

# Stepping Beyond the *Smith* Plaintiffs' Reliance on *Corso*: An Alternative Approach to Recovering Emotional-Distress Damages in Wrongful-Birth Cases in New Hampshire

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## I. INTRODUCTION

More than twenty years ago, in *Smith v. Cote*, the New Hampshire Supreme Court held “that New Hampshire recognizes a cause of action for wrongful birth.”<sup>1</sup> After so holding, the court then discussed the damages available to a prevailing wrongful-birth plaintiff. Among other things, the court held that when parental emotional distress associated with raising a disabled child, born after the mother had received negligent pre-natal assurance of the baby’s normal health, “results in tangible pecuniary losses, such as medical expenses or counseling fees, such losses are recoverable.”<sup>2</sup> The court further held that a wrongful-birth plaintiff may not recover intangible damages for the ongoing emotional distress associated with raising a disabled child who was carried to term as a result of negligent prenatal care.<sup>3</sup> However, because it was not raised on appeal, the *Smith* opinion did not address an alternative basis for recovering emotional-distress

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1. 128 N.H. 231, 242, 513 A.2d 341, 348 (1986).

2. *Id.* at 245–46, 513 A.2d at 350 (citing *Holyoke v. Grand Trunk Ry.*, 48 N.H. 541 (1869); Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making “the Punishment Fit the Crime,”* 1 U. HAW. L. REV. 1, 39–40 (1979)).

3. *Smith*, 128 N.H. at 247, 513 A.2d at 351.

damages—Linda Smith's claim under *Corso v. Merrill*<sup>4</sup> for the emotional distress associated with witnessing the birth of her disabled daughter after she had been assured that her daughter would be born healthy. I argue that while it seems unlikely that the New Hampshire Supreme Court would give wrongful-birth plaintiffs a *Corso* claim, the court, if presented with the correct legal question, could well rule that wrongful-birth plaintiffs may recover for the emotional distress they suffer as a result of witnessing the birth of an unexpectedly disabled child.

I begin with a brief discussion of the facts of *Smith* and the nature of a cause of action for wrongful birth. Next I examine the salient points of *Corso* and describe the parental-bystander doctrine the New Hampshire Supreme Court adopted in that case. In the following section, I assay the application of *Corso* to *Smith*, both as a logical matter and in terms of case law from other jurisdictions. Finally, I reframe the question from the one posed by the pleadings in *Smith*, i.e., whether a wrongful-birth plaintiff also has a *Corso* claim, and address the question that really matters: whether a wrongful-birth plaintiff in New Hampshire can recover for the emotional distress associated with witnessing the birth of an unexpectedly disabled child. Based upon both out-of-state authority and New Hampshire precedent, I conclude that a wrongful-birth plaintiff in New Hampshire should be able recover such damages even without a *Corso* claim.

## II. SMITH V. COTE

The plaintiffs in *Smith* were a mother and her daughter. The defendant was the mother's physician. The relevant facts are these:

Plaintiff Linda J. Smith became pregnant early in 1979. During the course of her pregnancy Linda was under the care of the defendants, physicians who specialize in obstetrics and gynecology. Linda consulted the defendants on April 8, 1979, complaining of nausea, abdominal pain and a late menstrual period. The defendants prescribed Keflex, an antibiotic, and recommended that Linda undergo a pregnancy test if her menstrual period did not begin. Two days later, Linda again consulted the defendants, complaining of an itchy rash and a slight fever. The defendants diagnosed Linda's condition as an allergic reaction to Keflex. Some time thereafter, the defendants determined that she was pregnant.

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4. 119 N.H. 647, 406 A.2d 300 (1979).

On August 3, 1979, nearly four months after the April visits, Linda underwent a rubella titre test at the direction of the defendants. The test indicated that Linda had been exposed to rubella. At the time the test was performed, Linda was in the second trimester of pregnancy.<sup>5</sup>

Subsequently, Linda's daughter, Heather, was born with congenital rubella syndrome.<sup>6</sup> Thereafter, Linda and Heather filed suit:

They allege[d] that Linda contracted rubella early in her pregnancy and that, while she was under the defendants' care, the defendants negligently failed to test for and discover in a timely manner her exposure to the disease. The plaintiffs further contend[ed] that the defendants negligently failed to advise Linda of the potential for birth defects in a fetus exposed to rubella, thereby depriving her of the knowledge necessary to an informed decision as to whether to give birth to a potentially impaired child. . . .

The plaintiffs [did] not allege that the defendants caused Linda to conceive her child or to contract rubella, or that the defendants could have prevented the effects of the disease on the fetus. Rather, the plaintiffs contend[ed] that if Linda had known of the risks involved she would have obtained a eugenic abortion.<sup>7</sup>

The *Smith* plaintiffs sued, asserting three counts. Linda asserted claims for wrongful birth (Count I) and negligent infliction of emotional distress under the parental-bystander doctrine set out in *Corso* (Count II), while Heather asserted a claim for wrongful life (Count III).<sup>8</sup> In connection with her wrongful-birth claim, Linda sought damages for the emotional distress associated with caring for and raising her disabled daughter.<sup>9</sup> In Count II, her *Corso* claim, Linda sought damages "for the emotional injury, including depression, attributable to the impact of her observation of Heather's defects at and after Heather's birth."<sup>10</sup>

Ruling on an interlocutory appeal that involved only the first and third claims,<sup>11</sup> the New Hampshire Supreme Court recognized a cause of action

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5. *Smith*, 128 N.H. at 234, 513 A.2d at 342.

6. *Id.*

7. *Id.* at 234, 513 A.2d at 342–43.

8. *Id.* at 234–35, 513 A.2d at 343.

9. *Id.*

10. *Id.* at 235, 513 A.2d at 343.

11. *Id.* at 235, 513 A.2d at 343. Regarding the plaintiffs' second claim, negligent infliction of emotional distress, the *Smith* court explained:

for wrongful birth<sup>12</sup> and discussed the damages available thereunder,<sup>13</sup> but declined to recognize a cause of action for wrongful life, explaining that “[w]e will not recognize a right not to be born, and we will not permit a person to recover damages from one who has done him no harm.”<sup>14</sup>

Regarding the availability of intangible damages for the emotional distress associated with raising a disabled child who was carried to term because of negligent prenatal care provided to the mother, the court first observed that “[e]xisting damages principles do not resolve the issue whether recovery for emotional distress should be permitted in wrongful birth cases,”<sup>15</sup> and then held that such damages are not recoverable.<sup>16</sup> The court

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In Count II, Linda seeks damages, under the parental bystander doctrine enunciated in *Corso v. Merrill* for the emotional injury, including depression, attributable to the impact of her observation of Heather’s defects at and after Heather’s birth. The validity of Count II is not among the transferred questions, and we express no opinion as to this aspect of the writ.

*Id.* (citation omitted).

12. *Id.* at 242, 513 A.2d at 348. The question presented concerning the existence of a cause of action for wrongful birth was this:

Will New Hampshire Law recognize a wrongful birth cause of action by the mother of a wilfully conceived baby suffering from birth defects, against a physician on the grounds that the physician negligently failed to test for and discover that the mother had rubella, failed to advise the mother as to the risks of potential birth defects in a fetus exposed to rubella, and thereby deprived the mother of the information on which she would have had an abortion to prevent the birth of her deformed child, where the physician did not cause the baby’s conception, and did not cause the deformities in the unborn fetus?

*Id.* at 235, 513 A.2d at 343.

13. *Id.* at 242–47, 513 A.2d at 348–51.

14. *Id.* at 252, 513 A.2d at 355. The question presented concerning the existence of a cause of action for wrongful life was this:

Will New Hampshire law recognize a cause of action for wrongful life brought by a minor child suffering from birth defects against a physician on the grounds that the physician negligently failed to test for, discover, and advise the child’s mother as to the mother’s having rubella and as to information concerning the potential effects of rubella on her unborn fetus, which failure allegedly caused the mother not to abort the fetus, thereby causing the plaintiff child to live and exist with mental and physical deformities?

*Smith*, 128 N.H. at 235–36, 513 A.2d at 343.

15. *Id.* at 246, 513 A.2d at 350. *But see* *Bader v. Johnson*, 732 N.E.2d 1212, 1220 (Ind. 2000) (eschewing the specification of damages unique to wrongful-birth cause of action and applying general principles of tort law to determine appropriate measure of damages); *Speck v. Finegold*, 439 A.2d 110, 114 (Pa. 1981) (using “the usual common-law principles of damages” to determine that because wrongful-birth plaintiffs’ “alleged injury (mental distress at having to be the parent of a defective, diseased child) was foreseeable, mental distress damages should be recoverable also”).

16. *Smith*, 128 N.H. at 247, 513 A.2d at 351 (citing *Moore v. Lucas*, 405 So. 2d 1022, 1026 (Fla. Dist. Ct. App. 1981)) (“The claim for past and future emotional pain and suffering resulting from the birth of Justin were [sic] properly stricken [by the trial court] on the basis of the impact doctrine.”); *Becker v. Schwartz*, 386 N.E.2d 807, 814 (N.Y. 1978) (“[C]alculation of damages for plaintiffs’ emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves.”); *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (characterizing emotional distress damages as “an award based upon speculation as to the . . . pluses and minuses of parental mind and emotion”). The *Becker* court, which, like the *Smith* court, determined wrongful life not to be a cognizable cause of action, added this fillip to its discussion of emotional distress damages in wrongful-birth cases: “As in the case of plaintiffs’ causes of action for damages on behalf of their

based its ruling on, among other things, “the need to establish a clearly defined limit to the scope of negligence liability in this area.”<sup>17</sup> Because the mother in *Smith* distinguished between the emotional injury she suffered as a result of witnessing the birth of her child and the emotional distress she had suffered and expected to suffer as a consequence of raising her child—seeking damages for the former in a *Corso* claim and damages for the latter in her wrongful-birth claim—whether or not a wrongful-birth plaintiff can recover emotional-distress damages for witnessing the birth of an unexpectedly disabled child is an unsettled question of New Hampshire law. Moreover, thanks to the way the *Smith* plaintiffs pleaded their case, the foregoing question is, in the first instance, framed in terms of whether a wrongful-birth plaintiff may also maintain a *Corso* claim.

### III. CORSO V. MERRILL

The second count in *Smith*, the one that was not before the New Hampshire Supreme Court on appeal, was Linda Smith’s claim for negligent infliction of emotional distress under the parental-bystander doctrine enunciated in *Corso*.

The plaintiffs in *Corso* were a mother and father whose eight-year-old daughter was struck by a car and permanently crippled.<sup>18</sup> The circumstances of the accident were these:

The Corso house was approximately fifty feet from the scene of the accident. Lolita Corso was in her kitchen at the time of the accident and she heard a “terrible thud” outside the house. After hearing this sound, she looked out the kitchen door and saw her daughter lying seriously injured in the street in front of the house. Vincent Corso was also in the kitchen when he heard his wife scream that Katherine had been hit by a car. He immediately ran out the door and observed his daughter lying in the street.<sup>19</sup>

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infants for wrongful life, the cognizability of their actions for emotional harm is a question best left for legislative address.” *Becker*, 386 N.E.2d at 814.

17. *Smith*, 128 N.H. at 246, 513 A.2d at 351. As the court further acknowledged: “Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.” *Id.* (quoting *Nutter v. Frisbie Mem’l Hosp.*, 124 N.H. 791, 794, 474 A.2d 584, 586 (1984)).

18. *Corso v. Merrill*, 119 N.H. 647, 649, 406 A.2d 300, 302 (1979).

19. *Id.*

Based on the foregoing, both parents sought recovery for, among other things, negligent infliction of emotional distress.<sup>20</sup> The trial court dismissed the claims for negligent infliction of emotional distress, ruling that they failed to state a cause of action for which relief could be granted.<sup>21</sup> In reversing, the New Hampshire Supreme Court abandoned the zone-of-danger rule,<sup>22</sup> under which recovery would have been unavailable to the Corsos, and held that “a mother and father who witness or contemporaneously sensorially perceive a serious injury to their child may recover if they suffer serious mental and emotional harm that is accompanied by objective physical symptoms.”<sup>23</sup> As the court further explained:

The emotional injury must be directly attributable to the emotional impact of the plaintiff’s observation or contemporaneous sensory perception of the accident and immediate viewing of the accident victim. Therefore, recovery will not be permitted for emotional distress when the plaintiff is merely informed of the matter after the accident or for the grief that may follow from the death of the related accident victim. . . . The test of foreseeability requires a relatively close connection in both time and geography between the negligent act and the resulting injury.<sup>24</sup>

In *Corso*, as in its subsequent opinion in *Smith*, the court expressed an inclination to avoid subjecting defendants to unlimited liability.<sup>25</sup>

#### IV. SMITH VS. CORSO

Having described *Smith* and *Corso*, I now return to the question that animates this article: would the New Hampshire Supreme Court, if presented with the question, allow a plaintiff with a wrongful-birth claim to pursue an additional claim under the parental-bystander doctrine enunciated in *Corso*? This is an academic question with practical consequences

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20. *Id.* at 650, 406 A.2d at 302.

21. *Id.*

22. *Id.* at 659, 406 A.2d at 308. In place of the zone-of-danger rule, the *Corso* court adopted a version of the rule announced by the California Supreme Court in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

23. *Id.* at 659, 406 A.2d at 308.

24. *Id.* at 656–57, 406 A.2d at 306 (citing *Krouse v. Graham*, 562 P.2d 1022, 1031–32 (Cal. 1977); *Nazaroff v. Superior Court*, 145 Cal. Rptr. 657, 664 (Cal. Ct. App. 1978); *D’Ambra v. United States*, 338 A.2d 524, 529 n.5 (R.I. 1975)).

25. *Corso*, 119 N.H. at 653, 406 A.2d at 304.

given the holding in *Smith* and the potential monetary value of a successful *Corso* claim.<sup>26</sup>

The argument for giving a *Corso* claim to a plaintiff such as the mother in *Smith* goes something like this. The mother in *Corso* suffered emotional distress as a result of hearing her daughter being struck by a car, while the father suffered emotional distress as a result of seeing his injured daughter lying in the street immediately after she was hit. In many wrongful-birth cases, a parent reasonably expecting the birth of a healthy child suffers emotional distress when he or she witnesses the delivery of a child with recognizable disabilities. In both situations, the parent claiming emotional-distress damages can establish proximity in time and space to the event that has caused his or her emotional distress.

Moreover, it does not seem that allowing wrongful-birth plaintiffs a *Corso* claim would run afoul of the New Hampshire Supreme Court's most clearly stated concern in both *Smith* and *Corso*: the unlimited spread of liability beyond any reasonable boundary.<sup>27</sup> Recovery could be limited to a parent who suffers serious mental and emotional harm accompanied by objective physical symptoms as a result of witnessing the birth of a child with recognizable disabilities after the mother had received negligent prenatal care and advice that caused the parents to reasonably expect the birth of a healthy child. A wrongful-birth *Corso* claim would be limited to parents, as opposed to more distant relatives, and would bar recovery for a parent who only learned of his or her child's condition at some time after the moment of delivery. As the Michigan Court of Appeals explained in affirming the trial court's dismissal of a claim for negligent infliction of emotional distress in *Taylor v. Kurapati*,<sup>28</sup> under a rule very similar to that stated in *Corso*:

The Taylors' claim is fatally flawed where both the parents acknowledged that they did not see their child's disabilities at or immediately after her birth. Brandy Taylor's deposition testimony indicated that she did not know anything was wrong with Shelby Taylor and that the doctors swept the child out of the room before

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26. Cf. *Duplan v. Harper*, 188 F.3d 1195, 1203 (10th Cir. 1999) (affirming, over plaintiff's claim of insufficiency, award of \$200,000 for the emotional distress caused by the parents' "loss of the right to decide whether to have a child who potentially may suffer birth defects"); *Chamberland v. Physicians for Women's Health, LLC*, No. CV010164040S, 2006 WL 437553, at \*1, \*9-\*10 (Conn. Super. Ct. Feb. 8, 2006) (denying defendant's motion for remittitur after jury awarded wrongful-birth plaintiffs \$7 million for their emotional distress); *Naccash v. Burger*, 290 S.E.2d 825, 828, 833 (Va. 1982) (affirming jury award of \$150,000 for emotional distress under a wrongful-birth claim).

27. See *Smith v. Cote*, 128 N.H. 231, 247, 513 A.2d 341, 351 (1986); *Corso*, 119 N.H. at 653, 406 A.2d at 304.

28. 600 N.W.2d 670 (Mich. Ct. App. 1999).

she had the chance to see her. Brian Taylor testified that he noticed something about Shelby Taylor's arm, but that the child was taken out of the room before he could notice more of the disabilities. The Taylors' physician was able to discuss the child's disabilities with the Taylors before they saw her. The undisputed facts of this case do not support a claim of negligent infliction of emotional distress.<sup>29</sup>

Thus, a *Corso* claim in the context of wrongful birth would be every bit as circumscribed as any other *Corso* claim,<sup>30</sup> satisfying the *Smith* court's concern with establishing clearly defined limits to the scope of negligence liability.<sup>31</sup>

One argument against giving wrongful-birth plaintiffs a *Corso* claim is the fact that the tortious act in a wrongful-birth case—the medical negligence that causes a woman to carry a baby with disabilities to term—generally takes place a trimester or two before the delivery itself. Arguably, that is enough to undermine the contemporaneity element of a *Corso* claim, notwithstanding that under normal circumstances the moment of delivery is a parent's first opportunity to learn of the mother's doctor's negligence. The Kansas Supreme Court noted the lack of contemporaneity when it held that “damages for emotional distress of the parents are not recoverable in a wrongful birth case,”<sup>32</sup> and went on to explain:

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29. *Id.* at 693 (citing *Wargelin v. Sisters of Mercy Health Corp.*, 385 N.W.2d 732, 737–38 (Mich. Ct. App. 1986)).

In a similar vein, in a case in which the Alaska Supreme Court seems to have endorsed the idea that a mother could have a bystander claim when her minor daughter's physician failed to diagnose the daughter's pregnancy, recovery was determined to be unavailable due to a lack of temporal proximity:

Under *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 365–66 (Alaska 1987), a bystander claim is permissible when a person closely related to a tort victim and in near proximity to the scene of the negligent injury suffers severe and foreseeable emotional distress due to “shock result[ing] more or less contemporaneously with,” or “follow[ing] closely on the heels of,” the injury's discovery. Here, M.A. [the mother] was not in close proximity to J.A. [the daughter], either at the time of the alleged misdiagnosis or when J.A. subsequently learned of her pregnancy; M.A.'s eventual “shock,” if any, does not appear to have occurred contemporaneously with her daughter's discovery of the injury; and there is no indication that the immediate “shock” came in response to the alleged injury—the lateness of the pregnancy's discovery—rather than to discovery of the pregnancy itself.

*M.A. v. United States*, 951 P.2d 851, 856 (Alaska 1998) (first two alterations in original).

30. See *Nutter v. Frisbie Mem'l Hosp.*, 124 N.H. 791, 796, 474 A.2d 584, 587 (1984) (instructing trial court to dismiss plaintiffs' *Corso* claim when parents were told of daughter's death in emergency room immediately afterward and were taken to see her body, but were not present at the moment of her death).

31. See *Smith*, 128 N.H. at 247, 513 A.2d at 351.

32. *Arche v. U.S. Dep't of the Army*, 798 P.2d 477, 482 (Kan. 1990).

The rule in Kansas is that plaintiffs can sustain a cause of action for negligent infliction of emotional distress caused by the injuries of a third party only if they were witnesses to the occurrence which caused the injury. We have thus far held that visibility of results as opposed to visibility of the tortious act does not give rise to a claim for emotional damages. The child's injury in this case occurred without human fault during development of the fetus; the parents were not aware of the injury at the time. The parents in *Schmeck* were responsible for their disabled child and suffered emotional distress because of the disablement, but were denied recovery for emotional distress. We see no reason why a wrongful birth case should be distinguished.<sup>33</sup>

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33. *Id.*; cf. *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992) (holding that Florida statute of repose "runs from the date negligent advice was given, not from the date of [disabled child's] birth"); *Taylor*, 600 N.W.2d at 692 (holding, under state statute, that wrongful-birth claim, as a species of medical malpractice, accrues at the time of the doctor's act or omission "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim").

On the other hand, Judge Hughes of the Virginia Circuit Court has ruled, in the context of a statute-of-limitations defense, that a cause of action for wrongful birth accrues upon the birth of the child, rather than at the time the mother's physician commits malpractice:

A cause of action for personal injury accrues on the date of the injury. [VA. CODE ANN. § 8.01-230 (2007).] Negligent infliction of emotion distress based on a "wrongful birth" was recognized in *Naccash v. Burger*, [290 S.E.2d 825] ([Va.] 1982) (action for wrongful birth of child afflicted with Tay-Sachs disease). There, the court said that the injury occurred when the doctors delivered the erroneous, prenatal medical diagnosis to the parents. *Id.* at [830]. However, the Court has not directly decided the statute of limitations question in the wrongful birth context. The defendant cites analogous medical malpractice cases on "failure to diagnose" for the proposition that the date of injury is the date on which the problem develops into "a more serious condition which poses greater danger to the patient or which requires more extensive treatment." *George v. Pariser*, [484 S.E.2d 888] ([Va.] 1997) (citing *DeBoer v. Brown*, 673 P.2d 912, 914 (Ariz. 1983)) (injury occurred when cancerous melanoma changed from benign to malignant status, allowing the cancer to metastasize and recur). The "more serious injury," as envisioned by the defendant, is Mrs. Santowasso's inability to legally abort her pregnancy, even if she had been informed that the twins were conjoined.

The court declines to adopt the *Pariser* date of injury test to the circumstances of the instant case. "The statutory word 'injury' means positive, physical or mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded . . . ." *Locke v. Johns-Manville Corp.*, [275 S.E.2d 900, 904] ([Va.] 1981) (emphasis added) [sic]. See also *Nunnally v. Artis*, [292 S.E.2d 126, 128] ([Va.] 1997). No positive, physical or mental hurt could have accrued at the time that the defendants' allegedly negligent treatment deprived the plaintiffs' of their opportunity to terminate the pregnancy, e.g., the end of the second trimester. The court finds that the cause of action accrued, and the damage developed, on the date that the plaintiffs became aware of their childrens' [sic] disorders—the birth date of the defective child, September 15, 1994. "Before the birth of a child, the plaintiffs had only a potential claim because the loss of the opportunity to abort is of no consequence unless the pregnancy results in a live birth. . . . [T]he cause of action is for the birth of a defective child in contravention of the parents' right to abort as a result of the defendants' alleged negligence; it is not the mere tortious deprivation of the right to abort, without more." *Barnes v. Head*, [No. 114928, 1993 WL 945979, at \*5-\*6] ([Va. Cir. Ct. Feb. 25.] 1993) (emphasis added) [sic]. The extent of the childrens' [sic] defects

There is a second, even more compelling argument against giving wrongful-birth plaintiffs a *Corso* claim. In a *Corso* claim, a parent's cause of action is derivative of the child's. That is, the daughter in *Corso* had claims against the driver who hit her.<sup>34</sup> By contrast, the doctor in *Smith* did no harm to Linda Smith's daughter, as the court observed when it decided not to recognize the tort of wrongful life.<sup>35</sup> Without a wrongful act being committed against the child in a wrongful-birth case, i.e., in the absence of a cause of action for wrongful life, it is difficult to see how the New Hampshire Supreme Court could allow the parents to pursue a *Corso* claim; parents asserting wrongful-birth claims simply have not "witness[ed] or contemporaneously sensorially perceive[d] a serious injury to their child."<sup>36</sup> What they have witnessed is their child's delivery, but in New Hampshire, under *Smith*, a child can never be injured by his or her own birth. Without an injury to a child, the necessary factual predicate for a *Corso* parental-bystander claim simply does not exist; with no injury to observe, there can be no bystander. Before there could be an injury for a wrongful-birth plaintiff to observe, the New Hampshire Supreme Court (or the legislature) would have to overrule *Smith* and recognize a cause of action for wrongful life. That seems improbable.

Not only does logic argue against giving a wrongful-birth plaintiff a *Corso* claim, so too does out-of-state case law, which either rejects the possibility of such a claim outright or allows *Corso*-like claims in circumstances sufficiently dissimilar to the situation in *Smith* that the opinions allowing such claims seem unlikely to inspire the New Hampshire Supreme Court to give a *Corso* claim to a wrongful-birth plaintiff.

First of all, and most directly, in *Quinn v. Blau*,<sup>37</sup> Judge Stodolink of the Connecticut Superior Court granted the defendants' motion to dismiss the wrongful-birth plaintiffs' claim for negligent infliction of emotional distress, brought under the Connecticut equivalent to *Corso*.<sup>38</sup> Moreover, courts have pointed out both that "[t]he nature of the tort of wrongful birth

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was not revealed despite repeated sonograms by the defendants; it only became apparent once the twins were born conjoined and required extensive medical care. As the Motion for

Judgment was filed on September 12, 1996, this is within the two year statute of limitations.

*Santowasso v. Zedler*, Nos. LB-2316-1 & LB-2317-1, 1998 WL 972091, at \*2-\*3 (Va. Cir. Ct. Jan. 29, 1998).

34. *Corso v. Merrill*, 119 N.H. 647, 650, 406 A.2d 300, 302 (1979).

35. *Smith*, 128 N.H. at 252, 513 A.2d at 354.

36. *Corso*, 119 N.H. at 659, 406 A.2d at 308.

37. No. CV96325691S, 1997 WL 781874 (Conn. Super. Ct. Dec. 12, 1997).

38. *Id.* at \*9. In so ruling, Judge Stodolink recognized that the Connecticut *Corso* equivalent, *Clohesy v. Bachelor*, 675 A.2d 852 (Conn. 1996), was decided after, and did not overrule, *Maloney v. Conroy*, 545 A.2d 1059 (Conn. 1988), in which the Connecticut Supreme Court held that a bystander to medical malpractice may not recover for emotional distress. *Quinn*, 1997 WL 781874, at \*9.

has nothing to do with whether a defendant caused the injury or harm to the child,"<sup>39</sup> and that a mother giving birth is not a bystander to anything; she is a participant.<sup>40</sup> In its opinion recognizing a cause of action for wrongful birth, *Siemieniec v. Lutheran General Hospital*,<sup>41</sup> the Illinois Supreme Court expressly declined to give wrongful-birth plaintiffs a cause of action for negligent infliction of emotional distress,<sup>42</sup> and the District of Columbia Court of Appeals reached a similar conclusion in *Cauman v. George Washington University*.<sup>43</sup> But because *Siemieniec* and *Cauman* were decided in zone-of-danger jurisdictions rather than jurisdictions applying the parental-bystander doctrine of *Dillon v. Legg*,<sup>44</sup> the opinions in those cases have limited value as guides to how the New Hampshire Supreme Court would regard a wrongful-birth plaintiff's *Corso* claim, given that *Corso* announced New Hampshire's abandonment of the zone-of-danger rule.<sup>45</sup>

Standing in opposition to *Quinn* are two cases in which courts have given a cause of action for negligent infliction of emotional distress to the parents of a child born with disabilities after the mother had received negligent pre-natal care, but neither case appears to provide a solid basis for giving New Hampshire wrongful-birth plaintiffs a *Corso* claim.

In *Taylor v. Kurapati*,<sup>46</sup> the Michigan Court of Appeals allowed the parents of a child born with negligently undiagnosed femur-fibula-ulna syndrome to pursue a claim for negligent infliction of emotional distress, and did so under the parental-bystander doctrine.<sup>47</sup> However, that court

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39. *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993).

40. *See, e.g.*, *Rich v. Foye*, No. X01UWYCV065003443S, 2007 WL 2702809, at \*7 (Conn. Super Ct. Aug. 28, 2007) ("Jason Rich and Keri Rich are not bystanders and thus are entitled to seek damages for emotional distress that is found to be a direct and proximate result of the defendants' negligence."); *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982) ("[W]e believe it would be wholly unrealistic to say that the Burgers were mere witnesses to the consequences of the tortious conduct involved in this case."); *see also Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 492-93 (Wash. 1983) (recognizing that statute allowing parents to recover for injuries to their children was not directly relevant to question of parents' right to emotional distress damages in wrongful birth action because "a wrongful birth claim does not allege injury to the child as the cause of the parents' injury; rather it alleges the birth of the child is the cause of the injury").

41. 512 N.E.2d 691, 705-06 (Ill. 1987).

42. *Id.* at 707.

43. 630 A.2d 1104, 1107 (D.C. 1993). After identifying the District of Columbia as a zone-of-danger jurisdiction, the court observed:

There is no claim in the instant case that the conduct of either doctor or either hospital caused physical injury to anyone. Hence there is no way to read the complaint as alleging that appellants witnessed injury to an immediate family member, or that they were in a "zone of physical danger," or that appellees' negligence caused them to fear for their safety.

*Id.* at 1106 (footnote omitted).

44. 441 P.2d 912 (Cal. 1968).

45. *Corso v. Merrill*, 119 N.H. 647, 658-59, 406 A.2d 300, 307-08 (1979).

46. 600 N.W.2d 670 (Mich. Ct. App. 1999).

47. *Id.* at 693.

was operating in a legal environment very different from that of New Hampshire. Just before holding that the *Taylor* plaintiffs were entitled to pursue a claim for negligent infliction of emotional distress, the court “conclude[d] that this intermediate appellate court should not continue to recognize the wrongful birth tort without the slightest hint of approval from the Michigan Supreme Court or our Legislature.”<sup>48</sup> Thus, in Michigan—but not in New Hampshire—negligent infliction of emotional distress was the only available cause of action for plaintiffs such as Linda Smith. The availability of a cause of action for wrongful birth in New Hampshire would seem to cut against the applicability of *Taylor*. At least two states have allowed recovery under the parental-bystander doctrine in medical malpractice actions for stillbirth,<sup>49</sup> but since the medical negligence in a typical stillbirth case takes place much closer to the time of delivery than the medical negligence in a typical wrongful-birth case, the stillbirth cases provide weak support, if any, for giving wrongful-birth plaintiffs a *Corso* claim.

In *Santowasso v. Zedler*,<sup>50</sup> a Virginia trial court, relying on *Naccash v. Burger*, allowed wrongful-birth plaintiffs to pursue a tandem claim for negligent infliction of emotional distress,<sup>51</sup> but because Virginia adhered to the impact rule at the time that case was decided, the *Santowasso* plaintiffs did not get a claim under the parental-bystander doctrine, which makes *Santowasso* plainly inapplicable to New Hampshire. Moreover, given that *Naccash*, unlike *Smith*, allows wrongful-birth plaintiffs to recover intangible damages for emotional distress and does not distinguish between the emotional distress associated with witnessing the birth of a disabled child and the emotional distress associated with raising that child, it is not entirely clear what was added to the *Santowasso* plaintiffs’ case by pleading a claim for negligent infliction of emotional distress in addition to their wrongful-birth claim.

In sum, both a comparison of the cause of action established by *Corso* to the typical wrongful-birth fact pattern and the case law from other states suggest, rather strongly, that the New Hampshire Supreme Court, if pre-

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48. *Id.* at 691. At least two other courts have gone the other way, ruling that state statutes barring wrongful-birth claims also barred claims for negligent infliction of emotional distress when the factual predicate for emotional-distress claim is essentially the same as that for a wrongful-birth claim. See *VanVooren v. Astin*, 111 P.3d 125, 128, 129 (Idaho 2005); *Wood v. Univ. of Utah Med. Ctr.*, 67 P.3d 436, 449–50 (Utah 2002). In both of those cases, the plaintiffs asserted claims for negligent infliction of emotional distress expressly to avoid their states’ statutory bans on wrongful-birth claims.

49. See *Giardina v. Bennett*, 545 A.2d 139, 142–43 (N.J. 1988); *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 365 S.E.2d 909, 917–19 (N.C. Ct. App. 1988).

50. Nos. LB-2316-1 & LB-2317-1, 1998 WL 972091 (Va. Cir. Ct. Jan. 19, 1998).

51. *Id.* at \*3.

sented with the question, would decline to give wrongful-birth plaintiffs a *Corso* claim.

#### V. BEYOND *SMITH* VS. *CORSO*

Viewed one way, the likely unavailability of a *Corso* claim for wrongful-birth plaintiffs in New Hampshire could be seen as foreclosing recovery of the damages Linda Smith sought in Count II of the suit underlying the *Smith* opinion. But, it is important to bear in mind that the question of whether or not a *Corso* claim is available to wrongful-birth plaintiffs is entirely an artifact of the litigation of *Smith*. By expressly dividing emotional distress into two categories—that caused by witnessing the birth of a disabled child and that caused by raising that child—Linda Smith did something relatively unusual. In the vast majority of the wrongful-birth cases I have examined, emotional distress has been treated both by plaintiffs and by courts as an undifferentiated whole.<sup>52</sup> The advantage of Linda Smith's litigation strategy is that the *Smith* court's decision to bar the recovery of emotional-distress damages in wrongful-birth cases was limited to the emotional distress resulting from raising an unexpectedly disabled child. By its own terms, *Smith* does not bar recovery of damages for the emotional distress associated with witnessing the birth of that child. The disadvantage was that by relying on *Corso*, Linda Smith may have short-changed herself by framing her claim unnecessarily narrowly, and in a way that would likely bar recovery, for the reasons I have already discussed.

Freed from the limitations imposed by Linda Smith's reliance on *Corso*, however, the operative question can be rephrased: notwithstanding the unavailability of damages to wrongful-birth plaintiffs for the emotional distress resulting from raising a child with unexpected disabilities, would the New Hampshire Supreme Court allow a successful wrongful-birth plaintiff to recover damages for the emotional distress resulting from witnessing the birth of a child who is, unexpectedly, disabled? Foreign authority, buttressed by New Hampshire case law, suggests an answer in the affirmative.

Of course, the strongest foundation for a decision allowing the damages Linda Smith sought in Count II would be an out-of-state opinion that is

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52. See, e.g., *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 493 (Wash. 1983) (holding that wrongful-birth plaintiffs could recover "damages for the parents' emotional injury caused by the birth of the defective child"); *Kush v. Lloyd*, 616 So. 2d 415, 422–23 (Fla. 1992). But see *Speck v. Finegold*, 439 A.2d 110, 114 (Pa. 1981) (Flaherty, J., concurring) (describing alleged injury in wrongful-birth case as "mental distress at having to be the parent of a defective, diseased child").

directly on point—an opinion from a jurisdiction that, like New Hampshire, recognizes a cause of action for wrongful birth, does not recognize a cause of action for wrongful life, bars the recovery of intangible damages for the emotional distress associated with raising a child disabled by a misdiagnosed pre-natal condition, but allows intangible damages for the emotional distress associated with witnessing the birth of such a child. I have found no such opinion. On the other hand, I have found any number of creative approaches to allowing wrongful-birth plaintiffs to recover damages for their emotional distress. In *Harbeson v. Parke-Davis, Inc.*,<sup>53</sup> the Washington Supreme Court analogized to the law applicable to parental recovery for the injury or death of a child.<sup>54</sup> In *Naccash v. Burger*,<sup>55</sup> the Virginia Supreme Court made an exception to the “general rule” that “damages for emotional distress are not allowable unless they result directly from tortiously caused physical injury.”<sup>56</sup> In *Kush v. Lloyd*,<sup>57</sup> the Florida Supreme Court held that “public policy requires that the impact doctrine not be applied within the context of wrongful birth claims.”<sup>58</sup> And, in *Bader v. Johnson*,<sup>59</sup> the Indiana Supreme Court held that a mother’s “continued pregnancy and the physical transformation of her body underwent as a result, satisfy the direct impact requirement of [Indiana’s] modified impact rule.”<sup>60</sup> While the opinions in *Harbeson*, *Naccash*, *Kush*, and *Bader* are all legally interesting, none of them are particularly useful as a basis for

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53. 656 P.2d 483 (Wash. 1983).

54. *Id.* at 492–93; *see also* *Blake v. Cruz*, 698 P.2d 315, 320 (Idaho 1984).

55. 290 S.E.2d 825 (Va. 1982).

56. *Id.* at 831. As the court explained, “refus[ing] to recognize an exception to the general [impact] rule, ‘would constitute a perversion of fundamental principles of justice.’” *Id.* (quoting *Berman v. Allan*, 404 A.2d 8, 15 (N.J. 1979)).

57. 616 So. 2d 415 (Fla. 1993).

58. *Id.* at 423.

59. 732 N.E.2d 1212 (Ind. 2000).

60. *Id.* at 1222. While creative, the approach taken by the *Bader* court, which is more limited than that taken by the *Naccash* and *Kush* courts, suffered from one significant drawback, at least from the plaintiffs’ point of view:

Provided she can prevail on her negligence claim, we see no reason why Connie [the mother] should not be able to claim damages for emotional distress. By contrast, Ronald [the father] did not suffer a direct impact as a result of Healthcare Provider’s alleged negligence. We disagree with his argument to the contrary. Rather, at most Ronald is a relative bystander, a classification of potential victims this court has recently adopted in *Groves v. Taylor*, 729 N.E.2d 569, 572–73 (Ind. 2000). Whether Ronald can prevail on his claim for emotional distress damages depends on the evidence adduced at trial.

*Bader v. Johnson*, 732 N.E.2d 1212, 1222 (Ind. 2000) (footnote omitted). So, it seems that in Indiana, the father is left with only a *Corso*-type claim, but, presumably, for the emotional distress associated with witnessing the injury to his child’s mother rather than the emotional distress associated with witnessing an injury to his child. *Bader* is also noteworthy for the court’s decision not to recognize a separate cause of action for wrongful birth, on grounds that medical malpractice was a fully sufficient theory of recovery for parents claiming damages resulting from negligent pre-natal care. *Id.* at 1216.

allowing the damages Linda Smith sought for the emotional distress associated with witnessing the birth of her daughter.

While I have found no case directly on point, I have found the next best things: (1) a case in which the New Jersey Supreme Court allowed precisely the damages Linda Smith sought in her *Corso* claim, as opposed to undifferentiated emotional-distress damages encompassing those sought in both Counts I and II of the *Smith* action; (2) a case in which the Alabama Supreme Court appears to have recognized the distinction between the two categories of emotional-distress damages and allowed only those associated with witnessing the birth of an unexpectedly disabled child; and (3) a case in which the Missouri Supreme Court expressly relied on the distinction between the two categories of emotional-distress damages.

In *Berman v. Allan*,<sup>61</sup> an opinion cited with approval in *Smith*, the New Jersey Supreme Court overruled *Gleitman v. Cosgrove*<sup>62</sup> and held that “a cause of action founded upon wrongful birth is a legally cognizable claim.”<sup>63</sup> At the same time, the *Berman* court reaffirmed *Gleitman* to the extent that decision declined to recognize a cause of action for wrongful life.<sup>64</sup> While New Jersey has since adopted a cause of action for wrongful life, at the time *Berman* was decided, New Jersey and New Hampshire both recognized a cause of action for wrongful birth and both did not recognize a cause of action for wrongful life, thus enhancing the value of *Berman* as an analog to *Smith*. Regarding damages for wrongful birth, the *Berman* court held that the “medical and other expenses that will be incurred to properly raise, educate and supervise the child”<sup>65</sup> were not recoverable, reasoning as follows:

In essence, Mr. and Mrs. Berman desire to retain all the benefits inhering in the birth of the child—*i.e.*, the love and joy they will experience as parents—while saddling defendants with the enormous expenses attendant upon her rearing. Under the facts and circumstances here alleged, we find that such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the

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61. 404 A.2d 8 (N.J. 1979).

62. 227 A.2d 689 (N.J. 1967).

63. *Berman*, 404 A.2d at 14.

64. *Id.* at 11–13. Subsequently, in *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984), the New Jersey Supreme Court recognized a cause of action for wrongful life, but limited the damages available thereunder.

65. *Berman*, 404 A.2d at 14.

parents and place too unreasonable a financial burden upon physicians.<sup>66</sup>

Thus, *Berman* and *Smith* reached different results on that particular measure of damages.<sup>67</sup> The *Berman* court did, however, determine that emotional-distress damages were recoverable:

The parents' claim for emotional damages stands upon a different footing. In failing to inform Mrs. Berman of the availability of amniocentesis, defendants directly deprived her—and, derivatively, her husband—of the option to accept or reject a parental relationship with the child and thus caused them to experience mental and emotional anguish upon their realization that they had given birth to a child afflicted with Down's Syndrome. We feel that the monetary equivalent of this distress is an appropriate measure of the harm suffered by the parents deriving from Mrs. Berman's loss of her right to abort the fetus.

Unlike the *Gleitman* majority, we do not feel that placing a monetary value upon the emotional suffering that Mr. and Mrs. Berman have and will continue to experience is an impossible task for the trier of fact. In the 12 years that have elapsed since *Gleitman* was decided, courts have come to recognize that mental and emotional distress is just as "real" as physical pain, and that its valuation is no more difficult. Consequently, damages for such distress have been ruled allowable in an increasing number of contexts. Moreover, as discussed in Part II *ante*, to deny Mr. and Mrs. Berman redress for their injuries merely because damages cannot be measured with precise exactitude would constitute a perversion of fundamental principles of justice.<sup>68</sup>

Not only did *Berman* hold that emotional distress is compensable, it appears to have limited the plaintiff's recovery to damages for the type of emotional distress identified in Linda Smith's *Corso* claim. In that claim, Linda sought damages for "the emotional injury, including depression,

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66. *Id.* (citing *Rieck v. Med. Protective Co.*, 219 N.W.2d 242, 244–245 (Wis. 1974); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975)).

67. *See Smith v. Cote*, 128 N.H. 231, 244–45, 513 A.2d 341, 349–50 (1986) (holding "that a plaintiff in a wrongful birth case may recover the extraordinary medical and educational costs attributable to the child's deformities" including "compensation for the extraordinary maternal care that has been and will be provided to the child").

68. *Berman*, 404 A.2d at 14–15 (internal citations omitted).

attributable to the impact of her observation of Heather's defects at and after Heather's birth."<sup>69</sup> The injury in *Berman* was the parents' "mental and emotional anguish upon their realization that they had given birth to a child afflicted with Down's Syndrome."<sup>70</sup> And it was the monetary value of "this distress,"<sup>71</sup> i.e., distress directly attendant to the birth of the plaintiffs' child, that the *Berman* court found to be an appropriate measure of the harm they suffered.<sup>72</sup> Thus, when the court subsequently wrote of "the emotional suffering that Mr. and Mrs. Berman have and will continue to experience,"<sup>73</sup> it seems to have been referring only to the emotional distress directly resulting from their perception of the birth of the child. Accordingly, *Berman* provides relatively strong support for the proposition that the damages Linda Smith sought in her *Corso* claim can be recovered in a standard wrongful-birth action.

Perhaps even more supportive is the Alabama Supreme Court's decision in *Keel v. Banach*,<sup>74</sup> in which that court recognized a cause of action for wrongful birth<sup>75</sup> and then went on to consider the question of damages. The plaintiffs sought damages for, among other things, "the tremendous emotional suffering and mental anguish associated with day-to-day life with Justin which, they claim[ed], [were] natural and foreseeable consequences of the injury they sustained."<sup>76</sup> After holding that "[e]motional distress suffered by the parents of an unhealthy child is compensable in a wrongful birth action,"<sup>77</sup> the court observed that

[a] jury could conclude that the defendants, in failing to inform Mrs. Keel of the possibility of giving birth to a child with severe multiple congenital abnormalities, directly deprived her and, derivatively, her husband, of the option to accept or reject a parental relationship with the child and thus caused them to experience mental and emotional anguish upon *their realization that they had given birth to a child afflicted with severe multiple congenital abnormalities*.<sup>78</sup>

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69. *Smith*, 128 N.H. at 235, 513 A.2d at 343.

70. *Berman*, 404 A.2d at 14.

71. *Id.*

72. *Id.*

73. *Id.*

74. 624 So. 2d 1022 (Ala. 1993).

75. *Id.* at 1029.

76. *Id.*

77. *Id.* at 1030 (citing *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Blake v. Cruz*, 698 P.2d 315 (Idaho 1984); *Eisbrenner v. Stanley*, 308 N.W.2d 209 (Mich. Ct. App. 1981); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983)).

78. *Keel*, 624 So. 2d at 1030 (emphasis added).

The court concluded by holding that, if proven, the “mental and emotional anguish the parents have suffered”<sup>79</sup> is compensable. Indulging in the presumption that the court chose its words with care, it would appear that the *Keel* plaintiffs were seeking the damages that *Smith* expressly disallows, i.e., damages for the emotional distress associated with raising a disabled child, and the *Keel* court determined those damages not to be compensable but, instead, ruled that wrongful-birth plaintiffs are entitled to seek the damages Linda Smith sought in her *Corso* claim, i.e., damages for the emotional distress resulting from her mental and emotional anguish at the moment of her daughter’s birth.

Finally, there is *Shelton v. St. Anthony’s Medical Center*.<sup>80</sup> In that case, the plaintiff was a mother who gave birth to a child with congenital abnormalities after the defendants negligently interpreted the results of an ultrasound test and did not inform her that the child she was carrying had various detectable congenital defects.<sup>81</sup> In the face of a state statute providing that “[n]o person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted,”<sup>82</sup> which, in effect, barred actions for wrongful birth, the mother brought a medical malpractice action. The court then had to determine whether the statutory wrongful-birth ban also barred plaintiff’s medical malpractice claim:

In determining the extent to which the statute bars plaintiff’s claim, the allegations of her petition are to be liberally construed, allowing them their broadest intendment . . . . Viewing the petition in this light, we hold that it states a viable claim of medical malpractice and thus should be reinstated to that extent. The petition does not merely allege that “but for the negligent conduct of another, a child would have been aborted,” § 188.130.2, but asserts that:

[a]s a direct and proximate result of the negligence and carelessness of the defendants, . . . plaintiff was denied the right to choose whether or not to terminate her pregnancy; and as a result thereof . . . plaintiff has suffered losses including loss of consortium, the right to lead a normal life; plaintiff has also suffered and will continue to suffer from emotional distress, anxiety and depression.

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79. *Id.*

80. 781 S.W.2d 48 (Mo. 1989).

81. *Id.* at 48.

82. *Id.* at 49.

. . .

The allegations of the petition state a breach of duty to inform the patient sufficiently to enable her to make a judgment, as well as damages flowing from such breach. Such damages are readily separable from damages arising from the possibility that but for the negligent conduct of defendants, the child would have been aborted. Plaintiff has alleged mental distress, and counsel asserts that some mental distress followed from the shock of discovering the defects in the baby at birth without being adequately advised of the deformities and prepared for this catastrophe. Therefore harm is attributable to defendants' negligence regardless of whether plaintiff would have had an abortion, and the pleading states a viable malpractice claim outside the provisions of § 188.130.2.<sup>83</sup>

In other words, the Missouri Supreme Court held that if the plaintiff had sought only damages for the emotional distress associated with raising a disabled child, her claim would have been barred by the anti-wrongful-birth statute, but because her counsel asserted that some of her emotional distress resulted from "the shock of discovering the defects in the baby at birth without being adequately advised of the deformities and prepared for this catastrophe,"<sup>84</sup> she had stated something more than a mere wrongful-birth claim.<sup>85</sup> Shock at the delivery of her unexpectedly disabled daughter

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83. *Id.* at 49–50 (citations omitted). See also *Liddington v. Burns*, 916 F. Supp. 1140 (W.D. Okla. 1996). In *Liddington*, Judge Miles-LaGrange ruled that while Oklahoma law barred wrongful-birth plaintiffs from recovering for negligent infliction of emotional distress for injuries to their children, *id.* at 1141, the plaintiffs in that case had not asserted a claim for *negligent infliction of emotional distress*, but only a *negligence* claim, under which they were entitled to recover for the mental anguish they suffered on account of their own injury, i.e., "being deprived of their right to decide whether to bear a child with a genetic or other defect," *id.* at 1142.

84. *Shelton*, 781 S.W.2d at 50.

85. *Shelton* also had another interesting wrinkle concerning the date on which the plaintiff's cause of action accrued:

As § 188.130.2 [the anti-wrongful-birth statute] became effective in the midst of plaintiff's pregnancy, we must determine when plaintiff's cause of action accrued and thus whether the statute is applicable to her claim. "A cause of action accrues at the time when its owner may legally invoke the aid of a proper tribunal to enforce his demands; when he has a present right to institute and maintain an action or suit." *Brinkmann v. Common Sch. District # 27 of Gasconade County*, 238 S.W.2d 1, 5 (Mo. [Ct.] App. 1951), *aff'd*, 255 S.W.2d 770 (Mo. banc 1953). Even though plaintiff claims this is a medical malpractice action for which the statute of limitations begins to run at the time of the act of neglect, see § 516.105, it appears on the face of her claim that the harm was not suffered until the child was actually born, and she therefore did not have the right to institute suit until that time. At the time the child was born, § 188.130.2 was fully effective as a bar to the extent plaintiff's claim fell within its provisions.

*Id.* at 49. Had the court determined that the plaintiff's cause of action had accrued at the time of the defendants' negligent act, then it would not have been necessary for it to work so hard to cast her claim as one for medical negligence rather than wrongful birth.

is precisely the injury for which Linda Smith sought recovery in her *Corso* claim.

In sum, *Berman*, *Keel*, and *Shelton* all stand for two propositions that would support Linda Smith's recovery for the emotional distress that resulted from witnessing the birth of her daughter, even without a *Corso* claim. The first proposition is that the emotional distress from witnessing the birth of an unexpectedly disabled child is separable from the emotional distress associated with raising that child. And second, all three cases expressly allow the recovery of such damages.<sup>86</sup>

While *Berman*, *Keel*, and *Shelton* demonstrate that wrongful-birth plaintiffs in New Jersey and Alabama and certain medical malpractice plaintiffs in Missouri can expect to recover the damages Linda Smith sought in Count II of her writ without making a *Corso*-type claim, those opinions do not establish that such damages should be available in New Hampshire. But, as it turns out, the *Smith* decision itself points toward sturdy New Hampshire roots on which to engraft the reasoning of *Berman*, *Keel*, and *Shelton*.

When deciding that wrongful-birth plaintiffs may not recover intangible damages for the emotional distress associated with raising a disabled child,<sup>87</sup> the New Hampshire Supreme Court relied on its previous decisions in *Prescott v. Robinson*<sup>88</sup> and *Siciliano v. Capital City Shows, Inc.*<sup>89</sup> The *Smith* court described *Prescott* in the following way:

In *Prescott v. Robinson*, a pregnant woman was injured in an automobile accident caused by the defendant's negligence. Her child was subsequently born permanently deformed. The woman brought an action for personal injuries in which she sought to re-

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86. While only *Berman* and *Keel* were actual wrongful-birth cases, given the Missouri Supreme Court's agile circumnavigation of that state's anti-wrongful-birth statute in *Shelton*, it is worth bearing in mind the Indiana Supreme Court's discussion of wrongful birth as a cause of action:

Although a popular characterization among some commentators and a number of jurisdictions the term "wrongful birth" seems to have its genesis as a play upon the statutory tort of "wrongful death." See Alexander M. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 634 n.62 (1979). However, as the Nevada Supreme Court observed, "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 of 'wrongful birth.'" *Greco v. United States*, 893 P.2d 345, 348 (1995). We agree. It is unnecessary to characterize the cause of action here as "wrongful birth" because the facts alleged in the Johnsons' complaint either state a claim for medical malpractice or they do not. Labeling the Johnsons' cause of action as "wrongful birth" adds nothing to the analysis, inspires confusion, and implies the court has adopted a new tort.

*Bader v. Johnson*, 732 N.E.2d 1212, 1216 (Ind. 2000) (footnotes and parallel citation omitted).

87. *Smith*, 128 N.H. at 246-47, 513 A.2d at 350-51.

88. 74 N.H. 460, 69 A. 522 (1908).

89. 124 N.H. 719, 475 A.2d 19 (1984).

cover for the mental distress she had suffered and would continue to suffer on account of her child's condition. We held that she could not recover for her post-natal emotional distress.<sup>90</sup>

*Siciliano*, in turn, was a case in which one child was injured and another killed on a carnival ride,<sup>91</sup> and their parents asked the court "to create a cause of action for parental loss of society of a minor child injured or killed as a result of negligent conduct."<sup>92</sup> In reliance on *Prescott* and *Siciliano*, the *Smith* court turned to the issue before it:

This case arises from a child's birth, not a child's injury or death. Nonetheless, we are struck by the parallels between the claims for emotional distress in *Prescott* and *Siciliano* and the claim before us. Moreover, we are mindful of the anomaly that would result were we to treat parental emotional distress as compensable. The negligent conduct at issue in *Prescott* and *Robinson* was the direct cause of injuries to or the death of otherwise healthy children. By contrast, in wrongful birth cases the defendant's conduct results, not in injuries or death, but in the birth of an unavoidably impaired child. It would be curious, to say the least, to impose liability for parental distress in the latter but not the former cases.<sup>93</sup>

The portion of *Prescott* on which the *Smith* court relied provides:

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90. *Smith*, 128 N.H. at 246–47, 513 A.2d at 350–51 (internal citations omitted).

91. *Siciliano*, 124 N.H. at 723, 475 A.2d at 20.

92. *Id.* at 723, 475 A.2d at 21.

93. *Smith*, 128 N.H. at 247, 513 A.2d at 351. In an opinion in which he ruled that wrongful-birth plaintiffs Jason and Keri Rich were entitled to recover intangible damages for their emotional distress, Judge Cremins of the Connecticut Superior Court criticized the above-quoted portion of the *Smith* decision:

In contrast, the New Hampshire Supreme Court reasoned in *Smith v. Cote*, *supra*, at 513 A.2d 351, that it would be illogical to allow damages for the parents' emotional distress in a wrongful birth case, when parents are not allowed to recover for emotional distress in a wrongful death action where the child's death is actually caused by the negligence of the physician.

Contrary to the *Smith* court's assertion, however, there is a logical distinction between these two situations. A wrongful birth case involves emotional distress arising out of a recognized duty to the parents directly, while a wrongful death case involves a duty owed to the child. Connecticut law, however, recognizes that in a wrongful birth case, the parents themselves have suffered a direct injury, by being deprived of the opportunity to choose to terminate the pregnancy. Allowing the parents to recover for their emotional distress directly resulting from the defendants' breach of a duty owed to them is consistent with "the normal duty of a tortfeasor to assume liability for *all* the damages that he or she has caused."

Rich v. Foye, No. X01UWYCV065003443S, 2007 WL 2702809, at \*7 (Conn. Super. Ct. Aug. 28, 2007) (quoting *Burns v. Hanson*, 734 A.2d 964, 969 (Conn. 1999)).

The fact that the plaintiff will undoubtedly suffer great disappointment during her lifetime, occasioned by her continual observation of her child's deformity and its probable suffering, though in some sense caused by the defendant's negligence, is a misfortune for which the law can afford no compensation in an action for negligence. If the collision which caused the injury both to her and her child had occurred while she was carrying the child in her arms, it would be a novel proposition to urge that she might recover damages for her subsequent mental distress on account of the disfigurement and ill health of the child. However severe the grief may be of the friends and relatives of the victim of a catastrophe, they can ordinarily maintain no common-law action for damages on that account. The deformity of a crippled child and its suffering may be an ever-present cause of disappointment to its parents, and their lives may be made miserable thereby, but they can obtain no redress on that ground against the person whose negligence was the cause of the child's condition.<sup>94</sup>

While the foregoing passage seems to foreclose the availability of the intangible emotional-distress damages Linda Smith sought in Count I, there is more to *Prescott*. Before the *Prescott* court held that the plaintiff mother was not entitled to damages for the emotional distress associated with raising her child, it held that she *could* recover for the emotional distress she suffered at the time of her child's birth:

The fact that one of the results of the alleged injury in this case was the deformity of the fœtus, which became the child's misfortune upon its birth, does not prove that no right of the plaintiff [i.e., the mother] was invaded in this regard for which damages are allowable. On the contrary, it shows that her natural right to the normal action of her physical organs in the growth and development of the fœtus was seriously infringed. Her ability to be delivered of a normal and healthy child was jeopardized, and her grief and apprehension before the birth on account of what the probable or not unreasonable effect would be upon the child is not a remote consequence of the alleged negligence of the defendant. It was her right to produce a healthy child; and, if by the defendant's negligence her enjoyment of that right was diminished or violated, her

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94. *Prescott*, 74 N.H. at 464–65, 69 A. at 524–25 (citing *Hyatt v. Adams*, 16 Mich. 180, 197 (1867)).

mental distress for the unnatural result to be expected was an element of damage for which she should be compensated, as well as her disappointment at the birth of a deformed child.<sup>95</sup>

Obviously, the deformity in *Prescott* and the disabilities in wrongful-birth cases are caused in very different ways. But, the “right to produce a healthy child” in *Prescott* is but a small step removed from the right that has been violated in a typical wrongful-birth case, the right not to produce an unhealthy child, when the child’s ill health stems from a pre-natal condition that an obstetrician operating within the prevailing standard of care should have diagnosed and discussed with the mother. More importantly, more than seven decades before *Berman, Keel*, and *Shelton* were decided, the New Hampshire Supreme Court, in *Prescott*, distinguished between the emotional distress associated with raising a disabled child and the emotional distress associated with witnessing the birth of a disabled child. In light of the *Smith* court’s rejection of the former category of damages, the distinction between the two categories is a necessary prerequisite for judicial recognition of a wrongful-birth plaintiff’s right to recover for the latter category, i.e., the damages Linda Smith sought in Count II of her writ. Based on *Berman, Keel*, and *Shelton*, as presaged by *Prescott*, a rather persuasive argument could be made for allowing wrongful-birth plaintiffs to

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95. *Id.* at 462–63, 69 A. at 523 (internal citation omitted). In the context of wrongful life, several courts have declined to recognize “the fundamental right of a child to be born as a whole, functional human being.” *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978); *see also* *Moore v. Lucas*, 405 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 1981) (quoting *Speck v. Finegold*, 408 A.2d 496, 508 (Pa. Super. Ct. 1979)). While those opinions might appear to call into question the *Prescott* court’s determination that the plaintiff in that case had a “right to produce a healthy child,” it seems difficult to argue with the proposition that a pregnant woman has a right to produce a child free from injuries inflicted on the child while in utero.

The *Prescott* court noted that its result was “not in conflict with cases cited by the defendant in which it has been held that no recovery could be had by the mother for the miscarriage and death of a child.” 74 N.H. 463–64, 69 A. at 524. As the court explained:

These cases do not decide that the mother’s solicitude consequent upon the injury and before the birth is not an element of her damage, but that the death of the child and her loss of the comfort and enjoyment of the company of a living child are too remote consequences to be considered by a jury in assessing her damages. 1 Joyce, Dam. § 185. In *Bovee v. Danville*, 53 Vt. 190, the decision is stated thus: “The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no farther. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage.” But injured feelings and regret before the birth and while the mother is seeking to perform her function of childbearing through the organs of her body may be proper elements of recoverable damage . . .

*Id.* at 464, 69 A. at 524 (citations omitted).

recover the damages Linda Smith sought in Count II without having to resort to a *Corso* claim.

If I were arguing before the New Hampshire Supreme Court that a wrongful-birth plaintiff should be allowed to recover intangible damages for the emotional distress associated with witnessing the birth of an unexpectedly disabled child, carried to term after the mother had received negligent pre-natal care, I would make the following points. The availability of such damages is an open question, due to Linda Smith's strategic bifurcation of her claims for emotional-distress damages. The separation of emotional distress into two categories, emotional distress caused by witnessing the birth of an unexpectedly disabled child and emotional distress caused by raising that child, did not begin with Linda Smith, but, in New Hampshire, goes back to *Prescott*. At least three other states have drawn a similar distinction, and have decided that a parent's emotional distress directly associated with the moment of birth of an unexpectedly disabled child is compensable. The courts so ruling have generally based their decisions on traditional tort principles,<sup>96</sup> which the New Hampshire Supreme Court recognized as a basis for its decision in *Smith*.<sup>97</sup> Finally, a decision allowing such damages would work no greater an expansion on wrongful-birth liability than *Corso* worked on negligence liability. This is so because a parent present at and cognizant of the birth of a child with recognizable birth defects, after having been assured of the child's normal health, is no more remote from the cause of the resulting emotional distress than a parent "witness[ing] or contemporaneously sensorially perceiv[ing] a serious injury to [his or her] child."<sup>98</sup> The rule of recovery I would propose is this: A parent asserting a meritorious wrongful-birth claim is entitled to recover both tangible and intangible damages for serious mental and emotional harm that is accompanied by objective physical symptoms and that was caused by learning about his or her child's unexpected disabilities by direct observation at the moment of delivery.

## VI. CONCLUSION

My conclusion is two-fold, and consists of a substantive component and a cautionary tale. Substantively, while it is apparent that *Corso* does not provide a wrongful-birth plaintiff with a vehicle for recovering for the emotional distress associated with witnessing the birth of an unexpectedly

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96. See *Keel v. Banach*, 624 So. 2d 1022, 1029–30 (Ala. 1993); *Berman v. Allan*, 404 A.2d 8, 14–15 (N.J. 1979).

97. See *Smith*, 128 N.H. at 239–44, 513 A.2d at 346–49.

98. *Corso v. Merrill*, 119 N.H. 647, 659, 406 A.2d 300, 308 (1979).

disabled child, such relief would appear to be available, without recourse to a parental-bystander theory, based upon the foundation laid in New Hampshire law by *Prescott*.

My substantive conclusion is, necessarily, targeted at potential wrongful-birth plaintiffs, but my subsidiary conclusion—my cautionary tale—may have broader utility. The litigation of *Smith* is a good reminder of the power that is held by the attorneys who frame the questions that courts decide. While Linda Smith's strategy of seeking emotional-distress damages under two different theories was a wise attempt to spread the risk of an unfavorable decision in a new and unsettled area of the law, her decision to seek damages under *Corso* was not without its own risks. With *Corso*, Linda Smith was able to rely on a ready-made theory of recovery that had previously been adopted by the New Hampshire Supreme Court. But, as I have shown here, a court could quite reasonably rule that wrongful-birth plaintiffs are not entitled to maintain a *Corso* claim because their children have not been injured, which means that they were not parental bystanders to an injury. The problem with Linda Smith's *Corso* claim is that it unnecessarily limited her chances of recovery by giving the court a question it could easily answer in the negative, i.e., whether Linda Smith was a bystander to an injury to her daughter, without ever addressing her real question, i.e., whether she, as a wrongful-birth plaintiff, was entitled to recover intangible damages for the emotional distress that resulted from witnessing the birth of her unexpectedly disabled daughter. A court could well answer that question in the affirmative. But, as a general rule, courts only answer the questions presented to them.<sup>99</sup> Thus, in this area of the law as in any other, it is important for attorneys to bear in mind the power they hold as the framers of the questions courts decide.

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99. See, e.g., *Livadas v. Aubry*, 943 F.2d 1140, 1147–48 (9th Cir. 1991) (Kozinski, J., dissenting) (“It is our responsibility to answer the question fairly presented to us by the litigants, not one we might prefer they asked.”).