

Feature Article

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“Zone of Uncertainty”: New Developments in Damages for Wrongful Birth

On May 6, 2011, the Illinois Supreme Court handed down its opinion in *Clark v. Children’s Memorial Hospital*. No. 108656, 2011 WL 1733532 (Ill. 2011). In a lengthy and detailed opinion, the court held first that plaintiffs claiming wrongful birth may not recover damages for the costs of caring for their child beyond his or her majority, and second that the “zone of danger” rule does not apply to negligent infliction of emotional distress (NIED) actions where the claim for emotional distress is attached to a separate theory of tort liability. *Clark*, 2011 WL 1733532, at *16, *20. While the holdings appear relatively straightforward, a potential exception to the first holding in a divorce setting and the broad language of the second holding indicate that the boundaries of this opinion are far from settled.

The plaintiffs, Amy and Jeff Clark, sued multiple defendants for wrongful birth, including Children’s Memorial Hospital and Dr. Barbara Burton, a geneticist at that hospital. *Id.* at *1. The Clarks’ first child, Brandon, began to exhibit developmental delays when he was 15 months old. *Id.* Prior to making the decision to conceive another child, the plaintiffs wanted to know if Brandon’s developmental issues were symptoms of Angelman Syndrome, a disease which is sometimes caused by the mutation of an inherited gene. *Id.* at *1–*2. They sought the opinions of two geneticists at two different hospitals, the second of which was from Dr. Burton at Children’s Memorial. Both geneticists informed the Clarks that Brandon’s condition was not caused by a genetic mechanism. *Id.* Relying on this information, the Clarks conceived a second child, Timothy, who began exhibiting the same developmental delays as Brandon three months after his birth. *Id.* at 2. Eventually, the Clarks discovered that the genetic sequencing analysis that both geneticists relied upon in forming their respective opinions indicated that Brandon suffered from Angelman Syndrome due to a genetic mutation. *Id.* If either geneticist had ordered additional testing based upon the results of the genetic sequencing analysis, they would have discovered that Brandon had inherited the mutation from his mother. *Id.* Dr. Burton later admitted that she would have advised the Clarks differently if she had been aware of the inherited nature of the mutation. *Id.*

The Clarks’ complaint sought damages for the costs of caring for Timothy during his minority, the costs of caring for Timothy after he reaches the age of majority, Timothy’s lost wages, and damages for negligent infliction of emotional distress. *Id.* at *3. In its opinion, the supreme court primarily focused on two issues: (1) whether the plaintiffs could recover for damages for post-majority care of Timothy, and (2) whether the plaintiffs could recover for damages for emotional distress caused by defendants’ negligence. *Id.* at *4.

Post-Majority Expenses

The court centered its discussion regarding post-majority expenses around a single question; namely whether Illinois law requires parents to care for a disabled child after he or she reaches the age of majority. *Id.*

at *5. While parents have a claim for wrongful birth under Illinois law, the actual child has no claim for wrongful life. See *Siemieniec v. Lutheran General Hospital*, 117 Ill.2d 230, 512 N.E.2d 691 (1987). Thus, the supreme court reasoned, damages for post-majority expenses are only permissible if the parents have an obligation to expend resources for their child after that child reaches the age of majority. See *Clark*, 2011 WL 1733532 at *5. Through an analysis of case law from other states, public policy, common law, and statutory law, the court determined that no general obligation exists, and that, generally, plaintiffs in a wrongful birth action may not recover damages for post-majority expenses. See *Id.* at *6–*16.

In its analysis of case law from other states, the court found that whether such damages were available in any given state depended upon whether the law of that state obligated parents to care for their disabled adult children. *Id.* at *12. In states which imposed such an obligation, damages for post-majority expenses were permitted. *Id.* Likewise, in states which imposed no such obligation, damages for post-majority expenses were prohibited. *Id.* Regarding public policy, the court focused on the distinction between wrongful birth, wrongful life, and medical negligence causing prenatal or neonatal injury. *Id.* at *16. Under Illinois law, there is no claim for wrongful life, and unlike a claim for medical negligence causing injury to a child, a claim for wrongful birth may not be brought by the child. *Id.* The court stated that public policy is best served when the distinction between these claims is kept intact, and because plaintiffs are only entitled to damages for the harm they suffered, the issue of damages for post-majority expenses ultimately comes down to whether or not the parents have a legal obligation to care for their disabled adult children. See *Id.*

While the court ultimately determined that no general obligation of parents to care for their disabled adult children exists, the court’s analysis of the common law and statutory law left open one avenue by which future plaintiffs might be able to recover damages for post-majority expenses—cases in which the parents are divorced. In its analysis of the common law, the court found that “the obligation of parents to support a disabled adult child . . . [is] limited to [cases] in which a custodial parent sought support from a non-custodial parent following a divorce.” *Id.* at *8. The court’s analysis of statutory law resulted in a similar conclusion. While the court found that the Public Aid Code, the Mental Health and Developmental Disabilities Code, and the Family Expense Act impose no obligation on parents to provide post-majority care for their disabled children, the court also found that the Illinois Marriage and Dissolution of Marriage Act gives courts discretion to award expenses for the post-majority care of a disabled child in divorce cases. *Id.* at *8–*12. Justice Freeman, in his dissent, suggested that the majority’s construction of the Illinois Marriage and Dissolution of Marriage Act “[encourages] divorce as [a] way around its ruling.” *Id.* at *28 (Freeman, J., dissenting). Indeed, the majority even recognized that, if the plaintiffs were to divorce at some point in the future, an obligation for post-majority care might be created. *Id.* at *11.

The language of the dissent will invariably spawn a renewal of this issue in a future wrongful birth claim involving divorced parents. Both the number of claims and the damages available for those claims, however, would be limited. First, any such claim would be limited to a case in which a previous divorce court imposed an obligation on one parent to provide post-majority expenses for a disabled child. Second, in such a case, the damages would seemingly be limited to the amount of expenses imposed upon the parent with the obligation.

Regardless of the limited nature of the exception, there are some solid arguments against allowing damages for post-majority expenses in divorce cases. To begin, one can argue that the exception itself is clearly against public policy. As the dissent notes, such an exception would greatly encourage divorce for parents claiming wrongful birth, as that appears to be a clear and relatively simple way around the court’s holding. See *Id.* at *28. Additionally, a number of practical problems arise with the implementation of such an exception. One such problem would arise if the parents decided to re-marry in the future. Damages would already have been awarded, and yet the parental obligation no longer exists. Such a situation, considering the economic benefits of getting a divorce prior to a trial for wrongful birth, is not only possible, but inevitable. Another issue is the amount of such damages, or how to determine the actual damages when variables regarding the parental obligation (such as death of the obligated parent) cannot be determined. It is important to remember that the child has no claim for wrongful birth, and the damages in such a case would be to relieve the obligated parent of his or her expenses, not to provide relief for the child. Determining the monetary

amount of a divorced parent's obligation would be difficult, as the obligation to pay for post-majority expenses would not take effect until the child reached the age of majority. It is possible the parent may not survive long enough to see his or her child reach the age of majority, and it is also possible that the child might not live to reach the age of majority. In either case, the obligation to pay for post-majority expenses would not take effect.

Negligent Infliction of Emotional Distress

The second issue the court dealt with was whether the “zone of danger” test for claims of NIED was appropriate in wrongful birth cases. *Id.* at *17–*21. The court found that the test was not appropriate and held that the zone of danger rule only applies “in cases where the plaintiff’s theory of liability is the negligent infliction of emotional distress. It does not apply where, as in a wrongful birth case, a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort.” *Id.* at *20. The court justified its holding by distinguishing between NIED as an individual tort and NIED as an element of damages tacked onto a different tort, and noted that damages for NIED are available to plaintiffs claiming other personal torts, such as defamation, medical negligence, conversion, and misappropriation of identity. *Id.* at *18–*20. While the court dealt only with wrongful birth in *Clark*, it did not limit its holding to wrongful birth claims. *See Id.* Rather, the court’s sweeping language will inevitably be interpreted to extend damages for NIED to other cases where, previously, such damages would not have been available.

Impact of *Clark*

While the *Clark* opinion certainly changed the law regarding damages in wrongful birth cases, the impact of this opinion is currently unknown. The opinion’s vague language regarding a possible “divorce exception” to the general ban on damages for post-majority expenses and the broad language regarding NIED as an element of damages indicate that these issues are not settled, and that room for diligent advocacy exists in this realm.

About the Author

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