

# EXITING THE DANGER ZONE: *CLARK V. CHILDREN'S MEMORIAL HOSPITAL*, 955 N.E.2D 1065 (ILL. 2011)

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## I. INTRODUCTION

The creation of “designer babies” and the manipulation of features and characteristics of unborn children may soon be possible with advancements in modern science.<sup>1</sup> This possibility is a highly controversial topic because not all parents will choose to participate in making their child this way and will stick to the old fashioned way of conceiving through intercourse, rather than through petri dishes.<sup>2</sup> The general population can agree, however, that every parent wishes for a healthy child, regardless of its gender, hair color, or athletic ability. With the advancement of genetic testing and reproductive technologies, such as pre-implantation genetic diagnosis (PGD), parents have the opportunity to determine their chances of giving birth to a child with a genetic disorder and to choose whether they are willing to accept the subsequent risks.<sup>3</sup> Diligent parents who obtain expert opinions to avoid having a disabled child should be entitled to recourse when they are misinformed and left to deal with the consequences of another’s negligence.

In *Clark v. Children’s Memorial Hospital*, the Illinois Supreme Court decided the issues of whether parents could recover damages for the extraordinary expenses of caring for their disabled child after he reaches age eighteen, the age of majority, and whether the parents could recover damages for emotional distress caused by the defendants’ negligence.<sup>4</sup> This Note will show that the Illinois Supreme Court erred in holding that the parents could not recover costs for caring for their disabled son after he

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1. Hank Greely, Prof. of Law at Stan. Univ., Dr. Grayson Distinguished Lecture Series at Southern Illinois University School of Law: The End of Sex—The Future of Human Reproduction New Technologies and Their Social and Legal Consequences (Sept. 15, 2011), *available at* <http://www.law.siu.edu/healthlaw/PastPresentations.php>.

2. *Id.*

3. *Id.*

4. 955 N.E.2d 1065 (Ill. 2011). The plaintiffs’ son suffered from Angelman Syndrome, which the couple had hoped to avoid by seeking genetic testing before conceiving another child. *Id.* at 1070. Two different physicians advised the couple that the wife did not carry the gene that causes the disorder. *Id.*

reaches eighteen because his condition, Angelman Syndrome, is a lifelong illness requiring lifelong care.<sup>5</sup> On the other hand, this Note will show that the court was correct in holding that plaintiffs do not have to meet the “zone-of-danger” test to recover emotional distress damages as an element of a wrongful birth claim.<sup>6</sup> It is not only reasonable, but also foreseeable, that parents who give birth to a disabled child would be emotionally distressed by the unexpected outcome, especially when previously told by two physicians that they did not need to worry about the disorder.

The focus of this Note centers on the court overruling its decision in *Siemieniec v. Lutheran General Hospital*<sup>7</sup> and the inapplicability of the zone-of-danger test in wrongful birth cases. Because of advancements in reproductive technologies and genetic testing, the courts will increasingly be deciding wrongful birth cases and similar actions in the years to come. *Clark* will play an important role in Illinois in the way plaintiffs will need to plead their claims in order to succeed on emotional distress claims. Section II of this Note provides general background information on wrongful birth actions and infliction of emotional distress claims and describes the brief history of Illinois’s adoption of the zone-of-danger rule in case law. Section III contains a detailed exposition of *Clark v. Children’s Memorial Hospital*. Section IV critiques the court’s decision to deny recovery for age of majority expenses, but commends its decision to permit recovery for emotional distress as an element of damages for wrongful birth actions.

## II. LEGAL BACKGROUND AND THE EVOLUTION OF THE “ZONE-OF-DANGER” RULE

### A. Understanding the Law of Torts

The ultimate goal of the plaintiff in most tort cases is an award of money damages.<sup>8</sup> Tort damages can be divided into three categories: (1) nominal damages; (2) compensatory damages; and (3) punitive damages.<sup>9</sup> Nominal damages are awarded in cases where the plaintiff wins on the merits of his case, but walks away with empty pockets, except for maybe a symbolic remedy, such as one dollar.<sup>10</sup> Compensatory damages are designed to compensate the plaintiff and put him in the position he would have been in had he not suffered harm by the defendant, whereas punitive

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5. See CHARLES A. WILLIAMS ET AL., FACTS ABOUT ANGELMAN SYNDROME 31 (2009).

6. *Clark*, 955 N.E.2d at 1088.

7. 512 N.E.2d 691 (Ill. 1987).

8. THOMAS C. GALLIGAN ET AL., TORT LAW 907 (4th ed. 2007).

9. *Id.*

10. *Id.*

damages are designed to punish the defendant for his intentional conduct.<sup>11</sup> For the plaintiff to recover money damages, he must establish a cause of action for which the law provides a remedy. Damages have traditionally been awarded in cases of assault, false imprisonment, defamation, slander, invasion of privacy, civil rights torts, personal injury torts, and medical malpractice.<sup>12</sup>

Wrongful birth is a medical malpractice tort that describes the action alleged by parents who would not have conceived or carried a physically or mentally impaired child to term but for the tortious conduct of the defendant in conducting prenatal testing and relaying incorrect information to the parents based on that testing.<sup>13</sup> Wrongful birth should not be confused with wrongful life—an action not brought by the parents in their own right, but by a parent or guardian on behalf of a minor who seeks damages for the defendant’s failure to give his or her parents proper advice regarding the child’s physical or mental impairment.<sup>14</sup> Many courts have rejected a claim for wrongful life on the grounds that life itself is not a harm.<sup>15</sup>

The first court to address the issue of recovery for wrongful birth was the Supreme Court of New Jersey in *Gleitman v. Cosgrove* in 1967.<sup>16</sup> The mother in that case had German measles during her first trimester, which resulted in her son’s birth defects, even though her physician advised her that the measles would have no effect on the baby.<sup>17</sup> The mother sued for emotional distress damages, the son sued for his birth defects, and the father sued for child rearing costs.<sup>18</sup> The mother claimed she would have had an abortion if her physician had correctly informed that her child would be born with birth defects as a result of her German measles.<sup>19</sup> However, abortion was illegal in most states at the time, including New Jersey.<sup>20</sup> The court dismissed all of the complaints because it refused to weigh the value of the son’s impaired life against no life at all and held that public policy supported the preciousness of life.<sup>21</sup> It was not until the United States Supreme Court’s decision in *Roe v. Wade*, which recognized a woman’s right to have an abortion, and the increased ability of health care

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11. *Clark*, 955 N.E.2d at 1074.

12. GALLIGAN, *supra* note 8, at 908.

13. BRUCE L. OTTLEY ET AL., ILLINOIS TORT LAW 24-27 (4th ed. 2011).

14. *Id.*

15. *Id.*; *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 696-97 (Ill. 1987).

16. 227 A.2d 689 (N.J. 1967).

17. *Id.* at 690.

18. *Id.*

19. *Id.* at 691.

20. *Id.*

21. *Id.* at 692-93.

professionals to predict and detect possible birth defects that the majority of jurisdictions began to recognize a cause of action for wrongful birth.<sup>22</sup>

In a wrongful birth claim, compensatory damages may include expenses for child rearing and emotional harm.<sup>23</sup> Courts tend to limit child rearing expenses to extraordinary expenses—those in excess of the ordinary expenses of child rearing.<sup>24</sup> Courts may also limit recovery of costs for raising a child to the age of majority, leaving uncompensated the period of time from majority to the child's death, thus holding the state responsible once the child reaches adulthood.<sup>25</sup> Some courts view wrongful birth as a personal injury tort against the parents and allow recovery for emotional harm as part of the total damages.<sup>26</sup> Other courts refuse to permit emotional harm damages at all unless the parents actually witnessed the child's injury, thereby satisfying the bystander rule.<sup>27</sup> Under the bystander rule, a plaintiff must show: (1) a close relative of the plaintiff suffered serious injury because of the defendant's negligent conduct; (2) the plaintiff was located near the scene of the negligent conduct; and (3) the plaintiff directly observed the injury.<sup>28</sup>

The bystander rule often applies in stand-alone emotional harm claims, such as a claim for negligent infliction of emotional distress.<sup>29</sup> For a plaintiff to recover under the theory of negligent infliction of emotional distress, a defendant's negligent conduct must have caused or threatened to cause physical harm to the plaintiff.<sup>30</sup> Under Illinois law, two classes of people have long been able to recover for emotional injuries with negligent infliction claims: direct victims and bystanders.<sup>31</sup> A direct victim suffers emotional injury after being physically harmed by a defendant's negligent conduct, whereas a bystander suffers emotional injury due to the fear that the defendant's negligent conduct will injure him or her.<sup>32</sup>

Prior to 1983, Illinois courts applied the "impact rule" in cases of negligent infliction of emotional distress, regardless of whether the plaintiff was a direct victim or a bystander.<sup>33</sup> Under the impact rule, a person owes

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22. Caroline Crosby Owings, Note, *The Right to Recovery for Emotional Distress Arising From a Claim for Wrongful Birth*, 32 AM. J. TRIAL ADVOC. 143, 144 (2008).

23. DAN B. DOBBS, *THE LAW OF TORTS* 795 (2000).

24. *Id.* at 794.

25. *Id.* at 795.

26. *Id.*

27. *Id.* at 795-96.

28. Kenneth B. Baren, *Bystander Emotional Distress Should Third Parties Recover Regardless of the Negligent Tort?*, 25 J. LEGAL. MED. 351, 356-57 (2004).

29. DOBBS, *supra* note 23, at 795.

30. Peter G. Land, *The Unintentional Expansion of Negligent Infliction of Emotional Distress*, 86 ILL. B.J. 82, 82 (1998).

31. *Id.* at 84.

32. *Id.*

33. OTTLEY ET AL., *supra* note 13, at 14-22.

no duty to protect another person from the negligent infliction of emotional distress unless it results from actual physical impact.<sup>34</sup> In *Rickey v. Chicago Transit Authority*, the Illinois Supreme Court thoroughly analyzed the law in relation to negligently inflicted emotional distress.<sup>35</sup> After doing so, the court changed its previous adherence to the impact rule and adopted the standard applied in the majority of jurisdictions, the zone-of-danger rule.<sup>36</sup>

## B. Case Law

*Robak v. United States* was the first Alabama decision on the issue of whether a cause of action exists for wrongful birth.<sup>37</sup> In that case, the hospital staff tested the mother twice for rubella; the first test was negative and the second test was positive.<sup>38</sup> No one from the hospital ever informed the mother of her positive test or the serious effects rubella could have on her unborn fetus.<sup>39</sup> The United States contended that no such cause of action could have existed because of the strong public policy against abortion; however, the court found that argument to misrepresent the meaning of *Roe v. Wade*.<sup>40</sup>

The *Robak* court noted that it was a fundamental tenet of tort law that a negligent tortfeasor was liable for all damages as a result of his negligence.<sup>41</sup> Some courts require the amount of money awarded to be offset by normal child rearing expenses; however, the *Robak* court did not.<sup>42</sup> The action was based on the hospital staff's negligent failure to diagnose the mother's rubella and inform her of it.<sup>43</sup> Had the staff not breached its duty, Robak would have obtained an abortion and would not have been required to undertake the expenditures incurred in caring for her child or his condition.<sup>44</sup> The district court introduced the idea of a reversionary trust and awarded the mother and father each \$450,000 to be placed in trust for the child.<sup>45</sup> Under such a trust, money is "dispersed as

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34. *Id.*

35. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 707 (Ill. 1987) (citing *Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983)).

36. *Id.*

37. 658 F.2d 471, 473 (7th Cir. 1981).

38. *Id.*

39. *Id.*

40. *Id.* at 474.

41. *Id.* at 478.

42. *Id.* at 479.

43. *Id.*

44. *Id.*

45. *Id.* at 474.

needed to pay for the costs of the impaired person.”<sup>46</sup> The remainder, if any, is returned to the defendant upon the death of the impaired person.<sup>47</sup>

In *Phillips v. United States*, the plaintiff’s child was born with Down Syndrome.<sup>48</sup> The *Phillips* court declined to follow *Robak* and held that the amount of damages awarded to parents for wrongful birth actions should be offset by normal child-care expenses because the children in those cases were usually planned but, coincidentally, born with congenital defects.<sup>49</sup> Had the child been born healthy, the parents would have been responsible for normal expenses; therefore, they should not be awarded any more than the difference between extraordinary expenses and normal child-care costs.<sup>50</sup> The court based its award to the parents on the total economic damages from the child’s birth to his life expectancy of forty years.<sup>51</sup>

*Phillips* also discussed whether damages for emotional distress should be awarded to parents in a wrongful birth claim.<sup>52</sup> The court looked at South Carolina law and found that mental pain and suffering in connection with a wrong was a proper element of actual damages where it was a proximate consequence of a wrong.<sup>53</sup> In *Phillips*, “the economic damages suffered by the plaintiffs [were] sufficient to remove the case from the category in which the sole damages alleged [were] those of mental anguish.”<sup>54</sup> Therefore, emotional distress damages would be permissible, even assuming the Phillips suffered no physical injury resulting from those emotional distress damages.<sup>55</sup>

The facts of *Kush v. Lloyd* are very similar to *Clark*. Mrs. Lloyd previously gave birth to a deformed son, so when she and her husband wanted to have another child, they sought genetic testing to see if their son’s deformities were caused by a genetic defect or were an act of nature.<sup>56</sup> Their physician advised them that they could have another child without incident; however, their second son was born with the same deformities as their first son.<sup>57</sup> The Lloyds sued to recover future extraordinary expenses to care for their son during his majority and emotional distress damages.<sup>58</sup>

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46. *Clark v. Children’s Mem’l Hosp.*, 955 N.E.2d 1065, 1095 (Ill. 2011).

47. *Id.*

48. 575 F. Supp. 1309, 1311 (D.S.C. 1983).

49. *Id.* at 1316.

50. *Id.*

51. *Id.* at 1317.

52. *Id.*

53. *Id.*

54. *Id.* at 1319.

55. *Id.*

56. *Kush v. Lloyd*, 616 So. 2d 415, 417 (Fla. 1992).

57. *Id.*

58. *Id.*

The court held that extraordinary expenses could not be applied in wrongful life cases, but could be awarded in wrongful birth actions.<sup>59</sup> Furthermore, the court extended the tort of wrongful birth to encompass all extraordinary expenses caused by the impaired condition for the duration of the child's life expectancy.<sup>60</sup> The court argued that allowing recovery of *all* future extraordinary expenses fulfilled the central policy of tort law in placing the person in a position nearly equivalent to what would have existed had the defendant not breached his duty to the plaintiffs, thereby causing injury.<sup>61</sup> In the context of wrongful birth, this position is the one that would have existed had the child actually been born in a healthy state like the parents expected. Damages are not measured by what would have existed had the child never been born because parents always assume the costs of healthy children, even if unplanned.<sup>62</sup> The court ordered that these damages be properly identified, segregated, and placed in a trust for the benefit of the Lloyds' son, with the parents as trustees.<sup>63</sup>

In regards to the emotional distress claim, *Kush* rejected the application of the state's impact doctrine (a hybrid of the impact and zone-of-danger approaches) to wrongful birth cases because emotional damages are an additional natural consequence of conduct that is a freestanding tort on its own, apart from any emotional injury.<sup>64</sup> The *Kush* court also noted that the impact doctrine was generally inapplicable to recognized torts in which damages were often predominantly emotional, such as defamation or invasion of privacy.<sup>65</sup> The *Kush* court stated:

There can be little doubt that emotional injury is more likely to occur when negligent medical advice leads parents to give birth to a severely impaired child than if someone wrongfully calls them liars, accuses them of unchastity, or subjects them to any other similar defamation. A defamation may have little effect, may not be believed, might be ignored, or could be reversed by trial publicity. But the fact of a child's serious congenital deformity may have a profound effect, cannot be ignored, and at least in this case is irreversible. Indeed, these parents went to considerable lengths to avoid the precise injury they now have suffered. We conclude that public policy requires that the impact doctrine not be applied within the context of wrongful birth claims.<sup>66</sup>

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59. *Id.* at 423.

60. *Id.* at 424.

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* at 422-23.

65. *Id.* at 422.

66. *Id.* at 422-23.

The court held that if emotional damages were ascertainable in the contexts of defamation and invasion of privacy, they were also ascertainable in wrongful birth claims.<sup>67</sup> The court affirmed the district court's finding that the parents had stated a valid claim for mental anguish because mental anguish was a natural consequence of the tort of wrongful birth, recoverable whether or not there was an impact.<sup>68</sup>

### C. Illinois Case Law

In *Rickey v. Chicago Transit Authority*, an eight-year-old boy, Robert, brought an action by and through his mother to recover damages for emotional distress allegedly suffered when he viewed an accidental injury to his five-year-old brother, Richard.<sup>69</sup> Robert and Richard were descending on a subway escalator when part of Richard's clothing became entangled in the escalator, choking him and placing him in a comatose condition.<sup>70</sup> Robert witnessed the accident and subsequently sustained severe mental and emotional distress as well as psychiatric trauma.<sup>71</sup> The circuit court held there was no cause of action for emotional distress caused by the negligence of another absent a contemporaneous physical impact upon the bystander-plaintiff and granted the defendant's motion to dismiss.<sup>72</sup>

The Illinois Supreme Court considered the issue of whether a bystander who did not suffer physical injury or impact at the time of the occurrence may recover damages for emotional distress which resulted from witnessing an injury to a close relative caused by the defendant's negligence.<sup>73</sup> In Illinois, recovery for negligently caused emotional distress suffered by a direct victim or a bystander who witnessed the injury of another had been consistently denied unless it was accompanied by a contemporaneous physical injury or impact on the plaintiff.<sup>74</sup> The *Rickey* court found that reevaluation of the impact rule was appropriate and, as a result, abandoned the rule.<sup>75</sup>

The court looked at standards adopted by other states and, citing the California Supreme Court's decision in *Dillon v. Legg*,<sup>76</sup> concluded that the complaint stated a cause of action because: (1) the minor plaintiff was near

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67. *Id.* at 422.

68. *Id.* at 418, 422.

69. 457 N.E.2d 1, 1 (Ill. 1983).

70. *Id.* at 2.

71. *Id.*

72. *Id.* at 1-2.

73. *Id.* at 2.

74. *Id.*

75. *Id.* at 3.

76. 441 P.2d 912 (Cal. 1968).



the scene at the time of the accident; (2) there was a direct emotional impact when he witnessed the accident; and (3) the plaintiff and the victim were close relatives.<sup>77</sup> However, the court viewed this standard as too vague and excessively broad because it would permit recovery for emotional disturbance alone.<sup>78</sup> The standard adopted by the court was the zone-of-danger rule that had been adopted in the majority of jurisdictions examining the question of recovery by a bystander claiming emotional distress.<sup>79</sup>

Under the zone-of-danger rule, a bystander has a right to claim physical injury or illness resulting from emotional distress when he was in the danger zone and had reasonable fear for his own safety because of the defendant's negligence.<sup>80</sup> This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk of physical impact to him.<sup>81</sup> The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence.<sup>82</sup> The court remanded *Rickey* back to the lower court to consider the facts under the newly adopted zone-of-danger rule.<sup>83</sup>

In *Siemieniec v. Lutheran General Hospital*, the Illinois Supreme Court applied the *Rickey* test to wrongful birth and emotional distress claims.<sup>84</sup> The plaintiff in *Siemieniec* conceived a child in 1980 and then learned that two of her deceased cousins had hemophilia.<sup>85</sup> Concerned that her child would inherit the disorder, the plaintiff sought genetic counseling during her first trimester.<sup>86</sup> She purportedly informed her physician that she would have an abortion if there was a substantial risk of her bearing a hemophilic child.<sup>87</sup> The physician referred her to another physician who opined that her risk of being a carrier of hemophilia was low.<sup>88</sup> Based on this information, the plaintiff proceeded with her pregnancy; however, her child was diagnosed with hemophilia.<sup>89</sup>

The plaintiffs' complaint sought damages for extraordinary medical expenses in caring for and treating the child's hemophilia during his minority, for extraordinary expenses the child would incur for the care and

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77. *Rickey*, 457 N.E.2d at 4.

78. *Id.*

79. *Id.* at 5.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 707 (Ill. 1987).

85. *Id.* at 693.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

treatment of his impaired physical condition after he reached the age of majority, and for the alleged emotional distress and mental anguish.<sup>90</sup> The court allowed the parents to recover the medical expenses needed during their child's minority, but denied the child's recovery for medical expenses during his majority.<sup>91</sup> The plaintiff seeking post-majority expenses in that case was the child himself, not the parents.<sup>92</sup> Because Illinois did not recognize a claim for wrongful life, the child was denied recovery.<sup>93</sup> *Clark* differed from *Siemieniec* on this point, however, because, in *Clark*, the parents were seeking post-majority expenses in a wrongful birth action, as opposed to the child seeking post-majority expenses in a wrongful life claim.<sup>94</sup>

The *Siemieniec* court further held that the plaintiff had no cause of action for emotional distress damages.<sup>95</sup> The court relied on the result from *Rickey* and held that, absent allegations and proof of intentional and outrageous conduct or that the parents themselves were at a high risk of injury during the incident that resulted in their subsequent physical injury or illness by reason of emotional distress caused by defendants' negligence, plaintiffs had no cause of action for emotional distress damages.<sup>96</sup> The complaint contained no allegations that the defendants' alleged negligence endangered the parents in any way or that the parents did or would suffer any physical injury or illness resulting from the emotional distress allegedly caused by the defendants' negligence.<sup>97</sup> The court held that the parents could not recover damages for their emotional distress as an element in the calculation of damages for wrongful birth because they could not state a claim for negligent infliction of emotional distress under the zone-of-danger rule.<sup>98</sup>

For twenty-four years, *Siemieniec* governed Illinois claims for emotional distress arising from wrongful birth actions. However, in *Clark v. Children's Memorial Hospital*, the court explained the difference between emotional distress as a freestanding tort and emotional distress as an element of damages in a separate tort action.<sup>99</sup> For a plaintiff to recover damages in a freestanding negligent infliction of emotional distress claim, he must prove that he was either physically injured as a result of the defendant's negligence or that he was at least in the danger zone at the time

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90. *Id.* at 694.

91. *Id.* at 707-08.

92. *Id.* at 696.

93. *Id.*

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

95. *Siemieniec*, 512 N.E.2d at 708.

96. *Id.* at 707.

97. *Id.*

98. *Id.*

99. 955 N.E.2d at 1087.

of the accident and subsequently suffered some form of physical harm.<sup>100</sup> After *Clark*, a plaintiff can recover damages for his emotional distress so long as he can plead a separate tort action, such as wrongful birth, and show emotional distress as an element of the damages sought, rather than as a separate action for damages.<sup>101</sup>

### III. EXPOSITION OF THE CASE

The Illinois Supreme Court faced two primary issues in *Clark v. Children's Memorial Hospital*. First, the court decided whether parents in a wrongful birth action could recover damages for the extraordinary expenses of caring for their disabled son past the age of majority.<sup>102</sup> Second, the court decided whether parents in a wrongful birth action could recover damages for emotional distress caused by the defendants' negligence when claiming the emotional distress as an element of wrongful birth, rather than as a separate theory of liability.<sup>103</sup>

#### A. Facts and Procedural Posture

In *Clark v. Children's Memorial Hospital*, plaintiffs Amy and Jeff Clark sought genetic testing and counseling from defendant Dr. Paul Wong to determine whether their son suffered from Angelman Syndrome, a condition that may either be inherited from a gene mutation or a random occurrence.<sup>104</sup> Dr. Wong advised the plaintiffs that their son did have Angelman Syndrome, but that his condition was not genetic.<sup>105</sup> Plaintiffs sought a second opinion from defendant Dr. Barbara Burton, who also advised plaintiffs that their son's condition was not genetic.<sup>106</sup> Relying on the doctors' conclusions, the Clarks conceived a second child, and in 2002, he too was diagnosed with Angelman Syndrome.<sup>107</sup> The information the physicians provided to the plaintiffs was wrong.<sup>108</sup> Dr. Burton acknowledged that further testing was needed to determine if Amy was a carrier of the abnormal gene.<sup>109</sup>

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100. *Id.* at 1085.

101. *See id.* at 1088.

102. *Id.* at 1073.

103. *Id.*

104. *Id.* at 1070.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1071.

Plaintiffs, individually and on behalf of their minor son, filed a sixteen-count complaint against several defendants.<sup>110</sup> Their claims included wrongful birth and negligent infliction of emotional distress.<sup>111</sup> The circuit court ruled that the damages available in a wrongful birth action did not include the extraordinary costs of caring for a disabled child after he reached the age of majority.<sup>112</sup> The circuit court also dismissed plaintiffs' claim for negligent infliction of emotional distress.<sup>113</sup> The appellate court reversed the circuit court's decision on both claims and defendants appealed.<sup>114</sup> The Illinois Supreme Court affirmed the judgment of the appellate court that allowed the parents' claim for negligent infliction of emotional distress, but reversed the portion of the appellate court judgment holding that the parents were entitled to recover damages for the post-majority expenses of caring for their son.<sup>115</sup>

#### B. Opinion of the Court

The *Clark* court started its analysis by reviewing the Illinois Supreme Court's decision in *Siemieniec*.<sup>116</sup> In that case, the court refused to recognize a cause of action for a wrongful life claim for the child, but did recognize a wrongful birth claim for the mother.<sup>117</sup> However, it did not address the issue of whether the mother could recover costs for caring for her child during his adulthood because the child in that case had hemophilia, which did not require life-long dependent care.<sup>118</sup>

Because there was no Illinois case law regarding the extraordinary expenses incurred past the age of majority, the court turned to Illinois statutory law for guidance.<sup>119</sup> The court stated that the plaintiffs were correct to cite section 513(a) of the Marriage and Dissolution of Marriage Act,<sup>120</sup> even though *Clark* was a tort case, because it showed the legislature's reluctance to draw an arbitrary line at the age of majority and stated that the issue should be decided on a case-by-case basis.<sup>121</sup>

The *Clark* court ruled that, in Illinois, parents have no legal obligation to support a disabled child beyond the age of majority.<sup>122</sup> Because the

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1090.

116. *See id.* at 1072-73.

117. *Id.* at 1072.

118. *Id.* at 1073.

119. *See id.* at 1076-80.

120. 750 ILL. COMP. STAT. 5/513(a) (2006).

121. *Clark*, 955 N.E.2d at 1078.

122. *Id.* at 1079.

parents have no duty to provide post-majority support, such expenses are not legal harms suffered by plaintiffs and are not compensable damages in a wrongful birth action.<sup>123</sup> Under Illinois common law and state statutes, “parents are not obligated to support a child after he reaches the age of majority, even if he is unable to support himself, unless ordered to do so pursuant to section 513 of the Marriage and Dissolution of Marriage Act.”<sup>124</sup> Furthermore, public policy did not support the plaintiffs’ argument for allowing recovery under that claim because the Clarks were willingly accepting responsibility for their son’s adult care.<sup>125</sup> The defendants did not cause them to bear this burden because they had no legal obligation under Illinois law to support their son after the age of majority.<sup>126</sup>

The court overruled *Siemieniec v. Lutheran General Hospital* and held that the zone-of-danger rule applied only in cases where the plaintiff’s theory of liability was the negligent infliction of emotional distress; it did not apply where, as in a wrongful birth case, a tort had already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort.<sup>127</sup> In *Rickey v. Chicago Transit Authority*, the court announced a zone-of-danger rule, as opposed to an impact rule, for claims of negligent infliction of emotional distress.<sup>128</sup> The *Clark* court held that the *Rickey* decision could not appropriately be applied because the case at bar involved an action for “wrongful birth,” rather than a freestanding emotional distress claim.<sup>129</sup> The wrong done to the parents was that they were deprived of an opportunity to make an informed decision about whether or not to conceive another child.<sup>130</sup> The parents merely asserted emotional distress as an element of damages for the wrong already done to them.<sup>131</sup>

### C. Justice Freeman, Concurring in Part and Dissenting in Part

In *Clark*, Justice Freeman agreed that the zone-of-danger rule should no longer be applied to defeat a plaintiff’s claim for emotional distress arising from negligence in genetic testing.<sup>132</sup> Freeman believed that *Kush v. Lloyd*, which addressed similar facts to those in the present case, should have been relied on as precedent because it was well reasoned on all the

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123. *Id.* at 1081.

124. *Id.* at 1080.

125. *Id.* at 1083.

126. *Id.*

127. *Id.* at 1088.

128. *Id.* at 1085.

129. *Id.* at 1086-87.

130. *See id.* at 1084.

131. *Id.* at 1087.

132. *Id.* at 1099 (Freeman, J., concurring and dissenting).

complex issues presented in those types of medical malpractice cases.<sup>133</sup> However, Freeman's reliance on *Kush* in answering the damages issue for extraordinary expenses past the age of majority lead to a result different from the majority opinion.<sup>134</sup>

Freeman disagreed with the majority's conclusion that the Clarks could not recover extraordinary medical expenses for the costs of caring for their son after he reached the age of majority.<sup>135</sup> He believed that the issue was not whether a parent was legally obligated to support a child after he reached age eighteen, but whether tort law should allow parents who have been the victims of clear negligence to recover medical expenses they will voluntarily take on in continuing to care for their disabled child.<sup>136</sup> He also believed that it was not up to the legislature to decide the damages issue, but rather was within the power of the judiciary to shape the law of negligence.<sup>137</sup> Justice Freeman noted that the public policy of Illinois allowed parents of permanently disabled children to allege and prove damages for the costs of caring for the child after the age of majority and that it was preferable for the alleged tortfeasors, rather than taxpayers, to pay those costs if found liable.<sup>138</sup>

Justice Freeman reiterated that the real injury to the Clarks was being deprived of the ability to decide whether or not to conceive another child who may be born with the same lifelong disease as their firstborn.<sup>139</sup> The Clarks already knew the consequences of having a child with Angelman Syndrome and, therefore, sought genetic testing to avoid the same devastating results in another pregnancy.<sup>140</sup> They understood that a person with this disorder would require a lifetime of extraordinary care at an extraordinary price.<sup>141</sup> As a result of being deprived of the opportunity to be accurately informed and prevent pregnancy, the Clarks carried the additional burden of knowing Timothy will never be able to care for himself.<sup>142</sup> The Clarks intended to never abandon Timothy and were committed to caring for his best interests throughout his entire life.<sup>143</sup> This commitment was "significant in assessing the consequences of [the] defendants' negligence."<sup>144</sup>

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133. *Id.*

134. *Id.*

135. *Id.* at 1090.

136. *Id.*

137. *Id.*

138. *Id.* at 1098-99 (quoting *Clark v. Children's Mem'l Hosp.*, 907 N.E.2d 49, 59 (Ill. App. Ct. 2009) (Gallagher, J., specially concurring)).

139. *Id.* at 1091-92.

140. *Id.* at 1092.

141. *Id.*

142. *Id.*

143. *Id.* at 1093.

144. *Id.*

Freeman suggested that the only way to fully and fairly compensate the Clarks was to allow recovery for the extraordinary medical and educational expenses that Timothy would need throughout his life expectancy.<sup>145</sup> Because the court had no way of knowing how long Timothy would live, Freeman suggested that awards in these types of cases should be placed in a reversionary trust.<sup>146</sup> Under a reversionary trust, the money would be disbursed as needed to pay for the costs of the impaired person.<sup>147</sup> Upon that person's death, the remainder, if any, would be returned to the defendant.<sup>148</sup> This type of award assures that the impaired individual will be adequately cared for, and if that individual dies before reaching the age of majority or the age of his life expectancy, the parents will not receive a windfall.<sup>149</sup>

#### IV. ANALYSIS

The Illinois Supreme Court was correct to view the parents in this case as direct victims of a wrongful birth action, rather than as bystanders of a negligent infliction of emotional distress claim. However, the court should have permitted recovery for the extraordinary expenses the parents will incur while caring for their son throughout his entire life, including adulthood. This Note analyzes the majority's decision in light of today's advances in reproductive technology, what other jurisdictions have decided in similar cases, and what Justice Freeman had to say in *Clark's* concurring and dissenting opinion.<sup>150</sup>

##### A. The *Clark* Court Incorrectly Prohibited the Plaintiffs from Recovering Damages for Medical Expenses Needed To Cover the Costs of Caring for Their Son During His Adulthood

In *Clark*, the majority erred in denying the plaintiffs' recovery of future extraordinary expenses past Timothy's age of majority. However, applying Section 513 of the Illinois Marriage and Dissolution of Marriage Act to justify recovery of future expenses is a weak argument because *Clark* did not involve a divorce proceeding. *Clark* involved a married

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145. *Id.* at 1094.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* Other courts have approved of such trusts. See *Robak v. United States*, 503 F. Supp. 982, 983 (N.D. Ill. 1980), *aff'd in part, rev'd in part*, 658 F.2d 471 (7th Cir. 1981); *Kush v. Lloyd*, 616 So. 2d 415, 424 (Fla. 1992).

150. The court should adopt Justice Freeman's suggestion of a reversionary trust. *Clark*, 955 N.E.2d at 1099. In *Robak*, the court established a reversionary trust for the plaintiffs to cover expenses for their child with rubella syndrome. *Robak*, 658 F.2d at 474.

couple who put forth the time and effort to make an informed decision before deciding to have another child, and despite all this, conceived a son with Angelman Syndrome. Surely, it is not the public policy of Illinois to encourage divorce so that parents of disabled children can recover medical expenses for their child past the age of eighteen. It would arguably be a violation of equal protection to allow divorced parents recovery while denying married couples the same opportunity. The Clarks even contended in their brief that they were separated.<sup>151</sup> While it made no difference to the majority's decision to deny them the expenses, it is plausible they mentioned their separation in order to recover under Section 513.

Contrary to the majority opinion, it can be argued that public policy would support having the *Clark* defendants pay the age-of-majority expenses because Timothy could then continue to be cared for by his parents financially, rather than becoming a ward of the state with a random court-appointed conservator who does not know Timothy personally. Allowing Timothy's parents to support him financially would keep him as part of the family more than if he received public aid, because his own parents would be choosing what is best for him. Parents who chose not to abandon their disabled children should be applauded, not burdened with the extra expenses it will take to provide their child adequate care. Otherwise, society sends a message that it will allow these parents to relinquish their parental responsibilities simply because they have no legal obligation.

Taxpayers would likely rather have the *Clark* defendants pay those costs, rather than have them paid with tax dollars, because it was the defendants' fault that the Clarks unintentionally brought another child into the world with Angelman Syndrome, not the taxpayers' fault. The Clarks' case was different from those where the child had a disorder that did not require lifelong care, such as hemophilia, because someone with hemophilia could take care of themselves once they turned eighteen, whereas a person with Angelman Syndrome can never be self-sufficient. Opponents of having the defendants pay will argue that the result would yield higher health care costs because the doctors would have to purchase higher malpractice insurance and would push those costs onto patients. However, as Justice Freeman's dissent argued, *Robak* offered a good compromise with the idea of a reversionary trust.<sup>152</sup> A reversionary trust avoids having the parents and taxpayers pay for the defendants' negligence, yet it does not award the parents a large lump sum that could potentially award them a windfall. Also, it does not leave the physicians having to push costs onto their patients.

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151. *Clark*, 955 N.E.2d at 1079.

152. A reversionary trust requires the defendant to pay the plaintiffs as needed, with the money held in a trust and the parents serving as the trustees. *See id.* at 1095. Once the money is no longer needed or the impaired child dies, any remaining money reverts back to the defendant. *See id.*



The Supreme Court of Florida, in *Kush v. Lloyd*, correctly awarded the Lloyds the extraordinary expenses they will incur in caring for their son throughout his entire life, including adulthood. Allowing recovery for all future extraordinary expenses fulfills the policy of tort law in placing the plaintiff in a position nearly equivalent to what would have existed but for the defendant's breach.<sup>153</sup> In the context of wrongful birth, this position is the one that would have existed had the child actually been born in the state of health the parents were led to believe would occur.<sup>154</sup>

The *Kush* court correctly reasoned that parents were guardians of their children's person, property, and best interests unless and until a court lawfully terminated that relationship, and the parents or other lawful guardian necessarily must be entrusted with any funds to pay for the child's care.<sup>155</sup> The claim for extraordinary damages should not depend on any *future* parental duty owed after the child reaches the age of majority. It should be based on the parents' *present* role as guardians of the impaired child's best interests.<sup>156</sup> The amount awarded should go in a segregated trust for the child's benefit.<sup>157</sup> Presumably, parents are the most fit to serve as trustees, absent any sufficient showing to the contrary, because they are the child's natural guardians.<sup>158</sup> Placing the funds in a trust also ensures proper administration under fiduciary laws.<sup>159</sup>

Illinois parents in a successful wrongful birth action should be awarded the extraordinary expenses needed to care for their impaired child throughout the child's entire life, even after the child turns eighteen. That is not to suggest that parents should be legally obligated in Illinois to remain responsible for their child past the age of majority, although some states, such as Nevada, do require the parents of handicapped children to support that child beyond the age of majority if the child cannot support himself.<sup>160</sup> Although parents in Illinois have no legal obligation, those that voluntarily assume the responsibility should be compensated accordingly.

#### B. The *Clark* Court Correctly Permitted the Plaintiffs To Recover Damages for Emotional Distress as Direct Victims of a Separate Tort Action, Rather than Applying the Zone-of-Danger Test

The Illinois Supreme Court's logic in *Clark* for permitting the plaintiffs to recover emotional distress damages is justified because the

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153. *Kush*, 616 So. 2d at 424.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Greco v. United States*, 893 P.2d 345, 350 (Nev. 1995).

Clarks were direct victims of the physicians' negligence when the physicians failed to accurately inform the Clarks that Amy was a carrier of a gene leading to Angelman Syndrome. The Clarks were deprived of making an informed decision regarding whether to have another child in their family, and they are now suffering a foreseeable amount of emotional distress because of it. The *Clark* decision changed existing law in Illinois by holding that the zone-of-danger rule should not be applied in wrongful birth actions when assessing recovery for the parents' emotional distress.<sup>161</sup> The zone-of-danger rule will still be applied when plaintiffs are bystanders of a tort, but not when they are the direct victims of the defendant's negligence.

The court started its analysis by looking at its precedential decision in *Siemieniec*, which denied the plaintiffs from recovering damages for emotional distress because the plaintiffs failed the *Rickey* test: before a plaintiff can recover for negligently caused emotional distress, he must have been endangered by the defendant's negligence and suffered physical injury or illness as a result of the emotional distress caused by that negligence.<sup>162</sup> The *Clark* court stated that it erred in viewing the Siemieniecs' claim as a separate theory of tort liability—a freestanding claim of negligent infliction of emotional distress—rather than as an element of damages flowing from the wrongful birth tort itself and in treating the Siemieniecs as bystanders rather than direct victims.<sup>163</sup>

The court then examined other jurisdictions' decisions in wrongful birth actions and referenced the Florida Supreme Court's decision in *Kush*.<sup>164</sup> After doing so, the court overruled *Siemieniec* on the issue, holding that the zone-of-danger rule did not apply in those types of wrongful birth actions.<sup>165</sup> The court's decision was well reasoned; if plaintiffs can recover emotional distress damages in defamation cases, they should definitely be allowed to recover them in wrongful birth actions. It is illogical to compare emotional distress suffered from being called a liar with emotional distress suffered after receiving incorrect medical advice and bearing a disabled child.

The harm from being called a liar will likely fade with time, whereas the harm suffered from bearing a disabled child never goes away. It is often the case that parents outlive a disabled child because people with a disability tend to have a shorter life expectancy. Losing a child is one of the greatest losses that anyone can incur. Not only will those parents suffer from watching their disabled child struggle every day to have a normal life,

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161. *Clark v. Children's Mem'l Hosp.*, 955 N.E.2d 1065, 1088 (Ill. 2011).

162. *Id.* at 1085; *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 707 (Ill. 1987).

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

164. *Id.*

165. *Id.*

they may then suffer the loss of that child if he or she dies before them. The pain from losing a child and the pain from witnessing a child's struggle will never fade with time.

The court also cited the works of Dan B. Dobbs, who agrees that the zone-of-danger rule has no logical bearing on a wrongful birth claim where a tort has already been committed against the parents.<sup>166</sup> Wrongful birth plaintiffs do not assert a freestanding emotional distress claim, but merely assert emotional distress as an element of damages for a personal tort.<sup>167</sup> For these reasons, the zone-of-danger rule offers no occasion to reject mental distress damages in wrongful birth cases any more than they would in the case of libel or invasion of privacy.<sup>168</sup> Dobbs adds that, in some authorities, such as the *Siemieniec* case, the distinction between emotional distress as damages and emotional distress as a freestanding tort seems to have been incorrectly overlooked.<sup>169</sup>

Although in wrongful birth claims, the child born with a disorder is the one physically injured, the parents are not just suffering emotional distress by witnessing their child's pain or impairment; they have emotional distress from the shock of bearing a child with a disability that was completely unexpected. Caring for a child such as Timothy is not only expensive, it is also extremely emotional. Arguably, all parents experience some form of stress in raising a healthy child, but that stress is no doubt elevated when their child is disabled, especially when the parents went through considerable lengths to avoid the disability.

Parents are tied to their own children's welfare. Parents with disabled children will worry about the way in which other children treat their child as he is growing up and whether he will be as openly accepted by his own community as a healthy child would be. These parents will carry more responsibilities with doctors' visits, special education, a higher cost of living, hiring professional caretakers, and making huge adjustments in their lifestyle. All of these responsibilities will take a toll on the parents' emotional well-being, as well as on their relationships with those around them, including their other children, co-workers, friends, and even each other as husband and wife. If the parents want to go on a date, they cannot simply hire just any babysitter; instead, they will need to find someone that can manage a child with a disability. Raising a disabled child will likely

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166. *Id.* (citing 2 DAN B. DOBBS, LAW OF REMEDIES 414 (2nd ed. 1993)). "In five decades of writing, teaching, and practice, Dan B. Dobbs has helped shape the law of torts. He is the author of two leading treatises—The Law of Torts, and The Law of Remedies—and a coauthor of the treatise Prosser & Keeton on Torts." *James E. Rogers College of Law: Economic Torts—The Dan B. Dobbs Conference on Tort Law*, UNIV. OF ARIZ, <http://www.law.arizona.edu/Events/tortsconfdobbs.cfm> (last updated Oct. 1, 2006).

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

168. *Id.*

169. *Id.*

test the parents more emotionally than anything they will ever have to endure in their lives.

Critics may argue that awarding money to parents for emotional distress sends a message to disabled children that they are unwanted or unloved; however, wrongful birth cases often involve parents who purposely sought genetic counseling so they would avoid bringing a disabled child into the world. There is also a difference between cases with parents like the Clarks, who sought genetic testing before conceiving, and parents like the Siemieniecs, who sought genetic testing once the mother was already pregnant and stated they would have an abortion if anything was wrong with the fetus. Awarding money damages for emotional distress is not going to encourage abortions or the creation of designer babies. Awarding damages will encourage physicians and hospitals to use the best possible resources for detecting abnormalities and accurately informing their patients.

Some will argue awarding damages for emotional distress will inhibit the medical profession from researching and advancing in genetics or that awarding money damages will drive good doctors out of Illinois for fear of being liable for human error. However, genetic research is going to continue, especially with parents being so interested in the possibility of choosing which gender their child will be or what characteristics that child will have, such as hair color or athletic ability.

*Clark* was decided at a time when more and more couples are turning to alternative forms of conceiving and having children. With advances in medical technology and stem cell research, physicians are better able to predict genetic abnormalities in fetuses and tell couples their risk of having a child with some form of impairment. Researches and medical professionals are also one step closer to being able to predict what traits a child will have.

Professor Hank Greely predicts that in the next few decades, parents will no longer try to conceive their children the traditional way through intercourse but will turn to petri dishes.<sup>170</sup> He points out five things parents want to know about their unborn children: (1) serious genetic diseases; (2) common diseases that could possibly be linked to genetics, such as diabetes; (3) cosmetics, such as hair color and nose shape; (4) behaviors regarding personality traits; and (5) gender.<sup>171</sup> Parents will be testing for more than just one trait or syndrome; they could essentially test for anything.<sup>172</sup>

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170. Greely, *supra* note 1.

171. *Id.*

172. *Id.*

Although there is a “slippery slope” argument that awarding money damages in a wrongful birth action could lead to awarding damages to parents who had a blue-eyed child when they asked for a brown-eyed child, it is a ridiculous comparison to say that the parents with the blue-eyed child will be nearly as distressed as the parents with a child with Down Syndrome. Unfortunately, the great advances in technology will lead to the possibility of parents creating their own designer baby in addition to the benefits of detecting birth defects. However, it is too far of a stretch to say that society is encouraging lawsuits based on wrong hair color or encouraging the abortion of a fetus because it is female rather than male simply because courts award emotional distress damages for parents who lost the opportunity to make a well-informed decision on whether or not to have another child.

Illinois was correct to overrule *Siemieniec* and hold the zone-of-danger rule inapplicable in wrongful birth actions because those parents are direct victims and will understandably suffer an incredible amount of emotional distress as a result of a physician’s negligence.

#### V. CONCLUSION

In conclusion, the Illinois Supreme Court improperly decided to reverse part of the appellate court’s decision in *Clark* by denying the award of extraordinary expenses for Timothy’s care after the age of majority to his parents for them to use on his behalf. Although parents have no legal obligation in Illinois to care for a child past age eighteen, whether healthy or disabled, public policy supports keeping a disabled child under the parents’ care and control, rather than turning that person over to the state. The Illinois Supreme Court properly decided, however, to reverse part of the appellate court’s decision by awarding damages for the parents’ emotional distress as an element of wrongful birth and holding the zone-of-danger rule inapplicable to wrongful birth actions. The parents were direct victims of their doctors’ negligent failure to accurately inform them of the high risk to having another child with Angelman Syndrome. They were deprived of the decision whether to conceive based on that information and now have two disabled children to care for even though they were responsible and sought two different opinions and genetic counseling. On the issue of awarding emotional distress damages, the *Clark* decision provided the correct standard moving forward in wrongful birth cases, which will surely increase with the advances in medical technology and genetic research.