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## What to Expect When She Wasn't Expecting: Contraceptive Manufacturers and Their Potential Liability in Pregnancy Tort Actions

Since the United States Supreme Court's recognition that women have a right to prevent conception and terminate pregnancy, women have sought safe and increasingly reliable methods for family planning. Prior to the early 1990s, when these methods failed, a woman could only obtain limited damages or no recovery in litigation involving an unplanned pregnancy or unwanted child. Technological improvements in contraception and diagnosis, however, coupled with increasing societal approval of contraception and abortion, have resulted in more jurisdictions recognizing such causes of action and permitting broader recovery of damages. Thus, today, in addition to suing her physician, a woman who has an unplanned pregnancy or an unwanted child might sue the manufacturers of her contraceptive device, the pharmacists that fill her prescription for oral contraceptives, and/or the genetic counselor who tests whether her fetus has a congenital disease or impairment. Although the legal theories, elements, and available damages vary across the United States, three causes of action predominate: claims for wrongful pregnancy, claims for wrongful birth, and claims for wrongful life.

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"Wrongful pregnancy," also known as "wrongful conception," is generally a cause of action in which the plaintiff alleges that due to her physician's negligent performance of a sterilization, she became pregnant. It is a cause of action in forty-one states, however, only a minority of the states that recognize wrongful pregnancy claims have explicitly provided that a plaintiff can bring a wrongful pregnancy action against the manufacturer of a contraceptive product or device. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695-696 (Ill. 1987) (defining wrongful pregnancy as an action against pharmaceutical manufacturer for negligence in dispensing contraceptive prescription), *overruled on other grounds by Clark v. Children's Mem'l Hosp.*, 955 N.E.2d 1065 (Ill. 2011) (same); *Cowe v. Forum Grp., Inc.*, 575 N.E.2d 630, 633 (Ind. 1991) (wrongful pregnancy is a "claim for damages sustained by the parents of an unexpected

child alleging that the conception of the child resulted from negligent sterilization procedures or a defective contraceptive product."); *Thomas v. Carter-Wallace Inc.*, 27 Pa. D. & C.4th 146 (C.P. 1994) (plaintiff can bring a wrongful pregnancy claim based on a defect in a condom used during intercourse), *aff'd*, 673 A.2d 412 (Pa. 1995). Although it is not a requirement that the woman carry the pregnancy to term, in most cases of wrongful pregnancy, the woman gives birth to a healthy, but unplanned child.

"Wrongful birth" and "wrongful life" concern the birth of a child with a physical or mental congenital disability. Notably, in both wrongful birth and wrongful life cases, the defendant's alleged negligence did not actually cause the child's impairment. Instead, in both causes of action, the plaintiff alleges that as a result of defendant's failure to diagnose or inform the parents of the child's genetic disability, the parents were prevented from making an informed choice about whether to terminate the pregnancy. When this cause of action is brought by the parents of the impaired child, it is called "wrongful birth." Twenty-five states recognize this cause of action.

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When the cause of action is brought by, or on behalf of, the impaired child, it is called "wrongful life." In addition to alleging a lack of informed choice, a child suing under the wrongful life theory argues that because of that uninformed choice, s/he was born into a life of pain and suffering that is worse than never having been born at all. Therefore, in the wrongful life context, the injury is the child's life and s/he is arguing that non-existence was the preferred alternative. Acknowledging that life itself is a legally cognizable injury raises difficult legal, moral, and social policy implications. For example, wrongful life claims touch on metaphysical questions about both the value and sanctity of life. Additionally, the well-intentioned application of the principle of "a remedy for every wrong" potentially affects the dignity of disabled individuals, because by identifying "impairment" as a harm, it entrenches social stigmas associated with disabilities. Because of such issues, and others raised by the legal theory, only four state supreme courts have recognized wrongful life as a cause of action, and the Connecticut Superior Court is split on the issue. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1157 (La. 1988); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983); *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Rich v. Foye*, 976 A.2d 819, 834 (Conn. Super. Ct. 2007).

## **Recoverable Damages**

The damages a plaintiff may seek, and therefore, a potential defendant's liability, depend both on the plaintiff's legal theory and the recovery scheme of the jurisdiction in which she sues. We discuss each cause of action and the available remedies below.

## I. **Wrongful Pregnancy**

All states that recognize a cause of action for wrongful pregnancy allow the plaintiff to recover compensatory damages. Whether a plaintiff can seek further damages depends on whether the jurisdiction applies either the "pure compensatory" rule, the "full recovery" rule, or the "tort-benefit balancing" rule.

### a. **Pure Compensatory**

In "pure compensatory" jurisdictions, a plaintiff is generally limited to the following damages: (1) the expenses of the unsuccessful sterilization procedure; (2) damages for pain and suffering related to the unwanted pregnancy; (3) the medical cost of delivering the child, as well as the pain and suffering associated with the delivery; (4) the woman's lost wages; (5) damages for emotional distress related to the pregnancy and delivery; (6) damages for injury or death of the woman as a result of the pregnancy; and (7) damages for loss of consortium.

***"All states that recognize a cause of action for wrongful pregnancy allow the plaintiff to recover compensatory damages."***

Most notably, a plaintiff in a "pure compensatory" jurisdiction is barred from seeking damages to cover the cost of raising the child to the age of majority. Thirty states follow the "pure compensatory" rule in wrongful pregnancy actions, but the recoverable damages vary depending on the jurisdiction. For example, West Virginia permits a plaintiff to seek "(1) any medical and hospital expenses incurred as a result of a physician's negligence, including costs of the initial unsuccessful sterilization operation, prenatal care, childbirth, postnatal care, and a second sterilization operation, if obtained; (2) the physical and mental pain suffered by the wife as a result of the pregnancy and subsequent childbirth and as a result of undergoing two sterilization operations; and (3) recovery for the loss of consortium and loss of wages." *James G. v. Caserta*, 332 S.E.2d 872, 876 (1985). On the other hand, a split in the Texas intermediate courts has resulted in two contradictory cases on the issue of what compensatory damages a plaintiff may seek. One decision provides for recovery of all seven types of compensatory damages discussed above. *Flax v. McNew*, 896 S.W.2d 839, 840 (Tex. App. Waco 1995). Another intermediate court limits the scope of available damages to the actual medical expenses incurred as a result of the failed procedure, barring recovery for pain and suffering, lost wages, emotional distress, and loss of consortium. *Crawford v. Kirk*, 929 S.W.2d 633, 637 (Tex. App. Texarkana 1996). The Texas Supreme Court has not yet resolved the split.

### b. **"Full Recovery"**

On the opposite end of the spectrum from "pure compensatory" jurisdictions are "full recovery" jurisdictions. "Full recovery" allows a plaintiff in a wrongful pregnancy case to recover all of the costs resulting from the pregnancy and birth (compensatory damages, discussed above), including the costs of

raising the healthy child until the age of majority. The costs of child-rearing include, but are not limited to, food, housing, clothing, education, and transportation. Only three states -- New Mexico, Oregon, and Wisconsin -- follow the "full recovery" rule in wrongful pregnancy cases. In New Mexico, however, these damages are only available in cases of a physician's failure to inform the woman of a failed sterilization.

***“Full recovery’ allows a plaintiff in a wrongful pregnancy case to recover all of the costs resulting from the pregnancy and birth, including the costs of raising the healthy child until the age of majority.”***

**c. "Tort-Benefit" Balancing**

"Tort-benefit" states allow a plaintiff to pursue the same damages that are available in "full recovery" jurisdictions, but offset the award by the pecuniary and non-pecuniary benefits conferred by the child. Therefore, a plaintiff can seek all costs, including the cost of raising the child, but the jury considers the "value" of the child in an equitable mitigation of damages. Six states -- Arizona, California, Connecticut, Maryland, Massachusetts, and Minnesota -- apply this rule of damages.

**II. Wrongful Birth**

As discussed above, all states that recognize a cause of action for wrongful pregnancy allow a plaintiff to seek, at minimum, compensatory damages. By contrast, only some of the states that recognize a cause of action for wrongful birth allow a plaintiff to seek compensatory damages. This is because in most wrongful birth suits, the plaintiff affirmatively sought to get pregnant and carry the pregnancy to term. She, therefore, assumed the cost of her medical and hospital expenses, the pain and discomfort of pregnancy and labor, lost wages, and loss of consortium. The only harm in the case of wrongful birth was the uninformed choice the plaintiff made to carry the pregnancy to term as a result of the defendant's action or omission.

In a wrongful birth cause of action, recoverable damages depend on whether the jurisdiction applies the "pure compensatory" rule, the "pure extraordinary" rule, the "mixed damages" rule, or the "tort-benefit" rule.

**a. Pure Compensatory**

The "pure compensatory" rule in wrongful birth cases is the same as in wrongful pregnancy cases. A plaintiff is generally limited to some variation of the following damages: (1) the expenses of the unsuccessful genetic test; (2) damages for pain and suffering related to the unwanted pregnancy; (3) the medical cost of delivering the child, as well as the pain and suffering associated with the delivery; (4) the woman's lost wages; (5) damages for emotional distress related to the pregnancy, delivery, or

deformity; (6) damages for injury or death of the woman as a result of the pregnancy; and (7) damages for loss of consortium. A plaintiff is, therefore, barred from seeking child-rearing expenses.

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Only four states -- Indiana, Louisiana, Tennessee, and Wyoming -- are "pure compensatory" jurisdictions. The exact damages available, however, vary from state to state. For example, Indiana permits a plaintiff to recover all seven types of damages enumerated above. *Bader v. Johnson*, 732 N.E.2d 1212, 1220 (Ind. 2000). On the other hand, Louisiana bars recovery to the emotional and mental distress associated with the child's disability and limits the scope of available damages to: (1) the cost of the genetic test; (2) expenses incurred during pregnancy and delivery; (3) the mother's pain and suffering; (4) the father's loss of consortium; and (5) their emotional and mental distress associated with the birth of an unwanted child. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1161–62 (La. 1988).

**b. "Pure Extraordinary"**

The "pure extraordinary" rule in wrongful birth cases permits a plaintiff to seek only the "extraordinary damages" associated with the child's impairment. Extraordinary damages are distinct from the child-rearing costs discussed above, as they are the expenses the family incurs because of the child's specific disability. Such damages include, but are not limited to, medical expenses, medication, prostheses, specialized therapy, and the cost of special education until the child reaches the age of majority. Only four states are "pure extraordinary" jurisdictions: Colorado, Ohio, Oregon, and Texas.

***“The ‘pure extraordinary’ rule in wrongful birth cases permits a plaintiff to seek only the ‘extraordinary damages’ associated with the child's impairment.”***

**c. "Mixed Damages"**

"Mixed damages" jurisdictions permit a plaintiff to seek both compensatory and extraordinary damages, but bar recovery of child-rearing expenses. The majority of states that recognize a cause of action for wrongful birth are "mixed damages" jurisdictions.

**d. "Tort-Benefit"**

No state applies the "full recovery" rule from wrongful pregnancy to wrongful birth causes of action. Instead, the broadest recovery is available in the three "tort-benefit" jurisdictions: California, Connecticut, and Rhode Island. The rule in those states is that a plaintiff may seek compensatory

damages, extraordinary damages, and child-rearing expenses, but the award will be reduced to reflect the benefit conferred by the child.

### III. **Wrongful Life**

The four states that recognize a cause of action for wrongful life -- California, New Jersey, Louisiana, and Washington -- permit the child to seek extraordinary damages. *Pitre*, 530 So. 2d at 1157; *Procanik*, 478 A.2d at 762; *Harbeson*, 656 P.2d at 495; *Turpin*, 643 P.2d at 965. Although the family can bring both a cause of action for wrongful birth and a cause of action for wrongful life, the family can recover the extraordinary damages only once. There are no other damages available in wrongful life causes of action.

### **Legal Developments**

Two legal developments are likely to impact the potential for non-healthcare providers to face liability in these pregnancy tort actions. The first major development is the trend of legal cases that expand the wrongful pregnancy cause of action to include defendants other than the plaintiff's physician. In the last twenty years, courts have increasingly allowed plaintiffs to bring suit against manufacturers of prophylactic products and devices, pharmacists, and genetic counselors. The second legal development is that recent electoral gains by pro-life groups in the two political branches of government have resulted in two types of legislation that could broaden the liability of non-physician defendants: statutory bans and "conscience" laws.

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In 2003, thirty states recognized wrongful birth claims. Last year, that number decreased to twenty-seven when Arizona joined the list of states prohibiting their courts from recognizing wrongful birth and wrongful life causes of action. In April 2013, Kansas passed "Civil Rights for the Unborn," a statutory ban on wrongful birth and wrongful life claims. A similar bill in Montana passed both the state House and Senate and was submitted to the governor on April 15<sup>th</sup>. Pursuant to the provision of Montana's Constitution governing gubernatorial inaction, the bill became law ten days later. Finally, earlier this year, a bill for a statutory ban on wrongful birth and wrongful life causes of action was introduced and tabled in the South Dakota House; the bill can be revisited at any time during the remainder of the legislative session. Despite eliminating these two causes of action, the statutory bans provide exceptions for negligence actions. Therefore, pharmaceutical and medical device manufacturers, pharmacists, and genetic counselors could still face liability in wrongful pregnancy actions.

"Conscience" laws allow healthcare providers to withhold certain information or services from their patients if it would offend their religion or conscience. For example, Kansas law protects medical

professionals who choose not to participate in "medical procedures or in the prescription or administration of any device or drug which result in the termination of a pregnancy or an effect of which the person reasonably believes may result in the termination of a pregnancy." In theory, this defense would be available to a genetic counselor who withholds information relating to test results, or a pharmacist who refuses to prescribe a morning-after pill, if either believes the results would lead his or her patient to have an abortion. Those non-physician defendants would not be liable for wrongful birth or wrongful pregnancy claims, respectively. At this time, however, it is unclear what impact this legislation might have on the potential liability of pharmaceutical and medical device manufacturers.

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