Recovery of Damages for Wrongful Birth

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PLEASE SCROLL DOWN FOR ARTICLE
RECOVERY OF DAMAGES FOR WRONGFUL BIRTH

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INTRODUCTION

A moment of one of life's greatest joys can instantly turn to heartwrenching anguish when a baby is unexpectedly born with severe birth defects. Parents of children with catastrophic birth defects must shoulder enormous financial burdens for the child's extraordinary medical and life care. This financial burden is often accompanied by devastating feelings of disappointment, sorrow, and worry.

Some parents who find themselves in this situation reside in states that recognize a legal remedy for a wrongful birth cause of action. This article surveys the often conflicting body of case law throughout the country on the items of damages potentially available or not, depending on the jurisdiction. Section I presents an overview of the prenatal diagnostic tests that are available to detect severe birth defects, which when performed accurately, yield information that is vital to a parent's decision to continue or terminate a pregnancy. Errors that result in a mistaken diagnosis are briefly discussed prior to presenting, in section II, a national overview of the status of recognition of the wrongful birth cause of action and the types of damages recoverable for care of the child in those states that do recognize the remedy.

Section III addresses parental recovery for emotional distress, and section IV discusses the applicability of statutory damage caps to wrongful birth actions. The article concludes with a recap of available damages, which may total well into seven figures or more, and observations concerning the

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need to be cognizant of the many legal issues presented by wrongful birth actions—some resolved and some remaining open.

I. PRENATAL DIAGNOSIS AND THE DETECTION OF BIRTH DEFECTS

Interest in our ability to obtain information about the developing fetus dates back hundreds of years. With the development of laboratory techniques providing reproducible cell growth, this fantasy quickly became reality. Amniocentesis, typically performed at 16-18 weeks, and chorionic villus sampling, done at 11-12 weeks, have become the benchmark for the safe and accurate diagnosis of birth defects and genetic disorders in the first trimester. Both have fetal loss rates of less than one percent and provide rapid answers related to the chromosomal makeup of the fetus, as well as the ability to perform molecular studies using fetal DNA. Over time, complementary “screening” tests have been developed which allow families to have non-invasive studies providing important information on the genetic status of the fetus. Guidelines for screening and diagnostic studies exist from multiple sources, including the American College of Obstetricians and Gynecologists (ACOG) and the American Society of Human Genetics (ASHG).\(^1\) The following diagnostic tests are available:

- Amniocentesis: The “gold” standard in prenatal testing, with accuracy approaching 100%, is performed transabdominally (through the maternal abdomen). Results are typically available in 7-10 days.
- Chorionic villus sampling (CVS): CVS has the advantage of being performed earlier than amniocentesis, but is performed using a thin catheter introduced into the cervix.\(^2\) Results are usually available in a similar time frame. There is a small, but increased risk for limb malformation/reduction following CVS.
- Chromosome microarrays: Microarrays technology utilizes DNA-based testing on fetal samples capable of identifying small microdeletions and microduplications below the resolution of standard cytogenetics. Results from targeted microarrays are available in 5-7 days. This technology may replace routine cytogenetics.
- Biochemical (marker) screening: Biochemical (marker) screening is traditionally done at 16-17 weeks on a maternal blood sample. For


\(^2\) See Fruiterman v. Granata, 668 S.E.2d 127, 132-33 (Va. 2008) (holding that expert testimony is needed to establish that CVS test, if performed, would have detected chromosomal abnormality).
instance, an alpha-fetoprotein test screens for neural tube defects. A variety of proprietary tests exist, including triple screen and quad screen measuring fetal proteins that are identifiable in maternal serum (alpha fetoprotein, estriol, and hCg, among others). A single calculation is made, ultimately comparing the individual’s risk for Down syndrome or other chromosomal aneuploidy syndrome on the screening study to that of a 35-year-old woman in the mid-trimester (whose fetus is at a 1 in 270 risk for Down syndrome). Biochemical screening can also be done in the first trimester.

- Ultrasonography and nuchal translucency screening: High resolution ultrasonography is capable of identifying a wide range of fetal malformations affecting many organ systems (central nervous system, heart, renal, and gastrointestinal tract) and is done in the mid-trimester. Fetuses with Down syndrome and other chromosomal disorders have a number of “soft” signs on ultrasound (for example, echogenic focus in heart and bowel, increased nuchal fold, short extremities) that increase the risk for potential bad outcomes. First trimester screening using similar studies are now routine and allow for nuchal translucency measurement.

- Molecular testing: Both amniocentesis and CVS provide ready access to fetal DNA. For at-risk families with known or suspected mutations, appropriate studies can be performed on the fetus.

A. Prenatal Genetic Counseling

Couples seeking prenatal diagnosis are seen in a variety of settings prior to a procedure or screening. Many obstetricians, as well as maternal-fetal medicine specialists, routinely provide this type of counseling. If an abnormality is detected on any of the routine screening studies, the patient will be referred to an appropriate specialist. This might be a geneticist at a tertiary care facility, or a different kind of specialist who could address findings in more detail. Wide geographic variation exists in terms of how this process works. Regardless of process, it is imperative that couples who choose such counseling be given prompt, complete and accurate descriptions of the test results and explanations of the possible implications in the event the couple has the child. Because couples hearing this information usually have significant uncertainty about their decision-making (because most have never faced such an issue before), easy-to-comprehend information is critical. Complicating this process is the fact that many states restrict termination of pregnancy to 24 weeks or less. Thus, in practical terms, a couple who receives genetic counseling/screening at 22-23 weeks is nearing the time limit for termination in all but a few states.
B. Areas for Potential Laboratory or Physician Error

The genetic testing process, although complex, generally has many safeguards in place to prevent errors and a specific mechanism for investigating errors should they occur. Despite the overall safety and high accuracy of prenatal and postnatal genetic testing, the potential for errors exists, and it is these errors that can result in liability for a physician or reference laboratory.

For example, in the case of amniocentesis, before an obstetrician or perinatologist performs a procedure, informed consent from the patient must be obtained. In doing so, the adequacy of information that is provided becomes a concern. Was the patient provided with sufficient information regarding risks, potential complications for the mother and fetus, probability rates regarding such complications, and any limitations on detection of genetic disorders? Potential procedure-related complications are numerous but infrequent, and include lack of adequate sample, maternal cell contamination, maternal bleeding, and specimen-handling errors (for example, switching of specimens, improper storage, lab accident).

Post-procedure issues may also arise when the specimen is transferred to the laboratory. A sample is often transported by commercial vehicle or mail, raising a small risk of loss or damage. Upon receipt by the laboratory, the sample is accessioned and enters the laboratory pathway, where the potential for error also exists (for example, misidentification of specimen, mishandling, loss). Samples are centrifuged, placed in culture vials (sometimes slides), incubated and allowed to grow. After harvesting of cells, chromosomes are analyzed, usually using an automated system. A lab director generally reviews the results, signs off on the sample, and generates a report to the referring physician. An error at any step of this process can have liability implications.

II. THE WRONGFUL BIRTH CAUSE OF ACTION

Medical errors such as failure to order prenatal testing, loss or damage to specimen, misinterpretation of results, or failure to report or delay in reporting may give rise to a cause of action for “wrongful birth.” The gist of the typical wrongful birth action involves a claim of negligent failure to provide adequate medical guidance preventing the parents from discovering that the child would be born with severe birth defects, which in turn precluded the parents from making an informed decision on whether to terminate the

Wrongful birth cases in jurisdictions recognizing the cause of action have been limited to instances where children are born with severe birth defects (for example, Down syndrome, Tay-Sachs disease, spina bifida, cystic fibrosis).

No reported decision has taken up the question of whether a minor genetic defect or the gender status of the fetus could give rise to a wrongful birth action. As noted by one court (which rejected the wrongful birth cause of action), wrongful birth actions for minor genetic differences or characteristics (such as genes predisposing the conceived fetus to hypertension, diabetes, breast cancer, or other diseases or conditions) "could slide quickly into applied eugenics" where the genetically "unfit" are subject to termination.\(^5\)

A clear majority of courts has recognized the "wrongful birth" cause of action. At present, the cause of action is accepted in at least 29 jurisdictions (including the District of Columbia).\(^6\) The cause of action has been rejected in at least eight.\(^7\) The remaining 14 jurisdictions have either not considered

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4 See Stewart-Graves v. Vaughn, 170 P.3d 1151, 1159 (Wash. 2007) (finding the right to terminate was based on the parents' constitutional right of reproductive autonomy); see also Roe v. Wade, 410 U.S. 113, 153 (1973) (finding the right to privacy conferred by the Constitution was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").


the viability of the cause of action or have discussed it, but have not taken a position on the issue.8

A representative case recognizing a tort cause of action for wrongful birth is Reed v. Campagnolo.9 “Wrongful birth” is essentially governed by traditional medical malpractice negligence principles.10 Simply put, there must be: (1) a duty, (2) a breach of duty, and (3) an injury (4) proximately caused by the breach.11 Reed involved the negligent failure of defendant physicians to perform prenatal diagnostic testing of a pregnant woman, which would have discovered severe genetic defects in the fetus.12 Had the defects been disclosed, the parents allegedly would have terminated the pregnancy by abortion. The Maryland Court of Appeals held that this allegation, requiring a fact-finding that proper testing would have led to abortion, was an essential link in the chain of causation.13 According to the court, “Plaintiffs in these cases must prove causation in the sense that they must convince the fact finder that they would in fact have acted as alleged, had the information concerning testing been made available.”14 Because the mother was not tested nor informed of the need for testing, the pregnancy was carried to full term and the child was born with severe deformities.

In recognizing the cause of action for “wrongful birth,” the Reed court acknowledged that the label is somewhat misleading: “The harm, if any, is

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8 Upheld in Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 13-15 (Minn. 1986); Mo. Rev. Stat. § 188.130(2) (2010); 42 Pa. Cons. Stat. § 8305(a) (2010); Ikkind v. Suarez, 519 S.E.2d 210, 212 (Ga. 1999); Grabbe, 120 S.W.3d at 689-91 (deciding that wrongful birth not recognized as a cause of action in tort, but breach of contract cause of action is available to physician who negligently performed diagnostic prenatal testing); Taylor v. Kurapat, 600 N.W.2d 670, 691 (Mich. App. 1999). Even in these minority jurisdictions, some limited recognition of a right to tort recovery is given. See, e.g., Shelton v. St. Anthony's Med. Ctr., 781 S.W.2d 48, 50 (Mo. 1989) (damages for mother's emotional distress are not prohibited by statute); McAllister v. Ha, 496 S.E.2d 577, 583 (N.C. 1998) (damages for mother's emotional distress due to birth of child afflicted with a disease caused by medical negligence were recoverable); see also Gallagher v. Duke Univ., 852 F.2d 773, 776-77 (4th Cir. 1988) (interpreting North Carolina law). An action for wrongful birth differs from wrongful conception, which is not premised on abortion. Wrongful conception is recognized even in states that prohibit a cause of action for wrongful birth. See, e.g., Molloy v. Meier, 679 N.W.2d 711, 722-23 (Minn. 2004).

9 Those jurisdictions include Alaska, Arkansas, Hawaii, Iowa, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Vermont, and Wyoming. “Wrongful birth” and “wrongful life” actions differ in that the wrongful birth action belongs to the parents while the wrongful life action is brought by or on behalf of the child. Twenty-seven jurisdictions refuse to recognize the wrongful life action. See Wills v. Wu, 607 S.E.2d 63, 68 & n.3 (S.C. 2004) (citing cases and statutes). Only three states have allowed such an action: California (Turpin, 643 P.2d at 965-66), New Jersey (Procanik v. Cillo, 478 A.2d 755, 757 (N.J. 1984)), and Washington (Harborne, 636 P.2d at 494-95).

10 Id. at 1147-48 (discussing Jones v. Malinowski, 473 A.2d 429 (Md. 1984)).

11 Id. at 1148.

12 Id. at 1146 (plaintiffs alleged that testing would have revealed elevated protein levels, indicative of an abnormal fetus, which would have led them to request amniocentesis).

13 Id. at 1149.

14 Id. (footnote omitted).
not the birth itself but the effect of the defendant's negligence on the [parents] resulting from the denial to the parents of their right, as the case may be, to decide whether to bear a child or whether to bear a child with a genetic or other defect." The court rejected an argument that no liability could be imposed because the physicians did not cause the child's impairments, which were genetic and not negligently inflicted. As stated by the court: "Even though the physical forces producing Ashley Nicole's birth defects were already in operation at the time of the alleged negligence of the physicians, under the chain of causation alleged by the Reeds the physicians could have prevented the harm to the parents."

A. Parents Can Recover Damages Measured by the "Extraordinary Expenses" of Supporting a Child with Severe Birth Defects

Despite majority recognition of the wrongful birth tort, no consensus has emerged on recoverable damages or the measure of such damages. Courts not only disagree with each other but are divided internally over the damages that may be recovered in a wrongful birth action.

The question certified in Reed did not ask the court to define the measure of damages recoverable by the parents. Nevertheless, to demonstrate a legally cognizable injury to the parents, the court did recognize damages measured by the extraordinary cost of supporting a child with severe birth defects:

Thus, those courts that recognize the cause of action [for wrongful birth] alleged by the Reeds permit, at a minimum, damages measured by the extraordinary cost, at least through minority, of supporting the child with severe birth defects as compared to supporting a child who is not so afflicted. These courts are not in agreement as to the period of time over which the extraordinary expenses are projected. In Berman v. Allan, the New Jersey Supreme Court rejected damages based on extraordinary support expenses, but allowed damages for the parents' emotional distress. Other courts allow both economic and emotional damages. We cite these authorities not for the purpose of defining or refining a measure of damages in these cases, but simply to demonstrate that there is a legally cognizable injury to the parents in these cases.

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15 Id. at 1150 (quoting Verrico, 551 N.E.2d at 10 n.3).
16 See id. at 1151-52.
17 Id. at 1152.
18 See, e.g., Schroeder v. Perkel, 432 A.2d 834, 841 (N.J. 1981) (showing that this disparity is generally conceded and noting that "[d]ivergent results of different courts or of different members of the same court reflect the complexity of the problem" posed by delineating the nature and extent of damages).
19 See Reed, 630 A.2d at 1150 (decided in response to questions certified by the United States District Court for the District of Maryland); see also Reed v. Campagnolo, 810 F. Supp. 167, 172-73 (D. Md. 1993).
20 Reed, 630 A.2d at 1151 (emphasis added) (citations omitted).
This dictum in Reed raises more questions than it answers. What “extraordinary support expenses” are recoverable? Are other pecuniary costs allowable? Should the recoverable expenses be mitigated or offset by the emotional satisfaction of parenthood? Are the recoverable expenses limited to the child’s minority or do they extend into adulthood? Are they limited by the parents’ life expectancies? Should the recoverable expenses be awarded to the parents outright or placed in trust for the benefit of the child? The answers to these questions vary among the many courts that have considered these issues.

B. “Extraordinary Expenses” and Life Care Plan Development

Those courts recognizing the wrongful birth cause of action “permit, at a minimum, damages measured by the extraordinary cost, at least through minority, of supporting the child with severe birth defects as compared to supporting a child who is not so afflicted.” There is overwhelming judicial precedent for the recovery of damages for extraordinary expenses including hospital and medical costs necessary to treat the birth defect, as well as any additional medical or educational costs attributable to the birth defect.

The recovery of such expenses is almost universally accepted by those jurisdictions recognizing a wrongful birth cause of action. The lone holdout is Louisiana, a civil law jurisdiction.

Life care planning for a child with a genetic disorder or birth defect can be both complex and challenging. In early life the focus should be on specific medical problems and intervention therapies, while in later years the focus shifts to long-term care needs. The lifetime expense for caring for any individual with a genetic disorder is, therefore, dependent on the birth defects that are present and whether they will persist over time. The child with Down syndrome and associated congenital heart disease makes for an informative example.

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21 Id.
22 See, e.g., Gallagher, 852 F.2d at 777; Liddington, 916 F. Supp. at 1133; Phillips v. United States, 575 F. Supp. 1309, 1317 (D.S.C. 1983) (South Carolina law); Keel, 624 So. 2d at 1030; Turpin, 643 P.2d at 965; Lininger, 764 P.2d at 1208; Garrison, 581 A.2d at 292; Haymon, 535 A.2d at 886; Kusil, 616 So. 2d at 423; Siemiatyczy, 512 N.E.2d at 706-07; Arche, 798 P.2d at 481; Thibeault, 666 A.2d at 114; Vezzani, 551 N.E.2d at 10; Greco, 893 P.2d at 349; Smith, 513 A.2d at 349-50; Bani-Esfarai v. Lerman, 505 N.E.2d 947, 948 (N.Y. 1987); Emerson, 689 A.2d at 414; Jacobs, 519 S.W.2d at 850; Harbeson, 656 P.2d at 493; James G., 332 S.E.2d at 882; Dumer, 233 N.W.2d at 377; see also Me. REV. STAT. tit. 24, § 2931(3) (2009) (limiting damages for “the birth of an unhealthy child born as the result of professional negligence” to those damages “associated with the disease, defect or handicap suffered by the child”); Thibeault, 666 A.2d at 115 (interpreting and applying the statute). Also note that many of the above-cited judicial decisions also limit the parents’ recovery of damages to the extraordinary expenses that they will incur for the special medical, educational, and institutional needs of the impaired child.
23 See Piire, 530 So. 2d at 1162 (concluding that parents may not recover damages for special expenses regarding the child’s deformity).
1. Medical Needs

- NICU admission: The infant with Down syndrome may require prolonged newborn hospitalization to address identified medical issues. The presence of congenital heart disease may present further complications.
- Admission for repair of congenital heart disease: A stay of one week would be expected requiring substantial costs to be incurred, including hospital charges (operating room, recovery room, equipment, drugs, and fluids), personnel (nurses, OR staff), post-operative care, and physician charges (cardiovascular surgery, anesthesia).
- Periodic specialty care: Visits to genetics, ophthalmology, ENT, and cardiology specialists would occur episodically with decreasing frequency over time.
- Laboratory studies: Tests to measure CBC and thyroid function periodically would be done.
- Therapeutic intervention: Prior to school age, the child with Down syndrome would require physical therapy, occupational therapy, speech therapy, and education to promote development. All of this would be in addition to education provided by the school system.
- Equipment: Use of computers for learning is expected with periodic updated assessments.

The approximate lifetime medical costs for the child with Down syndrome and associated congenital heart disease would be on the order of $4-$6 million in current dollars.

2. Long-Term Care Needs

Once adulthood is reached, long-term care options are reviewed. For some families, continued residence in the parents' home remains the best choice. Even in this setting, respite care and adult supervision would be necessary. Placement in a group home is dependent on availability and geography. Typical group homes cost upwards of $100,000 yearly, but do provide the benefit of 24-hour supervision. An attractive option for many families is to purchase a "home" (usually a condominium, often shared with a second family) for an adult with intellectual or cognitive disabilities who will not be completely independent and will need adult supervision. Here the costs tend to be limited, because it is a one-time expense.

The approximate non-medical costs from age 18 until death for the child with Down Syndrome and associated congenital heart disease might exceed $6-$8 million depending on survival.
3. Structured Settlement

In arriving at the projected cost of a life care plan to cover extraordinary expenses, future damages must be reduced to present value. In short, present value is the amount of money needed today to provide a larger sum in the future. Economists use a discount rate to arrive at the present value number. In the battle between opposing economists, the plaintiff’s claimed figure for present value can be significant multiples of the present value numbers offered by the defense economist. Wrongful birth claims are particularly susceptible to resolution by a combination of lump sum cash payment and a structured settlement where the defendant purchases an annuity that is used to fund future expenses.

C. “Extraordinary Expenses” Typically Exclude Ordinary Child-Rearing Expenses

In the wrongful birth context, claims by the parents for recovery of ordinary child-raising costs are rarely successful. The only jurisdictions which presently allow the recovery of ordinary child-rearing costs for a wrongful birth claim are Arizona and Rhode Island. Having previously decided a “wrongful pregnancy” case allowing the parents to recover the cost of support and care of a healthy child, the Supreme Court of Arizona concluded simply that the parents of an unhealthy child could bring a wrongful birth claim to recover damages in accordance with the principles established in the earlier “wrongful pregnancy” case.

Remarkably, Rhode Island is the only jurisdiction which denies the costs of rearing a healthy child that is the subject of a “wrongful pregnancy” action but allows their recovery in an action for wrongful birth. The Supreme Court of Rhode Island has held that, if a physician is placed on notice that the parents have a reasonable expectation of giving birth to a physically or mentally handicapped child, “then the entire cost of raising such a child would be within the ambit of recoverable damages.”

To the extent that claims for ordinary child-rearing costs were asserted in the other wrongful birth cases, the courts have refused to permit the parents to recover the costs ordinarily associated with raising a healthy child to

24 See Walker, 790 P.2d at 739-40; Emerson, 689 A.2d at 414.
25 See Walker, 790 P.2d at 738 (placing Arizona among the minority of eight jurisdictions which allow recovery of ordinary child-rearing costs in “wrongful pregnancy” actions and among only two jurisdictions considering the claim for such costs in the context of a wrongful birth action); see also Dumer, 233 N.W.2d at 377 (rejecting the claim in the context of a wrongful birth action under Wisconsin law).
26 Emerson, 689 A.2d at 414.
27 The subject of ordinary child-rearing costs was not addressed in some wrongful birth decisions; in others, no claim for such costs was presented by the parents. See, e.g., Linger, 764 P.2d at 1207 n.8 (noting that the plaintiffs did not request damages for “the costs ordinarily associated with raising a healthy child,” and the court need not “decide whether those costs may be recovered”); see also Viccaro,
Accordingly, the clear majority of courts whose decisions recognize a wrongful birth cause of action simultaneously reject claims for the ordinary costs of raising any child, afflicted or otherwise.

Limiting the parents to recovery of damages for extraordinary medical and educational costs attributable to birth defects addresses the specific injury which they claim to have suffered:

Although the extraordinary costs rule departs from traditional principles of tort damages, it is neither illogical nor unprecedented. The rule represents an application in a tort context of the expectancy rule of damages employed in breach of contracts cases. Wrongful birth plaintiffs typically desire a child (and plan to support it) from the outset . . . . It is the defendants' duty to help them achieve this goal. When the plaintiffs' expectations are frustrated by the defendants' negligence, the extraordinary costs rule "merely attempts to put plaintiffs in the position they expected to be in with defendant's help." . . .

Under this view of the problem, ordinary child-rearing costs are analogous to a price the plaintiffs were willing to pay in order to achieve an expected result . . . . We note that expectancy damages are recoverable in other kinds of tort cases . . . .

The extraordinary costs rule ensures that the parents of a deformed child will recover the medical and educational costs attributable to the child's impairment. At the same time it establishes a necessary and clearly defined boundary to liability in this area . . . . Accordingly, we hold that a plaintiff in a wrongful birth case may recover the extraordinary medical and educational costs attributable to the child's deformities, but may not recover ordinary child-raising costs.

In conclusion, nearly all of the wrongful birth decisions that have considered ordinary child-rearing costs as an element of damages do not permit their recovery.

D. "Extraordinary Expenses" May Include the Fair Value of Additional Services by Parents

Are parents entitled to compensation for the "extraordinary" parental care that has been and will be provided to the child whose daily requirements of care, feeding, and training exceed those of a normal child?

The court in Schroeder v. Perkel has held that parents in a wrongful birth action "cannot recover for services that they have rendered or will render personally to their own child without incurring financial expense." 59

58 See, e.g., Liddington, 916 F. Supp. at 1133; Phillips, 575 F. Supp. at 1316; Keel, 624 So. 2d at 1030; Garrison, 581 A.2d at 291; Haymon, 535 A.2d at 884; Kush, 616 So. 2d at 417 n.2; Siemieniec, 512 N.E.2d at 706; Areche, 798 P.2d at 481; P interesse, 530 So. 2d at 1162; Smith, 513 A.2d at 350; Bani-Esraili, 305 N.E.2d at 948; Jacobs, 519 S.W.2d at 849; Harbeson, 656 P.2d at 494; James G., 332 S.E.2d at 882; Dummer, 233 N.W.2d at 377.

59 Smith, 513 A.2d at 349-50 (citations omitted).

50 Schroeder, 432 A.2d at 841.
Conversely, Smith v. Cote disagreed with that restriction:

We see no reason, however, to treat as noncompensable the burdens imposed on a parent who must devote extraordinary time and effort to caring for a child with birth defects... Avoiding these burdens is often among the primary motivations of one who chooses not to bear a child likely to suffer from birth defects. We hold that a parent may recover for his or her ministrations to his or her child to the extent that such ministrations:

(1) are made necessary by the child's condition;
(2) clearly exceed those ordinarily rendered by parents of a normal child; and
(3) are reasonably susceptible of valuation.31

Another court, in Viccaro v. Milunsky, suggested that, if substantiated, the fair market value of necessary extraordinary services rendered by parents in providing care to their disabled child, perhaps measured by loss of wages, may be an appropriate element of damage.32

The fair market value of extraordinary services rendered by parents to their afflicted child has not been addressed in most of the cases that limit wrongful birth recovery to extraordinary support expenses. The Schroeder decision has failed to command a following insofar as it rejects compensation for parental services. Because parents are obligated to mitigate the extraordinary expenses which they do incur, requiring them to hire a private nurse or other caretaker to perform the extraordinary services necessary to care for the impaired child would seem illogical and arbitrary, if the parents are capable of performing such services in a more economical fashion.

E. "Extraordinary Expenses" Are Generally Not Offset by the Intangible Benefits of Parenthood

In Jones v. Malinovski, concerning the unplanned birth of a normal, healthy child, the Maryland Court of Appeals held that a jury may "consider awarding damages to parents for child rearing costs to the age of the child's majority, offset by the benefits derived by the parents from the child's aid, society and comfort."33 This benefits offset is derived from section 920 of the Restatement (Second) of Torts, which requires that any special benefit resulting from the defendant's negligence be offset against the damage caused by the negligence to the extent necessary to reach an equitable result.34 Jones recognized the "complexity" of the benefits offset, even when applied to the expenses of rearing a normal child:

31 Smith, 513 A.2d at 350 (citations omitted).
32 See Viccaro, 555 N.E.2d at 11.
33 Jones, 473 A.2d at 435.
34 RESTATMENT (SECOND) OF TORTS § 920 (1979).
The primary area of complexity with respect to the damages calculations in this case focuses upon the offsetting benefits rule which requires the jury to mitigate economic damages by weighing them against the worth of the child's companionship, comfort and aid to the parents. The jury must assess these benefits in light of the circumstances of the particular case under consideration, taking into account, among other things, family size and income, age of the parents and other relevant factors in determining the extent to which the birth of the child represents a benefit to the parents.\textsuperscript{35}

Even when a healthy child is born, the \textit{Jones} approach to benefits has been considered and rejected as speculative by courts which allow full recovery of ordinary child-rearing costs.\textsuperscript{36} Courts which decline to permit recovery of any costs for rearing a healthy child disparage the notion that such costs can be offset appropriately by the intangible benefits of family life. The \textit{Jones} "approach has been criticized essentially as comparing apples and oranges, that is, involving highly speculative and unquantifiable damages in contrast to intangible benefits."\textsuperscript{37} As stated by one court:

\begin{quote}
[\textit{W}hether these [child-rearing and educating] costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated. The child may turn out to be loving, obedient and attentive, or hostile, unruly and callous. The child may grow up to be President of the United States, or to be an infamous criminal. In short, it is impossible to tell, at an early stage in the child's life, whether its parents have sustained a net loss or net gain.\textsuperscript{38}
\end{quote}

In a wrongful birth situation, a healthy child is not part of the equation. It would appear that an offset is unlikely:

In the case of the wrongful birth of a severely impaired child, it would appear that the usual joys of parenthood would often be substantially overshadowed by the emotional trauma of caring for the child in such a condition, so that application of the benefit rule would appear inappropriate in this context.\textsuperscript{39}

\textsuperscript{35} \textit{Jones}, 473 A.2d at 436-37 (citation omitted).
\textsuperscript{36} \textit{See}, e.g., \textit{Lovelace Med. Ctr. v. Mendez}, 805 P.2d 603, 613-14 (N.M. 1991) (applying emotional benefits to economic loss did not equate to an application of similar benefits to similar losses); \textit{Marciniak v. Lundberg}, 450 N.W.2d 243, 249 (Wis. 1990).
\textsuperscript{37} \textit{Smith v. Gore}, 728 S.W.2d 738, 743 (Tenn. 1987).
\textsuperscript{38} \textit{McKerman v. Aasheim}, 687 P.2d 850, 855 (Wash. 1984).
\textsuperscript{39} \textit{William Lloyd Prosser & W. Page Keeton, LAW OF Torts § 55, at 371 n.48 (5th ed. 1984) (citations omitted); see also Atlanta Obs. & Gyn. Group v. Abelson, 398 S.E.2d 557, 565 (Ga. 1990) (Smith, J., dissenting) (expressing strong disdmy over the prospect of offsetting the economic damages by the benefits derived from raising an impaired child, noting that the court "would not even consider the theory that the joy of parenthood should offset the damages," where a child was born impaired because of a failure to diagnose a problem at delivery, and that "[t]here is no more joy in an abnormal fetus come to full term than a normal fetus permanently injured at delivery," as "[b]oth are heartbreaking conditions that demand far more psychological and financial resources that [sic] those blessed with normal children can imagine.").
To be sure, wrongful birth cases may be found which permit juries to offset the benefits of parenthood against the extraordinary expenses attributable to caring for a severely impaired child. Yet these cases are in the distinct minority. By confining the parents’ recovery to the extraordinary expenses attributable to the child’s genetic defects, most wrongful birth decisions either avoid the subject of offsetting benefits or reject it out of hand. A typical analysis comes from the Supreme Court of New Jersey in Schroeder:

By limiting damages to those expenses actually attributable to the affliction, we are not conferring a windfall on Mr. and Mrs. Schroeder. Although they may derive pleasure from Thomas, that pleasure will be derived in spite of, rather than because of, his affliction. Mr. and Mrs. Schroeder will receive no compensating pleasure from incurring extraordinary medical expenses on behalf of Thomas. There is no joy in watching a child suffer and die from cystic fibrosis.

Wrongful birth decisions seem to run counter to any argument that the benefits rule of Jones should be applied to offset extraordinary medical, educational, and related expenses by any benefit that parents derive from their severely impaired child. The Jones benefits offset theory is flawed enough without extending it to wrongful birth cases, in which the child’s “aid, society and comfort” are meager at best, and provides no readily measurable diminution of the extraordinary expenses that parents must incur in sustaining the child’s existence.

F. “Extraordinary Expenses” Are Not Offset by Public Assistance for Which the Parents May Be Eligible

In Emerson v. Margendants, the Supreme Court of Rhode Island held that liability for the extraordinary costs of maintaining a handicapped child

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40 See, e.g., Viccaro, 551 N.E.2d at 12 (noting that “[w]hatever emotional benefits the parents may derive from the children may also be offset against the extraordinary expenses the parents may incur”).
41 Schroeder, 432 A.2d at 842; see also Turpin, 643 P.2d at 965-66 (stating that “permitting plaintiff to recover the extraordinary, additional medical expenses that are occasioned by the hereditary ailment is also consistent with the established parameters of the general tort ‘benefit’ doctrine” because the “negligence has conferred no offsetting benefit to this interest of plaintiff”); see also Lininger, 764 P.2d at 1207 (finding that “the extraordinary financial burden the Liningers claim to have suffered, and will continue to suffer, is sufficiently unrelated to the pleasure they will derive from raising Pierce as to preclude operation of the benefit rule, at least to the extent that it would require some offset against those particular damages”); Garrison, 381 A.2d at 292; Haymon, 535 A.2d at 885 (posing that the emotional benefit of having a child does not come into play at all in calculating damages for extraordinary medical costs); Archibald, 798 P.2d at 482 (determining that the “benefit rule” should not be applied to wrongful birth cases because “[t]he special costs of caring for a disabled child are not logically subject to any offset in themselves”).
42 Emerson, 689 A.2d at 409.
should be offset by "any economic benefits derived by the parents from governmental or other agencies that might contribute to defraying the costs of caring for the child or its support in adult life." That court did not cite to any authority for this conclusion.

The same proposition had been considered and rejected in a case decided 14 years earlier, which *Emerson* overlooked. The court rejected the claimed offset on several grounds:

Even assuming the continued availability of these facilities and services, as well as the equivalence of these facilities and services to the facilities and services of private residential group homes, defendant's argument completely disregards the collateral source rule. Moreover, to the extent that Mr. Kirby's testimony concerned services provided through federal funds, these funds also do not constitute a proper offset. Finally, to the extent that Randy may ultimately receive benefits from the South Carolina Department of Mental Retardation, that agency is empowered to seek reasonable compensation from beneficiaries who have sufficient financial means.

How would a court today react to a contention that recoverable extraordinary expenses be offset by the economic benefits of public assistance? First, the answer to the inquiry depends on whether the collateral source doctrine is alive and well. The Maryland Court of Appeals held "that as a matter of public policy, government assistance programs are not a factor to be used in making that determination [i.e., the extent of parental financial ability to furnish medical and attendant care to an injured child]; otherwise the taxpayer would bear a financial burden that rightfully should be borne by the tortfeasor."

Second, extraordinary expenses may not be offset by the value of federally funded programs or services for which the parents may be eligible in the care and treatment of such child. This is dictated by federal law, as declared in *Phillips v. United States,* and cases cited therein.

Finally, to the extent that the child may be afforded care or other services by a state agency, the agency may be empowered to seek reasonable indemnification from the parents. The parents would be subject to liability

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43 Id. at 414.
44 *Phillips,* 575 F. Supp. at 1309 (where a defendant presented evidence concerning the facilities and services available to the parents at no cost through the South Carolina Department of Mental Retardation and other federal and state agencies).
45 Id. at 1316 (citations omitted).
46 See *Plank v. Summers,* 102 A.2d 262, 266-67 (Md. 1954) (commenting that the majority of cases hold that "where hospital and medical services are furnished gratuitously to the injured party, he can recover the value of those services from the tortfeasor").
48 See *Phillips,* 575 F. Supp. at 1316.
for the costs of such state-provided services and assistance at least through the child's age of majority.\textsuperscript{50}

G. "Extraordinary Expenses" Are Recoverable Beyond the Age of Majority if the Child Remains Dependent on the Parents for Support

After assessing the measure of pecuniary damages recoverable by the parents in a wrongful birth case, the next issue the family should explore is the duration of time for which those damages should be projected. Most courts permit the recovery of damages measured by the extraordinary costs, at least through minority, of supporting the child with severe birth defects. This leads to an inquiry whether, and under what circumstances, the costs may be projected beyond the age of majority.

Wrongful birth cases that have considered the issue of recovery of post-majority extraordinary expenses generally allow such damages under certain circumstances.\textsuperscript{51} The recovery of extraordinary expenses is measured by the estimated life expectancy of the impaired child, extending beyond the age of majority if the adult child will be incapable of self-support due to physical or mental birth defects and is reasonably likely to remain dependent upon his parents for basic needs. Some courts achieve this result by application of common-law principles.\textsuperscript{52} Other courts base their holdings, in whole or in part, upon statutory requirements of supporting a child who is unable to self-support because of physical or mental disabilities.\textsuperscript{53} The only cases which have denied recovery of post-majority expenses did so in reliance upon statutes which

\textsuperscript{50} See id. §§ 16-101, 16-102(a); see also Sinner v. Sinner, 479 A.2d 1354, 1359 (Md. 1984) (noting that in enacting the legislation later codified as these statutory provisions, the Maryland General Assembly stated its purpose to be "to remove the liability of parents for payment toward the cost of [State-provided] care for their adult children").

\textsuperscript{51} Many cases fail to address the question of post-majority costs for obvious reasons, such as the child dying in infancy, being put up for adoption, or the parents limiting their claims to pre-majority costs. See, e.g., Liddington, 916 F. Supp. at 1141 (noting that there was "no issue in this case as to whether a plaintiff may recover such damages after the child reaches the age of majority"); see also Keel, 624 So. 2d at 1023 (child died at age six); Cauman, 630 A.2d at 1105 (child put up for adoption at age 10 months); Hymon, 535 A.2d at 885-86 (deciding that "whether recovery should be limited to those expenses incurred during the child's minority or should extend into majority where a child is incapable of self-caring" is a matter to be resolved by the trial court in the first instance); Stienicke, 512 N.E.2d at 706-07 (declining to reach the question of post-majority costs by emphasizing that "the plaintiffs here seek to recover only those extraordinary expenses that will be incurred prior to the child's reaching his majority"); Goldberg v. Ruskin, 471 N.E.2d 530, 532 n.2 (Ill. App. 1984) (child born with life expectancy of two to four years); Naccash, 290 S.E.2d at 827 (child died at age two).

\textsuperscript{52} See, e.g., Robak, 638 P.2d at 478; Basten v. United States, 848 F. Supp. 962, 972 (M.D. Ala. 1994) (applying Alabama law); Phillips, 575 F. Supp. at 1317; Walker, 790 P.2d at 744; Linner, 701 P.2d at 1207 n.8; Kush, 616 So. 2d at 424; Stienicke, 512 N.E.2d at 706; Viccaro, 551 N.E.2d at 11; Smith, 513 A.2d at 350; Emerson, 689 A.2d at 414; James G., 332 S.E.2d at 882.

\textsuperscript{53} See, e.g., Garrison, 581 A.2d at 292; Clark v. Children's Mem'l Hosp., 907 N.E.2d 49, 55-57 (Ill. App. 2009); Greco, 893 P.2d at 350.
terminate the parents' obligation of supporting a disabled child at the child's age of majority.\textsuperscript{54}

At common law some states did not recognize a parental obligation to support adult disabled children.\textsuperscript{55} As a general rule it may be recognized that a parent's obligation to support a child ends when the child reaches majority—age 18.\textsuperscript{56}

Maryland has legislatively abrogated the common law under which parents were not required to support disabled adult children. In 1947, the Legislature enacted a statute

making it a criminal offense for a parent, possessing the means, to fail to provide for a destitute adult child whose mental or physical infirmity makes it impossible for the child to care for itself. The passage of this act is a clear indication of legislative intent to place failure to support an incapacitated child on equal footing with failure to support a minor child.\textsuperscript{57}

As presently codified, the Maryland statute declares the parental obligation to support "a destitute adult child" in the following terms: "If a destitute adult child is in this State and has a parent who has or is able to earn sufficient means, the parent may not neglect or refuse to provide the destitute adult child with food, shelter, care, and clothing."\textsuperscript{58} A "destitute adult child" is defined as "an adult child who: (1) has no means of subsistence; and (2) cannot be self-supporting, due to mental or physical infirmity."\textsuperscript{59} Construed together, these provisions mean that a parental "duty of support arises when the [adult] child has insufficient resources and, because of mental or physical infirmity, insufficient income capacity to enable him to meet his reasonable living expenses."\textsuperscript{60}

Despite its limited reference to "care" of a disabled adult child, the Maryland statute provision has been construed to impose a parental obligation to provide necessary medical care.\textsuperscript{61} This construction of the statute was settled many years ago. "While this statute does not mention 'medical care' in specific

\textsuperscript{54} See, e.g., Arche, 798 P.2d at 482-86 (holding that extraordinary expenses are to be calculated on the basis of child's specific life expectancy or age of majority, whichever is the shorter period; Kansas statutes no longer require a parent to support an adult incompetent child); Bani-Esrali, 505 N.E.2d at 948 (deciding that parents are limited to recovering extraordinary expenses incurred in treatment of child during minority, because parents have no legal obligation under New York statutory law to support child after majority).

\textsuperscript{55} See, e.g., Smith v. Smith, 176 A.2d 862, 865 (Md. 1962).

\textsuperscript{56} See Md. Code Ann., Fam. Law § 3-203(b)(1) (West 2010) ("The parents of a minor child . . . are jointly and severally responsible for the child’s support, care, nurture, welfare, and education").

\textsuperscript{57} Smith, 176 A.2d at 865; see also Sininger, 479 A.2d at 1357.

\textsuperscript{58} Md. Code Ann., Fam. Law § 13-102(b).

\textsuperscript{59} Id. § 13-101(b).


\textsuperscript{61} See Johns Hopkins, 697 A.2d at 1366 n.9.
terms, we have no hesitancy in holding that it is embraced within the scope of the broad language used."62 Under this statute, as construed, Maryland law imposes a continuing obligation upon parents to support and provide necessary medical care to a disabled adult child who, by reason of severe physical or mental birth defects, is incapable of self-support if the parents have sufficient means to provide such care and support.63

In a prenatal tort context, therefore, a tortfeasor "is responsible for the fair, reasonable, and necessary cost of [a child's] post-majority medical expenses caused by its negligence."64 By recovering damages for these expenses, the parents acquire sufficient means for discharging their statutory obligation of support after the disabled child attains the age of majority. Such recovery, of course, is subject "to the general principle that 'recovery of damages based on future consequences of an injury may be had ... if such consequences are reasonably probable or reasonably certain' to occur."65 If it is not reasonably certain that the child will survive to the age of majority and will remain completely dependent financially for parental care and support, then such recovery would constitute a windfall to the parents and should be denied.66

II. Duration of Time for Projecting Post-Majority Expenses

Wrongful birth decisions that allow post-majority expenses fall into two distinct categories. One group measures the duration by the life expectancy

63 See Stern v. Stern, 473 A.2d 56, 63 (Md. Ct. Spec. App. 1984) (deciding that an adult child born with cystic fibrosis, who had medical expenses of $150,000 per year, had never held full-time employment, and had never been free from economic dependence on his parents was "destitute").
65 Johns Hopkins, 697 A.2d at 1356 (citations omitted).
66 Bankert v. United Sistes, 937 F. Supp. 1169 (D. Md. 1996) (applying this principle). Bankert was not a wrongful birth case, but involved medical negligence in the delivery of a normal child resulting in injuries to the mother and cerebral palsy and developmental disabilities in the child. Id. at 1179. The child was only four years old at the time of trial, but the court refused to project future noneconomic damages beyond the next five years because damages beyond that time period were not shown to be reasonably probable. Id. at 1186. Judge Williams explained:

With the possible exception as to the need for continuous and supplemental therapeutic services, the Court cannot find that plaintiffs have established a reasonable degree of probability entitlement to the individualized life care plan for Ariel Bankert [the child] outlined by Dr. Sheryl Ranson. Dr. Ranson's conclusions (that it is unlikely that Ariel will be gainfully employed in the competitive labor market, will likely be in some sheltered program or in a supported employment program, and will likely require respite long term care and supported living assistance) are no more than conjecture and sheer speculation. The assumptions and conclusions taken by Dr. Ranson are based upon a negative or "worst scenario." As Kimberly Bankert [the mother] testified we "don't know what is going to happen to Ariel." The Court likewise is not in a position to predict.

Id. at 1185.
of the child, without apparent qualification. The other group is careful to limit recovery to the extent that the parents are obligated to support their adult child.

Limitation of damages to the duration of the child’s dependence on parental support may well be generally implicit in the decisions. However, only the Fourth Circuit has gone so far as to expose the fallacy of measuring damages solely by the life expectancy of the disabled and dependent child:

The district court refused to allow Mr. and Mrs. Gallagher to recover damages for any of the extraordinary medical expenses that Lisa will incur after her parents’ deaths. It rejected the Gallaghers’ argument that, because they will have to put money aside during their lives in order to insure that Lisa is properly cared for after their deaths, they are bearing all of Lisa’s medical expenses for the rest of her life and should be compensated for all of them.

We too must reject this argument. The injury for which the Gallaghers seek compensation is to them, not their child. While it is certainly understandable that the Gallaghers wish to insure that Lisa receives proper care after their deaths, we cannot ignore the North Carolina law that terminates their obligation to support Lisa at their deaths. Any decision to put money aside for her care after their deaths, as far as North Carolina law is concerned, is voluntary.

Thus, the estimated life expectancy of the parents may be considered as a limitation on their obligation to support their adult child. Maryland, like North Carolina, adheres to the principle that responsibility for child support ceases with the death of the parent.

Moreover, the wrongful birth cause of action belongs to the parents, not to their child. The expenses that a disabled adult child may incur after

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67 See, e.g., Basten, 848 F. Supp. at 972; Phillips, 575 F. Supp. at 1317; Kush, 616 So. 2d at 424; Vercaro, 551 N.E.2d at 11; Smith, 513 A.2d at 350; Emerson, 689 A.2d at 414.
68 See, e.g., Liminger, 764 P.2d at 1207 n.8 (holding that parents must prove that child will be dependent on them beyond age of majority); Garrison, 581 A.2d at 292 (deciding that “parents may recover damages measured by the life of the child or the child’s life expectancy to the extent she remains dependent upon either or both of her parents”); Greco, 893 P.2d at 350 (concluding that extraordinary expenses associated with an adult child’s care may be recovered “for whatever period of time it is established that [adult child] will be dependent upon [parent] to provide such care”).
69 Gallagher, 832 F.2d at 778 (citation omitted). But see also Vercaro, 551 N.E.2d at 13 (stating in dicta: “[w]e do not totally discount the possibility that we might impose liability for the extraordinary expenses of caring for a person like Adam after his parents’ deaths, perhaps in order to keep such a person from being a public charge.”); see also Basten, 848 F. Supp. at 972 (imposing such liability after expressly rejecting a defense contention that recoverable expenses should end when the parents die, stating that “parents devoted to a severely handicapped child would surely feel obligated to provide for that child’s extraordinary needs that continue to exist after the parents have died” and that because the parents “could reasonably be expected to save to provide for the child, these expenses are recoverable”).
70 See Taxier v. Malkus, 578 A.2d 761, 764 (Md. 1990) (holding that parent’s estate not liable for continuing child support); Stern v. Homer, 324 A.2d 134, 136 (Md. Ct. Spec. App. 1974) (providing that “[p]arenthood is a status which survives divorce and is terminable only by death or adoption”).
the deaths of her parents do not constitute a legally cognizable injury to the parents in a wrongful birth case. One court put it succinctly:

The injury in a wrongful birth claim is an injury to the parents, which is the loss of an opportunity to choose whether to terminate the pregnancy. The damages flowing from that injury are incurred by the parents, not the child, and include the emotional, physical and financial impact of being denied the opportunity to terminate the pregnancy.71

As such, the parents in a wrongful birth case have “their own independent claim, not one that is derivative” from the child.72

According to the prevailing view, the parental claim for negligently inflicted economic harm is independent from any claim arising from the same negligence that the child may possess. Thus,

where a parent is entitled to recover for medical expenses incurred as a result of negligent injuries to his minor child, the parent’s cause of action is not derivative, in a legal sense, from the infant’s cause of action, but is a separate and distinct ground for recovery vested in the parent.73

In conclusion, the right of parents to recover post-majority extraordinary expenses is restricted to those expenses that the surviving parent is reasonably certain to incur prior to his or her death. This time measurement marks the outer limit of the duration of wrongful birth liability. Of course, that liability will terminate sooner if the child dies, is adopted, or becomes self-sufficient. In no event, however, should the damages be measured beyond the estimated life expectancy of the surviving parent.

I. Damages for “Extraordinary Expenses,” Being Contingent on the Need for Their Expenditure, Should Be Placed in a Reversionary Trust

Because economic damages for wrongful birth are typically substantial and may be projected far into the future, many courts are reluctant to authorize lump sum awards payable outright to the parents. Apart from the contingencies and imponderables inherent in measuring three different life spans and estimating the extraordinary costs of medical care and support likely to escalate in years to come, there is one other factor that courts

72 Schroeder, 432 A.2d at 840 (citation omitted); see also Goldberg, 471 N.E.2d at 538; Smith, 513 A.2d at 354; Becker, 386 N.E.2d at 813. Contra Kush, 616 So. 2d at 424 (finding that parents’ claims for extraordinary damages are asserted as guardians of the best interests of an impaired child, so the claims “essentially are derivative”).
are loathe to mention: "Experience teaches that some parents cannot be trusted."^74

To prevent parents from obtaining windfall recoveries for future care and subsequently wasting the funds or putting up the child for adoption, courts have devised expediency for holding parents accountable to use damage awards for their intended purposes.

Federal courts, in particular, were among the first to fashion protective remedies. In Robak v. United States, the parties agreed that the award should be placed in a reversionary trust, with disbursements to be made as expenses were incurred. Upon the child's death the remainder, if any, would be returned to the defendant. State courts have imposed similar requirements.

Delaware has adopted a guardianship approach so as to preserve the funds under judicial supervision:

[W]e hold that the parents may recover damages measured by the life of the child or the child's life expectancy to the extent she remains dependent upon either or both of her parents. However, we also hold that the parents stand in a fiduciary relationship with the child in the care and expenditure of all sums recovered. Accordingly, the trial court must govern the manner in which the parents are to account for the investment and expenditure of any amounts received as damages. In exercising this supervisory authority, in the event that damages are awarded, the Superior Court is directed to then transfer this matter to the Court of Chancery for the establishment of an appropriate guardianship.~8

Court-ordered reversionary trusts or guardianships address concerns that it "would be unjust for the parents to be able to recover such [economic] damages and escape the expenses."~9 Such mechanisms also ensure "if the child does not survive the 'loss period,' that the parents are not compensated

^74 Walker, 790 P.2d at 741; see also Atlanta Obstetrics, 398 S.H.2d at 562 (citing this factor as a reason for refusing to recognize a wrongful birth cause of action and commenting that "once parents have obtained recovery of such [extraordinary child-care] expenses, there is no assurance that the funds will be expended on behalf of the child").

^75 Robak v. United States, 503 F. Supp. 982 (N.D. Ill. 1980), aff'd in part, rev'd in part, 658 F.2d 471 (7th Cir. 1981) (deciding that the monetary award—$900,000 total, $450,000 to each parent—for past and future maintenance and support of the child should not be paid in one lump sum); see also Phillips, 575 F. Supp. at 1320 n.10 (ordering the parents to submit a plan to effectuate their intentions to preserve the net economic award for the use and benefit of their son).

^76 Robak, 503 F. Supp at 983.

^77 See, e.g., Kush, 616 So. 2d at 424 (prompting the trial court to require that extraordinary expenses of caring for child during his minority and beyond be properly identified, segregated, and placed in trust for the child's benefit, with parents acting as trustees to ensure that the funds are properly administered); Arche, 798 P.2d at 486-87 (suggesting reversionary trust for benefit of child to prevent parents from recovering damages and escaping the expenses; upon child's death, remaining funds to be returned to defendant).

^78 Garrison, 581 A.2d at 292.

^79 Arche, 798 P.2d at 486.
for expenses they never incurred."\textsuperscript{80} That some courts have addressed these concerns underscores a need for defense counsel to seek to contain damage awards or settlements to prevent unjust enrichment.

For instance, Maryland law contemplates judicial discretion to protect an award of "economic damages" which includes future medical expenses.\textsuperscript{81} The trier of fact is required to itemize the award to the extent of such future expenses.\textsuperscript{82} Section (c) of the statute provides:

(1) The court... may order that all or part of the future economic damages portion of the award be paid in the form of annuities or other appropriate financial instruments, or that it be paid in periodic or other payments consistent with the needs of the plaintiff, funded in full by the defendant or the defendant’s insurer and equal when paid to the amount of the future economic damages award.

(2) In the event that the court... shall order that the award for future economic damages be paid in a form other than a lump sum, the court... shall order that the defendant or the defendant’s insurer provide adequate security for the payment of all future economic damages.

(3) The court... may appoint a conservator under this subsection for the plaintiff, upon such terms as the court... may impose, who shall have the full and final authority to resolve any dispute between the plaintiff and the defendant or the defendant’s insurer regarding the need or cost of expenses for the plaintiff’s medical, surgical, custodial, or other care or treatment.\textsuperscript{83}

Section (d) of the same statute provides for a reversion of unpaid funds upon the plaintiff's death: "If the plaintiff under this section dies before the final periodic payment of an award is made... the unpaid balance of the award for future medical expenses shall revert to the defendant."\textsuperscript{84}

Although this statute can arguably be viewed as procedural, rather than substantive, its provisions have nevertheless been applied in federal litigation.\textsuperscript{85} Thus, under Maryland law, a statutory mechanism exists to avoid parental windfalls and preserve an award of extraordinary medical expenses from being squandered by parents while ensuring that the future medical needs of the impaired child are met by adequate funds.

\textsuperscript{80} Id. at 488 (Six, J., concurring).
\textsuperscript{82} Id.
\textsuperscript{83} Id. § 11-109(c).
\textsuperscript{84} Id. § 11-109(d).
III. PARENTAL RECOVERY FOR EMOTIONAL DISTRESS

Wrongful birth complaints typically allege that parents will suffer from emotional distress and mental anguish during the lifetime of the child born with severe defects.

A. Courts Are Divided Over Whether Emotional Distress Damages Are Recoverable

Several jurisdictions have concluded that damages for emotional distress or mental anguish are recoverable in wrongful birth actions. Some of these courts have articulated their reasons for allowing emotional distress damages. In some instances, courts have had to side-step existing state restrictions upon recovery of these kinds of damages, such as the requirement of physical harm or the "impact" or "zone-of-danger" doctrines. In general, the emotional distress that parents have suffered and will suffer is said to be a direct and foreseeable result of being deprived of their option to accept or reject a parental relationship with a child with severe birth defects.

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86 See Reed, 630 A.2d at 1151 (citing Naccash, 290 S.E.2d at 830-31 (allowing recovery of emotional distress damages) and Harbison, 656 P.2d at 496-97 (also allowing recovery of emotional distress damages)); see also Gallagher, 852 F.2d at 778-79; Liddington, 916 F. Supp. at 1142; Basten, 848 F. Supp. at 978-79; Phillips, 575 F. Supp. at 1318; Keel, 624 So. 2d at 1030; Rich, 976 A.2d at 830; Kush, 616 So. 2d at 422-23; Pirello, 530 So. 2d at 1162 (deciding that recoverable emotional distress or mental anguish damages are limited to parents' emotional distress associated with the birth and the unexpected restriction upon their freedom to plan their family); Vescio, 551 N.E.2d at 50; Shelton, 781 S.W.2d at 50; Greco, 893 P.2d at 351; Smith, 513 A.2d at 350 (allowing recovery only to the extent that tangible pecuniary losses result from emotional distress); Speck v. Finegold, 439 A.2d 110, 116-17 (Pa. 1981) (op. of Roberts, J); Emerson, 688 A.2d at 414; Owens, 773 S.W.2d at 913.

87 See, e.g., Phillips, 575 F. Supp. at 1318-19; Kush, 616 So. 2d at 422; Naccash, 290 S.E.2d at 831.

88 See, e.g., Gallagher, 852 F.2d at 779 (determining that emotional distress as a result of giving birth to and raising a handicapped child is a reasonably foreseeable result of negligence); Basten, 848 F. Supp. at 973 (finding that "damages include the shock of learning of this child's abnormality"); Phillips, 575 F. Supp. at 1318-19 (finding that emotional distress damages are recoverable when accompanied by physical symptoms or when they are naturally the proximate result of negligence and accompanied by other recoverable damages such as economic losses); Keel, 624 So. 2d at 1030 (noting that defendants' failure to inform parents of the risks and depriving them of the option to accept or reject a parental relationship with the child "caused [plaintiffs] to experience marital and emotional anguish upon the realization that they had given birth to a child afflicted with severe congenital abnormalities"); Anhalt v. Superior Court, 208 Cal. Rptr. 599, 905 (Cal. App. 1984) (viewing parents as not mere bystanders, but instead as direct victims of the malpractice whose emotional harm was foreseeable); Kush, 616 So. 2d at 422-23 (commenting that an emotional injury is likely to occur when medical advice leads parents to give birth to a severely impaired child and damages may be recovered even if there is no "impact" or physical harm); Vescio, 551 N.E.2d at 11 (concluding that the emotional distress the parents sustain as a result of the negligence and any physical harm caused by that emotional distress are recoverable); Shelton, 781 S.W.2d at 50 (upholding a claim for mental distress resulting "from the shock of discovering the defects in the baby at birth without being adequately advised of the deformities and prepared for this catastrophe," which constitutes harm attributable to defendants' negligence); Greco, 893 P.2d at 351 (stating that "it is reasonably foreseeable that a mother who is denied her right to abort a severely deformed fetus will suffer emotional distress, not just when the child is delivered, but for the
There is an important but unresolved issue about whether financial concerns over the extraordinary expenses occasioned by the birth of a severely defective child provide a legitimate basis for recovering damages for emotional distress. Only one court has explicitly allowed recovery for this kind of emotional distress:

[O]ne of the primary causes for anguish for the parents of Molly would be their awareness of the substantial expenses for Molly not only while they are alive to care for her, but for those expenses continuing after the parents are deceased. The anguish is also caused by the knowledge that the financial resources needed to care adequately for Molly would diminish their financial ability to provide for their other child, Abbie. The sum awarded in this judgment will alleviate this concern and anguish.

Kathie is awarded $900,000 for anguish and mental suffering; Jonathan, her husband, is awarded $700,000 for anguish and mental suffering. \(^{89}\)

On the other hand, some courts have attempted to impose restrictions upon the extent to which emotional distress damages are recoverable. In New Hampshire, damages for emotional distress are generally not recoverable in wrongful birth actions, but are recoverable to the extent that the parents' alleged emotional distress results in tangible pecuniary losses, such as medical expenses or counseling fees. \(^{90}\) A Louisiana court has applied a different type of distinction, based upon the assumption that the injury to the parents does not encompass the defects with which their child was born. \(^{91}\)

The cases which reject altogether any recovery of emotional distress damages are almost as numerous as those which allow recovery in whole or in part. \(^{92}\) When these jurisdictions are counted, the resulting split of authority

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\(^{89}\) Bostan, 848 F. Supp. at 973.

\(^{90}\) See Smith, 513 A.2d at 350-51.

\(^{91}\) See, e.g., Pitre, 530 So. 2d at 1162 (finding that parents may recover damages for their emotional distress associated with their unexpected restriction upon their freedom to plan their family, but not for "emotional and mental distress associated with the child's deformity"); see also Liddington, 916 F. Supp. at 1142 (deciding that parents may not recover for mental anguish suffered on account of their child's birth defects, but may recover for mental anguish on account of being deprived of their right to decide whether to bear a child with genetic defects).

\(^{92}\) See, e.g., Garrison, 581 A.2d at 293; Cauman, 630 A.2d at 1106-07; Stiemeneck, 512 N.E.2d at 707; Arche, 798 P.2d at 482; Becker, 386 N.E.2d at 814; Jacobs, 519 S.W.2d at 849 (recognizing the wrongfull birth cause of action but denying recovery of emotional distress damages).
demonstrates that consensus is lacking on the subject of emotional distress damages.  

Decisions which refuse to allow the recovery of emotional distress damages typically rely upon doctrinal limitations aimed at eliminating feigned claims, such as the “zone-of-danger” rule or the requirement that emotional trauma be accompanied by physical injury.

Other wrongful birth cases reject the recovery of damages for emotional distress as being too speculative:

To be sure, parents of a deformed infant will suffer the anguish that only parents can experience upon the birth of a child in an impaired state. However, notwithstanding the birth of a child afflicted with an abnormality, and certainly dependent upon the extent of the affliction, parents may yet experience a love that even an abnormality cannot fully dampen . . . . [C]alculation of damages for plaintiffs' emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves.

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93 See, e.g., Linger, 764 P.2d at 1207 (expressly declining to decide whether general damages for emotional distress may be recovered in a wrongful birth case). Note, however, that of the jurisdictions that have considered the subject of emotional distress damages, seven deny recovery of such damages. Decisions in only 14 jurisdictions (Alabama, California, Florida, Massachusetts, Michigan, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia, and Washington) ever allowed emotional distress damages without substantial qualification. Four other jurisdictions (Idaho, Louisiana, New Hampshire, and Oklahoma) imposed limits on the extent of recovery. Because of statutory prohibitions on wrongful birth actions now in effect in Idaho, Michigan, Minnesota, Missouri, and Pennsylvania, the precedential value of judicial decisions from those jurisdictions is absent. Emotional distress damages are freely recoverable for wrongful birth in only 11 jurisdictions; they are either disallowed or limited in 10 other jurisdictions that recognize the cause of action.

94 See, e.g., Garrison, 581 A.2d at 293 (deciding that claim of damages for emotional distress is unfounded because there is "no present and demonstrable physical injury to plaintiff"); Cauwen, 630 A.2d at 1105-07 (holding that damages for emotional distress are not recoverable without some accompanying physical injury, unless the plaintiff was placed in a zone of physical danger and feared for his own safety; foreseeability of the risk of emotional distress will not alone suffice); Siemieniec, 512 N.W.2d at 707 (applying "zone-of-danger" rule; damages for emotional distress are not recoverable where there were no allegations that defendant’s negligence endangered the parents of the impaired child or that the parents suffered physical injury or illness by reason of emotional distress caused by negligence; however, see dissenting opinion by Judge Simon, taking issue with this aspect of the majority opinion); Arche, 798 P.2d at 482 (concluding that emotional distress caused by a third party's injury is recoverable only by "witnesses to the occurrence which caused the injury"; parents did not witness the child's prenatal injury during development as a fetus and were not even aware of such injury at that time). The "witness" rationale of Arche is flawed. In a wrongful birth action, the claim is for injury to the parents, not the child. In rejecting emotional distress damages, however, the Arche court looked instead to the "child's injury" that "occurred without human fault during the development of the fetus" and held that the parents were not "witnesses" to that occurrence. No court has followed this line of reasoning and several have rejected it. See, e.g., Phillips, 575 F. Supp. at 1318; Naccash, 290 S.E.2d at 831 (observing that "we believe it would be wholly unrealistic to say that the [parents] were mere witnesses to the consequences of the tortious conduct involved in this case").

95 Becker, 386 N.E.2d at 814; see id. at 818 (Wachtler, J., dissenting in part) (positing that if "the doctor did breach a duty directly owed to the parents, there is no longer any reason why they should not be entitled to recover for their emotional suffering as well as the pecuniary loss"); see also Jacobs, 519
The three-member panel rendering this decision was unanimous in recognizing a wrongful birth cause of action and in defining the measure of damages, but parted company on the availability of damages for emotional distress.

Similarly, in Bader v. Johnson, one judge in the three-member appellate panel concluded that, under Indiana's modified impact rule, damages for emotional distress are not recoverable for the tort of wrongful birth because the parents' injuries did not result from a direct impact. The other two judges agreed that the impact rule should not be applied in wrongful birth cases because the emotional distress is the precise injury that the parents were seeking to avoid. However, those judges then disagreed with each other. One of them stated that damages for emotional distress are not recoverable, not because of the impact rule, but because they are speculative and because it is impossible to separate the emotions caused by the parents' lost opportunity to abort the fetus from other emotional distress attributable to bearing a child born with those defects. The other judge concluded that a jury would be capable of determining the damages for emotional distress resulting from the negligence. On appeal, the Indiana Supreme Court rectified these differing opinions by allowing the mother's claim for damages for emotional distress, while holding that the viability of the father's claim would depend on evidence adduced at trial.

The split among the intermediate appellate judges in Bader is a microcosm of the lack of consensus that pervades this subject. The wrongful birth cases on emotional distress damages are almost in hopeless disarray. One reasoned approach to this difficult issue is provided by the Maryland Court of Appeals in Belcher v. T. Rowe Price Foundation, Inc. Maryland allows the recovery of emotional distress damages in wrongful birth cases to the extent that an emotional injury is capable of objective determination.

S.W.2d at 849 (commenting that damages for mental or emotional anguish suffered by parents would be "an award based upon speculation as to the quality of life and as to the pluses and minuses of parental mind and emotion"); Bader, 675 N.E.2d at 1119.

See Bader, 675 N.E.2d at 1127 (Friedlander, J.).

See id. at 1126 (Barteau, J.).

See id. at 1127-28 (Garbard, J.).

See id. at 1126-27 (Barteau, J.).


Id. at 884 (emphasis added) ("We take this as the present status of the law of Maryland—in tort actions, damages may be recovered for emotional distress capable of objective determination. In other words, under Vance's [Vance v. Vance, 408 A.2d 728 (Md. 1979)] definition of 'physical injury', damages resulting from harm psychological in nature may be obtained, independent of physiological harm, provided the cause and effect of psychological harm are established."). But see Garrison, 581 A.2d at 293; Cauman, 630 A.2d at 1106-07; Siemieniec, 512 N.E.2d at 707 (demonstrating that wrongful birth decisions which insist that emotional distress must be accompanied by bodily harm or physical endangerment are therefore incompatible with Maryland law, as explicated in Belcher).
Belcher also rejected the notion that claims for emotional distress, unaccompanied by bodily harm or symptoms, are too speculative or likely "to open the floodgates to feigned claims." There the Court of Appeals declared:

Vance [Vance v. Vance, 408 A.2d 728 (Md. 1979)] adequately answered the troubling basic policy issues surrounding the definition of the limits of liability for negligently inflicted emotional harm by requiring that such harm be capable of objective determination. Such an objective determination provides reasonable assurance that the claim is not spurious. Where this assurance can be found, so that the mental distress appears to be real and serious, there is no good reason to deny recovery. Where such assurance is not found, recovery should be denied.

In light of Belcher, "[t]he only limitation on recovery for an emotional injury, imposed to guard against feigned claims, is that the injury must be 'capable of objective determination.'"

One lingering problem is that Belcher did not spell out what kind of emotional injury is "capable of objective determination." The case was remanded for reconsideration of the evidence under that standard to determine "whether Belcher suffered sufficient psychological reaction from the alleged [emotional] injury to qualify for compensation." Consequently, the lower courts of Maryland have been forced to grapple with the question of proof in individual cases.

Maryland appellate opinions, rendered before and after Belcher, catalogue some of the injurious symptoms which may or may not be objectively determinable. In Hunt v. Mercy Medical Center, the Court of Appeals attempted to distill three generalizations from Maryland case law:

First, in order for an injury to be capable of objective determination, the evidence must contain more than mere conclusory statements, such as, "He was afraid," or "I

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103 Belcher, 621 A.2d at 884 (refuting the position that objectively determinable damages for emotional distress are "speculative" and not subject to recovery, meaning Maryland is unlikely to align itself with wrongful birth decisions which harbor that notion); see, e.g., Becker, 386 N.E.2d at 814; Jacobs, 539 S.W.2d at 849.

104 Belcher, 621 A.2d at 885 (concluding that "[w]e are now aware that mental injuries can be as real as broken bones and may result in even greater disabilities").


106 Belcher, 621 A.2d at 880.

107 See, e.g., Faya v. Almaraz, 620 A.2d 327, 338 (Md. 1993) (fear of having contracted AIDS, as manifested by emotional and mental distress accompanied by headaches, sleeplessness, "and the financial sting of blood tests for the AIDS virus"); Vance, 408 A.2d at 728 (spontaneous crying, detached and withdrawn affect, inability to function normally, sleeplessness, too embarrassed to socialize, symptoms of ulcer, emotional depression, deteriorated physical appearance indicated by unkempt hair, sunken cheeks, and dark eyes, all as a result of married woman's shock in learning after 18 years that her marriage was void); Hunt, 710 A.2d at 362 (patient's shock and distress at being misdiagnosed with cancer allegedly causing fatigue, sleeplessness, constipation and mood changes); New Summit Assocs., L.P. v. Nistle, 533 A.2d 1350, 1356 (Md. Ct. Spec. App. 1987) (nervous shock, resulting in nausea, diarrhea, and an inability to sleep).
could see that he was afraid." The evidence must be detailed enough to give the jury a basis upon which to quantify the injury. Second, a claim of emotional injury is less likely to succeed if the victim is the sole source of all evidence of emotional injury, as Bagwell [Bagwell v. Peninsula Reg'l Med. Ctr., 665 A.2d 297 (Md. Ct. Spec. App. 1995)] demonstrates. This phenomenon may be a purposeful bulwark against feigned claims or it may simply flow from the need for objective rather than subjective determinations... There is no reason why the victim's own testimony may not be sufficient, as long as it otherwise provides the jury with enough information to render his or her injuries capable of objective determination. Third, although minor emotional injuries may be less likely to produce the kind of evidence that renders an injury capable of objective determination, that does not mean that an emotional injury must reach a certain level of severity before it becomes compensable. 108

In sum, Maryland law permits the recovery of damages for emotional distress to the extent that it is capable of objective determination and supported by credible evidence. Thus, the unexpected shock of giving birth to an abnormal child with severe birth defects and the emotional distress of rearing such a child, past and future, is likely to be fully compensable.

B. Emotional Distress Damages, If Allowed, May Be Offset by the Emotional Benefits of Parenthood

The subject of the "benefits offset" was considered earlier in this article in relation to the extraordinary medical and related expenses that parents incur in raising a severely defective child. The weight of authority goes against reducing the recovery of such extraordinary expenses by the extent that the parents derive pleasure, comfort, or companionship from the child. Some of the decisions that found it inappropriate in that context to apply the "benefits offset" derived from Restatement (Second) of Torts section 920 also refused to allow the parents to recover any damages for emotional distress. 109 On the other hand, the courts which allow recovery of emotional distress damages are more receptive to the concept that damages for emotional distress should be offset by whatever emotional benefits the child brings to its parents. 110

Whether emotional distress damages should be offset by emotional benefits remains an open question in most jurisdictions. Two courts have flatly rejected any offset against recoverable damages for emotional distress. 111

108 Hunt, 710 A.2d at 369-70.
109 See, e.g., Garrison, 581 A.2d at 292-93 (no benefits offset; no emotional distress damages); Cannon, 630 A.2d at 1106-08 (no emotional distress damages); Haymon, 535 A.2d at 885 (no benefits offset); Arce, 798 P.2d at 482 (conceding that the benefits offset "may be necessary where damages for emotional distress are allowed, to take into account those positive emotions engendered by the child's existence," but, having denied such damages, there was nothing to offset).
110 See, e.g., Phillips, 575 F. Supp. at 1320; Vincare, 551 N.E.2d at 11-12, Speck, 439 A.2d at 117; Harbeson, 656 P.2d at 493.
111 See Greco, 893 P.2d at 351 (deciding that "[a]ny emotional benefits attributable to the birth of an impaired child) are simply too speculative to be considered by a jury in awarding emotional distress
For example, the "benefits offset" doctrine is firmly entrenched in Maryland. Jones v. Malinowski\(^{112}\) has been subjected to justifiable criticism for offsetting emotional benefits against economic damages; there is no apples-to-oranges comparison where emotional harm is tempered by offsetting emotional benefits. But Jones establishes that juries are capable of weighing the damages "against the worth of the child's companionship, comfort and aid to the parents."\(^{113}\) By this approach, in considering damages for emotional distress, juries in wrongful birth cases must be permitted to consider mitigating evidence of intangible emotional benefits derived by parents from their child's existence.

C. Damages for Parental Loss of the Child's Services, Companionship, and Society Are Not Recoverable in Wrongful Birth Cases

There is a flip side to the "benefits" theory. Some parents have claimed that a defendant's negligence, far from conferring any "benefits," deprived them of the services, companionship, and society of a normal child. Such claims for loss of parental consortium were rejected in the only cases in which they were asserted.\(^{114}\) Maryland law does not recognize parental claims for loss of a child's consortium.\(^{115}\)

D. Damages for Maternal Pain and Suffering Are Usually Not Recoverable in Wrongful Birth Cases

Damages for emotional distress are not the only items of non-economic damages that have been allowed in wrongful birth cases. A couple of decisions endorse the recovery of damages for the mother's pain and suffering associated with continued pregnancy and birth of an impaired child.\(^{116}\) However, pain and suffering due to childbirth has not been recognized as a compensable element of wrongful birth damages in any other jurisdiction.

\(^{112}\) Jones, 473 A.2d at 429.

\(^{113}\) Id. at 436-37.

\(^{114}\) See Viccaro, 551 N.E.2d at 11 (deciding against a finding of liability for loss of child's society and companionship because, had the defendant not been negligent, the child would not have been born); Greco, 893 P.2d at 350-51 (denying recovery for loss of child's services and companionship, noting that "here, the crux of Sundi Greco's claim is that she would have aborted the fetus had she been given the opportunity to do so," in which case, "she would have had no services or companionship at all"); see also Glasscock v. Laserra, 439 S.E.2d 380, 381 (Va. 1994) (holding that the parents of a child born with multiple congenital abnormalities "cannot recover damages for loss of services because the basis of their claim is that they were deprived of an informed opportunity to terminate the pregnancy").


\(^{116}\) See, e.g., Keel, 624 So. 2d at 1030; Pitre, 530 So. 2d at 1162.
E. Damages for Spousal Loss of Consortium Are Recoverable in a Wrongful Birth Case

The same cluster of wrongful birth decisions that allow recovery for pain and suffering also recognize loss of consortium damages suffered by the marital entity. A claim for loss of consortium arises from the loss of society, affection, assistance, and conjugal fellowship suffered by the marital unit as a result of the physical injury to one spouse through the tortious conduct of a third party. The consortium claim must be jointly asserted and tried. In the context of a loss of consortium claim, “two injuries may arise: (1) the physical injury to the spouse who was directly injured by the tortious conduct and (2) the derivative loss of society, affection, assistance, and conjugal fellowship to his or her spouse.”

On the surface, the “physical injury” requirement would seem to pose an insurmountable obstacle to recovery. However, proof of “physical injury” may be satisfied by evidence of a distressed mental state that is “capable of objective determination.” For example, negligent defamation of a husband has been found to support a spousal claim for loss of consortium, although there was no physical harm to anyone.

A compelling argument could be made that, if both spouses are awarded damages for emotional distress, they cannot also recover for claimed loss of consortium as such an award would constitute a double recovery. Such an argument would appear to be refuted, however, by jury instructions approved by the court in Jones v. Malinowski. In that case, the jury was instructed to consider “the personal injuries including mental distress sustained,” as well as “the effects that such injuries have on the overall physical and mental health and well-being of the [parents] as well as the effect on the marriage relationship.” This suggests that damages for loss of consortium may be recoverable in a wrongful birth case even if damages for emotional distress are also awarded to both parents.

117 See Baxten, 848 F. Supp. at 973; Keel, 624 So. 2d at 1030; Fitte, 530 So. 2d at 1161-62; see also Shelton, 781 S.W.2d at 50 (stating that claims of loss of consortium allege some damages “as a result of the shock of not being adequately informed and prepared for the birth of the deformed child”).
121 See Belcher, 621 A.2d at 884.
122 See Exxon Corp., U.S.A. v. Schoene, 508 A.2d 142, 148 (Md. Ct. Spec. App. 1986) (commenting that “the better reasoned cases are those that have held that the spouses’ cause of action for loss of consortium may be predicated on a mental or emotional injury to one of them without any accompanying physical harm”).
123 Jones, 473 A.2d at 431 n.2 (emphasis added).
IV. FINAL CONSIDERATION—DAMAGES CAPS

As part of tort reform efforts, a number of jurisdictions have enacted caps on certain types of damages, primarily those that are noneconomic. In handling cases, it is imperative for attorneys to consider whether those caps are applicable to reduce damages in a wrongful birth action.

It is beyond the scope of this article to perform a national survey and analysis of statutory damage caps. However, the types of issues that arise in connection with such caps can be illustrated by review of Maryland’s statute on the subject and cases interpreting it.

A. Are Damages Recoverable in a Wrongful Birth Action Subject to the Cap?

The first question that must be addressed is whether an award of damages for emotional distress (and any other intangible loss), if recoverable at all in a wrongful birth action, would be subject to the monetary limits of the cap. In Maryland, the statute at issue caps noneconomic damages.124 The “noneconomic damages” to which the monetary cap applies is defined by statute:

(2)(i) “Noneconomic damages” means:

1. In an action for personal injury, pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury; and

2. In an action for wrongful death, mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education, or other noneconomic damages authorized under Title 3, Subtitle 9 of this article.

(ii) “Noneconomic damages” does not include punitive damages.125

It is noteworthy that “mental anguish” and “emotional pain and suffering” are expressly included in the laundry list of noneconomic damages covered in an action for wrongful death, but omitted from statutory coverage of an action for “personal injury.” Express mention in the one category and exclusion from the other raises questions of legislative intent. If damages for emotional distress are covered by the statute in an action for wrongful birth, such distress must be classified as “other nonpecuniary injury” within the subsection (1) catchall.

The “injury” component of this catchall is readily satisfied in actions for wrongful birth. The Court of Appeals has established that the availability

125 Id. § 11-108(a)(2) (emphasis added).
of “both economic and emotional damages” in wrongful birth cases serves “to demonstrate that there is legally cognizable injury to the parents in these cases.”

Emotional injury is likewise “nonpecuniary” in the sense that it does not carry a fixed price tag. Such an injury may be psychological in nature if the mental state for which recovery is sought is “capable of objective determination.” That such damages are incapable of precise measurement, however, demonstrates that they are as just as “nonpecuniary” in nature as damages for pain and suffering, disfigurement, of loss of consortium.

Oaks v. Connors establishes that “emotional” or “psychological” injuries fall within the ambit of the statutory classification of “noneconomic damages.” In that case, the jury awarded $530,000 in “noneconomic damages” to a woman who “was severely injured as a result of the [motor vehicle] collision, sustaining several fractures to her right hand and arm in addition to serious neurological and psychological damage.” In addition, the jury awarded the plaintiff and her husband $130,000 for the noneconomic damage to their marital relationship. The Court of Appeals held that, by enacting section 11-108 of the Courts & Judicial Proceedings Article, the Legislature “intended for all noneconomic damages to be subject to a single cap.” These presumably included the “psychological damages” that formed part of the $530,000 award, as well as the loss of consortium separately awarded. The Court took note of “the pain, suffering, and depression that are personal to the injured victim” but “intertwined” with the harm to the marital relationship.

B. Is a Wrongful Birth Action the Type of Case to Which the Cap Applies?

Damages caps may be limited in application to only certain types of actions. For example, the monetary limits on the recovery of “noneconomic damages” are set forth in the Maryland Cap Statute as follows:

(b)(1) In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000.

(2) (i) Except as provided in paragraph (3)(ii) of this subsection, in any action for

126 Reed, 630 A.2d at 1151 (emphasis added).
127 Belcher, 621 A.2d at 884.
128 See Berman, 404 A.2d at 15 ("courts have come to recognize that mental and emotional distress is just as 'real' as physical pain, and that its valuation is no more difficult").
129 Oaks, 660 A.2d at 425.
130 Id. at 426.
131 Id. at 429 (emphasis in original).
132 Id. at 430.
damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $500,000.

(ii) The limitation on noneconomic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year, inclusive.

(3) (i) The limitation established under paragraph (2) of this subsection shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim.

(ii) In a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed 150% of the limitation established under paragraph (2) of this subsection, regardless of the number of claimants or beneficiaries who share in the award.133

The question that arises under this statute, then, is whether a wrongful birth action may be regarded as an “action for damages for personal injury” within the meaning of section 11-108(b).

There is no direct precedent addressing this issue, in Maryland or elsewhere. At least one court has held that an action for wrongful birth claiming damages for emotional distress is “an action for personal injuries” within that state’s two-year statute of limitations applicable to personal injury cases.134 The court reached this conclusion by looking to the plaintiffs’ pleading: the plaintiffs pled that, as parents, “they were deprived of an informed opportunity to terminate the pregnancy. Thus, their cause of action is personal in nature.”135

The Court of Appeals of Maryland has taken a somewhat different view. It has stated that the term “personal injury,” as used in section 11-108(b), “normally connotes a physical injury to a victim.”136 Under Maryland negligence law, any “emotional injury” is compensable if that injury is “capable of objective determination.”137 A compensable “physical injury” may be demonstrated simply by evidence of a distressed mental state.138

The doctrinally correct position is that an emotional injury (such as mental anguish or emotional distress) may come within the ambit of the “physical injury” rule by virtue of its outward manifestations. The only limitation on recovery for an emotional

134 See Gilchrist, 439 S.B.2d at 381.
135 Id.
137 Belcher, 521 A.2d at 884; see also Hunt, 710 A.2d at 366 (citing Belcher).
138 Vance, 408 A.2d at 733-34; see also Hunt, 710 A.2d at 366 (citing Vance).
injury, imposed to guard against feigned claims, is that injury must be “capable of objective determination.”

It may thus be concluded that a “personal injury” action, as that term is used in section 11-108(b), connotes a “physical injury” in the sense defined in Vance and Belcher. Therefore, a wrongful birth claiming emotional injury to the parents (such as mental anguish or emotional distress) constitutes an “action for damages for personal injury” within the meaning of section 11-108(b). An award of damages for such emotional injury is thus subject to the monetary limitations of the cap.

C. Is the Cap Applied to Support Each Parent’s Claim or to the Aggregate of Both Parents’ Claims

In a case where both parents are plaintiffs and each has suffered recoverable damages subject to the cap, it is important to assess whether each parent is entitled to recover the maximum amount under the cap, or whether the cap is a single limit that encompasses the damages to both parents. In Maryland, this determination turns on whether only one or both parents are “direct” victims of the negligence. There is no ready answer to this question. The application of a statutory maximum limit or “cap” on noneconomic damages that may be awarded in a wrongful birth case is completely without precedent in Maryland.

The applicable monetary limitation or “cap” of section 11-108(b)(2), $725,000 as of the date that this article was written, “shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim.” The apparent meaning of this subsection is that “each direct victim of tortious conduct” may recover up to the statutory maximum ($725,000). If each parent is considered a “direct victim,” then each may recover noneconomic damages in the maximum amount permitted by section 11-108(b)(2). In short, two separate “caps” would apply and the potential recovery could be as much as $1,450,000. On the other hand, if one parent claims injury “by or through” the direct victim of tortious conduct, then a single “cap” would limit the aggregate sum of noneconomic damages that might be awarded to the parents.

Section 11-108(b)(3) was quoted in Oaks v. Connors, but was not directly applicable because that case arose prior to the effective date of the statute. In Oaks, the jury awarded noneconomic damages to the injured spouse in excess of the statutory amount and a separate award for loss of consortium.

109 Hunt, 710 A.2d at 366 (citations and footnotes omitted).
110 Streidel, 620 A.2d at 909.
112 Oaks, 660 A.2d at 428 n.6.
jointly to her and her husband. The trial judge rejected the consortium award in its entirety and the Court of Appeals affirmed. The court proceeded to "hold that a loss of consortium claim is derivative of the injured spouse's claim for personal injury and, therefore, a single cap for noneconomic damages applies to the whole action."\(^{143}\)

1. **In a Wrongful Birth Action, the Mother Is a "Direct Victim"**

   The mother unquestionably sustains a direct injury. The parents' claim for wrongful birth rests upon the injury to the mother by virtue of the physician's or other health care provider's negligence, resulting in the mother being deprived of the right to make an informed choice either to prevent the child's conception or to terminate the child's life by abortion.\(^ {144}\)

2. **In a Wrongful Birth Action, Is the Father also a "Direct Victim" or Is His Claim Derivative of the Mother's?**

   While the mother's status as a "direct victim of tortious conduct" is not open to serious debate, the answer is less clear for the father. Nearly every wrongful birth opinion recognizes a legally cognizable injury to "the parents," usually in terms of their joint financial obligation to bear the extraordinary expenses of caring for their afflicted child.\(^ {145}\) As a matter of law, a father has no right to prevent or compel an abortion. Thus, "a mother's prerogative to have an abortion . . . is not subject to veto by her spouse or the natural father or the State."\(^ {146}\) Few cases explore the unique status of the father as an individual wrongful birth plaintiff.

   A few isolated cases recognize injury to the father. An early Florida case, *DiNatale v. Lieberman*, reversed a trial judge's decision to allow the mother, but not the father, to maintain an action for wrongful birth:

   The father's viable causes of action in this appeal are predicated upon a "wrongful birth" theory which is based upon the alleged negligence of a physician or laboratory in failing to properly diagnose and inform the parents of the impending birth of a defective child, thus giving them the choice to terminate the pregnancy. Even though a father has no legally enforceable right to either compel or prevent an abortion, he has a right to participate in the decision . . . He shares the mother's right to seek

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\(^ {143}\) *Id.* at 430 (emphasis added).

\(^ {144}\) *Staternotes*, 512 N.E.2d at 704 (emphasis added); *see also Archen*, 798 P.2d at 480; *Greco*, 893 P.2d at 351; *Smith*, 513 A.2d at 347.

\(^ {145}\) *See, e.g., Reed*, 630 A.2d at 1145.

\(^ {146}\) Laboratory Corp. of Am. v. Hood, 911 A.2d 841, 851-52 (Md. 2006) (holding that any duty owed to a father is not precluded by the right to terminate residing solely in mother and reserving ruling on the question of the laboratory's direct duty of care to father); *see also Coleman v. Coleman*, 471 A.2d 1115, 1121 (Md. Ct. Spec. App. 1984); *Fraiterman*, 668 S.E.2d at 135-37 (deciding that, based on the evidence presented, there was no physician-patient relationship between a husband and his wife's physician, who provided preconception counseling and pregnancy care).
damages for the negligent wrongful birth because he shares the legal obligation to provide for the child’s care and support. . . . The father’s right is not dependent upon the mother’s cause of action but is his individually. 147

The DiNatale opinion is not particularly enlightening, however. Obviously, the father shares with the mother the legal obligation to provide for the child’s care and support. He is entitled, if not required, to share in the extraordinary expenses recoverable in a wrongful birth action. Beyond that, DiNatale does not suggest that the father is a direct victim from the standpoint of noneconomic damages for his own emotional harm. More to the point are those wrongful birth decisions which suggest that the parents may seek damages for emotional distress “to recover for a direct and personal injury, not because of mental distress occasioned by an injury to [the child].” 148

Perhaps the most forthright exposition of the father’s status as a “direct victim” is provided by a California decision, Andalon v. Superior Court, upholding a claim of negligent infliction of emotional distress:

In this case we perceive both parents to be direct victims of the malpractice alleged. Mrs. Andalon was a party to the contract with the defendant [physician] and no issue of his duty to advise her concerning mongolism is tendered at this stage of the action. Mr. Andalon’s interest in the receipt of information and advice on this topic mirrors hers. His injury is not merely derivative of Mrs. Andalon’s injury but flows from his role as a participant in the reproductive life of the marital couple and its lawful choices. The burdens of parental responsibility fall directly upon his shoulders. The tort duty arising from the contract, between defendant and Mrs. Andalon, runs to him, not merely because of the foreseeability of emotional harm to him, but also because of the nexus between his significant interests and the “end and aim” of the contractual relationship. He is manifestly a direct beneficiary of tort-duty imposed by virtue of the doctor-patient relationship. 149

The intermediate appellate court decision in Andalon was not cited in Reed v. Campagnolo, and did not address a claim for wrongful birth. 150 In contrast, three of the wrongful birth decisions cited in Reed described the father’s status as “derivative”:

The parents’ claim for emotional damages stands upon a different footing. In failing to inform Mrs. Berman of the availability of amniocentesis, defendants directly deprived her and, derivatively, her husband of the option to accept or reject a parental

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147 DiNatale v. Lieberman, 409 So. 2d 512, 513 (Fla. App. 1982) (emphasis added) (citations omitted); Chamberland v. Physicians for Women’s Health, LLC, No. CV0101640408, 2006 WL 347553, at 6 (Conn. Super. Ct. Feb. 8, 2006) (deciding that a father’s rights are not derivative and that damages may be awarded to a father for emotional distress).

148 Greco, 893 P.2d at 351 n.10 (emphasis in original) (discussing basis on which plaintiff sought recovery).

149 Andalon, 208 Cal. Rptr. at 905 (emphasis added) (footnote omitted).

150 Reed, 630 A.2d at 1152.
relationship with the child and thus caused them to experience mental and emotional anguish upon their realization that they had given birth to a child afflicted with Down’s Syndrome. . . . We feel that the monetary equivalent of this distress is an appropriate measure of the harm suffered by the parents deriving from Mrs. Berman’s loss of her right to abort the fetus.151

More recently, the Superior Court of Alabama reached the same conclusion:

Emotional distress suffered by the parents of an unhealthy child is compensable in a wrongful birth action . . . A jury could conclude that the defendants, in failing to inform Mrs. Keel of the possibility of giving birth to a child with severe multiple congenital abnormalities, directly deprived her and, derivatively, her husband, of the option to accept or reject a parental relationship with the child and thus caused them to experience mental and emotional anguish upon their realization that they had given birth to a child afflicted with severe multiple congenital abnormalities.152

Under Alabama law, recoverable damages include the “mental and emotional anguish the parents have suffered.”153

Admittedly, all of these decisions provide no conclusive guidance. Whether the husband of a “direct victim of tortious conduct” is also a “direct victim” under section 11-108(b)(3) is essentially a question of legislative intent. Nevertheless, the situation of the husband-father in a wrongful birth case, seeking noneconomic damages for emotional distress over his wife’s act of giving birth to an abnormal child, seems fairly analogous to the “derivative” loss of consortium claim addressed in Oaks v. Connors.154

CONCLUSION

Given the increased scientific knowledge and improved ability to diagnose genetic precursors to significant adverse medical conditions prenatally, it remains to be seen whether the courts will expand recognition of tort recovery to outcomes other than severe birth defects. Depending on the severity of the birth defect and applicable law in a particular jurisdiction, damages for wrongful birth could be in the range of $10 million. Items of damages may include:

151 Berman, 404 A.2d at 14 (emphasis added); see also Nacecess, 290 S.R.2d at 830 (holding that “the erroneous Tay-Sachs report given [to the mother] deprived her, and derivatively, her husband, of the opportunity to accept or reject the continuance of her pregnancy and the birth of her fatally defective child,” which “was direct injury”).
152 Keel, 624 So. 2d at 1030 (emphasis added) (citations omitted).
153 See Basten, 848 F. Supp. at 973 (awarding mother $900,000 for anguish and mental suffering and father $700,000 for such damages; court found it “appropriate to award Kathy more for anguish than her husband for numerous reasons,” which are discussed in the case).
154 Oaks, 660 A.2d at 423.
- Hospital and related medical expenses associated with pregnancy and delivery;
- Costs associated with infant’s extraordinary care, treatment, and education;
- Costs associated with adult child’s extraordinary care and treatment;
- Parents’ lost income;
- Emotional distress of mother and father; and
- Loss of consortium.

Although nearly all jurisdictions that recognize the wrongful birth cause of action allow recovery of damages for the extraordinary expenses attributable to the child’s genetic defects, in some states there are notable limitations to recovery of damages. Moreover, there are many open questions regarding the availability of other potentially significant items. “Forum shopping” and choice of law issues may also come into play. If the claim is not susceptible to prompt resolution in advance of filing suit, one way to avoid the guesswork of going to trial without knowing which items will be allowed as damages is to seek clarification from the highest state court with jurisdiction over the issue.

As such, certified questions to the appropriate court, in advance of trial, might illuminate the issues and provide helpful guidance to the trial court and counsel. It is noteworthy that a significant number of the decisions which have defined the measure of damages in wrongful birth cases were rendered in direct response to questions certified by federal courts.

Wrongful birth cases are fraught with emotion and the economic stakes are exceptionally high. Regardless of the specific items of damages allowed, it is safe to conclude that in jurisdictions in which a wrongful birth cause of action is recognized, the potential outer limits of damages are enormous. Care must be taken to evaluate the medical, economic, and legal basis of all items of damages to resolve such claims in expeditious fashion in accordance with applicable law.

156 See, e.g., Walker, 790 P.2d at 735; Arche, 798 P.2d at 477; Vicario, 551 N.E.2d at 8; Greco, 893 P.2d at 345; Harbeson, 656 P.2d at 483; James G., 332 S.E.2d at 872.