Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful Conception, and Does the Categorization Even Matter?

Imagine that parents of a child, who bears a genetic abnormality, attempt to discern the risks in conceiving another child. Because they are concerned about the possibility of conceiving a second child with a similar defect, the parents consult a doctor for genetic testing. The doctor carelessly neglects to facilitate critical genetic tests, yet ensures the parents that the risks of an abnormality in a second child are low. Based on these optimistic test results, the parents choose to have another child. Despite the doctor’s assurances, the second child is born with the same genetic defect as the first child. The parents elect to sue the doctor for the erroneous medical consultation. Which prenatal cause of action should these parents bring for a claim based on negligent preconception genetic testing?

“Confusion . . . arises as to the proper denomination of these prenatal torts. Because this area of the law is new and fraught with emotion, both courts and commentators have often blurred . . . distinctions among the actions. Believing those distinctions are vitally important to both theory and outcome, we commence . . . .”

I. INTRODUCTION

Medical advancements currently allow parents to undergo preconception or neonatal genetic testing to determine the likelihood of a childhood defect. The advent of genetic testing has compelled courts to develop novel causes of action based on traditional negligence principles to address these medical malpractice claims. Typically, courts recognizing such parental malpractice

actions address them as either wrongful birth claims or wrongful conception or pregnancy causes of action. 4

A thorough lack of consistency in how jurisdictions consider these claims, however, permeates prenatal tort law and cultivates confusion. 5 Some courts compartmentalize facts into specific prenatal causes of action yet diverge in their differentiations and in how they provide compensation to parental victims. 6 Other jurisdictions recognize these parental claims exclusively under traditional negligence principles instead of a new set of prenatal legal rights. 7

4. See Kassama, 792 A.2d at 1115 (clarifying parental claim categories as wrongful birth and wrongful conception or pregnancy); Jennifer R. Granchi, The Wrongful Birth Tort: A Policy Analysis and the Right to Sue for an Inconvenient Child, 43 S. TEX. L. REV. 1261, 1264-66 (2002) (discussing birth-related torts, including parental claims termed wrongful pregnancy and birth); see also Kush v. Lloyd, 616 So. 2d 415, 417 n.2 (Fla. 1992) (distinguishing wrongful conception from wrongful pregnancy). The Kush court associated situations involving sterilization and contraceptive administration with wrongful conception and associated fault abortion procedures with wrongful pregnancy. Kush, 616 So. 2d at 417 n.2. This note will not distinguish between wrongful pregnancy and conception because numerous courts and commentators tend to use the terms interchangeably. See, e.g., Walker, 790 P.2d at 737 (using terms wrongful conception and pregnancy interchangeably); Siemieniec, 512 N.E.2d at 696 (discussing wrongful conception and wrongful pregnancy as one cause of action); Paula Bernstein, Fitting a Square Peg in a Round Hole: Why Traditional Tort Principles Do Not Apply to Wrongful Birth Actions, 18 J. CONTEMP. HEALTH L. & POL’Y 297, 301-02 (2001) (defining wrongful conception and wrongful pregnancy claims in context of one tort).


6. See Keel, 624 So. 2d at 1029 (identifying lack of consistency in how state courts allowing wrongful birth claims award damages); Abelson, 398 S.E.2d at 561-62 (emphasizing lack of consensus among courts in assessing damages in wrongful birth actions); Wilcoxon, supra note 5, at 1028-30 (identifying way courts diverge in categorizing certain factual scenarios as prenatal torts).

7. See Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 290 (Del. 1990) (refraining from use of wrongful birth label because claim presents traditional malpractice issues); Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000) (noting labels imply new torts and obscure malpractice analysis); Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., Inc., 802 N.E.2d 723, 729 (Ohio Ct. App. 2003) (classifying parental prenatal claims under traditional negligence principles). The Schirmer court noted, however, that prenatal labels are “useful monikers” even though it discussed the parental claim at bar within the bounds of traditional negligence. Schirmer, 802 N.E.2d at 729.
Conversely, a minority of jurisdictions prohibit either one or more of the prenatal causes of action or traditional negligence suits stemming from birth-related circumstances.  

Despite these varied approaches among the states, many courts nevertheless identify “typical” factual elements that correspond with either wrongful birth or wrongful conception claims, even though these distinctions can vary slightly.  

Wrongful birth cases tend to involve a planned pregnancy, postconception negligence, negligent neonatal testing or care, the birth of an unhealthy child and a parental action for the lost opportunity to terminate a pregnancy.  

Wrongful conception cases, in contrast, typically involve preconception malpractice, an unplanned pregnancy resulting in the birth a healthy child, negligence in sterilizations, abortion procedures, pregnancy diagnoses or contraception administration and a parental action for the lost opportunity to avoid a pregnancy.  

Negligent preconception genetic testing involves certain aspects associated with both of the “typical” characterizations of wrongful birth and wrongful conception. Specifically, it involves preconception negligence, a genetic testing context, a planned pregnancy, the birth of an unhealthy child and a
parental action for the lost opportunity to avoid conception. Preconception negligence and a lost opportunity to avoid pregnancy are facts associated with wrongful conception. The involvement of a planned pregnancy and an unhealthy child in the genetic testing context, however, implicate wrongful birth. Because negligent preconception genetic testing blurs these prenatal issues, it is not surprising that courts have treated such claims in an inconsistent manner.

In Part II, this note provides a historical context of the prenatal torts, with a specific emphasis on wrongful birth and wrongful conception, and explains typical judicial approaches to these causes of action. Part III details three different jurisdictional approaches to negligent preconception genetic testing issues. Specifically, this note examines North Carolina and Minnesota, which treat negligent preconception genetic testing as wrongful conception, Colorado and Washington, which categorize genetic testing negligence as wrongful birth, and Indiana and Nevada, which are likely to treat such actions as ordinary malpractice.

Part IV analyzes the merits of these different judicial approaches and suggests negligent preconception genetic testing best fits under the wrongful birth rubric, rather than wrongful conception. Within the Analysis, this note acknowledges the state-to-state prenatal tort classification discrepancies.

13. See Molloy v. Meier, 679 N.W.2d 711, 713-15 (Minn. 2004) (outlining facts of case involving negligent preconception genetic testing); McAllister v. Ha, 496 S.E.2d 577, 580 (N.C. 1998) (detailing factual scenario involving negligent preconception genetic testing). In Molloy and McAllister, the parental claimants argued that medical negligence deprived them of the opportunity to make an informed decision regarding whether to have a child. Molloy, 679 N.W.2d at 715; McAllister, 496 S.E.2d at 580.

14. See supra note 11 and accompanying text (defining aspects of wrongful conception action).

15. See supra note 10 and accompanying text (defining elements typically associated with wrongful birth claim).

16. Compare Gallagher v. Duke University, 852 F.2d 773, 776 (4th Cir. 1988) (explaining preconception genetic counseling negligence constitutes wrongful conception), and Molloy, 679 N.W.2d at 722-23 (classifying preconception genetic testing claim as wrongful conception), with Lininger ex rel. v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988) (identifying claim based on negligence in preconception genetic testing context as wrongful birth), and Vicearo v. Milunsky, 551 N.E.2d 8, 9 n.3, 10 (Mass. 1990) (phrasing preconception negligence action as wrongful birth although refraining from express label use).

17. See infra Part II (outlining traditional judicial treatments of prenatal torts).

18. See infra Part III (explaining different judicial treatments of negligent preconception genetic testing issues).


20. See infra Part IV.A (contending negligent preconception genetic testing constitutes wrongful birth).

21. See infra Part IV.B (recognizing confusion in labeling birth-related claims).
IV ultimately argues, however, that courts should clearly classify prenatal claims because they dictate whether parents have a viable cause of action in certain states, affect the damages awarded to parental claimants and additionally, are “so entrenched in normal usage that it is difficult to abstain from their use.”

II. HISTORY OF THE PRENATAL TORTS: POLICY DILEMMAS, INDISTINCT DEFINITIONS, AND WIDE-RANGING DAMAGE ALLOCATION

In *Gleitman v. Cosgrove*, an early prenatal tort case, the New Jersey Supreme Court precluded parental recovery. The court prohibited the claim despite the parents’ argument, now typical in birth-related actions, that a physician’s negligence deprived them of the opportunity to terminate a pregnancy. The court resisted awarding damages to compensate for the “intangible, unmeasurable, and complex human benefits of motherhood and fatherhood.” In dismissing the parental complaint, the court emphasized the sanctity of life. The New Jersey Supreme Court has since modified its position on prenatal torts and has adapted its laws to permit such claims.


24. See *Gleitman*, 227 A.2d at 692-94 (denying parental recovery). Mrs. Gleitman, a pregnant woman, consulted two doctors to determine whether her infection of measles would harm her in-utero child. *Id.* at 690. The doctors assured her that, despite her illness, the child would be healthy. *Id.* Her child Jeffrey, however, was born with serious defects. *Id.* A medical expert testified that these abnormalities were “causally related” to Mrs. Gleitman’s measles and that the two doctors deviated from medical standards by assuring her that the child would not be affected. *Id.*

25. *Id.* at 692-94 (concluding parental claim states no legal cause of action).

26. *Id.* at 693.

27. *Id.* (articulating moral concerns necessitating denial of parental recovery). The *Gleitman* court struggled with the argument that the parents’ inability to seek an abortion was a legal injury. *Gleitman*, 227 A.2d at 693. It likewise encountered difficulty in considering how to measure damages associated with parenting an unhealthy child. *Id.* Despite the court’s acknowledgement that Mrs. Gleitman could have sought an abortion without criminal punishment, it denied the parental claim because the sanctity of Jeffrey’s life outweighed the parent’s “unfortunate situation.” *Id.* In dismissing the parental claim, the court similarly rejected a wrongful life claim brought on behalf of Jeffrey. *Id.* at 692.

Other states have engaged in a similar legal struggle regarding the general permissibility of these prenatal suits, their legal character, the policy difficulties in favor of and opposition to these claims, and how to fairly compensate claimants.  

A. Policy Dilemmas

The emergence a few decades ago of birth-related actions, from decisions such as New Jersey’s Gleitman, has resulted in a divergent field of prenatal tort law. Much of this variance is due to the inherently divisive policies that surround birth-related torts. Courts, by their prohibition or allowance of these claims and their allocation or exclusion of damages, are impliedly holding certain values or policies over others. These policy questions permeating prenatal tort discussion include whether genetic disabilities are compensable injuries, whether damages associated with an unhealthy or unwanted child should have a monetary value, the extent of medical duty in the face of rapidly developing scientific and genetic capability, discrimination against persons with disabilities, abortion, reproductive rights, and the sanctity of life.

Even if one state’s legislature or judiciary does not sanction one or more of the birth-related torts, most courts at least recognize their legal pervasiveness in

---


30. See supra note 5 and accompanying text (detailing lack of uniformity in prenatal jurisprudence); see also Keel v. Banach, 624 So. 2d 1022, 1025-26 (Ala. 1993) (discussing Gleitman and noting most jurisdictions have rejected its reasoning for prohibiting wrongful birth).

31. See Becker v. Schwartz, 386 N.E.2d 807, 810 (N.Y. 1978) (stressing policies pervading birth-related claims). The Becker court stressed that “. . . it borders on the absurdly obvious to observe that resolution of this question transcends the mechanical application of legal principles. Any such resolution . . . must invariably be colored by notions of public policy, the validity of which remains, as always, a matter upon which reasonable men may disagree.” Id. at 810; Granchi, supra note 4, at 1281-85 (discussing policy considerations involved in birth-related lawsuits); Christy Hetherington, Note, Rhode Island Facing the Wrongful Birth/Life Debate: Pro-Disabled Sentiment Given Life, 6 ROGER WILLIAMS U. L. REV. 565, 565 (2001) (explaining prenatal policy “undertones” and corresponding state-wide discrepancies in treatment of birth-related claims); Wilcoxon, supra note 5, at 1053 (emphasizing wrongful birth and conception are “anything but traditional” because policies pervade legal issues).

32. See Bernstein, supra note 4, at 316-21 (explaining policy issues permeating birth-related torts); Wilcoxon, supra note 5, at 1035-40 (discussing public policy issues pervading prenatal tort law).

33. See Bernstein, supra note 4, at 316-21 (discussing “eugenic abortions,” medical duty, children as subjects of prenatal lawsuits feeling unwanted, and disabilities); Granchi, supra note 4, at 1281-85 (considering discrimination against disabled persons and abortion); Kelly E. Rhinehart, Student Article, The Debate Over Wrongful Birth and Wrongful Life, 26 LAW & PSYCHOL. REV. 141, 143-46 (2002) (considering policy issues pervading birth-related tort discussion). Rhinehart discusses policies surrounding the sanctity of life, a woman’s reproductive choices, the judicial award of parental damages in lawsuits involving unhealthy children, equal protection for disabled persons, and the medical duty involved in these lawsuits. Rhinehart, supra, at 143-46.
the medical malpractice arena. In their acknowledgement of these malpractice claims, many courts generally address them either under the basic theory of negligence or three specific prenatal labels. One of the prenatal classifications is wrongful life, which is a cause of action brought by or on behalf of an unhealthy child. In contrast, the other two classifications, wrongful birth and wrongful conception, are both parental claims.

With the exception of Washington, New Jersey, and California, wrongful life claims have met widespread judicial and statutory rejection. The majority of courts prohibit a child’s recovery for wrongful life primarily because of the policy problems with allowing a child to claim legal injury for having been born. A majority of courts, however, have identified legal merit in the two parental causes of action: wrongful birth and wrongful conception. Legal recognition of the two parental claims, specifically wrongful birth, became prevalent in large part due to the legalization of abortion after Roe v. Wade.

34. See, e.g., Kush v. Lloyd, 616 So. 2d 415, 417 nn. 2-3 (Fla. 1992) (per curiam) (discussing three prenatal claims: wrongful birth, wrongful conception or pregnancy, and wrongful life); Taylor, 600 N.W.2d at 674 (recognizing three birth-related torts of wrongful life, wrongful conception and wrongful birth); Becker, 386 N.E.2d at 810-11 (distinguishing wrongful life, wrongful conception, and wrongful birth).


37. Hetherington, supra note 31, at 568 (characterizing wrongful birth and conception as parental claims).


39. See Lininger ex rel. Lininger v. Eisenbaum, 764 P.2d 1202, 1210 (Colo. 1988) (emphasizing majority of courts’ refusal to recognize disabled life as legally recognizable injury); T. Brendan Kennedy, Comment, The Cost of Living: Maryland’s Refusal to Recognize the Wrongful Life Cause of Action Short-Changes Plaintiffs, 32 U. BALT. L. REV. 97, 102-03 (2002) (discussing rationales behind majority of jurisdictions’ prohibition of wrongful life). Kennedy explains that many courts refuse to recognize a “legal right to be born” and, thus, children bringing such suits do not present a recognizable legal injury. Kennedy, supra, at 102. Additionally, Kennedy highlights the numerous public policy issues involved in allowing recovery, including respect for “the sanctity of life” and “defective” or genetically unhealthy children. Id. at 103.

40. See Schirmer v. Mt. Auburn Obstetrics & Gynecologic Asso., Inc., 802 N.E.2d 723, 728 (Ohio Ct. App. 2003) (noting twenty states and District of Columbia recognize parental claims of wrongful birth); Flanagan v. Williams, 623 N.E.2d 185, 773-74 (Ohio Ct. App. 1993) (discussing majority of jurisdictions allow parental recovery either as wrongful birth or traditional negligence, abrogated by Simmerer v. Dabbas, 733 N.E.2d 1169, 1174 (Ohio 2000). The Flanagan court noted parental claimants should recover because if courts prohibited recovery, the prohibition would act to “immunize from liability those health care providers who negligently fail to provide adequate guidance to parents regarding potential genetic defects, either through pre-pregnancy counseling or prenatal care.” Flanagan, 623 N.E.2d at 775; see also Sullivan, supra note 2, at 113 (emphasizing majority of states’ legal systems permit wrongful conception claim).

Parental birth-related claims are more widely accepted than wrongful life claims because courts generally are able to pinpoint a legal injury. The courts that allow such claims view the lost parental opportunity to avoid conception or terminate a pregnancy as the legally cognizable injury, rather than expressly framing the child’s life itself as the injury. This enables many courts to circumvent policy difficulties. Only a minority of states prohibit one or both of the parental birth-related causes of action. States that do prohibit one or more of the parental claims do so largely because of perceived policy concerns. These morality-dominated concerns prevent such legal systems from recognizing the presence of a legal injury or causation.

42. See Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993) (framing injury as lost opportunity to decide whether to conceive child or terminate pregnancy); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 695 (Ill. 1987) (discussing negligence in birth-related action deprives parents of choice regarding whether to have child).

43. See supra note 42 and accompanying text (discussing character of injury in parental birth-related action); Hetherington, supra note 31, at 569 (identifying injury in birth-related lawsuit as denial of parental choice regarding whether to have child). Hetherington reflects on how courts have changed perceptions of what constitutes a recognizable injury and causation when discussing prenatal torts. Hetherington, supra note 31, at 569. Generally, courts recognizing such claims do not hold that a doctor’s negligence caused the child’s defect, but instead, conclude that medical negligence deprived parents of a choice regarding whether to conceive or give birth to a child. Id.

44. Hetherington, supra note 31, at 569 (discussing prenatal injury in context of birth-related torts). By viewing the lost parental opportunity as a recognizable injury in birth-related cases, courts refrain from concluding that a child’s genetic abnormality is the compensable injury, thereby avoiding public policy problems. Id. But see Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689 (Ky. 2003) (declining “to equate” parents’ lost opportunity to terminate unhealthy child with cognizable legal injury). The court in Grubbs prohibited the parental claim based on perceived policy difficulties. Id.


B. Indistinct Definitions

Many courts that recognize birth-related claims select certain characteristics as distinctive hallmarks to differentiate between wrongful birth and wrongful conception. The distinguishing features can include the health of the child, the timing of the medical negligence, or the factual circumstances in which the negligence occurred. The “hallmark” that one state court selects, however, can directly create a definitional conflict with another state court’s selected “hallmark.” This then generates inconsistencies from state to state in how courts associate facts with a parental cause of action.

Some courts avoid this labeling confusion by refraining from the use of classifications altogether and by discussing the claims without distinction, thereby adding another layer to the multifaceted prenatal tort backdrop. Regardless of whether one state’s courts use prenatal labels, however, all parental claimants must prove the fundamental elements of a negligence claim.

C. Wide-Ranging Damage Allocation

In addition to the varied ways courts define wrongful birth and wrongful conception, the distribution of damages associated with these claims is also inconsistent from state to state. Just as policy difficulties permeate a court’s decision regarding the allowance or prohibition of these claims, policy

48. See infra note 74 and accompanying text (utilizing timing of negligence as defining characteristic of birth-related lawsuits); infra note 85 and accompanying text (using health of child as defining characteristic).

49. See Wilcoxon, supra note 5, at 1027-30 (explaining three ways courts distinguish wrongful birth and wrongful conception). Wilcoxon identifies these distinguishing approaches and highlights inconsistencies caused by the varied ways that states differentiate between the two claims. Id.

50. See Rhinehart, supra note 33, at 141-42 (noting difficulties with characterizing birth-related claims). Rhinehart notes, “[t]he present problem is that the same set of facts may encompass a cause of action in one state, but not in another.” Id.

51. See Wilcoxon, supra note 5, at 1027-30 (identifying discrepancies among states in birth-related tort field).

52. See supra note 7 and accompanying text (providing examples of courts refraining from labeling prenatal claims); infra Part III.C (explaining Indiana and Nevada refrain from prenatal tort labeling).


complexities likewise influence how courts award damages to parents. 56 Notwithstanding policy concerns, courts generally attempt to award compensation to claimants in birth-related cases subject to the overarching goal of common-law tort. 57 Tort law dictates that courts award damages to make claimants whole and adequately compensate them for injuries sustained at the hands of the wrongdoing party. 58

In wrongful birth and wrongful conception claims, courts choose from a few different theories to compensate parents. 59 These conventional avenues in wrongful birth actions include awarding damages for the extraordinary costs associated with raising an unhealthy child until the child attains the age of majority, these same costs beyond the age of the child’s majority, damages for parental emotional harm, and compensation for comprehensive child rearing costs. 60 When compensating a wrongful conception claimant, damages typically range from hospital costs and pain associated with the faulty medical procedure, the unexpected pregnancy and birth of a child, to these medical costs plus extensive child rearing costs. 61 Some courts that award child rearing

56. See Siemieniec, 512 N.E.2d at 706 (articulating how complex issues involved in birth-related lawsuits affect damage distribution to claimants); Schroeder v. Perkel, 432 A.2d 834, 841 (N.J. 1981) (discussing difficulties in awarding damages in wrongful conception and wrongful birth lawsuits), abrogation recognized by Hummel v. Reiss, 608 A.2d 1341, 1344-45 (N.J. 1992) (noting prohibition of wrongful life action no longer applies). The Schroeder court noted, “the problems of wrongful conception and wrongful birth involve an evaluation not only of law, but also of morals, medicine and society. Thus, it is not surprising that the same issue may elicit divergent judicial responses.” Schroeder, 434 A.2d at 841.

57. See Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1992) (acknowledging courts abide by fundamental goal when awarding damages to compensate tort claimants); Siemieniec, 512 N.E.2d at 706 (explaining “general rule of damages in a tort action”).


59. See Sullivan, supra note 2, at 119 (detailing different approaches to awarding damages in birth-related context).

60. See Keel v. Banach, 624 So. 2d 1022, 1029-30 (Ala. 1993) (allowing extraordinary expenses during child’s minority, parents’ emotional and physical damages, and loss of consortium); Siemieniec, 512 N.E.2d at 706 (noting some jurisdictions award extraordinary expenses beyond child’s majority); Viccaro v. Mihunski, 551 N.E.2d 8, 10-11 (Mass. 1990) (providing discussion of jurisdictional damage allocation in wrongful birth lawsuits); Granchi, supra note 4, at 1279-81 (discussing array of damages awarded in wrongful birth action). Granchi explains that the majority of courts award damages for extraordinary costs associated with caring for an unhealthy child until the age of majority, while a minority of jurisdictions have awarded all child-rearing costs. Granchi, supra note 4, at 1279-80. Granchi also discusses recovery for emotional harm for parental claimants in the wrongful birth context. Id. The Keel court noted, however, that a majority of jurisdictions do not compensate parents for emotional distress. Keel, 624 So. 2d at 1029.

61. See Simmerer v. Dabbas, 733 N.E.2d 1169, 1172 (Ohio 2000) (recognizing four different recovery theories for wrongful conception action). The Simmerer court discussed four theories: full recovery (including child rearing and pregnancy-related costs), limited recovery (damages related to the failed procedure, pregnancy, and birth), the benefits rule (offsetting damages with the benefits associated with having a child), and no recovery. Id. at 1172; James G. v. Caserta, 332 S.E.2d 872, 887-78 (W. Va. 1985) (discussing damages awarded to claimant in wrongful conception claim). The James G. court awarded hospital and medical costs, and expenses for lost wages and loss of consortium, but did not grant expenses for raising a healthy child, partly because of the speculative nature of child-rearing costs. James G., 332 S.E.2d at 877-78. The court
costs to compensate parents for wrongful conception or wrongful birth actions follow the benefits rule. Under this rule, the court monetarily offsets the benefits associated with parenthood from the total damages awarded.

III. AN EXAMINATION OF THREE DIFFERENT APPROACHES TO NEGLIGENT PRECONCEPTION GENETIC TESTING

Like the more typical factual situations associated with prenatal torts—including deficient sterilizations, abortions, contraceptive distribution, pregnancy diagnoses and neonatal medical testing and care—courts approach negligent preconception genetic testing in a divergent manner. Because this strain of parental claims factually implicates aspects associated with both wrongful birth and wrongful conception, courts have varied in their approaches to this specific prenatal issue. Courts’ characterizations of prenatal torts generally determine whether they address negligent preconception genetic testing issues as wrongful birth, wrongful conception, or simply as ordinary negligence.

A. Minnesota and North Carolina: Categorizing Negligent Genetic Testing Claims as Wrongful Conception

The Minnesota and North Carolina legal systems generally prohibit wrongful birth actions. Minnesota statutorily bars parental action alleging
wrongful birth, while the North Carolina Supreme Court has refused to recognize it. Despite these prohibitions on wrongful birth, parents can bring wrongful conception claims in both states. Both North Carolina and Minnesota, in *McAllister v. Ha* and *Molloy v. Meier* respectively, have extended the more traditional approach to wrongful conception. These states have expanded wrongful conception from the contexts of negligent sterilizations, abortions, pregnancy diagnoses, or contraceptive administration, to circumstances involving negligent genetic testing. The courts in these states focus primarily on the timing of the negligence when characterizing these claims, rather than the health of the child or the factual circumstances surrounding the malpractice.

---

68. See *Minn. Stat.* § 145.424 (2004) (prohibiting wrongful birth and wrongful life claims). The Minnesota statute specifically bans wrongful birth claims and provides that: “No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.” *Id.*; see also *Azzolino*, 337 S.E.2d at 537 (barring both wrongful birth and wrongful life actions). The *Azzolino* court refused to recognize a wrongful birth claim absent legislative action on the issue. *Azzolino*, 337 S.E.2d at 533. The court declined to treat human life as an injury and, considered the lack of consensus among the states regarding damages as evidence of the problems associated with birth-related claims. *Id.* at 533-34. Additionally, because prenatal torts involve compensation for the “creation” of human life, the court emphasized that prenatal torts are not ordinary tort claims. *Id.* at 534.


70. 496 S.E.2d 577 (N.C. 1998).

71. 679 N.W.2d 711 (Minn. 2004).

72. See supra note 11 and accompanying text (discussing typical factual circumstances in wrongful conception claim); see also *Batten*, supra note 61, at 927 (arguing North Carolina Supreme Court incorrectly extended wrongful conception framework to negligent genetic testing). Batten argues the court’s decision in *McAllister* “adds confusion and inconsistency to an area of the law that is already plagued with a multitude of philosophical and moral challenges” and it “is not illustrative of a wrongful conception cause of action.” *Batten*, supra note 61, at 927, 932.

73. See *Gallagher v. Duke Univ.*, 852 F.2d 773, 776 (4th Cir. 1988) (labeling negligent genetic testing as wrongful conception action); *Molloy*, 679 N.W.2d at 722-23 (classifying negligent genetic testing as wrongful conception action); *McAllister v. Ha*, 496 S.E.2d 577, 582 (N.C. 1998) (allowing wrongful conception claim in case involving negligent genetic testing). The *Gallagher* and *McAllister* courts both likened claims for negligent genetic testing to a case involving a failed sterilization where the court granted recovery under the theory of wrongful conception, rather than *Azzolino*, which barred wrongful birth. *Gallagher*, 852 F.2d at 775-76; *McAllister*, 496 S.E.2d at 581-82. The *Gallagher* court noted, “[b]ecause the North Carolina Supreme Court recognizes a cause of action for medical malpractice based on wrongful conception when a normal child is born, we are confident that the Court would recognize a cause of action based on the same malpractice when a genetically defective child is born.” *Gallagher*, 852 F.2d at 776.

74. See *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 17 (Minn. 1986) (Simonett, J., concurring) (emphasizing wrongful birth involves right to abort and wrongful conception involves right not to conceive); *McAllister*, 496 S.E.2d at 582 (distinguishing parents’ wrongful conception claim from prohibited wrongful birth action). The *McAllister* court emphasized that the parents’ lost opportunity to decide whether to conceive a child was the legal injury. *McAllister*, 496 S.E.2d at 582.
example, the legislature exclusively identifies the prohibited wrongful birth claim as one that, “but for the negligent conduct of another, a child would have been aborted,” thus leaving parents to recover only in situations involving preconception negligence. Accordingly, the approach of North Carolina and Minnesota to such issues requires that negligent genetic testing claims fit plainly into the wrongful conception category. Though negligent preconception genetic testing appears to involve aspects associated with the wrongful birth action, the courts in these two states label these claims as wrongful conception. Because of this designation, the claim itself survives scrutiny and is not barred by the existing judicial or statutory prohibitions against wrongful birth claims.

B. Colorado and Washington: Applying the Wrongful Birth Label to Negligent Genetic Testing Claims

While the Washington legal system specifically permits wrongful conception actions, the Colorado court system and legislature have yet to directly address the issue. Courts in both states, however, legally permit parents to bring wrongful birth claims. Colorado and Washington courts have treated claims involving preconception negligence issues as wrongful birth actions, in Lininger ex rel. Lininger v. Eisenbaum and Harbeson v. Parke-Davis, respectively. Thus, because these states allow wrongful birth claims

76. See Molloy v. Meier, 679 N.W.2d 711, 723 (Minn. 2004) (holding complaint stated wrongful conception action because of preconception timing of negligence). Because the parents argued that they would have avoided conception had they known of the possibility of a genetic deformity in a second child, the court in Molloy concluded that the complaint stated a wrongful conception rather than wrongful birth action. Id.; see also McAllister, 496 S.E.2d at 582 (noting complaint alleging inability to make informed choice regarding conception stated wrongful conception claim).
77. See supra note 73 and accompanying text (noting negligent genetic testing presents wrongful conception claim).
78. See Molloy, 679 N.W.2d at 723 (concluding claim survives scrutiny despite statutory wrongful birth prohibition); McAllister, 496 S.E.2d at 582 (holding suit not barred under North Carolina’s judicial ban against wrongful birth); see also Lindsay Fortado, Genetic Testing Maps New Legal Turf: Doctor’s Liability Grows as Tests are More Widely Used, NAT’L L.J., Sept. 6, 2004 at 1 (noting Molloy case presents “newer strain of wrongful conception litigation”).
79. See Lininger ex rel. Lininger v. Eisenbaum, 764 P.2d 1202, 1204 n.3 (Colo. 1988) (refusing to express opinion on wrongful conception because facts not presented in case); McKernan v. Aasheim, 687 P.2d 850, 856 (Wash. 1984) (permitting wrongful conception action but limiting damages).
80. See Lininger, 764 P.2d at 1208 (allowing action and classifying it as wrongful birth largely due to birth of unhealthy child); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 488 (Wash. 1983) (permitting parental recovery for wrongful birth claim). The Harbeson court emphasized that wrongful birth “conforms comfortably to the structure of tort principles and that recognition of wrongful birth claims is a logical and necessary development.” Harbeson, 656 P.2d at 488.
81. 764 P.2d 1202 (Colo. 1988).
82. 656 P.2d 483 (Wash. 1983).
83. See Lininger, 764 P.2d at 1208 (treat[ing negligent genetic testing under wrongful birth heading); Harbeson, 656 P.2d at 494 (classifying preconception medical malpractice resulting in birth of unhealthy child
generally, parents have been successful in alleging these issues.84

Many courts, including those in Colorado and Washington, distinguish wrongful birth as involving the birth of an unhealthy child and wrongful conception as relating to the birth of a healthy child.85 Because the courts in these states view the health of the child as a defining differentiation between the two parental claims, negligent genetic testing issues involving unhealthy children straightforwardly fits into these states’ wrongful birth rather than wrongful conception category.86 Additionally, several courts and commentators define wrongful birth as negligence resulting in a “defective” child that deprived parents of the choice to avoid conception or terminate a pregnancy.87 Therefore, states utilizing this definition may also consider negligent preconception genetic testing allegations as a wrongful birth issue as wrongful birth).  

Lininger involved a typical negligent preconception genetic testing situation: parents underwent genetic testing to determine whether a defect in their first child was likely to manifest in a second child. Lininger, 764 P.2d at 1203-04. Despite optimistic medical feedback, they conceived another child with genetic defects. Id.  

Harbeson, in contrast, presents a variation on the negligent preconception testing situation: a mother who ingested medication to treat epilepsy discussed with a doctor the effects this medication would have on a pregnancy. Harbeson, 656 P.2d at 463. She received assurances that a child would be healthy and subsequently gave birth to two children with birth defects emanating from her ingestion of the epilepsy medication. Id.  

Although Harbeson involves medicinal side-effects rather than genetic testing, the parents in the case presented a comparable claim involving preconception malpractice, an intentional pregnancy in reliance on medical assurances, and a child subsequently born with a birth defect. Id.  

84. See Lininger, 764 P.2d at 1208 (allowing parental recovery for wrongful birth); Harbeson, 656 P.2d at 493 (permitting parental recovery under theory of wrongful birth).  

85. See Lininger ex rel. Lininger v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988) (defining claim for wrongful birth as malpractice resulting in birth of unhealthy child); Viccaro v. Milinsky, 551 N.E.2d 8, 9 n.3 (Mass. 1990) (noting wrongful birth involves unhealthy children and wrongful conception or pregnancy involves healthy children); Harbeson, 656 P.2d at 488 (distinguishing wrongful birth from wrongful conception based on health of child); see also Hensel, supra note 47, at 151-55 (discussing wrongful birth as involving unhealthy children and wrongful conception as involving healthy children).  


87. See Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993) (characterizing parental claims for lost opportunity to avoid conception or abort pregnancy as wrongful birth); Kush v. Lloyd, 616 So. 2d 415, 417 n.2 (Fla. 1992) (defining wrongful birth action). Specifically, the Kush court defined wrongful birth as “that species of medical malpractice in which parents give birth to an impaired or deformed child and allege that negligent treatment or advice deprived them of the opportunity or knowledge to avoid conception or to terminate the pregnancy.” Kush, 616 So. 2d at 417 n.2 (citing BLACK’S LAW DICTIONARY 1612 (6th ed. 1990)); Lori B. Andrews, Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks, 29 HOUS. L. REV. 149, 153-54 (1992) (noting wrongful birth entails failure to warn before or after conception); Catherine Palo, Cause of Action for Wrongful Birth or Wrongful Life, 23 C.O.A.2d 55 (2003) (defining wrongful birth as negligence depriving parental choice regarding conceiving or preventing birth); Ronen Perry & Yehuda Adar, Wrongful Abortion: A Wrong in Search of a Remedy, 5 YALE J. HEALTH POL’Y, L., & ETHICS 507, 513-15 (2005) (defining wrongful birth and wrongful conception). Perry and Adar define wrongful birth as those “cases in which a woman . . . seeks medical advice regarding the health of her fetus, and decides to conceive or to continue her pregnancy once the adviser maintains that the child will not be born with congenital disabilities, a statement that is later found to be incorrect.” Perry & Adar, supra, at 514 (emphasis added); Sullivan, supra note 2, at 109 (acknowledging wrongful birth action as involving lost opportunity to avoid conception or abort pregnancy).
because it corresponds within their existing wrongful birth framework.  

C. Indiana and Nevada: Negligent Preconception Genetic Testing Claims as Traditional Negligence

The legal systems in Indiana and Nevada regard prenatal claims as presenting traditional medical malpractice issues. Therefore, courts in both states, in Bader v. Johnson and Greco v. United States respectively, have declined to label parental causes of action as either wrongful birth or wrongful conception because they consider the labels as unnecessary in the legal analysis. Although these states have not specifically dealt with negligent preconception genetic testing issues, their refusal to apply new characterizations would likely extend to this area.

When presented with negligent preconception genetic testing, the Indiana and Nevada courts, and other courts that similarly avoid prenatal labeling, are likely to continue refraining from any form of categorization. Instead, these courts will examine negligent genetic testing facts to determine whether the claim satisfies the requisite negligence analysis. Only if these parents prove all of the elements of a negligence action will these courts permit parental recovery.

---

88. See supra note 87 and accompanying text (noting wrongful birth definition utilized by many courts and commentators).
89. See Bader v. Johnson, 732 N.E.2d 1212, 1216-17 (Ind. 2000) (discussing parental claim as ordinary medical malpractice); Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (applying traditional negligence principles rather than creating new birth-related tort). In both Bader and Greco, the parents asserted medical negligence in the neonatal context. Bader, 732 N.E.2d at 1215; Greco, 893 P.2d at 346-47. Essentially, in both cases, medical professionals either neglected to perform neonatal testing or failed to diagnose abnormalities with which the child would be born. Bader, 732 N.E.2d at 1215; Greco, 893 P.2d at 347. The plaintiffs argued that this negligence deprived them of the opportunity to make an informed choice about whether to terminate the unhealthy pregnancy. Bader, 732 N.E.2d at 1215; Greco, 893 P.2d at 347.
90. 732 N.E.2d 1212 (Ind. 2000).
91. 893 P.2d 345 (Nev. 1995).
92. See Bader, 732 N.E.2d at 1216 (refraining from specific characterizations of birth-related claims); Greco, 893 P.2d at 348 (declining use of prenatal labels with reference to birth-related claims). The Greco court noted, “we see no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the new name . . . .” Greco, 893 P.2d at 348.
93. See Bader, 732 N.E.2d at 1216 (discussing common law negligence application); Greco, 893 P.2d at 348 (emphasizing parental claim in birth-related context presents ordinary negligence).
94. See supra note 92 and accompanying text (discussing Nevada and Indiana courts’ abstention from labeling birth-related parental claims); see also Viccaro v. Milunsky, 551 N.E.2d 8, 9 n.3 (Mass. 1990) (allowing parental recovery for wrongful birth but abstaining from utilizing prenatal labels). The Viccaro court noted, “[t]hese labels are not instructive. Any ‘wrongfulness’ lies not in the life, the birth, the conception, or the pregnancy, but in the negligence of the physician . . . . [W]e . . . abstain in this case from using the labels . . . .” Viccaro, 551 N.E.2d at 9 n.3.
95. See Bader, 732 N.E.2d at 1216-17 (requiring negligence elements of duty, breach, causation, and damages).
96. See Greco, 893 P.2d at 348 (noting recovery based on claimants proving defendant breached duty to parents causing injury).
IV. ANALYSIS

Despite the inconsistent case-law surrounding prenatal actions, courts should nevertheless make an initial determination regarding whether the facts presented by parents implicate wrongful birth or wrongful conception.97 Specifically, courts should align facts involving negligent genetic testing issues with the wrongful birth action.98 After making the determination that wrongful birth is the best applicable designation for negligent genetic testing scenarios, courts should analyze the claim using traditional negligence principles to conclude whether parents have a cognizable claim.99

A. Negligent Preconception Genetic Testing Issues Best Correspond to the Wrongful Birth Classification

Colorado and Washington provide models for courts regarding the treatment of parental claims involving negligent genetic testing issues.100 These states appropriately treat the parental claims as implicating wrongful birth.101 Although the Minnesota and North Carolina courts properly view the preconception timing of the negligence as denoting wrongful conception, scrutinizing the factors associated with negligent genetic testing in their totality lends to a different interpretation.102 A planned pregnancy and the birth of an unhealthy child in a negligent genetic testing context overwhelmingly signify that this claim is, in essence, for wrongful birth.103

Classifying a claim involving negligent genetic testing as wrongful birth, instead of wrongful conception, makes the most sense from a definitional and conceptual standpoint.104 The crux of the wrongful birth complaint is that a

97. See supra note 4 and accompanying text (discussing categorizations of parental prenatal tort claims as wrongful birth or wrongful conception); see also Wilcoxon, supra note 5, at 1028-30 (recognizing difficulties in distinguishing whether courts should associate facts with wrongful birth or conception).
98. See supra note 83 and accompanying text (identifying treatment of negligent preconception genetic testing issues as presenting wrongful birth); see also Kush v. Lloyd, 616 So. 2d 415, 422-23 (Fla. 1992) (allowing recovery for negligent preconception genetic testing issues as wrongful birth).
99. See supra notes 53-54 and accompanying text (explaining negligence elements parents must prove in birth-related tort lawsuits).
100. See supra Part III.B (discussing approaches in Colorado and Washington concerning negligent genetic testing issues).
101. See supra Part III.A (noting Minnesota and North Carolina consider negligent preconception genetic testing as presenting wrongful conception); Part III.B (explaining Colorado’s and Washington’s treatment of negligent genetic testing issues as wrongful birth).
102. See supra notes 10-11 and accompanying text (relaying factual circumstances surrounding both parental prenatal claims); supra note 13 and accompanying text (discussing preconception genetic testing negligence specifically); supra note 74 and accompanying text (highlighting Minnesota and North Carolina focus on preconception timing and conclude facts present wrongful conception).
103. See supra notes 10-11 and accompanying text (comparing typical characteristics of both wrongful birth and wrongful conception causes of action).
104. See supra note 10 and accompanying text (identifying typical definitional aspects associated with wrongful birth action); supra note 87 and accompanying text (explaining frequent conceptualization of wrongful birth as involving lost chance to terminate or avoid pregnancy).
medical professional neglected to give parents indispensable information concerning a potential child’s health, thereby depriving them of the opportunity to make an educated decision regarding whether to have the child.\textsuperscript{105} Parents assert essentially the same argument in lawsuits stemming from preconception genetic testing negligence.\textsuperscript{106}

Most wrongful birth case law has specifically dealt with neonatal negligence and the lost opportunity to terminate a pregnancy, rather than preconception negligence and the lost opportunity to avoid conception, and this seems to support a wrongful conception classification.\textsuperscript{107} The timing of the negligent act, however, should not single-handedly transform such a complaint into a wrongful conception action.\textsuperscript{108} Courts should instead examine all of the circumstances of claims stemming from negligent genetic testing and conclude that such characteristics are most compatible with a wrongful birth classification.\textsuperscript{109}

Additionally, numerous jurisdictions and commentators already define wrongful birth as involving the lost opportunity for parents to make an informed choice regarding whether to avoid conception or terminate a pregnancy.\textsuperscript{110} By defining wrongful birth in such a manner, these courts appropriately negate timing as the sole imperative factor in distinguishing these parental claims.\textsuperscript{111} When courts utilize such a definition, there is no question that negligent genetic testing corresponds to wrongful birth.\textsuperscript{112} Courts should


\textsuperscript{106} See supra note 13 and accompanying text (highlighting claimants’ deprivation of informed choice regarding whether to avoid pregnancy).

\textsuperscript{107} See supra notes 10-11 and accompanying text (distinguishing wrongful birth as involving postconception negligence and wrongful conception as involving preconception negligence).

\textsuperscript{108} See Batten, supra note 61, at 930-31 (arguing preconception timing of negligence not sole factor when determining type of parental prenatal claim). Batten compared McAllister, a case concerning negligent genetic testing issues, with a prior North Carolina case involving a more typical wrongful conception context concerning a faulty sterilization procedure. Id. Batten argued that when courts contemplate which prenatal cause of action applies, the decisive differences between the wrongful birth and wrongful conception labels should outweigh any importance attached to the preconception timing of the negligent act. Id.

\textsuperscript{109} See supra notes 10-11 and accompanying text (discussing all factors typically associated with wrongful birth and conception).

\textsuperscript{110} See supra note 87 and accompanying text (noting courts and commentators frequently define wrongful birth as involving preconception and postconception negligence).

\textsuperscript{111} See supra notes 10-11 and accompanying text (noting timing of negligence as one factor associated with wrongful conception and birth claims); supra note 87 and accompanying text (discussing wrongful birth as involving preconception and neonatal negligence).

\textsuperscript{112} See supra note 13 and accompanying text (reviewing factors generally associated with negligent preconception genetic testing scenario); note 87 and accompanying text (defining wrongful birth without regard to mere timing of negligence).
align a complaint alleging an unplanned pregnancy, the birth of a healthy child, and factual contexts such as negligent sterilization, erroneous pregnancy diagnosis, faulty contraceptive distribution, or unsuccessful abortion procedures specifically with wrongful conception.\textsuperscript{113} Rather than extend the definition of wrongful conception, jurisdictions should view negligent preconception genetic testing issues as presenting a preconception strain of wrongful birth.\textsuperscript{114}

\textbf{B. An Argument in Favor of Prenatal Tort Label Retention}

The Indiana and Nevada courts properly conclude that prenatal claims invoke ordinary negligence principles.\textsuperscript{115} Courts, however, should not similarly abandon prenatal nomenclature.\textsuperscript{116} Because these labels are embedded in the prenatal landscape, neglecting to acknowledge their legal pervasiveness creates a detrimental result.\textsuperscript{117}

By failing to accept these classifications and by refusing to define the legal meanings behind them, courts intensify the confusion associated with birth-related torts.\textsuperscript{118} Because the labels permeate birth-related tort discussion, courts should attempt to associate the facts presented with the corresponding prenatal designation before discussing the legal merits of the claim.\textsuperscript{119} Courts may not

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{113} See supra note 11 and accompanying text (relaying typical factual circumstances associated with wrongful conception); see also Perry & Adar, supra note 87, at 513-14 (defining wrongful conception). Perry and Adar define wrongful conception as involving those “cases in which negligence by the defendant resulted in the birth of a healthy yet unwanted child. The negligence may manifest itself in the manufacture, provision, or installation of contraceptives; in the performance of vasectomy or tubal ligation; or in the carrying out of an abortion.” Perry & Adar, supra note 87, at 513. See generally Payne, supra note 11, at § 53 (identifying circumstances surrounding wrongful conception). Payne specifically identifies that “an action for wrongful pregnancy or wrongful conception is generally brought by the parents of a healthy, but unwanted, child against a pharmacist or pharmaceutical manufacturer for negligently filling a contraceptive prescription or against a physician for negligently performing a sterilization procedure or an abortion.” Payne, supra note 11, at § 53; Smith, supra note 45, § 4 (identifying nature of wrongful conception lawsuit). Smith discusses wrongful conception as involving circumstances including unsuccessful abortion procedures, sterilizations, and pregnancy diagnoses. Id.
\item \textsuperscript{114} See supra Part III.B (reviewing Colorado and Washington’s stance on negligent preconception issues specifically and prenatal torts generally).
\item \textsuperscript{115} See supra notes 53-54 and accompanying text (explaining parental claimants must prove negligence elements notwithstanding which label claim falls under); see also note 89 and accompanying text (explaining Indiana and Nevada consider birth-related torts as presenting traditional negligence principles).
\item \textsuperscript{116} See supra note 92 and accompanying text (explaining Indiana and Nevada abandon prenatal labels in favor of treating claims as ordinary negligence); see also Rhinehart, supra note 33, at 142 (urging legislatures to abandon prenatal tort distinctions in favor of malpractice principle utilization). Rhinehart emphasizes that because of the problem associated with differentiating prenatal torts, legislatures should terminate distinctions among them or actively operate to fine-tune their “parameters.” Rhinehart, supra note 33, at 142.
\item \textsuperscript{117} See supra notes 34-37 and accompanying text (emphasizing pervasiveness of discussion regarding prenatal torts and label usage); see also Lininger ex rel. Lininger v. Eisenbaum, 764 P.2d 1202, 1204 n.2 (noting integration of birth-related labels in general legal discussion regarding prenatal torts).
\item \textsuperscript{118} See supra note 5 and accompanying text (identifying present state of birth-related tort discussion as highly chaotic and confusing).
\item \textsuperscript{119} See Walker ex rel. Pizano v. Mart, 790 P.2d 735, 737 (Ariz. 1990) (suggesting courts make
\end{itemize}
\end{footnotesize}
necessarily recognize strong legal merit, beyond a confusing name game, in the birth-related labels.\textsuperscript{120} Despite such attitudes, however, birth-related classifications have a persistent legal presence which courts should attempt to understand so they can ameliorate the confusion.\textsuperscript{121}

In addition to their innate pervasiveness, the parental birth-related claims are not universally allowed, and this serves as a further reason for continuing to use prenatal designations.\textsuperscript{122} Because courts typically attach a certain set of facts with a particular prenatal label, their use imparts an understanding regarding how states consider the claims.\textsuperscript{123} In many states, a label is critical to ascertaining whether parents have a legally cognizable birth-related claim.\textsuperscript{124} This is true in states where the courts or legislature have prohibited wrongful birth claims but allowed wrongful conception claims or vice versa.\textsuperscript{125} Without the classifications, there is little legal guidance as to whether parental claimants could successfully bring a prenatal action based on a certain set of facts in a particular state.\textsuperscript{126}

Furthermore, prenatal designations determine how courts award damages to parents.\textsuperscript{127} Wrongful conception and wrongful birth cases usually result in a dissimilar distribution of damages because the courts must compensate parents for different injuries.\textsuperscript{128} The prenatal classifications convey an understanding for parental claimants specifically and the legal community at large regarding typical damage distribution in lawsuits stemming from wrongful birth or wrongful conception circumstances.\textsuperscript{129}

Because the labels have become an integral part of the birth-related legal

\begin{thebibliography}{99}
\bibitem{120} See supra note 7 and accompanying text (stressing certain states disregard labels when discussing birth-related torts because labels cause confusion); supra note 92 and accompanying text (explaining rationale behind courts refraining from utilization of birth-related tort labels).
\bibitem{121} See supra notes 34-37 and accompanying text (reflecting on presence of birth-related actions in current tort law).
\bibitem{122} See Phillips v. United States, 508 F. Supp. 544, 546 n.1 (D.S.C. 1981) (stressing non-universal acceptance of prenatal torts as rationale in favor of labels); Say, supra note 10, at 262-63 (arguing for retention of labels because of different judicial and statutory treatments of prenatal torts).
\bibitem{123} See supra notes 74-75 and accompanying text (highlighting Minnesota and North Carolina utilize timing as critical fact in assessing which label attaches); supra note 85 and accompanying text (emphasizing Washington and Colorado focus on child’s health when considering which prenatal label applies).
\bibitem{124} See supra note 8 and accompanying text (providing examples of legal systems prohibiting one or more birth-related causes of action).
\bibitem{125} See supra note 45 and accompanying text (noting some courts or legislatures allow one parental claim and not another).
\bibitem{126} See supra notes 8 and 45 and accompanying text (reflecting on allowances or prohibitions of parental birth-related claims).
\bibitem{127} See supra notes 59-63 and accompanying text (detailing typical damage awards in wrongful birth and wrongful conception lawsuits).
\bibitem{128} See supra notes 60-61 and accompanying text (distinguishing damages typically awarded to parents in wrongful conception from wrongful birth claims).
\bibitem{129} See supra notes 59-63 and accompanying text (explaining different damages associated with birth-related tort labels).
\end{thebibliography}
arena, courts should strive to make sense of their implications.\textsuperscript{130} Instead of terminating label usage, courts should attempt to create clear delineations of what factual scenarios correspond to which parental prenatal category.\textsuperscript{131} After establishing definitive categories and aligning a factual situation with its appropriate classification, courts then should apply negligence principles to the cause of action at bar.\textsuperscript{132}

V. CONCLUSION

In a simplistic legal landscape, all courts and legislatures would treat issues of law in one uniform manner. When emotionally charged policies saturate an area of state law, however, uniformity among the states does not always prevail. In the birth-related tort field, courts consider the controversial policies involved and address the legal issues presented with diametrically different approaches.

Specifically, courts have approached claims alleging negligent preconception genetic testing from distinct perspectives. Courts have treated these claims as presenting either a wrongful birth or wrongful conception claim or simply as ordinary negligence. Courts' inconsistent discussion of these claims has generated an unclear body of preconception birth-related case law, and legal systems should aim to clarify it.

When presented with a claim alleging negligent genetic testing, courts should make a preliminary determination regarding which birth-related classification best corresponds to the facts presented. Courts should not bypass this analysis, because neglecting to make this preliminary determination intensifies the lack of clarity currently pervading the law. Courts should conclude that negligent genetic testing issues best encompass the theoretical and definitional aspects associated with wrongful birth, rather than wrongful conception. Courts should then assess the merits of the claim by drawing upon traditional negligence principles. Finally, if the claim properly asserts the requisites of a negligence action, courts should compensate claimants under the wrongful birth rubric for their injuries suffered in a negligent genetic testing.

\textsuperscript{130} See Walker \textit{ex rel.} Pizano v. Mart, 790 P.2d 735, 737 (Ariz. 1990) (emphasizing necessity of distinguishing birth-related claims from one another). The court in Walker highlighted the importance of deciphering distinctions between the birth-related causes of action and summarized the dissimilar definitions of wrongful birth, wrongful conception, and wrongful life. \textit{Id.} at 737-38. The court recognized that several jurisdictions blur the prenatal causes of action together, failing to identify the importance of distinguishing them. \textit{Id.}

\textsuperscript{131} See supra note 5 and accompanying text (highlighting disorder surrounding judicial characterizations of wrongful birth and wrongful conception).

\textsuperscript{132} See supra notes 53-54 (explaining claimants must prove essential negligence requirements notwithstanding claim classification); see also Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 686 (Ky. 2003) (concluding traditional tort principles applicable to parental birth-related tort claims). But see Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990) (concluding traditional negligence principles “break down” when examining wrongful birth cause of action).
2006] NEGLIGENT PRECONCEPTION GENETIC TESTING 793

context.

Kathleen A. Mahoney