice involving the negligent performance of a medical procedure in combination with negligent delay in transmitting the results of the diagnostic tests to the parents. The resultant injury to the parents is that they have arguably been required to incur, and may be required in the future to incur, extraordinary expenses in the raising, care and education of their child, who suffers from a genetic disorder.

Id. Cf. Provencio v. Wenrich, 261 P.3d 1089, 1092 (N.M. 2011) (“[W]rongful conception is not a distinct tort. It is well-established among courts and scholars that wrongful conception sounds in the law of medical negligence.”).
in the birth of a child with handicaps involves such distinct and palpable harm that it should be treated as a separate and distinct tort. Indeed, it is not at all clear why the wrongful birth tort was defined as one involving a child born with handicaps rather than in some other way.\(^{42}\) For example, wrongful birth might instead have focused on whether the alleged negligence occurred pre- or post-conception or, perhaps, on whether the parent wanted to have a child.\(^{43}\) The state having defined the tort by focusing on the child’s condition rather than on the tortfeasor’s negligence or some other feature of the case is regrettable.\(^{44}\) The tort would be less stigmatizing if defined differently,\(^{45}\) notwithstanding that damages might still include the costs associated with the extraordinary care that a child with severe handicaps might require in order to thrive.\(^{46}\)

The second way of understanding the stigma criticism is that the state’s awarding of damages for the birth of a child with handicaps is itself stigmatizing for the disabled community, as a whole.\(^{47}\) Yet, the force of that argument is much greater than seems to be appreciated. Consider, for example, a plaintiff who sues for damages after becoming paralyzed because of someone else’s negligence.\(^{48}\) Permitting compensation in that context might also be said to be undermining the disabled community, because awarding damages in that context would involve the recognition that the plaintiff had been *harmed* as a

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\(^{42}\) Billauer, *supra* note 6, at 95 (discussing “commentators [who] use the term ‘wrongful birth’ to refer to parental claims incident to birthing an unwanted child, healthy or not”).

\(^{43}\) See *id.* at 95–96. See also Yakren, *supra* note 28, at 622 (suggesting “[r]eframing the wrongful birth claim as a loss of choice and control over procreation . . .”).

\(^{44}\) See Yakren, *supra* note 28, at 588 (“Scholars have further contended that courts stigmatize disability by labeling, framing, and compensating harm differently when parents have a ‘healthy’ child due to a medical provider’s failure to perform a proper sterilization or abortion.”).

\(^{45}\) Billauer, *supra* note 6, at 99 (“An alternative approach to addressing the situation, which also enlarges the scope of recovery, is to plainly call all these cases malpractice and hold the defendants to the general negligence/malpractice standard.”).

\(^{46}\) Smith v. Cote, 513 A.2d 341, 349 (N.H. 1986) (“[I]n most jurisdictions the parents may recover only the extraordinary medical and educational costs attributable to the birth defects.”).

\(^{47}\) Hensel, *supra* note 28, at 174 (“Wrongful birth and life actions transmit a potentially powerful message to all people with disabilities: as a matter of law, your impairment, standing alone, is a sufficient basis upon which to evaluate the quality of your life.”). See also Sheth, *supra* note 24, at 660 (“Wrongful birth and wrongful life claims are demoralizing to the disability community because they convey the message that an individual with a disability is inherently deficient.”).

\(^{48}\) See, for example, Sw. Emergency Physicians, P.C. v. Quinney, 819 S.E.2d 696, 698 (Ga. App. 2018) (alleging that the failure “to provide Quinney with proper medical treatment while he was in the emergency department of the hospital . . . resulted in Quinney suffering irreversible paraplegia.”).
result of the defendant’s negligence. The same point might be made with respect to others who seek compensation because the negligent defendant caused the plaintiff to become deaf or blind.

Commentators suggesting that individual wrongful birth damages should not be awarded because awarding such damages undermines the disabled community by making value judgments about differing lives would seem committed to the proposition that individual damages should not be awarded as a general matter because doing so would undermine the disabled community by making value judgments about differing lives. One would not expect such a commentator to suggest that someone who has become quadriplegic as a result of someone else’s negligence (e.g., in an auto accident) has suffered a “real loss” and thus should be compensated. The analysis of the auto accident example suggests that the injured person deserves compensation as a result of having been made worse off, which is allegedly the very kind of value judgment that some of the wrongful birth critics maintain must not be made.

One can affirm the inherent dignity and value of the differently abled community without denying that an individual has been harmed after having

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50. Canfield v. Sandock, 563 N.E.2d 1279, 1282 (Ind. 1990) (“Certainly, one who gains great pleasure from listening to music deserves compensation for loss of that pastime if a defendant’s negligence renders him deaf.”). See, for example, Walters v. Frakes, 953 N.W.2d 831, 840 (Neb. App. 2021) (“The inmate eventually sued the government and alleged that the negligence of the government’s prison employees in not reporting his complaints resulted in the delay in diagnosis and caused his blindness.”).

51. Cf. Hensel, supra note 28, at 194 (“The hard fought gains secured by the disability rights movement should not be placed at risk in the drive for individual compensation.”).

52. See id. at 176. See also Sheth, supra note 24, at 647 (distinguishing wrongful birth cases “from prenatal injury cases in which the child would have been born healthy were it not for the defendant’s negligent act committed in utero”).

53. See Stein, supra note 49, at 1118 (suggesting that that state should not make such value judgments).

54. See Michael J. Perry, The Morality of Human Rights, 50 SAN DIEGO L. REV. 775, 792 (2013) (“[A]ll human beings—even infants and the severely mentally disabled—have inherent dignity.”) (emphasis omitted); Dr. Jacqueline Laing, Information Technology and Biometric Databases: Eugenics and Other Threats to Disability Rights, 3 J. LEGAL TECH. RISK MGMT. 9, 19 (2008) (discussing “the inherent dignity of every person however disabled he or she might be”).
lost capacities as a result of someone else’s negligence.55 Further, one can argue that the tort system undermines the disabled community without precluding recovery for incapacitation due to someone else’s negligence.56 While commentators might rightly criticize states for creating a separate and distinct tort based on a child’s having been born with disabilities, the arguments sometimes asserted as a basis for rejecting wrongful birth claims (that awarding any damages would stigmatize the differently abled community) would, if taken seriously, require substantial revision of the tort system as a general matter.

ii. On Promoting Abortion

Some states are unwilling to award damages in a wrongful birth cause of action to any plaintiff who claims that a medical professional’s negligence caused the plaintiff to forego the opportunity to make an informed decision about whether to abort her pregnancy. Such a claim might be predicated on a medical practitioner having negligently failed to detect or disclose that the developing fetus had certain serious health issues. In these kinds of cases, the plaintiff asserts that if she had been informed in a timely manner of the fetus’s condition, she would not have carried the pregnancy to term.

Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C. involved “whether the parents of a child born with incurable and profound birth defects have a cause of action against a physician for failing to correctly diagnose and/or inform them of the fetal medical condition in time for an abortion.”57 The Kentucky Supreme Court explained that it 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.”58 Regrettably, the Grubbs court was not clear about why such a claim was not cognizable. The would-be plaintiff has in effect been precluded from making

55. See Michael B. Kelly, The Rightful Position in “Wrongful Life” Actions, 42 HASTINGS L.J. 505, 510 n.21 (1991) (“While society rightly insists that persons suffering from handicaps possess equal dignity and humanity, to date society has not expressed a preference that encourages the birth of children with genetic defects more strongly than the birth of healthy children.”). See id. (“The birth of an impaired child evokes universal expressions of sympathy, an indication that, other things being equal, society prefers healthy children at the same time it protects all children equally.”).

56. Anne Bloom & Paul Steven Miller, Blindsight: How We See Disabilities in Tort Litigation, 86 WASH. L. REV. 709, 715 (2011) (discussing how “tort litigation’s distorted perspective of disability provides political and cultural legitimacy for harmful stereotypes about people with disabilities . . . [which may] help to construct the experience of being disabled in our culture”).

57. 120 S.W.3d 682, 684 (Ky. 2003), as amended (Aug. 27, 2003).

58. Id. at 689.
an informed choice about whether to exercise the fundamental right to abort. If the “right of every woman to choose whether to bear a child is... of fundamental importance,” then one would expect that the deprivation of something so highly valued would be compensable.

The Kentucky court might have been suggesting that life, even with a congenital handicap, is so valuable for both the parent and the child that no cause of action predicated on a birth could be recognized. Yet, Kentucky recognizes a cause of action for preconception negligence resulting in the birth of a child, and one would expect that the state would treat pre- and post-conception negligence in the same way with respect to whether a cause of action is legally cognizable.

To clarify why the recognition of wrongful birth actions was offensive to public policy, the Grubbs court quoted from a dissenting opinion in a case decided by the New York Court of Appeals:

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

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59. See Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 403 (Iowa 2017) (“The compensable injury in a wrongful-birth claim is the parents’ loss of the opportunity to make an informed decision to terminate the pregnancy.”).


62. A separate issue might involve which damages would be recoverable under state law. Cf. Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc., 844 N.E.2d 1160, 1167 (Ohio 2006). [W]e look to our decision in Johnson on the proper measure of damages in situations in which a pregnancy occurs through alleged medical negligence (wherein the parents’ decision to avoid pregnancy is impaired by the negligence of another) and extend that decision to cover those situations in which a parent is denied the opportunity for an informed decision-making process during pregnancy because of alleged medical negligence. As in wrongful-pregnancy cases, we find the “limited damages” rule applicable to wrongful-birth cases. Damages are therefore limited to costs arising from the continuation of the pregnancy after the negligent act and for the birth of the child.

Id. (citing Johnson v. Univ. Hosps. of Cleveland, 540 N.E.2d 1370, 1370 (1989) (paragraph 2 of syllabus)). Kentucky limits the damages that might be awarded for preconception negligence. See Maggard, 627 S.W.2d at 48 (“[W]e hold that the damages are limited to the general and special damages incidental to the pregnancy and birth, such as, pain and suffering, loss of consortium, medical and hospital expenses, and loss of wages.”). See also Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983) (“[P]arents cannot recover damages based on the costs of raising a healthy but unexpected child from a doctor following an unsuccessful sterilization procedure.”).
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.\(^63\)

Thus, the Kentucky court suggested that wrongful birth actions were not cognizable because a negligent medical professional should not be held responsible for a condition “caused” by nature.\(^64\) But the point that the condition is congenital and incurable does not establish that the medical professional played no causal role in the harm’s occurrence.\(^65\)

The plaintiff parent is claiming that but for the physician’s negligence, the parent would not have had a child with a disability. That is true, although not because the parent would have had a child without a disability but, instead, because the parent would not have had that child. So, too, consider the plaintiff parent who sues because of preconception negligence resulting in the parent not knowing that her child was at risk of being afflicted with a terrible disease. When suing, the parent is not claiming that the genetic counselor did something to cause the child to have the congenital disease. Rather, the parent is claiming that but for the negligence the parent would not have had the child with the debilitating disease because the parent would have chosen not to conceive.

If the state were suggesting that having a child, with or without handicaps, is of incomparable value, then one would expect that no cause of action predicated on the birth of a child would be cognizable, regardless of whether the alleged negligence occurred pre- or post-conception. After all, if an individual negligently causes another to receive a benefit of incomparable value, the latter person cannot recover damages because the negligence resulted in a boon rather than harm.\(^66\)

An additional point about the Kentucky court’s reasoning should be noted, namely, that a much different issue would have been presented if the court had believed that the physician had played a causal role in the child having a

\(^{63}\) Grubbs, 120 S.W.3d at 689 (citing Becker v. Schwartz, 386 N.E.2d 807, 816 (N.Y. 1978) (Wachtler, J., dissenting)).

\(^{64}\) See id.

\(^{65}\) See id.

\(^{66}\) See Shelley A. Ryan, Wrongful Birth: False Representations of Women’s Reproductive Lives, 78 MINN. L. REV. 857, 884–85 (1994) (“When courts conclude as a matter of law that emotional harm damages are not recoverable under the ‘benefit/burden’ rule, they assume that in all wrongful birth cases, the parents are better off because of the defendant’s negligence.”).
disability. In cases where a medical professional has caused harm to a fetus, e.g., by causing the fetus to be exposed to some harmful substance, the court compares the life of the child with the handicap to what that child’s life would have been like without the handicap. Courts making that comparison have not been reluctant to permit damages to be awarded, as long as the harm was foreseeable.

The Kentucky Supreme Court is not the only state high court to refuse to permit the awarding of wrongful birth damages where the plaintiff alleged that the defendant’s negligence had resulted in the plaintiff’s loss of the opportunity to make an informed abortion decision. The North Carolina Supreme Court reached a similar result using similar reasoning in Azzolino v. Dingfelder. At issue in Azzolino was an allegation that “the defendants’ negligent failure to advise the parents properly of the availability of amniocentesis and genetic counseling and negligent prenatal care of the mother prevented the termination of the mother’s pregnancy by abortion.” The Azzolino court cited with approval the New York Court of Appeals dissenting opinion, also cited by the Grubbs court, suggesting that nature rather than the defendants had been responsible for the child’s condition. The North Carolina court emphasized that in the case before it there had neither been an allegation that “the defendants


Defendant’s conduct was not "likely to result" in plaintiff’s conception or birth, let alone her alleged injuries nearly three years after the car accident. Unlike a medical professional’s conduct which is directly and intentionally related to whether a child is conceived or born, such conception or birth is not a reasonably foreseeable result of the operation of a car.

Id.

70. 337 S.E.2d 528, 537 (N.C. 1985).

71. Id. at 530.


73. See Azzolino, 337 S.E.2d. at 536 (citing Becker v. Schwartz, 386 N.E.2d 807, 816 (N.Y. 1978) (Wachtler, J. dissenting in part)).
negligently injured a fetus,” nor that “the defendants in any way directly caused the genetic defect.”\textsuperscript{74} The court then rejected that “life, even life with severe defects, may ever amount to a legal injury.”\textsuperscript{75}

The North Carolina position that life with severe defects does not amount to legal injury needs to be unpacked. For example, the court might be suggesting that there can be no cause of action where the claim is that defendant’s negligence resulted in the plaintiff having a child with severe disabilities, because “life, even life with severe defects, may [not] ever amount to a legal injury.”\textsuperscript{76} But that would not account for North Carolina jurisprudence.\textsuperscript{77}

Suppose that a medical professional’s negligence occurred prior to conception, and that negligence deprived the plaintiff of the ability to make an informed decision about whether to conceive a child.\textsuperscript{78} Suppose further that the preconception negligence involved a failure to give information in a timely way, and that there was no contention that the medical professional in some way caused the child’s condition in any way other than in having failed to provide the relevant information in a timely way.\textsuperscript{79} In this kind of case, there would be no contention that the defendant had “directly caused the genetic defect,”\textsuperscript{80} and one would have assumed that \textit{Azzolino} would control and that the plaintiff’s tort action would be unsuccessful.

In \textit{McAllister v. Ha}, the North Carolina Supreme Court refused to apply \textit{Azzolino} in a case involving preconception negligence resulting in a decision to conceive and then to give birth to a child with foreseeable challenges.\textsuperscript{81} The defendant physician failed to report to the plaintiffs the results of bloods tests indicating that a child they conceived would have a one-in-four chance of

\textsuperscript{74} Id. at 532, 534.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} See generally id.
\textsuperscript{78} McAllister v. Ha, 496 S.E.2d 577, 582 (N.C. 1998).
\textsuperscript{79} Id. See id. at 584 (“[T]he disorder in this case, sickle-cell disease . . . [is] not the result of any injury negligently inflicted by . . . [the] defendant-doctor.”).
\textsuperscript{80} Azzolino, 337 S.E.2d at 534.
\textsuperscript{81} 496 S.E.2d 577, 582 (1998).
having sickle-cell disease. The plaintiffs had claimed that they would have avoided conception if they had been apprised of the relevant probabilities, i.e., that they would not have had the child but for the physician’s negligent failure to inform them of the test results.

The North Carolina Supreme Court expressly rejected that Azzolino controlled such a case. “The complaint does not allege that plaintiffs’ son’s very existence—the injury the Court declined to recognize in Azzolino—is an injury for which they should be compensated. Thus, the claim is not one precluded by Azzolino.” Basically, the court reasoned that this kind of case was distinguishable from one in which the plaintiff claimed to have been denied the opportunity to make an informed abortion decision, and thus was not precluded by North Carolina law. But that interpretation of North Carolina law focuses on the method by which the couple would have avoided having a child with sickle-cell disease—abortion versus avoiding conception—and does not suggest that “life, even life with severe defects, may [not] ever amount to a legal injury.” Instead, the North Carolina approach refuses to award damages based on the value of the lost opportunity to make an informed decision about whether to abort.

The Georgia Supreme Court offered an analysis that followed the lead offered by the high courts of Kentucky and North Carolina. When explaining that the state would not recognize wrongful birth actions, the Georgia court

82. Id. at 580 (“Plaintiffs allege that the traits carried by plaintiff-wife combined with the factor carried by plaintiff-husband put the couple at a one-in-four risk of bearing a child with sickle-cell disease.”).

83. Id. (“Plaintiffs further allege that because of defendant’s negligence, they never received any genetic counseling to prepare them for being the parents of a child with sickle-cell disease and were deprived of the opportunity to make an informed decision regarding whether to have another child.”).

84. Id. at 582.

85. See id. (“[T]he claim is not one precluded by Azzolino.”).

86. Azzolino, 337 S.E.2d at 534.

87. See McAllister, 496 S.E.2d 577. A related issue not discussed by the North Carolina Supreme Court is whether a cause of action would lie if a woman secured an abortion because she had not been fully informed about the fetus’s condition. Cf. Blackburn v. Blue Mountain Women’s Clinic, 951 P.2d 1, 4 (Mont. 1997).

Prior to the procedure, Blackburn told the Blue Mountain Clinic counselor that she was seeking an abortion only because she feared her baby would be born HIV positive. Blackburn claims neither the counselor, nor any nurse or doctor with whom Blackburn spoke at any time prior to her abortion, explained to Blackburn that an HIV negative mother could not deliver an HIV positive baby.

Id.
noted that “the defendants cannot be said to have caused the impairment.” However, when offering that assessment, the court was not thereby indicating that the state refused to recognize preconception torts. On the contrary, the court admitted that wrongful pregnancy actions were recognized in the jurisdiction.

The caselaw suggests that a number of factors are in play in the prenatal tort jurisprudence. Some jurisdictions are unwilling to recognize a cause of action if that action is predicated on the plaintiff having lost the opportunity to abort the pregnancy. Such an approach bars some wrongful birth/pregnancy actions but not others. For instance, this approach does not bar a wrongful birth/pregnancy claim that, but for the defendant’s negligence, there would have been no pregnancy. However, this approach does bar a claim that, but for the defendant’s negligence, the pregnancy would have been aborted.

89. See id. at 563.
90. Id. at 559.

A "wrongful pregnancy" action is typically brought by the parents of a child whose conception or birth is due to a physician’s negligent performance of a sterilization or of an abortion. In Graves, this court aligned itself with the vast majority of other jurisdictions in holding that such an action may be brought as "no more than a species of malpractice." The recovery of the plaintiff/parents in Graves, however, was limited to the general and special damages incurred during the pregnancy of the mother and the delivery of the child.


91. Jurisdictions might adopt a different approach in cases in which an individual has been advised inaccurately about the existence of a fetal condition resulting in a woman’s obtaining an unnecessary abortion. Cf. Martinez v. Long Island Jewish Hillside Med. Ctr., 512 N.E.2d 538, 539 (N.Y. 1987) (permitting woman to bring cause of action predicated on her having obtained an abortion after having been inaccurately informed that the child she was carrying would suffer from microcephaly or anencephaly).

92. See generally Willis v. Wu, 607 S.E.2d 63, 68 n.3 (S.C. 2004); Wilson v. Kuenzi, 751 S.W.2d 741, 742 (Mo. 1988) (en banc).
Some state legislatures and state supreme courts are quite clear about their unwillingness to permit wrongful birth actions based on the claim that the plaintiff was harmed because of a lost opportunity to make an informed

93. MO. REV. STAT. § 188.130(2) (2020) (“No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.”); MINN. STAT. § 145.424(2) (2020) (“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.”); KAN. STAT. ANN. § 60-1906(a) (2020).

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. OKLA. STAT. tit. 63, § 1-741.12(B)(3) (2021).

“Wrongful birth action” means a cause of action that is brought by a parent or other person who is legally required to provide for the support of a child, which seeks economic or noneconomic damages because of a condition of the child that existed at the time of the child’s birth, and which is based on a claim that a person’s act or omission contributed to the mother’s not having obtained an abortion.

Id. ARK. CODE ANN. § 16-120-902(a) (West 2021) (“A person is not liable for damages in a civil action for wrongful birth based on a claim that, but for an act or omission of the defendant, a child would not or should not have been born.”); IOWA CODE § 613.15B(1) (2021) (“A cause of action shall not arise and damages shall not be awarded, on behalf of any person, based on a wrongful birth claim that, but for an act or omission of the defendant, a child would not or should not have been born.”); MICH. COMP. LAWS § 600.2971(1) (2021) (“A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.”); ARIZ. REV. STAT. ANN. § 12-719A (2021) (“A person is not liable for damages in any civil action for wrongful birth based on a claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.”). But see ME. STAT. tit. 24, § 2931(3) (2020) (“Damages for the birth of an unhealthy child born as a result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child.”).

94. The North Carolina Supreme Court made clear that it believed wrongful birth tied up with abortion in particular. See Azzolino v. Dingfelder, 337 S.E.2d 528, 531 (1985) (“Wrongful birth refers to the claim for relief of parents who allege that the negligent treatment or advice deprived them of the choice of terminating pregnancy by abortion and preventing the birth of the defective child.”). The Georgia Supreme Court reflected a similar view. See Etkind v. Suarez, 519 S.E.2d 210, 211 (Ga. 1999).

Throughout her pregnancy, Dr. Jennifer Etkind was a patient of Dr. Ramon Suarez. After giving birth to a child with Down’s Syndrome, she and her husband filed suit against Dr. Suarez and his partnership, asserting a “wrongful birth” claim. Such a claim “is brought by the parents of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child.”

Id. (citing Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 559 (Ga. 1990).
abortion decision. Such a refusal has not been viewed as burdening abortion rights in an unconstitutional way. But states limiting wrongful birth actions when the plaintiff asserts that but for defendant’s negligence she would have aborted suggests that some state limitations on wrongful birth actions have more to do with attitudes about abortion than about other possible attitudes.

B. Wrongful Pregnancy

A wrongful pregnancy or wrongful conception claim also alleges that a child would not have been born but for the negligence of some medical professional. However, there is an important difference between wrongful pregnancy and wrongful birth cases in that the former kind of case does not involve a serious condition that the medical professional failed to discover or discuss.

The South Carolina Supreme Court defined wrongful pregnancy in the following way:

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

95. Etkind, 519 S.E.2d at 213 (“This holding does not violate the constitutional rights of the parents of an impaired child, because the refusal to recognize a wrongful birth claim absent authorizing legislation does not constitute undue interference by Georgia in the exercise of the right to elect to have an abortion.”). See also id. at 213 (“Nothing in Casey holds that the Federal Constitution compels the states to recognize a woman’s right to bring a civil suit against her obstetrician for the negligent failure to assist her in making an informed abortion decision.”). But see Hickman v. Grp. Health Plan, Inc., 396 N.W.2d 10, 19 (Minn. 1986) (Amdahl, C.J., dissenting) (“The legislature’s removal of the negligence action safeguard, while not preventing a woman from actually obtaining an abortion, does harm the complete exercise of a woman’s rights under Roe.”).

96. 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. Rather, Molloy’s complaint alleges that “[h]ad [she and her husband] known that [S.F.] had Fragile X, they would not have conceived [M.M.].” This states an action not for wrongful life or birth, but rather for wrongful conception—an action that has been recognized in this state for over a quarter century.

Id. (citations omitted).

97. Cf. Hensel, supra note 28, at 194 (“The hard fought gains secured by the disability rights movement should not be placed at risk in the drive for individual compensation.”).

contraceptive prescription or device.\textsuperscript{99}

The name of the tort is somewhat misleading. An individual bringing such a claim need not assert that the conception or pregnancy was wrongful, i.e., would not have occurred but for the defendant’s negligence.\textsuperscript{100} Instead, the plaintiff might be claiming that the pregnancy would not have \textit{continued to term} but for the defendant’s negligence.\textsuperscript{101} Characterizing the claim as that there would have been no pregnancy resulting in a live birth but for the defendant’s negligence includes cases in which the pregnancy would never have \textit{occurred} but for the defendant’s negligence\textsuperscript{102} and cases in which the pregnancy would never have \textit{continued} but for the defendant’s negligence.\textsuperscript{103}

There is yet another respect in which the name of this tort is misleading. Wrongful pregnancy and wrongful conception claims involve a \textit{healthy} child who would not have been born but for the defendant’s alleged negligence.\textsuperscript{104}

Consider, for example, a couple who cannot support an additional child because the couple is not wealthy and already has several children.\textsuperscript{105} One member of the couple is sterilized.\textsuperscript{106} If the sterilization is performed improperly, the couple might end up having another child, inability to provide for that additional child notwithstanding.

In most, but not all, of the states recognizing wrongful pregnancy actions, damages are limited to those associated with the pregnancy\textsuperscript{107} and the plaintiffs


\textsuperscript{100} See id.

\textsuperscript{101} See id.

\textsuperscript{102} See Johnson v. Univ. Hosps. of Cleveland, 540 N.E.2d 1370, 1370 (Ohio 1989) (wrongful pregnancy action based on negligent sterilization).

\textsuperscript{103} Miller v. Johnson, 343 S.E.2d 301, 302 (Va. 1986) (wrongful pregnancy actions based on negligently performed abortions).

\textsuperscript{104} Parents in the wrongful pregnancy cases are not usually accused of attempting to stigmatize their children. \textit{Cf.} Marciniak v. Lundborg, 153 Wis. 2d 59, 67, 450 N.W.2d 243, 246 (Wis. 1990) (“The parents’ suit for recovery of child rearing costs is in no reasonable sense a signal to the child that the parents consider the child an unwanted burden.”).

\textsuperscript{105} \textit{Id.} at 67 (“Individuals often seek sterilization precisely because the burdens of raising a child are substantial and they are not in a position to incur them.”).

\textsuperscript{106} \textit{Id.} at 62 (“In 1981, Paula Marciniak, wife of Douglas Marciniak, underwent a sterilization operation to avoid having further children.”).

\textsuperscript{107} Miller, 343 S.E.2d at 305.

The mother, therefore, may recover damages, if proven, for medical expenses, pain and suffering, and lost wages for a reasonable period, directly resulting from the negligently performed abortion, the continuing pregnancy, and the ensuing
are not permitted to recover the costs of raising the child.\textsuperscript{108} Many of the courts precluding child-rearing damages reason that the birth of a healthy child outweighs whatever costs might be accrued in raising that child.\textsuperscript{109}

The wrongful birth and wrongful pregnancy jurisprudence offers a few lessons. While negligence resulting in the birth of a healthy child is actionable, most states limit the damages that may be awarded to those occurring before the birth, reasoning that recoverable damages should not include the ordinary costs of raising a child.\textsuperscript{110} Where negligence results in the birth of a child with severe challenges, the state response is more complicated. Many states permit the recovery of the extraordinary costs associated with raising a child with a severe disability.\textsuperscript{111} However, some states are reluctant to permit the imposition of damages where the negligence solely involves a failure to inform a patient in a timely way of important information, reasoning that in such cases the negligent individual did not play a causal role in the child having the (possibly congenital) condition.\textsuperscript{112} Such states may also be reluctant to award damages where the harm was predicated upon a lost opportunity to abort.\textsuperscript{113} These justifications for prohibiting or limiting damages are controversial and in any

\begin{quote}
childbirth. The mother is also entitled under the general rule to recover damages, if proven, for emotional distress causally resulting from the tortiously caused physical injury.
\end{quote}

\textit{Id.}

\textsuperscript{108} \textit{Id.} at 307 ("[T]he costs of rearing a reasonably healthy child to majority are not recoverable in a wrongful pregnancy or wrongful conception action."). \textit{But see} Univ. of Ariz. Health Scis. Ctr. v. Superior Ct., 667 P.2d 1294, 1299 (Ariz. 1983).

\textit{[T]he preferable rule is that followed by the courts which, although permitting the trier of fact to consider both pecuniary and non-pecuniary elements of damage which pertain to the rearing and education of the child, also require it to consider the question of offsetting the pecuniary and non-pecuniary benefits which the parents will receive from the parental relationship with the child.}

\textit{Id.}

\textsuperscript{109} Boone v. Mullendore, 416 So. 2d 718, 722 ( Ala. 1982) ("The birth of a healthy child, and the joy and pride in rearing that child, are benefits on which no price tag can be placed. This joy far outweighs any economic loss that might be suffered by the parents."); Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983) ("The parents of a normal healthy child whom they now love have not suffered any injury or damage. The benefits conferred by the child’s existence clearly outweigh any economic burden involved.").

\textsuperscript{110} Schork, 648 S.W.2d at 863; Maggard v. McKelvey, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981).

\textsuperscript{111} Smith v. Cote, 513 A.2d 341, 349 (N.H. 1986).

\textsuperscript{112} Miller, 343 S.E.2d at 307; Univ. of Ariz. Health Scis. Ctr, 667 P.2d at 1299.

\textsuperscript{113} Molloy v. Meier, 679 N.W.2d 711, 723 (Minn. 2004).
III. OTHER KINDS OF CLAIMS INVOLVING PRE-BIRTH NEGLIGENCE

Negligence can occur pre-birth in a variety of contexts. Negligent actions either pre- or post-conception might result in a child being born with severe disabilities. However, the kinds of negligence cases discussed in this section differ from the paradigmatic wrongful birth cases in that the negligence does not merely involve a failure to apprise the couple of important information in a timely way.115 Instead, the negligent actor does something causing a child to have the disability—had there been no negligence, a child without the disability would (presumably) have been born. Many states permit liability to be imposed in these kinds of cases.116

A. The Rh Factor Cases

Cases in several states have involved the negligent failure to take appropriate steps when dealing with a patient who has Rh-negative blood. The adverse consequences that result may manifest in children not yet conceived, and states have nonetheless imposed liability for the severe consequences that have sometimes occurred.

Renslow v. Mennonite Hospital is a seminal case establishing the liability of individuals who fail to take account of the adverse consequences that can occur when Rh-negative blood is sensitized by Rh-positive blood.117 A thirteen-year-old girl who had Rh-negative blood was negligently exposed to Rh-positive blood on two different occasions, resulting in the sensitization of her blood.118 The difficulty came to light eight years later during a routine

114. See supra note 29 and accompanying text.
116. See id.
117. 367 N.E.2d 1250 (Ill. 1977).
118. Id. at 1251 (“Plaintiff’s six-count complaint for negligence and willful and wanton misconduct alleges that in October of 1965, when her mother was 13 years of age, the defendants, on two occasions, negligently transfused her mother with 500 cubic centimeters of Rh-positive blood.”). Id.
prenatal screening. The fetal exposure to the sensitized blood allegedly caused a variety of serious harms.

The Illinois Supreme Court reasoned that because negligently caused harm to a previable fetus is actionable, it would be “illogical to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child, unbeknownst to him, been conceived prior to his act.” The court held that “there is a right to be born free from prenatal injuries foreseeablely caused by a breach of duty to the child’s mother.”

The Renslow court understood that opening up liability to those not yet conceived would leave open whether, for example, liability might extend across several generations. But the court noted that “the case at bar is clearly distinguishable . . . [both because the] damage alleged is not, by its nature, self-perpetuating . . . [and because] the plaintiff [is not] a remote descendant.” Thus, while different courts might draw the line in different places with respect to who may recover from preconception tortious conduct, the Illinois Supreme Court suggested that the instant case did not involve a close case.

119. Id. (“In December 1973 she first discovered her condition when a routine blood screening was ordered by her physician in the course of prenatal care.”).

120. Id.

Plaintiff was born on March 25, 1974, jaundiced and suffering from hyperbilirubinemia. She required an immediate, complete exchange transfusion of her blood and another such transfusion shortly thereafter. It is further alleged that, as a result of the defendants’ acts, plaintiff suffers from permanent damage to various organs, her brain, and her nervous system.

121. Id.

122. Id.

123. Id. (“The defendants . . . raise the specter of successive generations of plaintiffs complaining against a single defendant for harm caused by genetic damage done an ancestor in a nuclear accident.”).

124. Id.


Although plaintiff is not a “DES daughter”—one who was exposed to DES while in utero—she may be no less a victim of the devastation wrought by DES than her mother, who is a DES daughter, and we see no sound basis for denying plaintiff her day in court along with her mother.

with Grover v. Eli Lilly & Co., 591 N.E.2d 696, 700 (Ohio 1992). Even if knowledge of the drug’s “dangerous propensities” is sufficient to create
Several other states have employed similar reasoning to reach similar conclusions. Those cases have involved somewhat different factual scenarios.

When a mother with Rh-negative blood is carrying an Rh-positive fetus, there is a risk of exposure and sensitization. That sensitization can be prevented if the drug RhoGAM is administered during the pregnancy and delivery of the child. However, once the mother’s blood has become sensitized, the administration of RhoGAM will not bring about desensitization.

*Walker v. Rinck* involved an Rh-negative woman (Judith Walker) who had given birth to an Rh-positive child. No RhoGAM was administered because test results erroneously indicated that the mother was Rh positive, liability to the women exposed to the drug in utero, this same knowledge does not automatically justify the extension of liability to those women’s children. It is one thing to say that knowledge of a propensity to harm the reproductive organs is sufficient to impose liability for a variety of different injuries to the reproductive organs. It is yet another thing to say that this generalized knowledge is sufficient to impose liability for injuries to a third party that occur twenty-eight years later.

(footnotes omitted).

126. See generally Empire Cas. Co. v. St. Paul Fire & Marine Ins. Co., 764 P.2d 1191 (Colo. 1988). Physician misreported blood type of mother and did not administer RhoGAM. Subsequently, the mother became sensitized, and injuries were found in her later conceived children. The Court described the cause of action as “an ordinary prenatal injury tort.” *Id.* Monusko v. Postle, 437 N.W.2d 367, 369–70 (Mich. Ct. App. 1989) (holding that failing to administer a rubella test and to immunize a woman during her child-bearing years gave rise to a cause of action by a post-conceived child who was born with injuries from rubella); *Pitre v. Opelousas Gen. Hosp.*, 530 So.2d 1151, 1157 (La. 1988) (“Logic and sound policy require a recognition of a legal duty to a child not yet conceived but foreseeably harmed by the negligent delivery of health care services to the child’s parents.”).

127. See id.

128. *Yeager v. Bloomington Obstetrics & Gynecology, Inc.*, 585 N.E.2d 696, 697 (Ind. Ct. App. 1992) (“RhoGAM can prevent an Rh-negative woman from developing the sensitivity to Rh-positive blood when administered during the pregnancy and delivery of her first Rh-positive child.”) aff’d, 604 N.E.2d 598 (Ind. 1992). *See also Lough ex rel Lough v. Rolla Women’s Clinic, Inc.*, 866 S.W.2d 851, 852 (Mo. 1993) (“The drug RhoGAM is designed specifically to prevent what occurred to Tyler. Administered within 72 hours of a woman giving birth to a child with an Rh factor different from hers, RhoGAM suppresses the mother’s immune system response, preventing the sensitization that harmed Tyler.”).

129. *Lee v. Williams*, 420 P.3d 88, 92 (Utah Ct. App. 2018) (“To protect against Rh-sensitization, doctors can administer an injectable medication called RhoGAM, which Williams testified significantly reduces the risk of Rh-sensitization. RhoGAM is preventative; that is, it can only prevent Rh-sensitization, and cannot undo the sensitization once it has occurred.”).

130. *Walker v. Rinck*, 604 N.E.2d 591, 592 (Ind. 1992) (“Mrs. Walker had Rh negative blood and the child had Rh positive blood . . . “).
notwithstanding that Walker had expressly warned her doctor that her blood was Rh negative.\textsuperscript{131}

Walker subsequently gave birth to other children, some of whom had Rh-positive blood.\textsuperscript{132} The Rh-positive children contended that they suffered harms as a result of the negligent failure to administer RhoGAM.\textsuperscript{133} The Indiana Supreme Court noted:

\begin{quote}
No one would seriously contend that an infant could not recover for injuries sustained as a result of a defective product, such as an automobile, manufactured prior to the conception of the infant. In those situations, as here, the wrongful conduct occurred prior to the conception of the infant plaintiff.\textsuperscript{134}
\end{quote}

The \textit{Walker} court reasoned that the duty to Walker arose from the contract she had with her physician.\textsuperscript{135} That duty may be extended to the beneficiaries of the agreement and, here, the beneficiaries of the agreement were her future children.\textsuperscript{136} Further, the very injuries that occurred were the kind that would foreseeably result from the failure to administer RhoGAM.\textsuperscript{137}

The Missouri Supreme Court also held that a negligent failure to administer RhoGAM was actionable, notwithstanding that the child had not yet been conceived at the time of the negligence.\textsuperscript{138} The court emphasized that the harms due to the negligence were foreseeable and that the physician–patient relationship between the mother and physician was also meant to protect future

\textsuperscript{131} \textit{Id.} (“Dr. Rinck ordered blood tests from Lake Ridge. Those tests erroneously reported that Mrs. Walker had Rh positive blood.”). \textit{Id.} (“Mrs. Walker, who was a nurse, informed Dr. Rinck that she had Rh negative blood.”).

\textsuperscript{132} \textit{See id.}

\textsuperscript{133} \textit{See id.}

\textsuperscript{134} \textit{Id. at 594.}

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id. at 595 (“Here, the Walker children were the beneficiaries of the consensual relationship between their mother and Dr. Rinck, and Dr. Rinck had actual knowledge that the only reason for the administration of RhoGAM was for the benefit of future children who may be born to Mrs. Walker.”). See also Lough v. Rolla Women’s Clinic, Inc., 866 S.W.2d 851, 854 (Mo. 1993) (“Foreseeability is the paramount factor in determining existence of a duty, but a relationship between the parties where one is acting for the benefit of another also plays a role.”) (citing Hoover’s Dairy, Inc., v. Mid–America Dairymen, Inc., 700 S.W.2d 426, 432 (Mo. 1985) (en banc)).}

\textsuperscript{137} \textit{Walker}, 604 N.E.2d at 595 (“It can hardly be argued that the injuries suffered by the Walker children were not foreseeable when the medical reason to give RhoGAM to their mother was to prevent the exact injuries which they allege occurred.”).

\textsuperscript{138} \textit{Lough}, 866 S.W.2d at 852.
children.\textsuperscript{139} The negligent failure to administer the RhoGAM resulted in the very harms that RhoGAM was designed to prevent.\textsuperscript{140}

The Missouri court offered the following hypothetical to illustrate why the tort should not be barred merely because the child had not yet been conceived at the time the negligence occurred.

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.\textsuperscript{141}

Here, the harms were even more foreseeable and particularized. The mother must receive the RhoGAM shortly after the birth of her child precisely because future children would be at risk if her blood became sensitized.\textsuperscript{142} The relevant issue was not whether she had future children with her current husband or, instead, with a different husband should she divorce and remarry, i.e., the relevant issue did not involve the particular chromosomes of the harmed children.\textsuperscript{143} Rather, the important issue was preventing any possible children that she might bear from being at risk of the severe difficulties that might result were the mother not treated with RhoGAM in a timely way.\textsuperscript{144}

\textbf{B. Other Kinds of Cases}

In the Rh factor cases, the failure to administer a drug causes the mother’s blood to become sensitized, which puts at risk any future children that she might

\textsuperscript{139} \textit{Id.} at 854 (“[A] relationship between the parties where one is acting for the benefit of another also plays a role.”) (citing \textit{Hoover’s Dairy, Inc.}, 700 S.W.2d at 432). \textit{See also} \textit{Lynch v. Scheininger}, 744 A.2d 113, 126 (N.J. 2000).

We reject the contention advanced by some that the physician whose negligence gives rise to the claim owes no duty to a child not yet conceived. In the fields of obstetrics and gynecological surgery, the relationship between a physician’s responsibilities and the possibility of consequences to the mother that affect future pregnancies is well understood.

\textit{Id.}

\textsuperscript{140} \textit{Lough}, 866 S.W.2d at 853 (“Indeed, the very reason for the RhoGAM treatment is to benefit later conceived children of the mother, while injury to those children in the absence of proper treatment is highly predictable.”) (citing \textit{Renslow v. Mennonite Hospital}, 367 N.E.2d 1250, 1253 (Ill. 1977)).

\textsuperscript{141} \textit{Id.} at 854.

\textsuperscript{142} \textit{Id.} at 852.

\textsuperscript{143} \textit{See id.}

\textsuperscript{144} \textit{Id.} at 852.
bear. So, too, the failure to administer a rubella vaccine to a woman of child-bearing age might put at risk any children that the non-vaccinated woman might bear were she to contract rubella during her pregnancy.

At issue in Monusko v. Postle was a negligent failure to administer a rubella vaccine to a woman of child-bearing age by her OB/GYN doctors. The woman later contracted rubella while pregnant, and the child born suffered the foreseeable effects from rubella exposure in utero. The Monusko court rejected the suggestion that liability could not be imposed because the negligence occurred prior to the child’s conception, reasoning that the “plaintiff . . . , while not specifically contemplated, would have been the beneficiary of a test and immunization procedure specifically designed to alleviate the harm which resulted in this case.” Further, it did not matter whether the child born was the child of the patient and the man who was her husband at the time of the negligent failure to administer the rubella vaccine or, instead, the child of the patient and a different husband—the child’s particular chromosomes did not play a role in whether the doctors were liable for their negligence.

An additional point might be made about Monusko. The tort damages were sought by the child, Andrea. But the doctors’ negligence in failing to test for or immunize against rubella occurred primarily during Jill Monusko’s pregnancy when she was carrying her daughter, Loretta. The negligence was

145. Id.
147. Id. (patient never tested nor immunized for rubella during several visits by OB/GYN doctors). But see McNulty v. McDowell, 613 N.E.2d 904, 907 (Mass. 1993) (“The fact that McDowell was an obstetrician-gynecologist and thus concerned with the health of his patients’ reproductive systems does not, in itself, impose an affirmative duty on him to do everything possible to protect the health of a child not yet conceived, planned, or intended.”); see also id. (noting that in Monusko, the patient had indicated that she was planning on having another child).
148. Monusko, 437 N.W.2d at 368 (“Andrea Monusko was born on February 10, 1980, in a severely impaired physical and mental condition, suffering from rubella syndrome.”).
149. Id. at 369–70 (“We hold that defendants owed a duty to Andrea, even though she was not conceived at the time of the alleged wrongful act.”).
150. The court noted that the vaccine was to prevent harms to children as a general matter rather than, for example, the children that the patient might have had with the man who was her husband at the time the negligence occurred. See id. at 370 (“[T]he test and the preconception immunization are specifically designed to prevent rubella syndrome in children that are not yet conceived.”).
151. Id. at 367–68 (“Count I seeks damages for plaintiff Andrea Monusko for a preconception tort.”).
152. Id. at 368.
tied to Andrea in that Jill Monusko had an intrauterine device (IUD) removed by the doctors and at that time she announced that she was hoping to have another child, who eventually turned out to be Andrea.153 Here, too, there was no focus on the particular chromosomes of the child.154 Rather, the point was that the defendants had created a risk for any child Monusko carried while remaining unvaccinated.155

In Monusko, the negligent failure to vaccinate resulted in the later-conceived fetus being exposed to rubella. In the Rh factor cases,156 the failure to administer RhoGAM in a timely way put later-conceived Rh-positive fetuses at risk. In neither of these kinds of cases did the negligence result in a change to the mother’s chromosomes.157 In Jorgensen v. Meade Johnson Laboratories Inc., the Tenth Circuit addressed whether liability might be imposed where the harms to the child were the result of a change to the mother’s chromosomes.158

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Jill Rose Monusko (Monusko) began prenatal care and treatment at Burns Clinic on November 22, 1977, prior to the birth of her second child, Loretta Monusko. The individual defendant doctors provide OB/GYN treatment at Burns Clinic. Monusko received prenatal care through February of 1978. She was not tested for her rubella status at any of her visits.

On March 2, 1978, she was admitted to Northern Michigan Hospital, where Loretta was delivered by at least one of the Burns Clinic defendants. Monusko was neither tested nor immunized during her stay in the hospital. She was neither tested nor immunized during her Burns Clinic visit.

See also id.

Plaintiffs put forward the recommendation made by the American College of Obstetricians and Gynecologists which states that a rubella test should be given to the pregnant patient if her status is unknown. They further rely on the ACOG standard which states that the first postpartum examination is “an optimal time for review of family planning and for determining immunizations, including rubella.”

Id. There was no mention in the Monusko opinion of the doctor who gave prenatal care to Jill Monusko while she was carrying Andrea. See id. That doctor also should have performed the screening, and the tort action against that doctor would have been more clear-cut. Perhaps that doctor settled with the family.

153. Id. (“On March 22, 1979, Monusko returned to the Burns Clinic to have her IUD removed. She indicated to the attending doctor that she wished to have a third child. She was neither tested nor immunized for rubella at that visit.”).

154. Id.

155. Id.


158. 483 F.2d 237 (10th Cir. 1973).
At issue in *Jorgensen* was an allegation that an oral contraceptive had caused a change in the chromosomes of the woman taking the contraceptive.\(^\text{159}\) Later, she stopped taking the contraceptive when she was ready to have children.\(^\text{160}\) Allegedly, the contraceptive caused a change in her chromosomes resulting in her children having various serious, debilitating conditions.\(^\text{161}\)

The defendant argued that there could be no liability because the alleged tortious conduct had occurred prior to the children’s conception.\(^\text{162}\) The Tenth Circuit, applying Oklahoma law, rejected that preconception torts were not cognizable.\(^\text{163}\) 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.”\(^\text{164}\)

The *Jorgensen* court suggested that liability would be imposed if, on remand, the harms could be shown to have been proximately caused by the drug.\(^\text{165}\) An aspect of the *Jorgensen* opinion worthy of note is that the court did

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159.  *Id.* at 239.

160.  *Id.* at 238.

161.  *Id.* at 239 (alleging that “minor plaintiff, Pamela B. Jorgensen, suffered severe, excruciating, and constant pain and suffering and mental retardation and deformity as a result of the aforesaid exposure.”).  *See also id.* (“[T]he deceased twin, Kimberly, adopts the above allegations and makes other similar averments and seeks damages for retardation, deformity, pain and suffering.”).

162.  *Id.*

163.  *Id.* at 240.


165.  *Jorgensen*, 483 F.2d at 240 (“We are persuaded that the Oklahoma courts would treat the problem of the injuries alleged here as one of causation and proximate cause, to be determined by competent medical proof.”).
not reject the children’s cause of action by arguing that once the mother’s chromosomes had been altered, the only way that the children could have avoided their congenital difficulties would have been never to have been born at all.¹⁶⁶ Rather than suggest that the relevant alternatives for the children were living with the congenital difficulties or never having lived at all, the court instead suggested that the relevant alternatives for the children were living with the congenital difficulties or living without those congenital difficulties.¹⁶⁷ Yet, if the oral contraceptive had caused a change in the mother’s chromosomes prior to the children’s conception, the children who would have been born had the mother never used the contraceptive would have been different children, i.e., would have had (somewhat) different chromosomes.¹⁶⁸ Thus, a different court might have said that if Alta Jorgensen had never taken the oral contraceptive, Kimberly and Pamela never would have been born (even if there were other children with those names).¹⁶⁹ But that would mean that Kimberly and Pamela (the plaintiffs) could only have (1) never lived at all, or (2) lived the lives that they in fact lived, which would have meant that they likely would have been barred from bringing an action against the manufacturer.¹⁷⁰

To understand why this choice by the Jorgensen court was important, it is helpful to consider some other cases, for example, Doolan v. IVF America

¹⁶⁶. See id. at 241.
¹⁶⁷. See id. at 239–40. These would be the relevant alternatives assuming that the plaintiff could show that the drug proximately caused the children’s difficulties by bringing about a change in the mother’s chromosomes. Id.
¹⁶⁸. Id. at 239.
¹⁶⁹. Id. at 238.

The complaint avers that on or about May 1, 1966, and at different times thereafter, the mother of the twins purchased the company’s Oracon birth control pills and used them for several consecutive months; that immediately prior to November 1, 1966, she ceased taking the pills and became pregnant; and that on July 19, 1967, she gave birth to the Mongoloid twins, Kimberly and Pamela. Kimberly died in March, 1971. It is claimed that the company is strictly liable in tort and for negligence and breach of its warranties in the manufacture and sale of the birth control pills.

¹⁷⁰. Oklahoma does not allow wrongful life actions in certain contexts. See Okla. Stat. Ann. tit. 63, § 1-741.12(C) (West 2021) (“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.”). It is simply unclear what the Oklahoma Supreme Court would say about a wrongful life action in this context, although very few states recognize wrongful life actions. See Michael A. Berenson, The Wrongful Life Claim—the Legal Dilemma of Existence Versus Nonexistence: “To Be or Not to Be”, 64 Tul. L. Rev. 895, 901 (1990) (“[F]ew states permit a child to recover in a wrongful life action.”).
At issue were the negligence claims brought by Thomas Doolan and his parents against the defendants. Thomas’s parents, Laureen and John, had given birth to a child with cystic fibrosis and they wished to have a second child who was free of the disease. They created several embryos and had them tested. The parents were informed that a particular embryo was free of the disease and suitable for implantation. Only after Thomas’s birth did Laureen and John learn that they had been wrongly informed that the embryo was free of the cystic fibrosis gene mutation.

The Doolan court did not discuss whether any of the other embryos were free of the gene mutation—had such an embryo been implanted, the Doolans might have had a child who did not have cystic fibrosis.

The Doolan court distinguished the Rh factor cases by noting that, in those cases, “the negligence of the defendant caused the minor plaintiff to be born with severe defects, when he/she would have otherwise been born healthy.” Further clarifying its meaning, the court explained, “[s]tated otherwise, there is no way Thomas Doolan could ever have been born without cystic fibrosis.”

172. Id. at *1 (“This matter comes before this Court on defendants’ motion for summary judgment on each of plaintiff Thomas Doolan’s negligence claims (Counts III, VI, XII, XVIII, and XXI), as well as on each of plaintiffs John and Laureen Doolan’s loss of consortium claims (Counts XXXI through XXVIII, inclusive) . . . .”).
173. Id. (“In 1993, plaintiff Laureen Doolan gave birth to her first child, Samantha, who was born afflicted with cystic fibrosis.”).
174. Id. (“Mr. and Mrs. Doolan wished to have another child, but they wanted some assurance that their second child would not have cystic fibrosis.”).
175. Id. (“A cell from each of the resulting ten embryos was then retrieved by MPD, whereupon the cells were sent to defendant Genzyme Corporation (‘Genzyme’).”).
176. Id. (“In a letter dated December 23, 1996, defendant Katherine Klinger, Ph.D. (‘Dr.Klinger’), the Vice President of Science at Genzyme, advised MPD that Embryo No. 7 was free of the cystic fibrosis gene mutation and suitable for implantation.”).
177. Id. (“On November 21, 1997, Mrs. Doolan gave birth to her son, minor plaintiff Thomas Doolan. Shortly after Thomas’ birth, it was discovered that he did, in fact, suffer from cystic fibrosis and that his condition was due to the Delta F-508 genetic mutation.”).
178. See id. at *5 (“Mr. and Mrs. Doolan assert that were it not for the alleged negligence of the defendants, they would currently be raising a boy named Thomas, and that this child would not be afflicted with cystic fibrosis.”). In a different case, a couple had been told that a few of the embryos had been free of cystic fibrosis. See Grossbaum v. Genesis Genetics Inst., LLC, 489 F. App’x 613, 615 (3d Cir. 2012). However, at least one of the embryos was not free of the gene and the child born to them had cystic fibrosis. See id. It is simply unclear whether either of the other two embryos identified as lacking the cystic fibrosis gene in fact was free of that gene. See id.
180. Id.
Yet, the same point might have been true in Jorgensen (depending upon what could be proved at trial)—it may be that once Alta Jorgensen’s chromosomes were changed as a result of taking the oral contraceptive, any children born to her would have had the congenital difficulties that her children in fact had, i.e., there is no way that those children could ever have been born without those difficulties.

Suppose Alta Jorgensen had never taken the oral contraceptive. Then, it might be assumed, her children would not have had those congenital difficulties. But those children would have been different children with somewhat different chromosomes. The point is not that the Jorgensens should have been precluded from recovering if in fact the oral contraceptive caused chromosomal damage resulting in congenital difficulties for their children but, instead, that the claim that there was no way that a particular child could have been born without the harm does not alone establish that recovery should be precluded.

One of the reasons that Thomas Doolan was precluded from recovering for cystic fibrosis was that the trial court viewed past precedent as controlling. One of the reasons that Thomas Doolan was precluded from recovering for cystic fibrosis was that the trial court viewed past precedent as controlling.\(^{181}\) The Supreme Judicial Court of Massachusetts had already decided a case in which a child had sought damages for his congenital difficulties that allegedly resulted from a physician’s negligent failure to detect that his mother had a genetic condition. In Viccaro v. Milunsky, the Supreme Judicial Court of Massachusetts rejected that the child had a cause of action against the physician. However, the court had also held that the parents had a wrongful birth action against the physician, and believed that there was no need to permit the child to recover given that the parents could recover.\(^{184}\)

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181. *Id.* at *3 (“The holding in *Viccaro* is clearly applicable to this case.”).
182. *Viccaro v. Milunsky*, 551 N.E.2d 8, 9 (Mass. 1990) (“The defendant concluded that Amy did not have the disease and that there should be no likelihood of her developing the disorder or of having affected children. . . . On March 27, 1984, Adam was born severely afflicted with anhidrotic ectodermal dysplasia.”).
183. *Id.* at 12–13 (“[T]he defendant whose negligence (it is asserted) is a reason for Adam’s very existence should not be liable for the unfortunate consequences of Adam’s birth with a genetic disease, such as his pain and suffering, emotional distress, and loss of his parents’ consortium.”).
184. *Id.* at 11 (“[T]he Viccaros are entitled to recover the extraordinary medical and educational expenses and other extraordinary costs associated with caring for Adam.”). *Id.* at 13 (“As long, however, as Adam’s parents are entitled to recover against the defendant for the extraordinary costs they will incur because of Adam’s genetic disease, Adam need not have his own cause of action for those expenses.”).
In *Doolan*, neither the child nor the parents could recover.\(^{185}\) That may have been due to the particular claim the parents asserted—loss of consortium.\(^{186}\) The Supreme Judicial Court of Massachusetts had rejected a similar claim when holding that the child could not be awarded damages for a physician’s having failed to detect a genetic condition in his mother.\(^{187}\) However, the *Viccaro* court had awarded the parents the extraordinary costs and expenses associated with their child’s care and education,\(^{188}\) so it may be that the plaintiffs should have sought those extraordinary expenses rather than damages for loss of consortium.\(^{189}\)

Nonetheless, one point about the *Doolan* court’s justification for rejecting loss of consortium damages might be made. That court reasoned that the “plaintiffs’ assertion that this hypothetical Thomas Doolan would have been ‘healthy’ discounts the possibility that he might have been afflicted with another type of birth defect or long term illness.”\(^{190}\) But an analogous point might have been made in the Rh factor cases too, namely, that the child born (where RhoGAM had been administered in a timely way) might have been afflicted with some other ailment, but the *Doolan* court had agreed that recovery in the Rh factor cases was appropriate, presuming that the child would have been healthy if only the negligence had not occurred.\(^{191}\)

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186. *Id.* (“Plaintiffs John and Laureen Doolan advance two arguments in support of their claims for loss of consortium.”).

187. *Viccaro*, 551 N.E.2d at 12 (“We see no basis for the Viccaros to recover for the loss of Adam’s society and companionship as a normal child . . . ”).

188. *Id.* at 11 (“[T]he Viccaros are entitled to recover the extraordinary medical and educational expenses and other extraordinary costs associated with caring for Adam.”).

189. The *Doolan* court noted that the plaintiff parents in *Viccaro* had been awarded the extraordinary medical expenses associated with raising their child. *See Doolan*, 2000 WL 33170944, at *3 (citing *Viccaro*, 551 N.E.2d at 13). However, when denying the Doolans’ loss of consortium damages, *id.* at *5 (“[T]he defendants are entitled to summary judgment as a matter of law on the parent plaintiffs’ claims for loss of consortium.”), the court never discusses whether the parents were awarded other damages.

190. *Id.* at *5.

191. *Id.* at *4 (“In both *Rinck* and *Monusko*, the negligence of the defendant caused the minor plaintiff to be born with severe defects, when he/she would have otherwise been born healthy.”).
C. Liability for Compromised Gametes

The Doolans knew that they were carriers of cystic fibrosis and wanted to take steps to reduce the likelihood that their second child would have the disease. Other families take different steps to reduce the likelihood of passing a disease to their children, e.g., by relying on others’ gametes. Whatever the method used, such couples as a general matter are hoping that their child will be healthy and may well seek screening of their own or others’ gametes precisely because they want their child to be healthy.

Couples securing gametes might be hoping that the donor had eyes or hair of a particular color, e.g., the same colors as one of the members of the couple. Sometimes, the wrong gametes are used, whether inadvertently or otherwise. Or, sometimes, it is alleged that the gametes used were not screened properly for disease. In these cases, the plaintiff may be claiming that but for the defendant’s negligence or misrepresentation, different gametes would have been used to create the embryo. Were different gametes used, the child actually born would not have been born and, instead, a different child would have been born.

192. Id. at *1.
193. See Michelle McEntire, Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators, 29 CAMPBELL L. REV. 761, 761 (2007) (“I don’t care if it’s a boy or a girl, as long as it’s healthy. It is the mantra of almost all expectant parents.”).
194. See, for example, Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 68 (Utah 1998), wherein the couple sought a donor who “closely matched David in physical characteristics and blood type . . . .”
195. See St. Paul Fire & Marine Ins. Co. v. Jacobson, 48 F.3d 778, 779 (4th Cir. 1995) (in different cases, the physician used his own sperm rather than the sperm of the husband or that of a donor for artificial insemination).
Cryobank, Sims and Rothman failed to examine or test Donor No. 276 to ascertain whether he was suffering from kidney disease or was a potential carrier of the ADPKD gene, failed to properly investigate Donor No. 276’s family history of kidney disease, and falsely represented to the Johnsons that the sperm they were purchasing had been tested and screened for infectious and “reasonably detectable genetically transferred” diseases and medical abnormalities, and therefore could safely be used to effectuate the Johnsons’ pregnancy.
197. Id. at 666 (“Implied in these allegations is that had the Johnsons been informed of the genetic risk, they would have selected another donor, and Brittany would not have been born.”).
That a different child would have been born should not end the analysis, however. Consider *Johnson v. Superior Court*. At issue was an allegation that the sperm bank “failed to disclose that the sperm they sold to the Johnsons came from a donor with a history of kidney disease called autosomal dominant polycystic kidney disease (ADPKD).” After noting that “had the Johnsons been informed of the genetic risk, they would have selected another donor, and Brittany would not have been born,” the California appellate court concluded that, therefore, the particular damages sought could not be awarded. However, in so ruling, the court was not rejecting that any damages could have been awarded but merely that governing law precluded awarding the particular damages that the plaintiff had sought. Thus, while the *Johnson* court suggested that general damages could not be awarded citing a state supreme court case, the very case cited permitted an award for the extraordinary expenses that might be associated with treating a particular inherited disease. Thus, past case law supported the *Johnson* court awarding damages for the extraordinary expenses associated with the child’s care, notwithstanding that Brittany was not in existence at the time the negligence occurred and notwithstanding that a different child with different DNA would (probably) have been born but for the negligence.

In *Paretta v. Medical Offices for Human Reproduction*, a New York court considered whether there could be recovery when a child, created through the

198. 124 Cal. Rptr. 2d 650 (Ct. App. 2002).
199. Id. at 653.
200. Id. at 666.
201. Id. (“We conclude that the trial court fairly characterized Brittany’s cause of action as one for wrongful life, and that under *Turpin* and *Andalon* Brittany is not entitled to recover general damages or damages for lost earnings.”).
202. Id. at 664.
203. *Turpin*, 643 P.2d at 966 (“[W]hile a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.”).
204. See *Johnson*, 124 Cal. Rptr. 2d at 664–66.
use of a donated ovum, was born with cystic fibrosis.\textsuperscript{205} The defendants allegedly failed to do a proper screening of the egg to make sure that it did not carry the cystic fibrosis gene.\textsuperscript{206} In addition, the husband whose sperm was used to create the embryo was never tested to see if he was a cystic fibrosis carrier.\textsuperscript{207}

The plaintiffs argued that this case differed from the paradigmatic wrongful birth claim in that the defendants had not merely failed to inform them in a timely way about the likelihood that the child created would have cystic fibrosis.\textsuperscript{208} Here, “the defendant doctors were actually responsible for Theresa’s conception, had a role in her genetic composition, and combined the sperm and egg both of which carried cystic fibrosis.”\textsuperscript{209} But the court rejected the parents’ claim, reasoning that Theresa, “like any other baby, does not have a protected right to be born free of genetic defects.”\textsuperscript{210}

While the \textit{Paretta} court was correct that no one has a protected right to be born without handicap, that does not dispose of the relevant issue. The children born with severe difficulties as a result of a doctor’s failure to administer RhoGAM in a timely way did not have the right to be born free of handicap, but their injuries were nonetheless compensable.\textsuperscript{211} So, too, while the children born with genetic handicaps resulting from someone or something altering their parents’ chromosomes do not have a protected right to be born free of genetic handicap, these children should nonetheless be able to recover damages if the defendants negligently acted in ways that would result in foreseeable harm.

The \textit{Paretta} court did not bar the parents from recovering the extraordinary expenses associated with caring for their child.\textsuperscript{212} Nonetheless, the court’s analysis was disappointing when the court refused to recognize that the child had a cause of action because “permitting infants to recover against doctors for wrongs allegedly committed during in vitro fertilization would give children

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\textsuperscript{205} 760 N.Y.S.2d 639, 641–42 (Sup. Ct. 2003) (“Tragically, Theresa was diagnosed with cystic fibrosis, a chronic debilitating progressive genetic disease that is inherited from both parents.”).
\textsuperscript{206} \textit{Id.} at 642 (“In October 2000, plaintiffs commenced this action, alleging defendants committed medical malpractice when they failed to properly screen the egg and inform the Paretta that the egg tested positive for the cystic fibrosis gene.”).
\textsuperscript{207} \textit{Id.} at 641 (“Mr. Paretta was not tested to ascertain whether he was a carrier of the disease.”).
\textsuperscript{208} \textit{Id.} at 643.
\textsuperscript{209} \textit{Id.} at 645–46.
\textsuperscript{210} \textit{Id.} at 646.
\textsuperscript{211} \textit{Id.} at 648.
\textsuperscript{212} \textit{Id.} at 647 (noting that the “Paretta can pursue recovery for the pecuniary expense they have borne and continue to bear for the care and treatment of their sick infant.”).
\end{flushright}
conceived with the help of modern medical technology more rights and expectations than children conceived without medical assistance."  

Such a rationale, if taken seriously, might require a substantial reworking of reproductive negligence.

Consider a fetus suffering from a condition that might be ameliorated or cured with treatment in utero. If the fetus does not receive that treatment because of a medical professional’s negligence, the professional is likely liable, even though that professional is not responsible for the fetus initially having that condition. It is precisely because of the availability of modern medical technology (and the failure to use it) that such a medical professional would be held liable—liability would not be imposed but for the existence of the ameliorative or curative treatment.

A separate issue involves the kinds of in utero treatment that might be performed. Suppose that a particular gene could be modified in utero so that the child eventually born would not have a serious debilitating condition.

213. Id. at 646.

214. See, for example, Ruth M. Farrell, Women and Prenatal Genetic Testing in the 21st Century, 23 HEALTH MATRIX 1, 11 (2013), which discusses “the possibility and availability of interventions to ameliorate the sequelae of a genetic condition in utero . . .”).

215. Courts rejecting the imposition of liability often emphasize that the condition was incurable. See Grubbs ex rel. Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 689 (Ky. 2003); Azzolino v. Dingfelder, 337 S.E.2d 528, 536 (N.C. 1985); Wilson v. Kuenzi, 751 S.W.2d 741, 744 (Mo. 1988).


Now, several novel techniques are being investigated that show real promise of augmenting fetal repair, serving as alternatives for specific prenatal conditions, and even expanding the breadth of conditions treated in utero. For example, in utero cellular therapy, tissue engineering, gene-based therapies, and the artificial womb are all advancing quickly and may offer tremendous benefits to the fetus in the near future.


Targeted genome editing is a process that allows scientists to mutate a gene of interest by deleting segments of the gene, inserting more genetic sequences, or
Presumably, the modification of that one gene would not be thought to make the individual a different person, although some line would have to be drawn to determine when the number or quality of changes would indeed make the person a different individual.

Yet, too much should not be made of the conundrum of how many or which kind of gene changes would yield a new person rather than simply be a continuation of the old person. It might be rather difficult to set a number (e.g., six gene changes still involve the same person but seven involve a different person). Further, there might be good reason not to set a particular number of changes that would make the individual a “new” person.

Gene editing has been heralded as a possible scientific breakthrough that will enable scientists to prevent individuals from having certain diseases.

substituting some genes for other genes. The general aim of genetic editing is to modify a specific characteristic of an organism by changing a small portion of the organism’s genetic code. In doing so, there is great potential for curing various genetic diseases.

Id. (footnotes omitted).

219. Id. at 320 (“[C]hanging a single gene does not necessarily result in the creation of a new person.”); Kirsten Rabe Smolensky, Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions, 60 HASTINGS L.J. 299, 333 (2008) (“But to argue that changing a single gene, even a gene that controls for a central component of one’s identity, always results in the creation of a different person seems to place too much emphasis on genetics.”).


[A]ny individual who claims that some modifications will preserve identity while others will not is presented with the unenviable task of determining at what specific point a person’s identity changes. This recalls the famous paradox of the Ship of Theseus, in which the planks of a ship are replaced until none of the original planks remain, and one may wonder whether it is still the same ship, or at what point its identity changed.

Id. (footnotes omitted).


There are other criteria [besides DNA] that are essential to making the person what she is, for example, an individual’s personality or her concept of self. 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 because but for the negligence the individual would have been a different person.

Id. (footnotes omitted).

222. See Roa, supra note 218, at 300–02.
Prevention of certain diseases might be accomplished by targeting one gene,\textsuperscript{223} while prevention of other diseases might require targeting several genes.\textsuperscript{224}

When the technology has been sufficiently developed, it will be used on living persons.\textsuperscript{225} In addition, it will be used in utero\textsuperscript{226} or on embryos pre-implantation.\textsuperscript{227} A number of legal issues will have to be resolved.

For example, suppose that it were necessary to modify several genes of an individual in order to prevent great suffering.\textsuperscript{228} Presumably, an individual who has received such treatment would not be viewed as a new person post-

\textsuperscript{223} John M. Conley, \textit{Introduction: A Lawyer’s Guide to CRISPR}, 97 N.C. L. REV. 1041, 1045 (2019) ("In the simplest application, the CRISPR mechanism finds and cuts out a ‘defective’ gene— for example, one that causes a single-gene disease such as cystic fibrosis, hemophilia, or sickle cell disease—and the cell replaces it with a normal one.").

\textsuperscript{224} Teddy Ellison, \textit{Why Genetics Is CRISPR than It Used to Be: Helping the Novice Understand Germ Line Modification and Its Serious Implications}, 26 S. CAL. INTERDISC. L.J. 595, 604 (2017) ("CRISPR . . . has been shown to effectively target multiple genes at once . . . , potentially opening the doors to curing several genetic diseases . . . ."). \textit{See also} Conley, supra note 223, at 1047.

There is a long way to go before CRISPR gene editing becomes part of everyday patient care, but it has the potential both to “fix” the causes of single-gene diseases and to contribute to the prevention or treatment of diseases that are caused by a complex interaction of genes and environmental factors, including cancer and heart disease.

\textit{Id.}

\textsuperscript{225} Tessa R. Davis, \textit{Freezing the Future: Elective Egg Freezing and the Limits of the Medical Expense Deduction}, 107 KY. L.J. 373, 422 (2018) ("[G]ene editing can be used as care for already living persons . . . ."). Ellison, supra note 224, at 596 ("[G]ene therapy—the practice of correcting defective genes to battle diseases in living humans—has been seen as a potential scientific breakthrough with great promise for future generations . . . .").

\textsuperscript{226} Grant Hayes Frazier, \textit{Defusing a Ticking Time Bomb: The Complicated Considerations Underlying Compulsory Human Genetic Editing}, 10 HASTINGS SCI. & TECH. L.J. 39, 42 (2019) ("Fast-forward 10 years. In utero gene editing is effective, safe, inexpensive and, perhaps, covered by insurance.").

\textsuperscript{227} \textit{See} Ann Potter, \textit{To Edit or Not to Edit?—Regulating CRISPR Transnationally}, 53 VAND. J. TRANSNAT’L L. 1727, 1728 (2020).

In the fall of 2018, Chinese scientist Dr. He Jiankui announced that he edited the genes of human embryonic cells for the first time in history, and that the mother had given birth to the babies already. Dr. He inserted CRISPR/Cas-9 (Clustered Regularly Interspaced Short Palindromic Repeats/CRISPR-associated protein 9) into germline cells, in order to naturally immunize the babies to human immunodeficiency virus (HIV). Once the embryonic cells received the vector, they were then placed in the mother via \textit{in vitro} fertilization. Nine months later, Dr. He announced his feat, propelling the global community into the germline-editing era without its permission.

\textit{Id.} (citations omitted).

\textsuperscript{228} \textit{See id.} at 1737–38.
treatment, as if the person (pre-treatment) had been killed and replaced.\textsuperscript{229} By the same token, substantial gene editing performed in utero should not be viewed as bringing about the death of one individual to create another, which might have implications for civil or criminal liability.\textsuperscript{230}

Whatever approach is adopted with respect to potential liability in the use of this new technology, it must protect the medical professionals who do (even substantial) gene editing to prevent terrible suffering.\textsuperscript{231} Yet, such a system should not immunize the medical professional who performs the relevant procedures negligently or recklessly, thereby causing patients needless suffering, whether that gene editing is performed on an independent person or is performed in utero or is performed on embryos prior to implantation.\textsuperscript{232} As the cases involving RhoGAM illustrate,\textsuperscript{233} there is no need to preclude the

\\textsuperscript{229} See \textit{id.} at 1738.

\textsuperscript{230} Cf. Marka B. Fleming, \textit{Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries}, 29 PACE L. REV. 43, 44 (2008) (“Most state legislatures have . . . passed laws against fetal homicide, or feticide.”). To make matters more complicated, the law does not always define individuals in the same way for all purposes. See \textit{id.} at 44–45. For example, a child might be considered to be part of one family for certain purposes but not for other purposes. See, e.g., Andrea Smith, \textit{Blood & Money: A Conflict in Texas Statutes Regarding Adoptees’ Inheritance Rights from and Through Biological Parents}, 3 TEX. A&M J. PROP. L. 217, 232 (2016) (“Currently, along with Texas, there are three other states that allow an adopted child to inherit from the birth parents: Kansas, Louisiana, and Rhode Island.”). An individual might be considered of one sex for certain purposes but not for other purposes. See Mark Strasser, \textit{Defining Sex: On Marriage, Family, and Good Public Policy}, 17 MICH. J. GENDER & L. 57, 59 (2010) (“[A] transgendered individual might be considered male for purposes of identification on a birth certificate or driver’s license but be considered female for purposes of determining the sex of potential marriage partners.”). Before the Court issued \textit{Obergefell v. Hodges}, 576 U.S. 644 (2015), striking down same-sex marriage prohibitions, individuals might be precluded from marrying because of how the state defined sex for purposes of marriage. See \textit{id.}

\textsuperscript{231} Here, this gene editing is presumed to be voluntary. Some commentators are worried about whether such therapy will be required. See, e.g., Angela Liang, \textit{Gene Therapy: Legal and Ethical Issues for Pregnant Women}, 47 CLEV. ST. L. REV. 61 (1999); Potter, supra note 227 at 1736 (“Given the low cost and availability of CRISPR treatment, if an individual refused to modify his or her ‘violent’ genes and later committed a violent act, questions arise over how a person ought to be punished for refusing the treatment.”).


\textsuperscript{233} An Indiana court used the Rh factor analysis to discuss why liability could be imposed for intentionally using the wrong sperm in an artificial insemination procedure. See Anonymous Physician 1 v. White, 153 N.E.3d 272, 278–79 (Ind. Ct. App. 2020). Because the individual suing was the child born as a result of the artificial insemination, \textit{see id.} at 274 (“Matthew filed the complaint after he had
imposition of liability merely because the child has not yet been born or the embryo has not yet been implanted. Indeed, the Rh factor cases and *Jorgensen* suggest that a medical professional who negligently or recklessly harms an individual not yet conceived might nonetheless be liable.  

Gene editing is helpful to think about because it may provide techniques in the future for correcting conditions that are now viewed as incurable. But it is also helpful for thinking about how certain kinds of negligence should be treated currently.

Consider the Doolans, who had been falsely told that the embryos they were going to have implanted did not have the cystic fibrosis gene. One approach to such cases is to deny recovery because it is speculative to make assumptions about what would have happened had a different embryo been implanted. But that is not the approach taken in the Rh factor cases, which instead simply assume what the child’s life would have been like had the RhoGAM been timely administered. Analogously, courts might make assumptions about what life would have been like had there been gene editing to prevent or ameliorate the disease. The point is not that the gene editing is available but instead is to provide a way of thinking about the baseline in light of which to determine damages.

Even when the gene-editing technology has developed sufficiently to afford these great benefits, a separate issue will involve how much it costs and who...

learned that Physician had used Physician’s own sperm, rather than a medical school resident’s donor sperm, to artificially inseminate Matthew’s Mother, Elizabeth White (‘Elizabeth’). As a result of this artificial insemination procedure, Elizabeth became pregnant and gave birth to Matthew.”). The Indiana court rejected the argument that in effect the plaintiff was arguing that he should not have been born (because other sperm should have been used) and thus that this plaintiff could not be allowed to recover. *See id.* at 281.


235. Frazier, *supra* note 226, at 41 (“Recent developments indicate these technologies hold great promise for future applications, and several experts have noted that these technologies’ efficacy is rapidly progressing and clinical use is likely not far off.”) (footnote omitted).


237. *See Jorgensen*, 483 F.2d at 239.


239. *See also Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013) (“[Gene editing] enabled Myriad to develop medical tests that are useful for detecting mutations in a patient’s BRCA1 and BRCA2 genes and thereby assessing whether the patient has an increased risk of cancer.”).
will have access to the technology. Suppose, for example, that a couple could create several embryos and have them tested for the presence of a particular gene as a way of assuring that their child will not have a particular disease. Or, the couple could incur much greater expense (and perhaps greater risk, depending upon how well the technology had progressed) by creating embryos that might undergo gene editing to prevent the occurrence of that same disease. As a matter of public policy, it would hardly be sensible to impose liability for negligent or reckless gene editing but not for the negligent or reckless medical professional who implants the wrong embryo and thereby brings about the very harm that the testing and implantation procedure was designed to avoid.

IV. CONCLUSION

Wrongful birth and wrongful pregnancy/conception cases involve negligence that might have occurred pre- or post-conception. States differ with respect to whether they recognize these causes of action and, if recognizing them, the kinds of damages that are potentially awarded. States also differ with respect to whether any importance should be attributed to whether the negligence occurred pre- or post-conception.

That there are these differences is unsurprising, given differing public policy priorities. But these public policy differences do not suggest that states should have differing policies with respect to whether liability should be imposed for negligent testing and implantation of embryos, because the reasons cited by states to limit or preclude liability in the context of wrongful pregnancy and wrongful birth cases are usually not implicated in the negligent testing and implantation cases.

In the wrongful birth cases, some states are reluctant to impose liability because they believe that nature, rather than negligence, was responsible for the underlying condition. But the underlying condition in the negligent testing and implantation cases is not due to nature but to the professional’s negligence. Where there are two substances and the tester wrongly identifies which is poisonous, we do not immunize the tester because nature made the one but not the other poisonous. Nor do we immunize the professional who could have ameliorated a condition merely because nature was the initial cause of the condition.

240. Laura Hercher & Anya E.R. Prince, Gene Therapy’s Field of Dreams: If You Build It, Will We Pay?, 97 N.C. L. Rev. 1463, 1465 (2019) ("High costs and inequities of access are hardly unique to gene therapy, but these new treatment models, wildly expensive and resistant to economies of scale, threaten to bring the problem to a new level with profound societal implications.").
Some states view abortion rights with a jaundiced eye and do not wish to permit any cause of action based on the claim that but for someone’s negligence the pregnant woman would have aborted her pregnancy. The negligent testing and implantation cases are not predicated on a lost opportunity to abort. Further, permitting liability in these kinds of cases will presumably result in fewer mistakes which might result in fewer abortions.

Gene editing may provide a wonderful way to prevent needless suffering. Merely because a condition is congenital will not mean that it cannot be ameliorated or cured. Once those techniques are developed, medical professionals will not be able to escape liability for their negligence or recklessness by blaming nature for causing the condition. But we do not need to wait until those techniques are developed to see why individuals who have been negligent in testing or implanting embryos should be held responsible if they played a causal role in the production of a child with the very conditions that the testing was designed to detect and prevent. Courts should consider the rationales and justifications that are already entrenched in tort law, which should lead them to understand why the current refusal to permit recovery in cases involving the use of compromised gametes is consistent with neither the existing jurisprudence nor good public policy.