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Azzolino v. Dingfelder: North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims

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The recent development of medical processes to detect genetic defects in unborn fetuses,[1] in combination with the recognition of a woman's legal right to obtain an abortion,[2] has caused a reformulation of the physician's duty of due care in the area of prenatal malpractice torts. Recognition of this duty has led to the development of new claims for relief, most notably those termed "wrongful birth"[3] and "wrongful life."[4]

This Note examines the development of these new tort claims and analyzes the North Carolina Court of Appeals' decision in *Azzolino v. Dingfelder*.[5] It concludes that the court's novel formulation of damages is potentially detrimental to those it is designed to benefit and is an unwarranted abandonment of established case law.

In October 1979 Michael Azzolino was born with a permanent genetic disorder known as Down's syndrome or mongolism.[6] Michael's mother had received prenatal care at the Haywood-Moncure Community Health Center (the Clinic), a family health care facility operated by Orange-Chatham Comprehensive Health Services, Inc. (OCCHS).[7] During her visits to the Clinic, Mrs. Azzolino was under the care of Jean Dowdy, a registered nurse employed by the Clinic as a family nurse practitioner, and Dr. James R. Dingfelder, a board-certified obstetrician-gynecologist on the staff at North Carolina Memorial Hospital in Chapel Hill.[8] Dr. Dingfelder's duties at the Clinic included providing prenatal care for patients and supervising the work of the family nurse practitioners.[9]

During the first trimester of her pregnancy Mrs. Azzolino asked Nurse Dowdy about the advisability of having amniocentesis performed.[10] Nurse

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1. These procedures include amniocentesis, ultrasonography, roentgenography, and fetoscopy. *See* Elias & Verp, *Prenatal Diagnosis of Genetic Disorders*, 12 OBSTET. GYNECOL. ANN. 79 (1983). For a discussion of amniocentesis and ultrasonography, see *infra* note 10.

2. Roe v. Wade, 410 U.S. 113 (1973).

3. For a discussion of the wrongful birth claim, see *infra* notes 25-59 and accompanying text.

4. For a discussion of the wrongful life claim, see *infra* notes 60-81 and accompanying text.

5. 71 N.C. App. 289, 322 S.E.2d 567 (1984), *disc. rev. granted*, 313 N.C. 327, 327 S.E.2d 887 (1985).

6. Normal human genes have 46 chromosomes, arranged in 23 pairs. Down's syndrome is a chromosomal abnormality caused by the presence of a third chromosome in the twenty-first pair. Individuals afflicted with Down's syndrome suffer moderate to severe mental retardation as well as physical abnormalities such as a small, somewhat flattened skull, a short, flat-bridged nose, and squared hands with shortened fingers. Reduced "sensory acuity levels," especially in the ability to smell and taste, are common, as are coordination and reflex difficulties. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1290 (26th ed. 1981); D. GIBSON, DOWN'S SYNDROME 6, 8-10 (1978).

7. *Azzolino*, 71 N.C. App. at 292, 322 S.E.2d at 571.

8. Through a contractual arrangement between the University of North Carolina School of Medicine and the Clinic, Dr. Dingfelder spent one-half day per week at the Clinic. *Id.*

9. *Id.*

10. Amniocentesis is a diagnostic procedure in which amniotic fluid (the fluid surrounding the fetus in the womb) and fetal cells present in the fluid are aspirated with a syringe and tested for

Dowdy advised Mrs. Azzolino not to undergo the procedure.[11] During a later appointment, Mrs. Azzolino questioned Dr. Dingfelder about amniocentesis, stating that she had heard there was a need for such testing in pregnant women over the age of thirty-five.[12] She was thirty-six at that time and was concerned about the risk of having a deformed child. Dr. Dingfelder informed her that amniocentesis was not necessary for women below age thirty-seven.[13] He did not perform amniocentesis on Mrs. Azzolino, nor did he advise her of the existence of a genetic counseling facility in Chapel Hill. If amniocentesis had been performed, the genetic abnormality of the fetus would have been discovered in time for Mrs. Azzolino to exercise her legal right to obtain an abortion.[14]

On October 13, 1981, the Azzolinos filed a medical malpractice action naming Dr. Dingfelder, Nurse Dowdy, and OCCHS as defendants.[15] Three distinct claims for relief, as well as a claim for punitive damages, were stated in the complaint. In the first cause of action plaintiff parents set forth a "wrongful birth" claim. They alleged that the individual defendants negligently had failed to provide Mrs. Azzolino with complete and correct information with respect to amniocentesis and the availability of genetic counseling. They further alleged that if Mrs. Azzolino had been advised properly, she would have undergone amniocentesis and would have discovered that her child, if born, would suffer from Down's Syndrome. They alleged that given this knowledge Mrs. Azzolino would have had the fetus aborted.[16] In the second cause of action the child, Michael Azzolino, set forth a "wrongful life" claim. He alleged that the negligence of the physician caused him to be born afflicted with Down's Syndrome instead of being aborted while still a fetus, "thereby damaging him by virtue of his very existence."[17] In the final cause of action Michael's half siblings claimed damages due to the fact that the financial and emotional hardships resulting from having a Down's Syndrome child in the family deprived them of the full measure of parental comfort, care, and society.[18]

Defendants filed motions to dismiss all three claims for relief stated in the

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biochemical and chromosomal defects. Amniocentesis usually is performed in conjunction with an ultrasonic examination, a procedure that allows the physician to determine the position of the fetus within the womb, thus reducing the risk that a vital organ of the fetus will be injured when the needle is inserted into the amniotic sac. *See* Elias & Verp, *supra* note 1, at 79-80. Amniocentesis is the standard test performed to detect Down's syndrome and has an accuracy rate of over 99%. *See* Berman v. Allen, 80 N.J. 421, 424, 404 A.2d 8, 10 (1979); *Azzolino*, 71 N.C. App. at 317, 322 S.E.2d at 586.

11. Nurse Dowdy's advice apparently was based solely on her belief that the problem of genetic defects should be left "in God's hands." *Azzolino*, 71 N.C. App. at 311, 322 S.E.2d at 582. Nurse Dowdy's only other discussion of amniocentesis with Mrs. Azzolino was to state the potential harmful consequences of what she termed "a very dangerous procedure." *Id.* In fact, the increased risk of either fetal or maternal injury produced by amniocentesis is less than one percent. *See* Elias and Verp, *supra* note 1, at 83.

12. *Azzolino*, 71 N.C. App. at 313, 322 S.E.2d at 583.

13. *Id.*

14. *Id.* at 314, 322 S.E.2d at 584.

15. *Id.* at 317, 322 S.E.2d at 586.

16. *Id.*

17. *Id.* at 292, 322 S.E.2d at 571.

18. *Id.*

complaint. These motions were granted for the second and third claims.[19] Defendants' motion for partial summary judgment on the issue of punitive damages also was allowed,[20] leaving the parents' wrongful birth claim the sole cause of action remaining for trial. At the close of plaintiffs' presentation of evidence, defendants successfully moved for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure.[21]

Wrongful birth and its related causes of action were not recognized at common law.[22] Consequently, when these claims first were asserted in the 1960s, there was some confusion as to the terminology involved.[23] At present, the claims for relief in prenatal malpractice cases in which the defect itself was not caused by the defendant's negligence are divided into six categories.[24] By far the

19. *Id.* at 293, 322 S.E.2d at 572.

20. *Id.*

21. A motion for directed verdict is properly granted only if the plantiff fails to present evidence sufficient to support a favorable finding on all the essential elements of his claim for relief. In a tort action these essential elements are duty, breach of duty, proximate cause, and actual damages. *Id.* at 310-11, 322 S.E.2d at 582.

That the directed verdicts were granted in favor of each defendant individually is important because it separated the claims for appeal. An adverse finding against one defendant therefore would not necessarily affect the others. *See infra* note 96.

22. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 259, 190 N.E.2d 849, 858, *cert. denied*, 379 U.S. 945 (1963); *Azzolino*, 71 N.C. App. at 294, 322 S.E.2d at 573.

23. The term "wrongful life" first was used in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 259, 190 N.E.2d 849, 858, *cert. denied*, 379 U.S. 945 (1963). This claim would now be termed one for dissatisfied life. *See infra* note 24. Later courts have added to this confusion. *See* Robak v. United States, 658 F.2d 471, 475 (7th Cir. 1981) (wrongful pregnancy referred to as wrongful birth); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 772, 233 N.W.2d 372, 375 (1975) (confusing wrongful life or wrongful birth with wrongful pregnancy); *see also* W. PROSSER & W. KEETON, THE LAW OF TORTS § 55, at 370 & n.34 (W. Keeton 5th ed. 1984) (*Zepeda* referred to as a wrongful life claim). For a discussion of the distinction between wrongful birth, wrongful life, wrongful pregnancy, and dissatisfied life claims, *see infra* note 24.

24. The six claims are wrongful birth, wrongful life, wrongful pregnancy, unplanned life, dissatisfied life, and claims by the deformed infant's siblings. *See infra* text accompanying notes 25-59 (discussion of wrongful birth); *infra* text accompanying notes 60-81 (discussion of wrongful life). Wrongful pregnancy is the parents' cause of action against the defendant physician for some negligent act that results in the birth of a healthy, but unplanned, child. *See* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (unsuccessful abortion); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (tranquilizers negligently substituted for oral contraceptives); Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977) (failed tubal ligation). Wrongful pregnancy is sometimes called wrongful conception. *See* Holt, *Wrongful Pregnancy*, 33 S.C.L. REV. 759 (1982). Unplanned life is the filial counterpart to the parents' wrongful pregnancy claim. These two claims generally are joined. *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 718-20 (1982). Dissatisfied life is the claim brought by an illegitimate child against his father, claiming injury by virtue of his status as an illegitimate child. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 379 U.S. 945 (1963); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

The courts of at least five jurisdictions have faced claims brought by the siblings of an unplanned child, alleging damages to the extent that the new child diminished their share of parental society, care, and financial support. This claim could be termed an "unplanned sibling" claim. *See* White v. United States, 510 F. Supp. 146 (D. Kan. 1981); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Aronoff v. Snider, 292 So. 2d 418 (Fla. App. 1974); Miller v. Duhart, 637 S.W.2d 183 (Mo. App. 1982); Sala v. Tomlinson, 73 A.D.2d 724, 422 N.Y.S.2d 506 (1979); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974). In *Azzolino* the North Carolina Court of Appeals rejected a similar claim by the siblings of a deformed child. *See Azzolino*, 71 N.C. App. at 306, 322 S.E.2d at 578-79. No court has recognized a cause of action for either the dissatisfied life or unplanned sibling claims. *See* Rogers, *supra*, at 729 & n.119 (dissatisfied life claims successful); *Azzolino*, 71 N.C. App. at 303-04, 322 S.E.2d at 578 (unplanned sibling claims unsuccessful).

most important of these claims are those for wrongful birth and wrongful life.

Wrongful birth is a claim for relief brought by the parents of a child born with genetic defects[25] or other abnormalities[26] discoverable during the first trimester of pregnancy.[27] A negligent act of the mother's doctor[28] is alleged to have caused this defect to go undiscovered until after the birth of the child. The plaintiff parents claim that but for the negligence of the doctor, they would have obtained a legal abortion and avoided the burdens of caring for a deformed child. Although not a traditional cause of action, wrongful birth fits into the traditional tort framework[29] as a medical malpractice claim.

The first case to address a wrongful birth claim squarely was *Gleitman v. Cosgrove*,[30] a 1967 New Jersey Supreme Court decision. In *Gleitman* defendant doctor negligently made the erroneous statement that the mother's contraction of German measles during pregnancy would not harm the fetus. Full information on the risk of German measles was within the professional knowledge of defendant's speciality.[31] The mother alleged that she might have secured an abortion had she been aware of the risk of birth defects resulting from her condition.[32] Plaintiff parents sought damages for the mental anguish and severe fi-

25. Examples of parental suits for undiscovered genetic defects include Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1980) (Down's syndrome); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (Tay-Sachs disease); Call v. Kazirian, 135 Cal. App. 2d 189, 185 Cal. Rptr. 103 (1982) (Down's syndrome); Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981) (cystic fibrosis); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979) (Down's syndrome); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (Down's syndrome); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (polycystic kidney disease), *aff'd sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984) (Down's syndrome); Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982) (Tay-Sachs disease).

26. Most nonhereditary fetal defects are caused by a disease contracted or a drug taken by the woman during pregnancy. The most common defect-producing disease is rubella, or German measles. *See* Robak v. United States, 658 F.2d 471 (7th Cir. 1981); Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Although often filed as products liability claims, suits based on defects produced by the drug diethylstilbestrol (DES) can be viewed as wrongful life claims. As in all wrongful life claims, if the defendant had not performed the negligent act complained of—distributing a dangerous drug designed to prevent miscarriage—the plaintiff child probably would not have been born. A leading case in this area is Sindell v. Abbott Laboratories, 26 Cal. 3d 558, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1981). *See* Abrahams & Musgrove, *The DES Labyrinth*, 33 S.C.L. REV. 663 (1982).

27. The timing of the defect's discoverability is important because it determines the availability of an abortion to terminate the pregnancy. Since a woman has an absolute right to obtain an abortion during the first trimester of pregnancy, the birth of an infant suffering from a defect discoverable during the first trimester is due to the choice of the child's mother, or to the negligence of the mother's physician. *See infra* note 77.

28. To support a claim for relief, the negligent act or omission could have been the fault of the doctor, a nurse, a lab technician, or some other provider of prenatal health care. This negligence could have taken several forms. *See infra* text accompanying notes 43-48.

29. The elements of a tort claim are the presence of a duty owed by the defendant to the plaintiff, a breach of that duty, a close causal relationship between the breach of duty and the injury to the plaintiff, and actual injury or damages suffered by the plaintiff. Lowery v. Newton, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981); W. PROSSER & W. KEETON, *supra* note 23, § 30, at 164-65.

30. 49 N.J. 22, 227 A.2d 689 (1967).

31. *Id.* at 25-26, 227 A.2d at 690-91.

32. *Id.* at 26, 227 A.2d at 691. This allegation by the mother might have given defendant a strong defense. By claiming that but for defendant's assurances she "might" have had an abortion,

nancial burdens associated with raising a deformed child.[33]

The court denied recovery on three grounds. First, it stated that the parents' claim did not demonstrate the essential element of proximate cause;[34] because the child's defect resulted from the disease contracted by his mother and not from any act of defendant, the court concluded that causation could not be shown. The court noted that the result would have been different if plaintiff parents had shown an "act or omission which result[ed] in impairment to what otherwise would [have been] a normal, healthy child."[35] Second, the court stated that even if the parents had been informed of the possible risks to the fetus, their only alternative to having the child was abortion, a procedure subject to criminal sanction in New Jersey.[36] Since the doctor could not have been negligent in refusing to perform a criminal abortion, he could not have been negligent in failing to advise the parents to consider such an abortion.

Third, the court reasoned that had the parents been able to obtain an abortion lawfully, their claim would fail for lack of ascertainable damages.[37] Damages in a tort action are compensatory and are "measured by comparing the condition plaintiff would have been in had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence."[38] In a wrongful birth claim the parents allege that but for the negligence of the mother's doctor, their deformed child would not have been born. This claim would require the court to assign a value to the "intangible, unmeasurable, and complex"[39] benefits of parenthood that plaintiff parents would not have experienced had they obtained an abortion, and to compare this value with the alleged burdens incurred in raising a child with birth defects. For the parents to state a recognizable injury, the burden of parenthood must outweigh the benefits. The court believed that such a determination was impossible.[40]

A major portion of the court's reasoning in *Gleitman* was invalidated by the landmark abortion decision *Roe v. Wade*.[41] In ruling that a state has no legitimate interest in prohibiting abortions during the first trimester of pregnancy,[42] the Supreme Court not only effectively nullified the "inherent sanctity of life" argument, but also eliminated the causation problem. Because a woman's right to have an abortion is a fundamental right, the decision implied that liability can

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plaintiff mother made proof of causation difficult. The implication of her statement is that she might not have elected to obtain an abortion. Later plaintiffs have avoided this problem by alleging that but for the negligence of the defendant, an abortion "would" have been obtained. *See, e.g., Azzolino*, 71 N.C. App. at 292, 322 S.E2d at 571.

33. *Gleitman*, 49 N.J. at 26, 227 A.2d at 691.

34. *Id.* at 28, 227 A.2d at 692.

35. *Id.*

36. *Id.* at 31, 227 A.2d at 693-94. The court's claim in *Geitman* is premised on the idea of the inherent sanctity of human life, an idea also noted in *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

37. *Gleitman*, 49 N.J. at 29-30, 227 A.2d at 693.

38. *Id.* at 29, 227 A.2d at 692.

39. *Id.* at 29, 227 A.2d at 693.

40. *Id.*

41. 410 U.S. 113 (1973).

42. *Id.* at 164.

attach to all acts or omissions that abridge that right. The failure to inform a woman of special conditions that might produce a deformed infant would operate to discourage her from making an informed decision as to whether to exercise her right to obtain an abortion. Therefore, a woman's doctor has a duty to inform her of such high risk conditions. This duty would be breached if the doctor (1) failed to inform the woman that a diagnostic procedure existed,[43] (2) failed to inform the woman of a high-risk condition for which no diagnostic testing was available,[44] (3) informed the woman of the diagnostic test but negligently failed to perform the test,[45] (4) informed the woman of the diagnostic test but negligently advised her not to undergo the test,[46] (5) performed the diagnostic test in a negligent manner, obtaining an incorrect result,[47] or (6) performed the diagnostic test but failed to inform the woman of the test results.[48] Any of these failures would deprive the woman of information essential to an informed decision as to whether to obtain an abortion, thus proximately causing the birth of the deformed infant.

The problem of unprovable damages noted in *Gleitman* still exists even in the wake of *Roe*, but it apparently has caused few problems for the courts. This development may be reflective of the trend toward allowing recovery of damages for purely psychic injuries begun with *Dillon v. Legg*[49] in 1968. The increased certainty with which psychiatrists have been able to measure mental anguish is considered to be a major factor in allowing recovery for damages once thought too speculative to be proved.[50]

Most of the wrongful birth cases decided since *Roe* have tended to accept wrongful birth as a variety of the traditional negligence action.[51] As in all medical malpractice claims, the physician's duty of due care is created by virtue of his professional relationship with the patient.[52] The defendant's conduct in comparison to the accepted standard of professional behavior determines whether that duty has been breached. Other jurisdictions also employ an objective standards test, frequently couched in terms of the customary community standards

43. *See* Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977).

44. *See* Robak v. United States, 658 F.2d 471 (7th Cir. 1981).

45. There appears to be no reported case illustrating this type of negligent behavior. Imposing liability in this instance would be consistent with the general pattern of imposing liability for failure to present a pregnant woman with information relevant to her consideration of obtaining an abortion. *See infra* notes 75-77 & 86-87 and accompanying text.

46. *See* Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984).

47. *See* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978).

48. Although there is no reported authority illustrating this type of negligent behavior, imposing liability would be logically consistent with cases imposing liability for failure to present a pregnant woman with information relevant to her decision to either obtain an abortion or give birth. *See infra* notes 75-77 & 86-87 and accompanying text.

49. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

50. *See* W. PROSSER & W. KEETON, *supra* note 23, § 54, at 361-62.

51. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

52. *See* Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C.L. REV. 711, 713 (1984).

for behavior.[53] As noted above,[54] interference with the woman's right to obtain an abortion is sufficient to establish proximate cause. The only substantial area of disagreement among jurisdictions that have considered wrongful birth claims has been the question of the proper measure of damages.

Damage awards in wrongful birth cases can be divided into four categories. First, the court can award parents all the costs they will have to bear as a result of the defendant's negligent act. These costs would include the normal expenses of raising an ordinary child, the extraordinary expenses to be incurred for the care and treatment of an impaired child, and the mental anguish suffered by the parents as a consequence of caring for their deformed child.[55] Second, the court can approach the issue of causation in a slightly broader fashion. Instead of focusing solely on the fact that but for the defendant's negligent act this particular deformed child would not have been born, courts can consider the expectations of the plaintiffs. Some courts have reasoned that since the plaintiffs in a wrongful birth suit intended to become parents, they also must have intended to bear the ordinary expenses of their child. The normal expenses of raising a child, therefore, are deducted from any award for damages. Thus, only the parents' mental anguish and the extraordinary expenses involved in raising an impaired child will be awarded.[56]

Third, some courts allow the plaintiff parents to recover only for the ex-

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53. *See* State v. Ulin, 113 Ariz. 141, 143, 548 P.2d 19, 21 (1976) ("recognized standards of good medical practice in the community"); Hickman v. Employers' Fire Ins. Co., 311 So. 2d 778, 779 (Fla. 1975) (to be liable doctor must act "clearly against the course recognized as correct by his profession"); Jackovach v. Yocum, 212 Iowa 914, 925, 237 N.W. 444, 449 (1931) ("usual and customary practice among physicians and surgeons in the same or similar localities"); Goheen v. Graber, 181 Kan. 107, 111-12, 309 P.2d 636, 637 (1957) ("reasonable degree of learning and skill ordinarily possessed by members of his profession . . . in the community where he practices or similar communities"); Cervantes v. Forbis, 73 N.M. 445, 448, 389 P.2d 210, 213 (1964) ("recognized standards of medical practice in the community"); Harbeson v. Parke-Davis, Inc., 78 Wash. 2d 460, 467, 656 P.2d 483, 489 (1983) ("degree of skill expected of the average . . . practitioner, in the class to which defendant belongs").

54. *See supra* text accompanying notes 42-48.

55. Only one court has adopted this formulation of damages in a wrongful birth action. *See* Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law). An offset for the normal costs of child care is a sounder rule for the reasons stated in the text accompanying note 56. The *Robak* rule is better suited to wrongful pregnancy claims since in those cases no child was expected or desired by the plaintiff parents. About half of the courts faced with wrongful pregnancy claims have allowed damages consistent with *Robak*. The others have disallowed recovery for normal expenses of child raising because of the "offsetting benefit" rule. The different approaches to this problem and the courts that have adopted each position are noted in Hartke v. McKelway, 526 F. Supp. 97, 104 (D.D.C. 1981). For a discussion of the "offsetting benefit" rule, see *infra* note 56.

56. *See* Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983). The parents' mental anguish is a compensable injury because there is a general public policy "to compensate parents not only for pecuniary loss but also for emotional injury." *Id.* at 475, 656 P.2d at 493.

The *Eisbrenner* court used RESTATEMENT (SECOND) OF TORTS § 920 (1979) to justify deducting from damages the normal expenses of raising a child. Section 920 states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

The court concluded that the various benefits of parenthood would offset at least part of any award for the parents' mental anguish. *Eisbrenner*, 106 Mich. App. at 367-68, 308 N.W.2d at 214.

traordinary expenses involved in raising the deformed child.[57] Although they accept the idea of offsetting the award by the normal costs of raising a child, they will not recognize an award for the parents' mental anguish. These jurisdictions believe that mental anguish damages are not sufficiently ascertainable. Last, some courts have awarded damages only for the mental anguish of the parents, with no compensation given for the costs of raising a child. At least three different rationales have been offered in support of such an award.[58] The extraordinary medical and educational expenses of the impaired child are so clearly a proper subject of recovery, however, that no jurisdiction which recognizes the wrongful life cause of action denies that additional recovery.[59]

The other major cause of action in the area of prenatal malpractice torts is the wrongful life claim. Unlike wrongful birth, in which the parents sue directly as plaintiffs, a wrongful life action is brought in the name of the impaired child. This difference has made most courts, including those that recognize an action for wrongful birth, unwilling to accept wrongful life claims.[60] Analysis of the four elements of a traditional tort claim as applied to wrongful life cases highlights several different criticisms of the claim.

First, the very nature of the claim has caused some courts to decide that it is not a traditional tort. In a wrongful life claim, the plaintiff child alleges that the defendant physician negligently permitted the child to be born, thereby causing the child to suffer life with a permanent disability. The child's very existence is alleged to constitute its injury. Given the high value society places on human

57. *See* Moore v. Lucas, 405 So. 2d 1022 (Fla. App. 1981); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). The reluctance of these states to award damages for mental anguish is not limited to wrongful birth cases. In the area of bystander tort, in which a witness to a tort committed against a third person recovers for mental anguish, the leading case allowing recovery, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), had not been followed by any of the four states in question at the time the above noted cases were decided. The *Dillon* rule since has been adopted in Texas. *See* Landrith v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978).

58. *See* Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984), *disc. rev. granted*, 313 N.C. 327, 327 S.E.2d 887 (1985). In *Berman* the court considered the complete educational expenses of the child without isolating the additional costs of educating an impaired child. It held that "such an award would be wholly disproportionate to the culpability involved, and . . . would . . . constitute a windfall to the parents." *Berman*, 80 N.J. at 432, 404 A.2d at 14. Although the *Karlsons* court stated that an award for mental anguish would be proper, it does not seem to have considered an award for the child's expenses. *Karlsons*, 57 A.D.2d at 78-79, 394 N.Y.S.2d at 936-37. In *Azzolino* the court concluded that "the unusual nature of the wrongful life and wrongful birth actions" required that only the child be allowed to recover for these extraordinary expenses. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

59. The New Jersey Supreme Court allowed the parents to recover extraordinary child support expenses in Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981). The New York Court of Appeals allowed similar recovery in Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The court of appeals in *Azzolino* also permitted the child to sue for these expenses. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

60. *See, e.g.*, Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *aff'd sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

life[61] and the lack of any common-law precedent for wrongful life claims,[62] some courts have concluded that no legally recognized wrong has been committed.

Second, *Roe v. Wade*,[63] the decision that provided the rationale for the parents' wrongful birth claim, also has created an impediment to the recognition of wrongful life actions. In *Roe* the Court held that a fetus was not protected by the fourteenth amendment because a fetus is not a person.[64] It therefore can be argued that the physician owes no duty to the fetus, since a duty is defined as "that [obligation] which a person owes to another."[65] Without the essential element of duty, the plaintiff can not maintain a negligence action. Prior to *Roe*, the "no duty" argument was not raised, probably because the fetus was treated as a person in state abortion statutes.[66]

Third, some courts have held the plaintiff child unable to prove causation.[67] The child's defect was not actually produced by the defendant's negligent act, but by some external factor such as disease or a genetic trait present in the child's mother. These courts, therefore, are unwilling to impose liability on a physician for a condition he did not "cause." The physician "caused" the child's deformity only in the sense that he prevented the child's destruction as a fetus.[68] The idea that such destruction is a reasonable alternative to life—however tortured—is rejected by these courts.

Last, by far the most troublesome aspect of a wrongful life claim is assigning a value to the alleged damages. The traditional tort damage award—placing the injured party in the position he would have occupied "but for" the acts of the defendant—is inapplicable. If the defendant had not acted in a negligent manner, the plaintiff would not have been born. To determine damages the court must compare the current position of the plaintiff—living with a permanent impairment—with the position the plaintiff would have been in had the defendant not been negligent—aborted while still a fetus. This determination necessarily requires the court to place a value on "the utter void of nonexistence"[69] and has caused some courts to rule that wrongful birth claims fail for lack of ascertainable damages.[70]

Not all courts have found these difficulties insurmountable. The highest

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61. *See supra* note 36.

62. *See supra* note 22 and accompanying text.

63. 410 U.S. 113 (1973).

64. *Id.* at 158.

65. BLACK'S LAW DICTIONARY 453 (5th ed. 1979).

66. *See Roe*, 410 U.S. at 158 n.55. The Court noted certain inconsistencies with this argument. *Id.* at 157-58 n.54.

67. *See* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

68. *But cf.* notes 42-48 and accompanying text (a woman has a fundamental right to obtain an abortion).

69. Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967).

70. *See* Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 59 Wis. 2d 766, 233 N.W.2d 372 (1975).

courts of three states have recognized wrongful life as an example of the traditional medical malpractice claim.[71] Various theories have been used to overcome each of the objections previously raised against wrongful life claims.

Two theories have been proposed in support of the existence of a duty owed by the woman's doctor to her unborn fetus. A major argument against the finding of such a duty can be negated if the fetus is assumed to be a person. Despite the *Roe* holding, a fetus is recognized as a legal person for several purposes,[72] including the well-established proposition that an infant can recover damages for other prenatal torts.[73] There is no reason this rule should not apply in wrongful life cases. Second, even if the fetus is not recognized as a person, the duty owed to its mother would extend to it as well. This idea is taken from section 311 of the Restatement (Second) of Torts.[74] The physician's duty is not to prevent the birth of an impaired child but rather to inform the parents so that they can make an intelligent decision as to "whether life is best for the child."[75]

Determining whether there has been a breach of duty is a question of fact to be addressed at trial.[76] The threshold determination in wrongful life cases is whether the child's defect was such that a reasonable physician would have known of its presence by the end of the first trimester.[77] Failure to perform diagnostic tests that would have discovered the impairment is a breach of the duty of due care.

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71. *See* Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

72. *See* Roe v. Wade, 410 U.S. 113, 161-62 (1973). These rights, however, are contingent upon the live birth of the child. *See infra* note 73.

73. The right of a child to sue for prenatal injuries first was recognized in Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). All jurisdictions now permit a child to recover for prenatal injuries produced by a direct act of the defendant, but only if the child is born alive. *See* W. PROSSER & W. KEETON, *supra* note 23, § 55, at 368. If a plaintiff chooses to bring a wrongful life claim under this theory, the threshold requirement of live birth will, by definition, always be satisfied.

74. RESTATEMENT (SECOND) OF TORTS § 311 (1965) provides:

> Negligent Misrepresentation Involving Risk of Physical Harm
>
> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.

Comment b to this section is particularly illustrative of the wrongful life action. It provides that

> it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine.

Id. comment b.

75. *Azzolino*, 71 N.C. App. at 298, 322 S.E.2d at 574.

76. *See* W. PROSSER & W. KEETON, *supra* note 23, § 37, at 237.

77. Since *Roe v. Wade* a pregnant woman has had an absolute right to obtain an abortion in the first trimester of pregnancy. If the defect in the fetus is not discoverable until after the first trimester, the physician cannot be held liable for negligence, since nothing he could have done would have provided the woman with more complete information as to the desirability of an abortion. Liability will attach in cases of a defect that the physician negligently fails to discover during the first trimester because at that time the woman could have pursued abortion as an alternative to allowing the birth of the child.

The element of causation, once considered unprovable in wrongful life cases,[78] no longer is considered a major obstacle. The defendant's argument that the mother's condition is the actual cause of the child's injury, although literally true, does not reach the essence of the complaint. The plaintiffs do not claim that the physician produced the genetic condition in the child's mother. Nor do they argue that the defect in the fetus was produced by some negligent act of the defendant. Instead, they allege that the defendant's acts precluded any parental decision to abort the fetus[79] and that this negligence caused the birth of a deformed infant whose very life constitutes injury.

Determining the proper measure of damages has been difficult for the courts that have recognized the wrongful life claim. By claiming that his injury results from the very fact of life itself, the child is claiming, in effect, that not having been born would have been preferable to living with a deformity. This claim for the general damages resulting from life with a deformity has never been recognized.[80] Some courts, however, have allowed the child's claim for the extraordinary expenses for education, medical treatment, and special care necessitated by his impairment.[81] Such special damages are both compensatory in nature and sufficiently ascertainable to be awarded without undue speculation.

Azzolino v. Dingfelder[82] presented the first opportunity for a North Carolina court to evaluate the wrongful life, wrongful birth, and unplanned sibling claims.[83] Following a review of the purposes and functions of the motion to dismiss,[84] the court considered Michael Azzolino's wrongful life claim in light of the essential elements of a traditional negligence action. First, the court determined that the defendants owed Michael a duty. This duty arose not only from an extension of defendants' duty to Michael's mother, but also from Michael's independent right to damages for other prenatal torts. Thus, both rationales used by other jurisdictions to establish a duty to the child were

78. *See supra* note 67 and accompanying text.

79. *Azzolino*, 71 N.C. App. at 306, 322 S.E.2d at 580.

80. *See* W. PROSSER & W. KEETON, *supra* note 23, § 55, at 371.

81. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982); Procanik v. Cillo, 97 N.J. 339, 351, 478 A.2d 755, 762 (1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 479, 656 P.2d 483, 495 (1983). For examples of other attempts to develop a formula for measuring damages in prenatal torts cases, see Note, Park v. Chessin: *The Continuing Judicial Development of the Theory of "Wrongful Life,"* 4 AM. J. LAW & MED. 211 (1979); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970).

82. 71 N.C. App. 289, 322 S.E.2d 567 (1984), *disc. rev. granted*, 313 N.C. 327, 327 S.E.2d 887 (1985).

83. Prior to discussing the merits of the allegations, the court had to decide whether a timely appeal had been filed by Michael. Defendants claimed that Michael's right to appeal was forfeited because it was not exercised within 10 days of the granting of the motion to dismiss. The court ruled that while an appeal could have been made at that time, it was only necessary after the granting of the directed verdict against the parents' claims. The directed verdict marked the date of final judgment because the claims of Michael and his parents were not separate and distinct. *Id.* at 294, 322 S.E.2d at 572.

84. The court noted that the sole function of the motion to dismiss is to test the complaint for legal sufficiency, compelling the trial court to treat the allegations of the challenged pleading as true. The motion should not be granted unless "the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 295, 322 S.E.2d at 573.

adopted by the court.[85]

Second, the court considered the question whether this duty had been breached. Because defendants' duty to the mother required disclosure of "material information about genetic risk," failure to disclose such information evidenced a breach of the duty of due care.[86] The lack of this information effectively precluded the rational exercise of the mother's right to obtain an abortion. Interference with this right established the third essential element of the claim, proximate cause.[87] The evidence of causation was particulary strong in this case.[88]

Last, the court considered the joint questions of actual injury and appropriate damages.[89] Like all other jurisdictions that have considered the matter, the court concluded that the claim for general damages was speculative.[90] The court, however, also determined that Michael's claim for special damages was cognizable at law. These special expenses include "the extraordinary costs of special treatment, teaching, care, medical services, aid and assistance [required] for the child because of his impairment."[91] Unlike the other jurisdictions that allow both the wrongful birth and wrongful life claims, the court in *Azzolino* ruled that these special damages could be recovered only by the child.[92]

The court next considered what might be called the "unplanned sibling" claim. The court noted that five other jurisdictions had considered and disallowed similar claims.[93] Fatal flaws were noted in each of the three theories plaintiffs used to justify their claim.[94] The court concluded that "there is no basis in law or logic for such an action."[95]

Finally, the court considered the parental claim of wrongful birth. Favorable resolution of the wrongful life claim virtually predetermined the outcome of the wrongful birth claim.[96] The elements of duty, breach, and proxi-

85. *See supra* notes 72-75 and accompanying text.

86. *Azzolino*, 71 N.C. App. at 297, 322 S.E.2d at 574.

87. *See supra* notes 42-48 and accompanying text.

88. Mrs. Azzolino testified that "if she had been told there was a 50% chance of injury to the fetus occurring and a one in 2,000 chance of having a child with Down's Syndrome, she still would have had amniocentesis." *Azzolino*, 71 N.C. App. at 317, 322 S.E.2d at 586. Evidence also was presented to demonstrate that Mrs. Azzolino had obtained abortions on two earlier occasions. The evidence supported her contention that she would have had an abortion in this instance if the risks had been explained to her. *Id.*

89. *Id.* at 299, 322 S.E.2d at 576.

90. *Id.* at 300, 322 S.E.2d at 576. *See supra* text accompanying note 80.

91. *Azzolino*, 71 N.C. App. at 301, 322 S.E.2d at 576.

92. The other jurisdictions to allow this claim permit either the child or the parents to recover the special damages. *See supra* note 71.

93. *Azzolino*, 71 N.C. App. at 303, 322 S.E.2d at 578; *see supra* note 24.

94. First, the court rejected the negligence theory because the doctor owed no duty to the deformed child's siblings. Second, a claim based on nuisance theories was ruled to be applicable only in instances of unreasonable interference with a real property right. Last, the court ruled that a claim based on the loss of parental consortium is not recognized in North Carolina. *Azzolino*, 71 N.C. App. at 304-06, 322 S.E.2d at 578-79.

95. *Id.* at 304, 322 S.E.2d at 578.

96. The court's ruling in plaintiffs' favor on the wrongful birth and wrongful life claims was based solely on the evidence of Doctor Dingfelder's negligence. Because he treated Mrs. Azzolino within the scope of his employment at the Clinic, the doctrine of respondeat superior could have

mate cause found to exist in the child's cause of action are all derived from the initial duty owed by the physician to the mother. A few distinctions, however, merit attention. First, North Carolina has adopted a statute pertaining to the standard of care applicable to medical malpractice actions.[97] A key provision of this statute is that liability will not exist unless the physician's act was "not in accordance with the standards of practice among members of the same health care profession . . . situated in the same or similar communities . . . ."[98] The enactment of the "same or similar community" rule "presumably reflects the belief, based in large part on the well-worn distinction between the country doctor and the big city doctor, that the quality of medical practice differs with the character of communities and that the standard of care, to be fair, must reflect this difference."[99] In *Azzolino* defendant physician sought to use this rule to limit his duty of care to the performance of the services the Clinic could have been expected to provide.[100] The court was not persuaded by this argument, and held defendant to the standard of care exercised at North Carolina Memorial Hospital.[101]

Second, the court justified its recognition of the wrongful birth claim with reference to its earlier recognition of the wrongful pregnancy claim.[102] Although the court did not articulate its reasoning on this point, one possible argument is obvious. If damages are to be awarded in wrongful pregnancy cases for the birth of a healthy but unwanted child, it seems inequitable not to afford similar relief to the parents of a child born with a serious deformity. Third, the court recognized the public policy of holding negligent individuals liable for the consequences of their actions.[103]

Last, the court once again was faced with the question of the appropriate measure of damages. After reviewing the approaches taken by other jurisdic-

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supported a finding against OCCHS. The court of appeals therefore ruled that the directed verdicts in favor of the clinic and OCCHS were erroneously granted. *Id.* at 318-19, 322 S.E.2d at 586-87. The directed verdict in favor of Jean Dowdy was upheld because plaintiffs were unable to establish the essential element of proximate cause. *Id.* at 312, 322 S.E.2d at 583.

97. N.C. GEN. STAT. §§ 90-21.11 to -21.14 (1981).

98. *Id.* § 90-21.12; *see* Byrd, *supra* note 52, at 723.

99. Byrd, *supra* note 52, at 713. The *Azzolino* court quoted and relied on this passage. *See Azzolino*, 71 N.C. App. at 315, 322 S.E.2d at 585.

100. *Azzolino*, 71 N.C. App. at 315, 322 S.E.2d at 585.

101. *Id.* The use of North Carolina Memorial Hospital (NCMH) as the relevant community was important for finding a breach of duty. Testimony of other physicians practicing at NCMH indicated that while genetic testing would be recommended for women age 37 and over, such testing would be performed on younger women if they showed "high concern" about genetic defects of the fetus. "High concern" was defined as "sufficient concern to have talked to their obstetrician or someone . . . ." *Id.* at 315, 322 S.E.2d at 584-85. Doctor Dingfelder apparently believed that the other physicians at the Clinic would have performed amniocentesis only on women over age 37. Not performing amniocentesis on Mrs. Azzolino therefore would have been in accordance with the accepted practice at the Clinic, though it may have been negligent for someone practicing in the NCMH community. *Id.* at 315-16, 322 S.E.2d at 585.

102. *See* Jackson v. Bumgardner, 71 N.C. App. 107, 321 S.E.2d 541 (1984), *disc. rev. granted*, 312 N.C. 797, 325 S.E.2d 486 (1985) (arguments heard April 8, 1985); Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320, *appeal dismissed*, 300 N.C. 375 (1980) (The decision dismissing the appeal was not included in the Southeastern Reporter.).

103. *Azzolino*, 71 N.C. App. at 307-08, 322 S.E.2d at 580.

tions,[104] the court decided that an award for the complete cost of raising the child would be "wholly disproportionate to the culpability involved and would place an unreasonable financial burden on health care providers."[105] The court also noted that an award for punitive damages would be inappropriate.[106] Having earlier decided to allow only the child to maintain an action for extraordinary support expenses, the court ruled that the parents could recover damages "only for the mental anguish which they have endured and will continue to endure as a result of the birth of the impaired child."[107] This division of damages marks a change from the established law of this state and may be detrimental to the interests of those persons it is designed to protect.

It is a settled rule in North Carolina and other states that the tortious action of a third party which produces injury to a minor child creates two distinct claims for relief. These claims are:

> (1) the right of the child to recover for his mental and physical pain and suffering, and the impairment of earning capacity after attaining majority; and (2) the right of the parent to recover for loss of services of the child during minority, and other pecuniary expenses incurred or likely to be incurred by the parent as a consequence of the injury, including expenses of medical treatment.[108]

If wrongful birth and wrongful life claims are recognized as essentially similar to accepted traditional torts, the traditional damages rules should not be summarily discarded. As noted above, the child's claim for general damages has been rejected uniformly as not susceptible to nonspeculative proof.[109] This conclusion leaves only the parents' claim for the extraordinary expenses of raising an impaired child.[110] These damages traditionally have been recoverable by the parents as an incident of their duty to provide for the support of their child. The court noted in *Azzolino* that "it is the child who suffers if the money is not there to pay for the care that he needs."[111] Apparently believing that this situation was unusual, the court held these special damages recoverable only by the child. Although it is true that a child born with a deformity would suffer if the proper care were not provided, the same could be said about a child who was born healthy but became impaired shortly after birth as the result of a defendant's conduct. Even if unusual circumstances qualify the child's action for special damages, there is no reason to deny the parents' traditional claim. Allowing either the parents or the child to bring an action for extraordinary support expenses would bring North Carolina into agreement with the other jurisdictions that have recognized both the wrongful life and wrongful birth claims.[112]

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104. *Id.* at 308, 322 S.E.2d at 581; *see supra* notes 55-59 and accompanying text.

105. *Azzolino*, 71 N.C. App. at 309, 322 S.E.2d at 581.

106. *Id.* at 320, 322 S.E.2d at 587-88.

107. *Id.* at 309, 322 S.E.2d at 581.

108. 3 R. LEE, N.C. FAMILY LAW § 241, at 218 (4th ed. 1981).

109. *See supra* text accompanying note 80.

110. Although not a traditional element of damages, the modern trend is to allow recovery for the parents' mental anguish. *See supra* notes 49-50 and accompanying text.

111. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

112. *See supra* note 71 (list of cases from these jurisdictions).

Several policy considerations support the majority rule recognizing the parental claim for extraordinary support expenses of a child born with a deformity. First, the recognition of this parental claim is evidence of the high value society places on the family unit. Taking the right to sue for the child's injuries away from the parents only lessens the esteem accorded the family relationship. The court's refusal to allow the parents to recover extraordinary support expenses is tantamount to claiming that the special relationships within the family are no longer worthy of protection.[113]

Second, the parents' duty to provide care and support for their children long has been recognized in this State.[114] This duty has been cited as a major reason for allowing the parents' claim for damages.[115] Nothing in the *Azzolino* opinion suggests that this traditional duty has changed. There is, therefore, no reason to abandon such a fundamental rule of damage recovery.

As an alternative to the traditional rule of parental recovery, the court in *Azzolino* proposed creation of a guardianship for the benefit of the child.[116] Guardianships often are formed when a child obtains a large sum of money or other valuable property.[117] Although this form of fiduciary relationship has the advantage of ensuring the existence of the funds necessary for the care of the child, several potential drawbacks should be noted. First, the formalities of a fiduciary relationship can transform even simple transactions, such as the payment of the child's expenses and the sale of investment securities, into cumbersome procedures.[118] Second, such proceedings can be expensive. Annual accountings must be filed with the court. The costs of preparing such records, as well as the fiduciary's commission, are payable from the ward's property.[119] These requirements diminish the amount of money available for the child's support. Last, although the opinion is unclear, there is some doubt whether the parents could qualify as the child's guardians. If the court were not troubled by the parents' inability to handle the damage award in a prudent manner, the

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113. Among the damages traditionally recoverable following injury to an unemancipated minor child is the value of the services and earnings of the child lost due to the injury. Such recovery follows from an interference with a unique parental right. *See* 3 R. LEE, *supra* note 108, § 241, at 220. Recovery by a third-party guardian, *see infra* text accompanying note 116, is inconsistent with this traditional obligation.

114. *See* Floyd v. Atlantic Coast Line R.R., 167 N.C. 55, 59-60, 83 S.E. 12, 14 (1914).

115. *See* 3 R. LEE, *supra* note 108, § 241, at 221.

116. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

117. *See* G. BOGERT, THE LAW OF TRUSTS § 17, at 37 (5th ed. 1973).

118. A guardian, like a trustee, is a fiduciary with certain powers and duties prescribed by statute.

> The powers of a guardian are ordinarily narrower than those of a trustee. . . . In many states a guardian can make no investment without the authority of the court which appointed him, nor can he without such authority sell land of his ward. The authority of a guardian does not extend beyond the jurisdiction of the court which appointed him . . . .

1 A. SCOTT, THE LAW OF TRUSTS § 7, at 73 (3d ed. 1967).

In North Carolina, payment of support costs from the ward's property is subject to the formalities specified in N.C. GEN. STAT. § 33-6 (1984). The special proceedings involved in the sale of property are outlined in N.C. GEN. STAT. §§ 33-31, -33 (1984). The guardian's power of investment is defined in N.C. GEN. STAT. §§ 36A-1, -2 (1984).

119. The annual accounting procedure is set forth in N.C. GEN. STAT. § 33-39 (1984). The guardian's commission is provided for in N.C. GEN. STAT. § 33-43 (1984).

guardianship itself would not be necessary. These doubts also could disqualify the parents as guardians. There is judicial precedent for disallowing parents as guardians on the grounds that the interests of the two relationships are naturally inconsistent.[120] These criticisms are not intended to suggest that the use of a guardianship is necessarily improper, or that it would be improper in this instance. Indeed, special circumstances may merit the creation of a fiduciary relationship.[121] This criticism of the court's decision in *Azzolino*, however, is directed to the general rule that a guardianship is *required* in wrongful life cases. A more logical rule would allow the trial judge, the authority most familiar with the special circumstances of each case, to use his discretion in ordering the creation of a guardianship.[122]

In a case of first impression, the North Carolina Court of Appeals has chosen to recognize claims for relief based on wrongful birth and wrongful life. This enlightened holding brings the state in line with the progressive jurisdictions that have considered these claims. Despite its assertion that wrongful birth and wrongful life are forms of the traditional medical malpractice claim the court adopted a nontraditional and insupportable formulation of damages. Action should be taken on appeal to allow the parents to recover in their own names the extraordinary support costs attributable to their impaired child.

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120. *See* White v. Osborne, 251 N.C. 56, 110 S.E.2d 449 (1959).

121. One such circumstance would be the parents' inability to manage large sums of money. Another factor would be uncertainty as to the collection of the entire judgment. This latter factor was the rationale used to require the appointment of a nonparental guardian in White v. Osborne, 251 N.C. 56, 59-60, 110 S.E.2d 449, 451-52 (1959).

122. The trial judge could use his discretionary power to supervise the creation of a private support trust managed by a professional trustee, such as a bank. A private trust, properly administered, would provide the same security as a guardianship, but reduced judicial overview would result in substantial savings in administrative costs. *See* Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 334 (1960).