'Wrongful Birth'

Plaintiffs Can Recover for Emotional Distress

By Christopher T. Hurley and Mark R. McKenna

The Illinois Supreme Court's *Clark v. Children's Memorial Hospital* decision holds that parents can recover for emotional distress if they prevail in a claim for negligent genetic counseling even though they suffered no direct physical injury and were not in the "zone of danger."

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With the rapid growth of prenatal genetic testing,[1] courts are increasingly faced with complex issues arising from claims of negligent genetic counseling. In its 1987 decision in *Siemieniec v. Lutheran General Hospital*,[2] the Illinois Supreme Court first recognized parental tort claims for wrongful birth when negligent genetic counseling results in the birth of a disabled child. Recently in *Clark v. Children's Memorial Hospital*,[3] the Illinois Supreme Court clarified that damages available to parents who pursue a wrongful birth claim include both the extraordinary expenses of care for the disabled child until his or her majority, as well as compensation for the parents own emotional distress.

Wrongful life v. wrongful birth

The Illinois Supreme Court has recognized a clear distinction between the claims of parents and children when negligent genetic counseling results in the birth of a child with disabilities. In wrongful life claims, the injured child seeks to recover damages for the defendant medical provider's negligent failure – either pre-conception or prenatally – to predict or diagnose his or her disease. Wrongful life claims raise ethical and moral concerns and are widely disfavored by courts, including the Illinois Supreme Court.

In *Siemieniec*,[4] the Illinois Supreme Court adopted the Court of Appeals of New York's criticism of wrongful life claims in *Becker v. Clark*.[5] The court in *Becker* explained that a wrongful life claim requires a calculation of damages comparing the value of the life in an impaired state and the value of nonexistence. The court reasoned that the law is not equipped to make this comparison.

The court also explained that a wrongful life claim runs contrary to the high value the law places on life, as opposed to its absence. For these reasons, Illinois courts still refuse to recognize wrongful life claims for children born disabled due to negligent genetic counseling.

However, in a wrongful birth claim, plaintiff parents "allege they would have avoided conception or terminated the pregnancy by abortion but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents to the likelihood of giving birth to a physically or mentally impaired child."[6] In *Siemieniec*, the Illinois Supreme Court recognized for the first time that parents could maintain an action for wrongful birth of a child under Illinois common law.

Damages in wrongful birth claims

In *Siemieniec*, the plaintiff parents received negligent genetic counseling when a physician characterized their already-conceived child's risk of inheriting hemophilia as very low. When their child was born with hemophilia, the parents sought damages from the counseling hospital and doctor for the extraordinary medical expenses of caring for their child during his minority and for emotional distress.

The *Siemieniec* court held that the parents could seek damages for the "extraordinary expenses – medical, hospital, institutional, educational, and otherwise – which are necessary to properly manage and treat the congenital or genetic disorder" of the afflicted child during his minority.[7] The court did not reach the issue of whether post-majority damages were available to the plaintiff parents. Further, the court dismissed the parents' claims for negligent infliction of emotional distress because the parents failed to plead facts demonstrating that they fell within the "zone-of-danger."[8]

The Illinois Supreme Court in *Clark* held for the first time that parents in a wrongful birth case may seek damages for their own emotional distress.

Under the "zone-of-danger" rule, "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has a reasonable fear for his own safety is given a right of action for physical injury or illness resulting from the emotional distress."[9] According to the court, the parents did not fall within the "zone-of-danger" because the defendants' negligence did not physically endanger the parents of the impaired child.

Until the Illinois Supreme Court's 2011 decision in *Clark*, *Siemieniec* served as the primary authority for wrongful birth claims in Illinois. Although *Siemieniec* did not address the issue of post-majority damages, its holding with respect to emotional damages for parents in wrongful birth cases addressed an area of damages that has long been a source of conflict between the highest courts of many states.

Some courts that recognize wrongful birth claims allow parents to recover emotional damages for the distress of being denied the opportunity to decide whether to conceive a child.[10] Commonly in these decisions, the court does not apply the "zone-of-danger" rule because the defendant's negligence was the proximate cause of the plaintiff parents' mental pain and suffering.[11] Courts have also acknowledged that an emotional injury is more likely to occur from negligent prenatal counseling than from other kinds of torts.[12]

Other courts that recognize wrongful birth claims do not allow parents to recover damages for emotional distress.[13] In *Howard*, the court reasoned that the plaintiff parents suffered "no physical or mental injury, other than the anguish of observing their child suffer, as a result

1. The amount of prenatal genetic tests available to parents grew from 100 in 1993 to 1,000 in 2003. Elizabeth Weil, *A Wrongful Birth?*, N.Y. Times Magazine, March 12, 2006.
2. *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230, 512 N.E.2d 691 (1987).
3. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, 955 N.E.2d 1065 (2011).
4. *Siemieniec*, 117 Ill. 2d at 240.
5. *Becker v. Shwartz*, 386 N.E.2d 807 (N.Y. 1978).
6. *Siemieniec*, 117 Ill. 2d at 236.
7. *Id.* at 260.
8. *Id.* at 261-62.
9. *Id.* (quoting *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983)).
10. *See Smith v. Saraf*, 148 F. Supp. 2d 504, 514 (D.N.J. 2001); *McAllister v. Ha*, 496 S.E.2d 577, 582-83 (N.C. 1998); *Phillips v. United States*, 575 F. Supp. 1309, 1317-18 (D.C.S.C. 1983); *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982).
11. *See Naccash*, 290 S.E.2d at 831 (recognizing an exception to the physical impact requirement); *see also Phillips*, 575 F. Supp. at 1317-18.
12. *See Kush v. Lloyd*, 616 So. 2d 415, 422-23 (Fla. 1992) (comparing the emotional damages of a wrongful birth claim with those allowed in defamation cases).
13. *See Howard v. Lecher*, 366 N.E.2d 64 (N.Y. 1977); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

The Myth of the Rebuttable Presumption for Loss of Society in Wrongful Death Cases

A recent case illustrates that in claims for loss of society in wrongful death cases, the rebuttable presumption of a substantial pecuniary loss is sometimes illusory. The lesson: instead of relying on the presumption, plaintiffs should offer as much proof as they can.

No one can imagine placing a dollar value on the loss of a beloved parent, spouse, or child. Yet Illinois common law arising from the Wrongful Death Act has attempted to do just that in a way that promotes respect for the bereaved.

A rebuttable presumption of a substantial pecuniary loss applies where a decedent leaves a direct lineal heir or spouse. *Hall v. Gillins*, 13 Ill. 2d 26, 31, 147 N.E.2d 352, 355 (1958); *In re Estate of Finley*, 151 Ill. 2d 95, 103-04, 601 N.E.2d 699, 702 (1992). Various cases have established that the presumption applies to spouses, parents of minor children, parents of adult children, and children for loss of society of their parent.

In the seminal *Finley* case, the court affirmed these presumptions, recognizing that pecuniary losses encompass loss-of-society damages for many facets of family relationships, but rejecting a presumption in favor of siblings, who had to actually prove their special relationship.

The Illinois Pattern Jury Instructions recognize the presumption: "Where a decedent leaves (lineal next of kin), the law recognizes a presumption that the (lineal next of kin) have sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case." IPI Civil 31.04. Factors that rebut the presumption of loss include evidence of estrangement and other factors that may negatively affect the relationship, such as the ill health of the decedent, lack of sobriety, or separation imposed by geography or outside familial circumstances.

Notwithstanding this strong presumption, Illinois courts have sometimes allowed zero damages to surviving family members even in the absence of rebuttal evidence. A case in point is one I tried, *Passow v. Glaser*, No. 2-09-1178, 2011 Ill. App. Unpub. LEXIS 859, at *1 (2d Dist. March 11, 2011).

Unrebutted presumption but no award

Passow involved a 48-year-old plaintiff's decedent, a wife and mother of two and grandmother of three. She died from a perforated bowel caused by her physician's malpractice. The unrefuted testimony of Mrs. Passow's two adult daughters was that they had an extremely close relationship with their mother at the time of her death. The defendants provided no independent evidence controverting the family's testimony.

Despite the absence of evidence to rebut the presumption of substantial loss of society, the jury awarded nothing to Mrs. Passow's daughters or her spouse for this element of damages. The defendants introduced no evidence of estrangement or any other factor negating loss of society, conducted very little cross-examination, and did not even make a closing argument on the issue. So, one might ask, how was the presumption rebutted?

The court indicates that it was rebutted by a credibility assessment. "[I]n committing the assessment of damages to the discretion of the jury, the law also commits to the jury the assessment of the credibility of the witnesses." *Id.* at *15.

The court went on to state that there was evidence of estrangement in some testimony from the plaintiffs' witnesses, ignoring the witnesses' frank testimony that the estrangement was in the past. Notwithstanding the witnesses' honesty in disclosing the tribulations of their relationship with the decedent, the court opined, "the jury may reasonably not have believed the picture of close family life" the next of kin "tried so hard to depict." *Id.* at *16.

Tips for avoiding a zero damage award

The lesson of *Passow* is that plaintiffs should not rely on the perceived advantage of the rebuttable presumption. Rather, they should offer as much independent proof of loss of society as possible.

Evidence of family contact. If the plaintiffs testify to multiple telephone calls per week, admit the telephone records. If the plaintiffs attest to family outings or regular events shared with the decedent, produce the photographs, videos, calendars, cards, and letters.

In this digital age, it should be easy to obtain e-mails and Facebook posts showing positive communication or photos of family events where the decedent was present. Of course, when opening the Pandora's box of the web, make sure that these sites are thoroughly vetted before inviting the scrutiny of the defendants.

Testimony by disinterested parties. Testimony of a disinterested third party, if it overcomes hearsay objections, also bolsters loss-of-society evidence. The *Passow* court criticized the absence of corroborating evidence from the decedent's very young grandchildren, *Id.* at *16, so plaintiffs should avoid any perception that they failed to call corroborating witnesses, such as close family friends or ministers. *See Eaglin v. Cook County Hosp.*, 227 Ill. App. 3d 724, 592 N.E.2d 205 (1st Dist. 1992) (family pastor testified to relationship; $1.5 million verdict to 14 family members upheld).

Don't introduce evidence of estrangement. Avoid evidence of estrangement, unless the defendant specifically elicits it. If estrangement becomes an issue, refocus the evidence on the relationship of the parties at the time of death, which has weathered such storms and managed to recover.

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of the defendants presumed negligence, nor did that negligence directly cause the child to fall victim to the disease."[14]

Furthermore, states recognizing wrongful birth actions differ as to whether parents can recover expenses of caring for a child beyond the age of majority. Certain courts have allowed parents to recover post-majority expenses.[15] Generally, these courts extended damages into the child's majority based on the belief that the parents' obligation to support a disabled child does not end when the child reaches the age of majority.

The Colorado Supreme Court held that the parents in a wrongful birth action could recover medical expenses beyond the child's age of majority if they prove that the child will be dependent upon the parents beyond the age of majority.[16] Conversely, in states where parents do not have any legal obligation to support adult children, courts typically have not allowed parents to recover extraordinary costs once the child reaches the age of majority.[17] These courts reason that without a legal obligation to support adult children, parents have no grounds for recovering these costs from the tortfeasor.

Clark partially overrules *Siemieniec*, declines to allow post-majority expenses

In *Clark v. Children's Memorial Hospital*, the plaintiff parents' first son was born with Angelman Syndrome, a permanent disorder that causes severe and long-term developmental delays. Angelman Syndrome can occur either as the result of a genetic abnormality or at random. Because of this, the parents sought counseling to determine whether their son's condition was genetically caused. If it was genetically caused, the parents testified, they would not have willingly conceived additional children because of a 50 percent chance that the children would have Angelman Syndrome.

Several geneticists, including a geneticist at Children's Memorial Hospital, counseled the plaintiffs that their son's condition did not have a genetic cause, even though laboratory tests had confirmed that the mother was the carrier of a genetic mutation that created a 50 percent risk that each of her children would be born with Angelman Syndrome. Based on the erroneous genetic advice, the plaintiffs conceived another child, who was also born with Angelman Syndrome.

Caring for one child with Angelman Syndrome makes everyday life difficult, but caring for two children with Angelman Syndrome is exponentially more challenging. For instance, the plaintiffs' children in *Clark* require constant assistance for basic care, such as hygiene, walking, changing, and feeding.

The *Clark* court also held that parents may not recover the post-majority expenses of caring for a dependent, disabled child in a wrongful birth case.

Also, children with Angelman Syndrome demonstrate unpredictable behaviors that subject parents caring for their children to biting and rough treatment, especially as the disabled children become older. In *Clark*, the older child with Angelman Syndrome is unable to control his upper body and sometimes strikes his mother. Finally, the children are consistently unable to sleep through the night due to their condition. These care requirements understandably place extreme emotional strain on the parents in *Clark*.

The parents brought suit based on claims of wrongful birth and negligent infliction of emotional distress. The trial court dismissed the case, relying in part on *Siemieniec*, and held that expenses associated with caring for the second child with Angelman Syndrome were unavailable beyond the age of majority, and emotional damages were likewise unavailable.

The first district appellate court reversed, holding that plaintiffs in a wrongful birth action may recover damages for the extraordinary expense of caring for their disabled child beyond the age of majority. The appellate court further held that the parents "adequately pleaded that they fall within the zone-of-danger rule and therefore have stated a cause of action for negligent infliction of emotional distress."[18]

Reversing the appellate court in part, the Illinois Supreme Court held that parents may not recover the post-majority expenses of caring for a dependent, disabled child in a wrongful birth case.[19] Prior to *Clark*, the Illinois courts never directly addressed whether parents may recover the extraordinary costs of caring for a fully dependent child after the age of majority.[20]

Clark differed from *Siemieniec* with respect to this issue because, unlike the child in *Siemieniec*, the Clark's child will never be emancipated from his parents. The court reasoned that, as mentioned in *Siemieniec*, the common law and statutes of Illinois do not require parents to support their child after he or she reaches the age of majority, and therefore the tortfeasor should only be liable for the specific expenses for which the plaintiff's parents are legally responsible.[21] Specifically, the court stated, "[i]f the legislature prefers a different result that would place the burden of [post-majority] support on the tortfeasor rather than on the parents or the tax payers, it could do so."[22]

The court also discussed whether the public policy of the state favors holding the tortfeasor responsible for post-majority expenses in wrongful birth claims. According to the court, part of the longstanding public policy of the state is "that a tortfeasor is to be held liable for the harm that he causes, no more and no less."[23] Because the defendants did not cause the plaintiff parents to be legally responsible for supporting their child after the age of majority, in a wrongful birth case, the parents accepted this burden voluntarily. Thus, the Court asserted that the parents' willingness to support their child "cannot overcome the fundamental premise that the defendant has not

14. *Howard*, 366 N.E.2d at 66.
15. *Greco v. United States*, 893 P.2d 345, 350 (Nev. 1995); *Kush*, 616 So. 2d at 423-24; *Viccaro v. Milunsky*, 551 N.E.2d 8 (Mass. 1990); *Garrison v. Medical Center of Delaware, Inc.*, 581 A.2d 288, 292 (Del. 1988); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Phillips*, 575 F. Supp. at 1316.
16. *Lininger*, 764 P.2d at 1215.
17. *Arche v. U.S. Department of Army*, 798 P.2d 477 (Kan. 1990) (holding that parents cannot recover care costs or medical expenses from the child's majority); *Bani-Esrali v. Lerman*, 505 N.E.2d 947 (N.Y. 1987) (holding that parents cannot recover expenses incurred during the child's majority).
18. *Clark v. Children's Memorial Hospital*, 391 Ill. App. 3d 321, 332 (1st Dist. 2009).
19. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 74.
20. *See Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230, 260, 512 N.E.2d 691, 706; *Thornhill v. Midwest Physician Center of Orland Park*, 337 Ill. App. 3d 1034, 1052, 787 N.E.2d 247, 262 (1st Dist. 2003) (holding that there was no error in dismissing a post-majority expenses claim where the plaintiff parents failed to present evidence of expenses).
21. *Clark*, 2011 IL 108656, ¶ 74.
22. *Id.* ¶ 67.
23. *Id.* ¶ 85.

caused them to bear this burden."[24]

However, the Illinois Supreme Court in *Clark* also affirmed the appellate court in part, reversed *Siemieniec*, and held for the first time that parents in a wrongful birth case may seek damages for their own emotional distress. In its holding, the court stated that the zone-of-danger rule applies only in cases where the plaintiff's sole theory of liability is negligent infliction of emotional distress.[25]

When the Illinois Supreme Court adopted the zone-of-danger rule in *Rickey v. Chicago Transit Authority*,[26] it addressed potential problems with bystander claims – namely, that the resulting emotional injuries are "hardly foreseeable," and these claims could result in frivolous litigation.[27] After *Clark*, the zone-of-danger rule no longer applies in wrongful birth cases, among others, where a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort.[28]

In a wrongful birth case, for example, the zone-of-danger rule's protections against unforeseeable injuries and frivolous litigation are inapplicable because the tortfeasor should anticipate the severe emotional harm that will result from incorrect genetic counseling. In reversing *Siemieniec*, the *Clark* court held that the earlier decision erroneously viewed the emotional distress claim as a separate theory of tort liability instead of an element of damages flowing directly from the wrongful birth tort itself.

The Illinois Supreme Court in *Clark* also pointed to the availability of damages for emotional distress for plaintiffs in cases involving other personal torts such as defamation. Thus, based on the *Clark* decision, plaintiff's attorneys have a new avenue of recovery for plaintiffs in wrongful birth cases in Illinois.

Conclusion

In *Clark*, the Illinois Supreme Court made an important correction in the law by recognizing the right of parents to recover damages for emotional distress in wrongful birth cases. However, the court declined to allow, in wrongful birth cases, economic damages beyond the age of majority for children that will always be totally dependent on their parents for economic support. This effectively places the financial burden created by tortious conduct on the parents or the state of Illinois. The Illinois legislature should rectify this gap in the law by requiring the tortfeasor to pay the full measure of damages associated with the tortfeasor's negligence, no matter the age of the disabled child. ■

24. *Id.*
25. *Id.* ¶ 113.
26. *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).
27. *Id.* at 555.
28. *Id.*