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Ignoring Distress Signals: Why Courts Recognize Emotional Distress Damages in Wrongful Adoption Claims

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NOTE

IGNORING DISTRESS SIGNALS: WHY COURTS SHOULD
RECOGNIZE EMOTIONAL DISTRESS DAMAGES IN
WRONGFUL ADOPTION CLAIMS

*Erica Shultz** **

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I. INTRODUCTION

Picture a young couple, sweethearts since high school and happily married for several years. The couple finds they are unable to bear their own children. This information devastates the couple for a short while, but the desire to raise a family quickly directs their attention to their only

* *Editor's Note:* This Note received the Gertrude Brick Prize for the Outstanding Note written during the Spring 2000.

** In memory of my cousin Michael.

alternative: adoption. At least we will be able to adopt a healthy baby, the prospective parents muse, struggling to find optimism in their unfortunate situation. Placing themselves at the mercy of an adoption agency of national renown, the couple requests a child with a healthy profile. The agency introduces the prospective parents to a vibrant baby, born to a successful woman who could not handle raising the infant after the startling death of the child's father. A plausible story, an adorable baby boy, and a couple looking for someone to love. The couple finalizes the adoption, and names their baby Michael.

Regrettably, the adoption agency which placed Michael with parents Marty and Phyllis Juman intentionally withheld the young boy's true medical history.¹ Michael's mother was not a college-educated woman with a temporary bout of melancholy associated with the loss of her boyfriend.² Rather, Michael's mother had a severe mental illness, one which led to a frontal lobotomy years before Michael was born.³ Michael himself discovered these devastating facts while searching for the source of his own schizophrenia, an illness which ultimately took his life.⁴ Tormented by the suffering of his parents as they struggled to understand and deal with his wrenching illness, Michael relentlessly pursued the adoption agency which placed him with his unsuspecting parents.⁵ Only one month prior to his untimely death, Michael and his parents achieved a measure of justice. Michael lived to witness the State of New York recognize the tort of wrongful adoption for the first time.⁶

This Note explores several of the themes comprising the debate around wrongful adoption. Part II chronicles the development of wrongful adoption as a cause of action. Part III examines the current positive trend towards recognizing a duty on adoption agencies to disclose known health and family information to adoptive parents. Part IV considers the recent scholarly works supporting a duty to investigate, and exposes some of the weaknesses in their arguments. Part V visits a relatively unexplored aspect of this devastating cause of action—the phenomenon of uncompensated loss associated with a failure of the courts to expand common law recovery mechanisms to encompass the emotional injuries suffered by victims of wrongful adoption.

1. *See Juman v. Louise Wise Serv.*, 663 N.Y.S.2d 483, 485 (N.Y. App. Div.) (1997).

2. *See id.*

3. *See id.*

4. *See* Stephanie Saul, *Michael's Law*, *NEWSDAY, LONG ISLAND NEWSPAPER*, Aug. 31, 1997, at A58-59.

5. *See id.* at A58; *see also* Lisa Belkin, *What the Jumans Didn't Know About Michael*, *N.Y. TIMES*, March 14, 1999, at 42.

6. *See* Saul, *supra* note 4, at A59.

II. THE DEVELOPMENT OF WRONGFUL ADOPTION AS A CAUSE OF ACTION

Contrary to what the phrase may suggest, “wrongful adoption” is not a cause of action against adoption agencies for creating an unwanted legal union between a parent and a child. Rather, wrongful adoption refers to a lawsuit brought by adoptive parents who were either intentionally or negligently misinformed about the health of their adoptive child, and subsequently suffer losses associated with raising a disabled child.⁷ States that recognize wrongful adoption perceive it as a variation on traditional common law principles.⁸ States that have rejected the cause of action did so because the cases before them did not satisfy the statutory elements of either fraud or negligent misrepresentation.⁹

The tort of wrongful adoption initially applied to only fraud-based claims, but the term now encompasses negligent conduct by adoption agencies.¹⁰ Additionally, one jurisdiction allowed a claim for breach of contract in a wrongful adoption factual scenario to survive a motion for summary judgment.¹¹ Today courts are generally willing to hold adoption agencies liable for misleading prospective parents.

A. *Fraud-Based Wrongful Adoption Claims*

Fraud is well-established in the common law, and its application in the wrongful adoption setting requires that plaintiffs prove the typical fraud elements, usually some variation of the following:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and

7. See MADELYN FREUNDLICH & LISA PETERSON, *WRONGFUL ADOPTION: LAW, POLICY AND PRACTICE* 11 (1998).

8. See *Roe v. Catholic Charities*, 588 N.E.2d 354, 357 (Ill. App. Ct. 1992) (stating that by recognizing causes of action that fit well within the established common law of the state, the whole body of common law develops); see also *Gibbs v. Ernst*, 647 A.2d 882, 886 (Pa. 1994).

9. See *Richard P. v. Vista del Mar Child Care Serv.*, 106 Cal. App. 3d 860, 865-66 (Cal. Ct. App. 1980). But see *Cesnick v. Edgewood Baptist Church*, 88 F.3d 902, 908 (11th Cir. 1996) (upholding the district court’s decision that the statute of limitations barred their common-law tort claims, and noting in a footnote that nothing indicates that the state of Georgia even recognizes the tort of wrongful adoption); *Michael J. v. County of Los Angeles Dep’t of Adoptions*, 201 Cal. App. 3d 859 (Cal. Ct. App. 1988) (stating that adoption agencies “should not be liable for mere negligence in providing information regarding the health of a prospective adoptee”).

10. See FREUNDLICH & PETERSON, *supra* note 7.

11. See *Cesnick*, 88 F.3d at 909.

(6) resulting injury that was caused by the reliance.¹²

Ohio became the first state to announce that an adoption agency which fraudulently misrepresented¹³ an adoptive child's health history could be held liable for damages.¹⁴ In *Burr v. Board of County Commissioners*, the prospective parents contacted the adoption division of the Stark County Welfare Department to express their interest in adopting a child.¹⁵ The agency introduced the couple to a child they described as a "nice big, healthy, baby boy," given up for adoption by a teenage mother who left the state seeking better employment.¹⁶ Relying on the factual background given to them by the adoption agency, the couple adopted the boy and brought him into their family.¹⁷ Not long after the adoption, the child began experiencing physical and mental problems, and was classified as educable mentally retarded in grade school.¹⁸ Later, doctors diagnosed the boy with Huntington's Disease.¹⁹ After successfully obtaining a court order to open their child's sealed medical records, the Burrs discovered that all of the information given to them by the adoption agency about their child's history was false.²⁰ The boy's mother was not a teenager and had actually given birth to her son in a mental hospital.²¹ Furthermore, records in the agency's possession prior to the adoption indicated that the infant was developing slowly. The agency never relayed this information to the Burrs.²²

The court held that the Burrs successfully met each element of fraud.²³ It upheld the award of \$125,000 in damages, finding the amount an appropriate figure to cover medical bills, expenses, and the couple's emotional distress.²⁴

12. See FREUNDLICH & PETERSON, *supra* note 7, at 12.

13. This cause of action is sometimes referred to as intentional or deliberate misrepresentation. See MADELYN DEWOODY, ADOPTION AND DISCLOSURE 9 (1993).

14. See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1105 (Ohio 1986).

15. *Id.* at 1103.

16. *Id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.* at 1103-04.

21. See *id.* at 1104. Many additional aspects of the boy's early history were concealed from his future parents. See *id.* For instance, there was some evidence suggesting that the child's father may also have been a mental patient. See *id.* The mother and baby shared similarly low intellectual levels. See *id.* Finally, an expert testified that the child's early medical profile put at him at risk for Huntington's Disease. See *id.*

22. See *id.*

23. See *id.* at 1106.

24. See *id.* at 1108.

Several jurisdictions recognize the analogous tort of intentional non-disclosure,²⁵ and allow plaintiffs to argue both causes of action simultaneously.²⁶ This sister cause of action only differs in that it must be proven that the offending party purposefully conceals a material fact, as opposed to making an affirmative misrepresentation.²⁷

Public policy supports holding adoption agencies liable for fraud when they dishonestly convey or withhold vital health and background information.²⁸ Far from establishing adoption agencies as the guarantors of the children they place in adoptive homes,²⁹ an honest approach to the placement of special needs children encourages their future success and development.³⁰ Furthermore, victims of wrongful adoption often experience acute guilt upon realizing that they would not have adopted the child now in their home had the agency revealed the child's background information prior to placement.³¹ It is obviously in the best interests of all parties to an adoption that the a agency inform the adoptive parents about all material details of the child's background.

25. See *Michael J. v. Los Angeles County Dep't of Adoptions*, 201 Cal. App. 3d 859, 875 (Cal. Ct. App. 1988).

26. See *id.* at 872.

27. See *Gibbs v. Ernst*, 647 A.2d 882, 888 n.12 (Pa. 1994). Freundlich and Peterson characterize the *Juman* case as one of deliberate concealment. See FREUNDLICH & PETERSON, *supra* note 7, at 14. However, the distinction is illusory: intentional misrepresentation, deliberate concealment and intentional nondisclosure are all variations of fraud.

28. See *Roe v. Catholic Charities*, 588 N.E.2d 354, 360 (Ill. App. Ct. 1992); see also *Michael J.*, 201 Cal. App. 3d at 875 ("Public policy cannot extend to condone concealment or intentional misrepresentation which misleads prospective adoptive parents about the unusual calamity they are assuming. The adoption of a child is an act of compassion, love and humanitarian concern where the adoptive parent voluntarily assumes enormous legal, moral, social and financial obligations."); *Wolford v. Children's Home Soc.*, 17 F. Supp. 2d 577, 582 (S.D.W.V. 1998) (holding that West Virginian public policy fully supports a fraud-based claim of wrongful adoption).

29. See *Roe*, 588 N.E.2d at 360.

30. See *id.* Disabled or problem children will be placed with parents who are prepared both financially and emotionally to deal with their special needs. See *id.* Also, the likelihood of effective treatment for the child's illness or disability increases if the parents can provide the child's entire health history to future health care providers. See *id.*

31. See *Juman v. Louise Wise Serv.*, 663 N.Y.S.2d 483, 486 (N.Y. App. Div. 1997). The couple stated that, "they would not have made a positive decision to adopt Michael if the defendant had disclosed that the birth mother suffered from schizophrenia and had had a frontal lobotomy." *Id.* Before filing suit against Louise Wise, the Jumans wrestled with these emotions, wondering if the suit would appear to the public as though they regretted raising the son they loved so much. See Marc Freeman, *Son's Concealed Past Drives Pair in Adoption Lawsuit*, PALMBEACHPOST, March 30, 1998, at 1A; see also *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1106 (Ohio 1986). During direct examination, Mr. Burr testified that he would not have adopted the child if he had been made aware of the child's complete family health background. See *id.* at 1106 n.3.

B. Negligence-Based Wrongful Adoption Claims

When injured parents began to bring cases of adoption agency negligence³² to the courts, the issue was brought to the forefront. Realizing the similarly damaging impact that negligent behavior can have on unsuspecting parents, the courts began recognizing that adoption agencies have a duty to both provide truthful responses to questions about a child's health and affirmatively provide only honest information.³³ The earliest example of a court recognizing a cause of action for negligent misrepresentation by an adoption agency was *Meracle v. Children's Service Society*.³⁴ In that case, the parents of a severely ill child sued the Children's Service Society for negligently misrepresenting the child's family background and health history.³⁵ The Meracles told Children's Service Society that they would adopt any child that did not have a debilitating or terminal disease, and the agency soon placed a twenty-three month old baby with them.³⁶ The agency told the parents that the baby's grandmother suffered from Huntington's disease but misinformed them about the likelihood of their child developing the illness.³⁷ In addition, the agency inaccurately stated that the child's father had tested negative for the same disease.³⁸ The child eventually developed the fatal illness.³⁹

The court, after noting the failure of other jurisdictions to recognize a negligence-based claim for wrongful adoption, ruled in favor of the Meracles.⁴⁰ Critical to its decision were the unique facts of the *Meracle* case⁴¹ that differed from prior negligent misrepresentation cases.⁴² In

32. The courts see no reason to distinguish the pleading requirements for negligent misrepresentation actions from other negligence actions. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 745 (5th ed. 1984). Thus, a plaintiff alleging a claim of negligence-based wrongful adoption must establish that: (1) the adoption agency owed a duty to adoptive parents; (2) the adoption agency breached that duty; and (3) the adoptive parents were injured because of the agency's breach of duty. *See* FREUNDLICH & PETERSON, *supra* note 7, at 17.

33. *See* FREUNDLICH & PETERSON, *supra* note 7, at 16.

34. 437 N.W.2d 532, 537 (Wis. 1989).

35. *See id.* at 533.

36. *See id.*

37. *See id.* Specifically, the agency told the parents that the disease is genetic, and that the failure of one generation to inherit the illness meant that later generations would not be at any greater risk to the disease than anyone else. *See id.* at 533. In fact, as the Meracles discovered after watching an episode of *60 Minutes* which reported on the disease, a child whose parent has Huntington's Disease has a 50% chance of inheriting it. *See id.*

38. *See id.* The Meracles learned from the same episode of *60 Minutes* that there is no test to determine whether someone had inherited the disease. *See id.*

39. *See id.*

40. *See id.* at 537.

41. *See id.*

42. *See e.g.*, *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 373 (Cal.

Meracle, the adoption agency voluntarily assumed the duty of explaining Huntington's Disease to the adoptive parents.⁴³ The court held that once an agency volunteered information about a child's health, it could not negligently convey this information or carelessly speculate about the child's future well-being.⁴⁴ Its limited holding intentionally avoided imposing an obligation on agencies to disclose known information to prospective parents.⁴⁵ The court further declined to speculate whether adoption agencies have a duty to investigate the health backgrounds of the children they place.⁴⁶

Moving further along the continuum, the court in *M.H. v. Caritas Family Services*⁴⁷ held an agency liable for negligent misrepresentations through nondisclosure.⁴⁸ In *M.H.*, a couple obtained the assistance of Caritas Family Services in adopting a child that did not have a severe mental disability.⁴⁹ A nun responsible for placements informed the couple about a suitable child.⁵⁰ In conversations with the couple about the baby boy, the nun vaguely mentioned that there was a possibility of incest in the child's background that might cause future developmental abnormalities.⁵¹ Nevertheless, the parents adopted the child, seemingly unmoved by the casual comment.⁵² Soon after the adoption, the boy began having emo-

App. Div. 1980) (disallowing a negligent misrepresentation claim against an adoption agency because the agency disclosed all of the information in their possession).

43. See *Meracle*, 437 N.W.2d at 537.

44. See *id.* The court stated that, "[t]o avoid liability, agencies simply must refrain from making affirmative misrepresentations about a child's health." *Id.*; see also *Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 73 (R.I. 1995) (stating that when agencies say nothing to avoid liability, it should alert parents to very carefully consider the particular adoptee); *Michael J. v. Los Angeles County Dep't of Adoptions*, 247 Cal. Rptr. 504 (Cal. Ct. App. 1988). In *Michael J.*, the adopted child had an extensive birthmark across much of his body, and the adoption agency represented that the mark made him a hard to place child. See *id.* at 505. However, the agency possessed records in which a doctor stated that he would not give a prognosis for the child at the time. See *id.* In fact, the birthmark was a manifestation of Sturge-Weber Syndrome, an illness that the agency either knew or should have known afflicted the young boy. See *id.* at 513. The court ruled that although in this case the nondisclosure of the doctor's records constituted negligence, and possibly fraud, "mere negligence in providing information regarding the health of a prospective adoptee" would not give rise to a cause of action. *Id.*

45. See *Meracle*, 437 N.W.2d at 537.

46. See *id.*

47. 488 N.W.2d 282 (Minn. 1992).

48. See *id.* at 288; see also KEETON, *supra* note 32, § 106, at 738 (stating that a defendant who chooses to disclose must reveal enough information to prevent misleading interpretations).

49. See *M.H.*, 488 N.W.2d at 284. Caritas Family Services was a Catholic social service agency that placed children for adoption. See *id.*

50. See *id.* at 285.

51. See *id.*

52. See *id.*

tional and behavioral problems.⁵³ A doctor treating the child requested additional information from Caritas Family Services about the boy's genetic background, and in response Caritas sent the doctor a report indicating that the child's *parents* were brother and sister.⁵⁴ Caritas eventually admitted that it had known the true history of the boy's lineage.⁵⁵ The parents sued Caritas Family Services for negligently communicating this information.⁵⁶

In holding in favor of the parents, the court imposed a duty on adoption agencies to completely and accurately convey *all* information about a child's background once it undertook to communicate *any* information about his background.⁵⁷ By withholding details, Caritas Family Services had misled the parents and caused them damage.⁵⁸ Although it was initially a fraud-based cause of action, wrongful adoption now appropriately encompasses negligence as a basis for recovery.⁵⁹

III. DUTY TO DISCLOSE

Courts can extract a duty to disclose relevant information to prospective parents about an adoptee's health and family background from both state disclosure statutes and the common law. Generally, imposition of a duty to disclose on adoption agencies has the widespread support of commentators,⁶⁰ and more recently, a significant number of state courts.⁶¹

A. Statutory Basis

States differ widely in the nature and breadth of their disclosure statutes.⁶² Some statutes require extensive disclosure, mandating that adoption agencies collect information regarding an adoptive child's background.⁶³ However, other states have weak disclosure statutes that fail

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.* at 286.

57. *See id.* at 288; *see also* Jackson v. Montana, 956 P.2d 35, 46 (Mont. 1998) (stating that an agency needed to use due care in providing background information to adoptive parents).

58. *See M.H.*, 488 N.W.2d at 288.

59. *See* FRUENDLICH & PETERSON, *supra* note 7, at 11.

60. *See, e.g.,* D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681, 699 (1992).

61. *See* Roe v. Catholic Charities, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992); *see also* Mohr v. Commonwealth, 653 N.E.2d 1104, 1112 (Mass. 1995); Gibbs v. Ernst, 647 A.2d 882, 891 (Pa. 1994).

62. *See* DEWOODY, *supra* note 13, at 19-20.

63. *See* DEWOODY, *supra* note 13, at 15.

to provide a cause of action for aggrieved parents.⁶⁴ Beyond the mere existence of disclosure provisions,⁶⁵ states vary with respect to the type of information subject to disclosure,⁶⁶ the subjects of inquiry,⁶⁷ the applicable time for disclosure,⁶⁸ and the extent of a duty to verify collected information.⁶⁹

Unfortunately, very few states impose penalties on adoption agencies that fail to comply with their disclosure statutes.⁷⁰ Even without imposing automatic liability, however, the mere presence of a statute requiring disclosure suggests that concealment is unreasonable.⁷¹ Typically, a court will consider agency liability predicated on both non-compliance with a state disclosure statute, and common law causes of action based on fraud and/or negligent or intentional misrepresentations.⁷² Even more dramati

64. See FREUNDLICH & PETERSON, *supra* note 7, at 34. *But see* Jackson v. Montana, 956 P.2d 35, 49-50 (Mont. 1998) (finding the state agency statutorily liable for not specifically delineating the information that should have been disclosed, and additionally, when combined with a state manual for handling adoptions, suggesting that all background information about the child and its biological parents must be disclosed).

65. See DEWOODY, *supra* note 13, at 15. Most states mandate disclosure of some non-identifying information. *See id.* at 22. Others, including Delaware, Oklahoma, and South Carolina, allow the agency to decide whether to disclose information. *See id.* at 23. The District of Columbia, Louisiana, Maine, Nevada, New Mexico, Rhode Island, and Tennessee all permit the courts to use discretion in decisions regarding disclosure. *See id.* at 24.

66. See FREUNDLICH & PETERSON, *supra* note 7, at 34; DEWOODY, *supra* note 13, at 17-18. For instance, most statutes require that the agency provide parents with the medical histories of both the child and the birth parents. *See* DEWOODY, *supra* note 13, at 18. A few states require disclosure of a child's social and/or educational history. *See id.*

67. See FREUNDLICH & PETERSON, *supra* note 7, at 34.

68. *See id.*

69. *See id.* Very few states impose affirmative obligations on adoption agencies to investigate the health backgrounds of the children in their care. *See* DEWOODY, *supra* note 13, at 48. Even states that do impose a duty to investigate fail to indicate the extent of such investigations. *See id.* at 18.

70. *See* DEWOODY, *supra* note 13, at 60. Some even limit liability for agencies that fail to comply with the statute. *See id.*; *see also* FREUNDLICH & PETERSON, *supra* note 7, at 34.

71. *See* D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 919 (1992). The author suggests that when mandatory disclosure statutes are violated, there is, "at least . . . prima facie evidence of breach of duty" even if there may not be negligence per se. *Id.* at 920; *see also* Gibbs v. Ernst, 647 A.2d 882, 892 (Pa. 1994) (stating that under common law a duty may be established by statute).

72. *See* Jackson v. Montana, 956 P.2d 35, 47, 51 (Mont. 1998); *see also* Wolford v. Children's Home Soc'y, 17 F. Supp. 2d 577, 583 (S.D.W.V. 1998). Wolford provides a good example of how to premise liability for wrongful adoption on a disclosure statute. The West Virginia Legislature drafted a statute that holds adoption agencies liable for failing to disclose pertinent information. *See id.* Additionally, the West Virginia statutes include a general substantive provision that creates liability whenever the facts of a particular case show that the plaintiff is a member of a protected class, the legislature intended for a private cause of action to exist, the cause

cally, recent cases suggest that a court may impose liability for violations of statutory disclosure provisions that the state enacted after the initiation of a wrongful adoption suit.⁷³

B. *Common Law Basis*

Although scholarly discourse on wrongful adoption supports a presumption of adoption agency liability for failure to disclose material information to prospective parents, only a few courts have supported an affirmative duty to disclose.⁷⁴ Requiring adoption agencies to disclose vital background information furthers the interests of all parties involved in adoption proceedings. Some of the noted benefits of a duty to disclose include: guiding early treatment of a child with medical or psychological problems,⁷⁵ informing a child about the child's medical history (which is important for the individual's current well-being and for the child's future decisions about childbearing),⁷⁶ reassuring adoptive parents that they are receiving the fullest picture of their child's history,⁷⁷ and providing adoptive parents with information that is vital to their decisions of whether or not to adopt.⁷⁸

Others argue that imposing an affirmative duty to disclose on adoption agencies would limit the number of adoptions,⁷⁹ create negative self-images in adopted children,⁸⁰ invade the privacy rights of birth parents and their families,⁸¹ and inspire an unhealthy arms race among parents for the "best" child.⁸² Notwithstanding these concerns, the adoption community almost universally supports full disclosure of medical and social informa-

of action correlates to the legislative scheme, and the cause of action does not invade the realm of the federal government. *See id.* at 583 (citing W.VA. CODE § 55-7-9 (1994)). Because the disclosure statute expressed a state policy supportive of open adoptions and the factual situation in the case fit the private cause of action statute, the *Wolford* court found a private cause of action against adoption agencies for failure to disclose. *See id.* Finally, the court noted that by refraining from immunizing adoption agencies from tort liability, the legislature impliedly approved of private causes of action. *See id.* at 584.

73. *See* FREUNDLICH & PETERSON, *supra* note 7, at 34; *see also* Mallette v. Children's Friend & Serv., 661 A.2d 67, 70 (R.I. 1995) (holding an agency liable for breaching a duty of care to prospective parents despite the absence of a statute requiring disclosure).

74. *See* sources cited *supra* note 61.

75. *See* FREUNDLICH & PETERSON, *supra* note 7, at 8.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See* Blair, *supra* note 60, at 696.

80. *See id.* at 697.

81. *See id.* at 698. Indeed, some parents might choose to forego adoption as an alternative if it means being subject to in-depth questioning. *See id.*

82. *See id.*

tion to adoptive parents.⁸³ The benefits outweigh the costs, and even the costs can be reduced or eliminated in many instances. For example, there is little authority to support the contention that special needs children remain unadopted for long periods of time.⁸⁴ There are many more adoptive children than parents,⁸⁵ and there are numerous parents that are willing and even looking to raise a child with a disability.⁸⁶ Counseling during the initial stages of adoption can reduce the possibility of mistaken stigmatization associated with a risk of disease in a child's background.⁸⁷ Furthermore, while the privacy interests of birth parents demand due respect,⁸⁸ it is often the case that birth parents sacrifice their own privacy concerns *voluntarily* to update adoption agencies with biological information about themselves as it develops.⁸⁹ Finally, the argument that parents would compete for the perfect baby is misguided,⁹⁰ because of the high ratio of prospective parents to adoptive children.⁹¹

Although there is considerable scholarly support for an affirmative duty to disclose,⁹² only a few courts have recognized and imposed this duty.⁹³ The first step toward establishing an affirmative duty to disclose is to recognize an obligation on the part of adoption agencies to answer questions about a child's background truthfully and completely. In *Roe v. Catholic Charities*,⁹⁴ a court took this initial step.⁹⁵ In this case, the parents told the agency that they wanted to adopt a healthy child.⁹⁶ The couple eventually adopted a boy whom a social worker for Catholic Charities characterized as, "a normal child who only needed lots of love."⁹⁷ However, Catholic Charities knew that the boy had behavioral and emotional problems and that he had seen several mental health care providers to address these issues,⁹⁸ but Catholic Charities never revealed this information to the adoptive parents, even when the parents asked

83. *See id.* at 698-99.

84. *See id.* at 707.

85. *See id.* at 712. For every adoptive child, there are 20 couples looking to adopt. *See id.*

86. *See id.* at 707.

87. *See id.* at 708-09.

88. *See id.* at 712.

89. *See id.* at 711.

90. *See id.* at 712.

91. *See supra* note 85 and accompanying text.

92. *See Note, When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1773 (1992); *see also* Blair, *supra* note 60, at 707.

93. *See sources cited supra* note 61.

94. 588 N.E.2d 354 (Ill. App. Ct. 1992).

95. *See id.*; *see also* FREUNDLICH & PETERSON, *supra* note 7, at 20.

96. *See Roe*, 588 N.E.2d at 356.

97. *Id.*

98. *See id.*

specific questions about the child's personality.⁹⁹ The court in this case held that a social worker had a duty to honestly answer prospective parents' questions about the adoptive child that the social worker placed.¹⁰⁰ Relying on traditional tort principles, the court found Catholic Charities liable because the agency could foresee the serious consequences of its actions.¹⁰¹ Furthermore, the court found that the burden imposed on social workers to comply with this duty was minimal because it simply involved giving prospective parents accurate answers to their questions.¹⁰² Finally, the court viewed its requirement of full disclosure as supportive of adoption and the family unit in general.¹⁰³

The next step was to address adoption agency silence. In *Gibbs v. Ernst*,¹⁰⁴ a court held for the first time that an adoption agency could not avoid liability simply by revealing nothing.¹⁰⁵ In that case, an adoptive couple repeatedly requested information about their child's background, and the agency continuously reassured the parents that they had been given all information available about the child's history.¹⁰⁶ The *Gibbs* court found that the adoption agency had kept many details from the parents,¹⁰⁷ and announced an obligation for adoption agencies to, "make reasonable efforts to reveal fully and accurately all non-identifying information in their possession to the adopting parents."¹⁰⁸

Following *Gibbs*, the court in *Mohr v. Commonwealth* even further refined the duty of adoption agencies to disclose.¹⁰⁹ In this case, a couple sought to adopt a child from the Massachusetts Department of Public Welfare.¹¹⁰ The Department warned the prospective parents that the children in the Department's care often have emotional problems.¹¹¹ In response the couple indicated that they would consider a child with either a correctable medical or emotional problem,¹¹² but would not consider a

99. *See id.*

100. *See id.* at 365.

101. *See id.*

102. *See id.* at 365; *see also Jackson*, 956 P.2d at 46-47 (finding that the need for parents to be fully-informed about an adoptive child's background prior to adoption justifies the slight burden on adoption agencies).

103. *See Roe*, 588 N.E.2d at 365. The court noted that support of the family unit is a public policy concern of the State of Illinois, as expressed in the Illinois Marriage and Dissolution of Marriage Act. *See id.* at 365-66.

104. 647 A.2d 882 (Pa. 1994).

105. *See id.*; *see also* FREUNDLICH & PETERSON, *supra* note 7, at 21.

106. *See Gibbs*, 647 A.2d at 886.

107. *See id.* at 893.

108. *Id.*

109. 653 N.E.2d 1104, 1112 (Mass. 1995).

110. *See id.* at 1107.

111. *See id.*

112. *See id.*

“special needs” child.¹¹³ Eventually, the couple adopted a girl named Elizabeth who they were told suffered from malnutrition and was being tested for dwarfism.¹¹⁴ Although the Department possessed diagnostic information indicating that Elizabeth was mentally retarded and that her mother suffered from schizophrenia, it never disclosed this information to the future parents.¹¹⁵ The couple soon noticed that Elizabeth exhibited disruptive behavior and was developing slowly.¹¹⁶ Many years later, while obtaining immunization records for Elizabeth, Mrs. Mohr discovered the hidden facts about Elizabeth’s medical background.¹¹⁷

The plaintiffs sued for wrongful adoption, and after considering the competing policy issues,¹¹⁸ the court approved their claim of negligent misrepresentation.¹¹⁹ This unique case was the first to establish an affirmative obligation on adoption agencies to disclose relevant information even absent parental questions. The court gave no indication that the Mohrs ever questioned the Department about specific aspects of Elizabeth’s medical or family history.¹²⁰ Rather, the Department had simply refrained from volunteering any information.¹²¹ In squarely confronting this deception, the court announced that, “an adoption agency does have an affirmative duty to disclose to adoptive parents information about a child that will enable them to make a knowledgeable decision about whether to accept the child for adoption.”¹²² To comply with this duty, the court held that an agency use “due care” in reporting background information to prospective parents.¹²³

Given a history that suggests that courts will rely on either statutory language or common law principles to find adoption agencies liable for

113. *See id.* at 1107 n.5.

114. *See id.* at 1107. The Department gave the couple superficial details about the girl’s mother, specifically about her appearance and career goals. *See id.*

115. *See id.* at 1106-07.

116. *See id.* at 1107.

117. *See id.* The plaintiffs admitted that they would have refrained from adopting Elizabeth had they known about her medical background. *See id.* at 1108.

118. *See id.* at 1112. The court found that full disclosure enabled the adoptive parents to ensure that the child would receive appropriate medical care at an early age. *See id.* Also, full disclosure facilitated informed decisions regarding whether to adopt. *See id.* Finally, the court realized that adoptive parents who are well-informed will naturally feel reassured about the adoption process and more confident that the agency has given them honest information. *See id.* at 1112-13.

119. *See id.* at 1112.

120. It is possible that the decision simply does not mention that the Mohrs asked about Elizabeth’s background, when in fact they did. If this is the case, then the decision easily falls into the analytical framework of *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994).

121. *See Mohr*, 653 N.E.2d at 1107.

122. *Id.* at 1112.

123. *Id.* at 1113.

fraudulent and negligent statements or omissions to adoptive parents, it seems clear that only full, truthful disclosure of background information to parents will shield adoption agencies from liability.

III. DUTY TO INVESTIGATE

Although courts are slowly beginning to impose a duty on adoption agencies to disclose information from the medical records and biographies in their possession, no court has been willing to compel adoption agencies to independently investigate the backgrounds of the children they seek to place. Courts consistently refuse to burden adoption agencies with a duty to investigate. For example, the court in *Gibbs* declined to recognize a duty to investigate because the relevant adoption statute imposed no such obligation.¹²⁴ The *Mohr* court avoided the question, stating in a footnote:

This is not a case where an adoption agency placed a child without discovering and informing the potential adoptive parents about the child's medical and familial background. Thus, we need not and do not address whether and to what extent an agency has a duty to investigate a child's background.¹²⁵

Commentators have not followed the slow pace of the courts in acknowledging the need to impose a duty to investigate on adoption agencies. Rather, many of those studying the evolution of wrongful adoption criticize the courts' reasons for refusing to impose a duty to investigate on adoption agencies.¹²⁶ The overarching concern among this segment of the legal community is that by failing to acknowledge a duty to investigate, courts encourage adoption agencies to gather as little information as possible because the agencies know that the sufficiency of their collection efforts will go unchallenged.¹²⁷ Commentators are quick to

124. See *Gibbs v. Ernst*, 647 A.2d 882, 894 (Pa. 1994). The decision references 23 PA. CONST. STAT. § 2533(b)(12) which requires that the intermediary involved in the adoption provide a "statement that medical history was obtained and if not obtained, a statement of the reason therefor." *Id.* At best, the court notes that this might imply that an agency worker use his/her best efforts to obtain the records, but falls far short of imposing a duty to investigate. *Id.* However, earlier the court stated that, "[adoption] agencies are only under the obligation to make reasonable efforts to determine if their statements are true." *Id.* at 891. While the court notes that burdensome investigations can be avoided, it seems to suggest that investigations in less tedious instances would be expected. See *id.*

125. *Mohr*, 653 N.E.2d at 1113 n.11.

126. See, e.g., Jennifer Emmaneel, Note, *Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include a Duty to Investigate and a Duty to Warn*, 29 GOLDEN GATE U. L. REV. 181, 228 (1999).

127. See FREUNDLICH & PETERSON, *supra* note 7, at 39-40.

provide an endless list of catastrophic consequences resulting from a failure to recognize a duty to investigate, without considering the practical implications of imposing this obligation on adoption agencies.¹²⁸

Beyond insisting on disclosure of known information, many feel that adoption agencies should be required to conduct a reasonable investigation into a child's medical and social history.¹²⁹ They find support for a duty to investigate in both state disclosure laws and policy arguments. Many state disclosure laws imply the need for an investigation in order for an adoption agency to be in full legal compliance, creating an elastic environment in which courts could easily impose an obligation to investigate.¹³⁰ However, very few statutes explicitly require investigations, and those that do provide vague guidelines for the scope of such an investigation.¹³¹ Yet even in states with limited or non-existent disclosure laws, supporters of a duty to investigate feel that judges are within their authority to enforce such an obligation.¹³²

Several social and pragmatic barriers threaten the potential success of an imposed duty to investigate. First, birth parents, much like adoptive parents, run the risk of having to raise a child with a disability that an investigation would not uncover, and thus there is no reason to take additional steps for adoptive parents. This argument is rejected by commentators who view adoptive parents as assuming a greater risk because biological parents can investigate their own medical histories and can at least be aware of some potential problems.¹³³ Second, some argue that courts would have a difficult time establishing the scope and extent of a reasonable search.¹³⁴ For example, should adoption intermediaries be required to verify information given to them by biological parents?¹³⁵ Should an intermediary be obliged to verify a biological father when the child's mother is unsure who the father is?¹³⁶ Should an investigation be

128. *See id.* at 40.

129. *See Note, supra* note 92, at 1773.

130. *See id.* at 1774.

131. *See DEWOODY, supra* note 13, at 48.

132. *See Note, supra* note 92, at 1774-75. The author states that a family law judge would not be beyond his/her discretionary power in establishing a duty which is supportive of the adoption process. *See id.* at 1774.

133. *See id.* at 1777. In response to the suggestion that adoptive parents should conduct their own inquiries into the histories of their child's biological parents or be held comparatively negligent, one court said, "We conclude that the plaintiffs had no duty to conduct the type of investigation suggested by the Commonwealth." *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1113 n.12 (Mass. 1995).

134. *See FREUNDLICH & PETERSON, supra* note 7, at 42.

135. *See id.* at 43-44.

136. *See id.* at 40.

handled through questionnaires or through personal interviews?¹³⁷ What must an adoption agency uncover in order to comply with a “reasonable investigation?”¹³⁸ Third, investigative agents risk invading the birth parents’ privacy rights.¹³⁹ Fourth, adoption agencies may not be able to provide the necessary financial¹⁴⁰ and labor resources¹⁴¹ to conduct an adequate search. Fifth, the burden on adoption agencies to carry out this type of investigation would not only strain financial resources, but might diminish the number of adoptions.¹⁴²

Notwithstanding the above arguments, there are those who refuse to consider an obligation to investigate as an unfair burden, but rather perceive it as a substantially less onerous hindrance compared to that of raising a disabled child without prior preparation or commitment.¹⁴³ While

137. Blair suggests that the better alternative is to conduct interviews with biological parents. See Blair, *supra* note 60, at 768. While the advantages of in-person interviews are clear for example, (alleviating risk that the important questions go unanswered, ensuring that one parent is not completing an application for the other, and targeting potential problem areas in the parents’ medical or psychological histories), many of the general concerns regarding a duty to investigate are still present. For example, a person confronted in a live interview may feel like his/her privacy is being infringed even more so than had he/she completed a questionnaire. See FREUNDLICH & PETERSON, *supra* note 7, at 41. As a result, one of the parents may not want to participate in the interview, leaving holes in the parents’ biographies.

138. One author suggests that a reasonable investigation “*might* include the child’s genetic background as well as doctor evaluations based on a [sic] standard physical and psychological examinations.” Emmaneel, *supra* note 126, at 228 (emphasis added). The problem is that without some general understanding of what would be required of an investigation, adoption agencies remain open to countless lawsuits surrounding this vague language.

139. See FREUNDLICH & PETERSON, *supra* note 7, at 41. The authors caution that birth parents who are considering adoption might forego the option after learning that the adoption agency can pry into their backgrounds, or they might seek out practitioners that do not conduct a background search but also fail to provide the full range of counseling services. See *id.*; see also Jackson v. State, 956 P.2d 35, 50 (Mont. 1998).

140. *But see* Note, *supra* note 92, at 1178 (stating that fulfillment of an obligation to investigate would not cost very much because private agencies usually place infants, and state agencies that typically place older children would expend little in conducting an investigation because many of their children are already a part of the state welfare system, enabling the adoption agency to complete an investigation merely by compiling the various government documents about a particular child). The small expenses that are required to complete a reasonable investigation that may reveal that a child has or will develop physical and/or emotional problems represents an expense that all of society should bear as a cost of raising disabled children. See *id.* Such an expense should not rest entirely on those who can not bear children of their own. See *id.* Some states require adoptive parents to fund their own investigation, thereby reducing the adoption agency’s own expenses to nothing. See Emmaneel, *supra* note 126, at 229.

141. See FREUNDLICH & PETERSON, *supra* note 7, at 41 (questioning whether social workers engaged in counseling adoptive parents are appropriately trained to conduct an investigation of this kind).

142. See Gibbs v. Ernst, 647 A.2d 882, 894 (Pa. 1994).

143. See Emmaneel, *supra* note 126, at 228; see also Blair, *supra* note 71, at 917 (stating that

riddled with numerous impracticalities, the attractiveness of a duty to investigate continues to fuel the current debate surrounding wrongful adoption.

IV. RECOVERY PROBLEMS

While the discussion surrounding wrongful adoption tends to focus on whether or not to impose an obligation on adoption agencies to investigate the backgrounds of the children they place, there has been relatively little commentary concerning the difficulties that victims of wrongful adoption encounter in recovering damages from adoption agencies. Commentators concern themselves with prevention, but once the damage is done, the legal system provides little recovery for aggrieved parents. Victims of wrongful adoption must be able to recover for losses associated with the intentional and negligent misrepresentations made by adoption agencies. However, many courts have erected formidable obstacles to recovery, leaving numerous victims of wrongful adoption uncompensated for unanticipated and unprecedented financial losses.¹⁴⁴

The *Juman* case exemplifies the challenges that parents confront in pursuing damages for wrongful adoption. Until their son died at age 29, Marty and Phillis Juman supported Michael and paid for years of psychiatric care, including expensive residential treatment exceeding \$2 million.¹⁴⁵ The State of New York allowed Michael's parents to sue for out-of-pocket expenses that accrued between the time that the adoption agency's negligence was discovered and Michael's twenty-first birthday, which amounted to three years.¹⁴⁶ The care that the Jumans provided for Michael in the eight years until his death went uncompensated. Marty Juman suffered three heart attacks and also required psychiatric attention for depression, but was denied compensation for these injuries.¹⁴⁷ Even more disconcerting, the Jumans were restricted from recovering for their greatest injury, the pain that accompanied raising a schizophrenic child, by

by placing the burden on defendants to disclose information, adoptive parents can raise special needs children, "with their eyes wide open"); Note, *supra* note 92, at 1778 (stating that the burden of raising special needs children should be shouldered by all of society).

144. See Blair, *supra* note 71, at 893. The author states that uniformed adoptive parents are less prepared than fully-aware parents both financially and emotionally to deal with a disabled child. *See id.*

145. See *Juman v. Louise Wise Servs.*, 608 N.Y.S.2d 612, 614 (N.Y. App. Div. 1994).

146. Mr. and Mrs. Juman provided their son his own apartment and supported his psychiatric treatment until his death at age 29. Telephone Interview with Marty Juman (January 9, 2000). However, the trial court held that New York law only entitled the Jumans to recover their out-of-pocket-expenses for Michael's illness up to the time he turned 21. See *Juman*, 608 N.Y.S.2d at 614.

147. See *Juman*, 608 N.Y.S.2d at 614.

the State of New York's rules governing recovery in fraud-based cases.¹⁴⁸ The only other source of possible recovery still available to the Jumans is a claim for punitive damages that is pending in the New York courts.¹⁴⁹

Generally, parents suing for wrongful adoption can recover the extraordinary medical expenses associated with raising a disabled child.¹⁵⁰ Courts typically award damages for such pecuniary losses because they represent the calculable consequence of withholding from adoptive parents the option to choose whether or not to care for a special needs child.¹⁵¹ Indeed, these expenses can be enormous.¹⁵² But often, an award of medical expenses reflects only a small portion of a parent's true loss, with emotional suffering comprising the greatest component of that loss.

Initially at common law, courts would award damages for emotional distress only when it accompanied an independent intentional tort such as battery, assault, and false imprisonment.¹⁵³ Eventually, the courts realized that it was arbitrary to limit recovery of emotional distress damages to instances in which trauma accompanied certain delineated torts,¹⁵⁴ and they began recognizing it as an independent action.¹⁵⁵ The general rule that has emerged holds defendants liable for outrageous conduct that inflicts serious mental distress.¹⁵⁶

A. EMOTIONAL DISTRESS DAMAGES ASSOCIATED WITH FRAUD CLAIMS

In wrongful adoption suits, courts are split regarding whether a parent suing under a theory of fraud or intentional misrepresentation can recover emotional distress damages as a component of damages for the underlying action.¹⁵⁷ The *Burr* Court is the only court to allow recovery for emotional distress in an intentional misrepresentation case of wrongful adoption.¹⁵⁸

148. See *Juman v. Louise Wise Servs.*, 663 N.Y.S.2d 483, 489 (N.Y. App. Div. 1997).

149. See *id.* at 490.

150. See *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 535 (Wis. 1989). The court stated that, "[i]t is only the extraordinary expenses, the unexpected expenses resulting from Erin's special needs, which are actionable." *Id.*; see also *Juman*, 663 N.Y.S.2d at 488; *Burr v. Board of County Comm'ns*, 491 N.E.2d 1101, 1106 (Ohio 1986).

151. See *Blair*, *supra* note 71, at 888-89. The author suggests that this deprivation of a right to choose is an injury itself, beyond emotional damages. See *id.* at 889.

152. See *Burr*, 491 N.E.2d at 1109 (noting that the reported medical expenses for Patrick Burr exceeded \$80,000); see also *Blair*, *supra* note 71, at 892-93 (reporting that the Meracles' spent more than \$30,000 per year for their daughters medical care, and that residential care can cost up to \$15,000 per month).

153. See KEETON, *supra* note 32, § 12, at 57.

154. See *id.*

155. See *id.*

156. See *id.* at 60.

157. See *Blair*, *supra* note 71, at 904.

158. See *Burr*, 491 N.E.2d at 1108.

Other courts have suggested that they would allow recovery of emotional distress damages if a parent could prove that the fraudulent conduct caused physical injury.¹⁵⁹

Some courts simply refuse to award emotional distress damages in intentional misrepresentation cases. For example, New York justifies its adherence to this policy by summarily referring to its history of limiting damages in fraud cases to pecuniary losses.¹⁶⁰ Some courts flatly refuse to award emotional distress damages in fraud cases without explaining their reasoning, and simply refer to other courts that have such rules.¹⁶¹ Besides the argument that fraud is strictly an economic tort,¹⁶² some contend that emotional damages should not be awarded in fraud cases because the parties do not contemplate these damages¹⁶³ and awarding such damages would place the plaintiff in a better position than before the fraud occurred.¹⁶⁴

However, courts that have recognized emotional distress claims in fraud cases counter by emphasizing the intentional nature of fraud as supportive of recovery.¹⁶⁵ Particularly in a tort setting, defendants accused of fraud are highly culpable and at least as liable for injury as their negligent counterparts.¹⁶⁶ Herein lies the unique paradox associated with a fraud-based wrongful adoption case: the defendant breaches a higher threshold of wrongdoing than a negligent defendant, and yet the plaintiff alleging fraud may be unable to utilize the same recovery mechanisms as plaintiff's analogue pursuing a claim of negligence. Courts must abandon their obsolete rules against awarding more than pecuniary damages in fraud-based wrongful adoption cases. Plaintiffs pursuing these causes of action have suffered serious emotional distress which deserves compensation.

Allowing emotional distress claims to accompany fraud-based wrongful adoption actions does not interfere with the customary policy reasons for emotional distress claims. First, the number of plaintiffs who might bring

159. See, e.g., *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 536 (Wis. 1989); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 290 (Minn. 1992).

160. See *Juman v. Louise Wise Servs.*, 663 N.Y.S.2d 483, 489 (N.Y. App. Div. 1997).

161. See Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1, 5 (1989).

162. See Blair, *supra* note 71, at 905. However, this argument fails to recognize the increasing tendency for courts in other jurisdictions to recognize such claims.

163. See *id.* (stating that this principle derives from contract law and is thus inapplicable in the tort arena).

164. See *id.* The problem with this argument, says the author, is that it tends to support compensation for emotional injury rather than discourage it, because only by allowing emotional distress damages can a plaintiff truly be restored to the position he/she occupied before the fraud. See *id.*

165. See Merritt, *supra* note 161, at 6.

166. See *id.*

such claims is low, limited in fact to the disabled child's parents. Second, the types of injuries experienced by victimized parents are fully foreseeable and are more often the basis for elaborate cover-ups of a child's true health history.¹⁶⁷ Third, the emotional anguish experienced by parents in these situations is virtually always genuine and severe.¹⁶⁸ Resorting to archaic notions of the economic nature of fraud claims and established "rules" constrains the ability of courts to fully compensate victims of a drastically injurious tort.

Parents pursuing wrongful adoption claims must be able to recover for their emotional suffering. Courts can ameliorate their general reluctance to awarding emotional distress damages in fraud cases by limiting recovery to specific types of fraud-based actions. Several jurisdictions support a right to recover emotional distress damages in particular fraud-based claims, which compare favorably with the wrongful adoption cause of action. For example, some courts distinguish between business and non-business frauds, allowing recovery for emotional distress injuries in the latter, but not the former.¹⁶⁹ Public policy supports awarding damages for non-business frauds, which are as likely to engender emotional distress claims as negligence-based causes of action. This distinction obviously supports allowing recovery for emotional distress in fraud-based wrongful adoption suits because such claims are clearly non-commercial in nature.

Still other courts allow recovery only for severely injured fraud victims.¹⁷⁰ This may be a less useful distinction for wrongful adoption cases because it seems to re-emphasize what is currently a required element of emotional distress without offering anything more.¹⁷¹ Other courts focus on the extent of financial damage, rather than the scope of emotional injury.¹⁷² Again, since wrongful adoption suits often generate excessive losses,¹⁷³ this distinction would help more victims recover. Finally, some courts allow jurors the discretion to consider and incorporate emotional distress damages into an award of punitive damages.¹⁷⁴ Even in

167. While searching for information about his birth parents, Michael Juman came across the notes of the social worker responsible for his adoption. *See* Belkin, *supra* note 5, at 47-48. Enclosed were two separate accounts of his birth mother's history, one that the agency told the Jumans and another that recounted the actual story of her early life. *See id.* at 47. "On every page [of the report], it seemed to Martin [Marty], there was something else that sent his head spinning." *Id.*

168. *See* Blair, *supra* note 71, at 892.

169. *See* Merritt, *supra* note 161, at 10. However, the author notes that courts are not always consistent in addressing this dichotomy. *See id.* at 11. For instance, some courts deny recovery in personal actions while others allow recovery in purely commercial actions. *See id.*

170. *See id.* at 8.

171. *See* KEETON, *supra* note 32, § 12, at 63.

172. *See* Merritt, *supra* note 161, at 9.

173. *See supra* note 152 and accompanying text.

174. *See* Merritt, *supra* note 161, at 12. Courts vary with respect to what kinds of fraud cases

jurisdictions that prohibit awards of punitive damages to compensate victims, judges may tacitly endorse this method by vaguely instructing jurors to consider all factors in calculating punitive damage awards.¹⁷⁵ More jurisdictions should allow suitable fraud-based claims to include emotional distress damages. Further, those jurisdictions that have already formed such a category should include fraud-based wrongful adoption claims within that group.

Parents who have been misled by adoption agencies are entitled to recover damages for the emotional distress associated with raising a child with unanticipated health and behavioral problems. Courts must either abandon their inflexible fraud rules, or develop or expand a category of fraud claims, such as wrongful adoption fraud, which public policy supports as an exception to these rules.

B. *Intentional Infliction of Emotional Distress Claims*

In jurisdictions that prohibit emotional distress claims associated with fraud, a parent suing for wrongful adoption could try to establish an independent action for intentional infliction of emotional distress.¹⁷⁶ While the requirements for pleading emotional distress as part of a fraud cause of action may be vague, a plaintiff attempting to establish an independent cause of action for intentional infliction of emotional distress must prove the following distinct elements:

- (1) the defendant must have intended to upset the plaintiff or must have acted with reckless disregard of the consequences;
- (2) the conduct must have been "beyond all possible bounds of decency, and . . . regarded as atrocious, and utterly intolerable in a civilized community"; and
- (3) the plaintiff's emotional distress must have been severe.¹⁷⁷

To establish that the plaintiff's distress is genuine, many courts require plaintiffs to prove that the emotional trauma *caused* the physical injury.¹⁷⁸ Some wrongful adoption plaintiffs will not be able to demonstrate physical injury. However, if the defendant's conduct is sufficiently outrageous, most courts will overlook the physical injury requirement.¹⁷⁹

are eligible for punitive damages awards. *See id.*

175. *See id.* at 14. In fact, appellate courts often support awards of punitive damages when it was impossible to bring an emotional distress claim at the trial level. *See id.*

176. *See generally id.* at 15.

177. *Id.* at 16 (quoting *Harsha v. State Sav. Bank*, 346 N.W. 791, 801 (Iowa 1984)).

178. *See KEETON, supra* note 32, § 12, at 64.

179. *See id.*

The outrageousness element, sometimes framed in terms of maliciousness or recklessness, often proves a stumbling block for plaintiffs pursuing an independent claim for emotional distress damages in a negligence-based wrongful adoption suit. In *M.H. v. Caritas Family Services*, the court disallowed the parents' intentional and negligent infliction of emotional distress claims because the adoption agency's conduct did not willfully or maliciously intrude on their rights.¹⁸⁰ It should be noted that *M.H.* was a negligent misrepresentation case, thus raising the possibility that the conduct of a defendant in an intentional misrepresentation case is sufficiently outrageous to support an independent claim for emotional distress damages.¹⁸¹ Indeed, the intentional actions of a fraudulent defendant that cause damage to the plaintiff may be perceived as outrageous.¹⁸² However, as Professor Merritt satirically notes in his article, courts often perceive fraud as too commonplace to rise to the level of outrageous conduct.¹⁸³

Given that many wrongful adoption plaintiffs will have a difficult time proving either the physical injury or outrageousness necessary for an independent claim of intentional infliction of emotional distress, courts should allow them to allege emotional distress as a component of their claims for intentional or negligent misrepresentation.

C. *Negligent Infliction of Emotional Distress Claims*

In cases of negligent misrepresentation or when a defendant's conduct is not sufficiently egregious, parents may pursue a claim for negligent infliction of emotional distress.¹⁸⁴ Not surprisingly, courts are even less likely to award emotional distress damages when the defendant acts negligently, rather than intentionally.¹⁸⁵ Herein lies the puzzle that prevents victims of wrongful adoption from recovering damages for emotional distress: courts are unwilling to award such damages in intentional/fraudulent misrepresentation cases because of restricting

180. See 488 N.W.2d 282, 290 (Minn. 1992). Cf. *M.H. v. Caritas*, 475 N.W.2d 94, 100 (Minn. Ct. App. 1991) (stating that the defendant's conduct was not outrageous enough to support an intentional infliction of emotional distress claim, but a negligent infliction of emotional distress claim was proper because it accompanied an independent intentional tort).

181. See *M.H.*, 488 N.W.2d at 288-89.

182. See KEETON, *supra* note 32, § 12, at 61.

183. See Merritt, *supra* note 161, at 19-20. Professor Merritt suggests that courts should reconsider their aversion to awarding emotional distress damages in fraud cases rather than constrain plaintiffs to the unworkable option of proving an intentional infliction of emotional distress claim. See *id.* at 20-21.

184. See Blair, *supra* note 71, at 923.

185. See KEETON, *supra* note 32, § 54, at 360.

precedent and yet they are also reluctant to award such damages in cases of mere negligent conduct.

Courts are generally reluctant to award damages for emotional distress in negligence unless there is a showing of physical injury.¹⁸⁶ Indeed, many emotional distress claims in wrongful adoption lawsuits are summarily dismissed due to a lack of physical injury at the time when the cause of action first accrued.¹⁸⁷ However, the requirement of physical injury in wrongful adoption cases is unnecessary and avoidable. Some states do not require proof of physical injury at all in negligent infliction of emotional distress cases.¹⁸⁸ Others forego the requirement when the conduct is outrageous enough to cause severe mental distress.¹⁸⁹ Still another variation dispenses with the physical injury requirement in the types of torts which provide a legitimate basis for eliminating it.¹⁹⁰ For instance, in cases of negligent embalming and negligent transmission of a message involving death, courts do not require a showing of physical injury because these torts are particularly likely to generate genuine emotional distress.¹⁹¹ In wrongful birth cases, courts dispense with the physical injury element because the parents' emotional distress is unquestionably sincere.¹⁹² Similarly, the emotional grief experienced by parents apprized of their adopted child's true health history is unlikely to be feigned.

Although some jurisdictions have a "zone of danger" requirement in negligence-based emotional distress cases,¹⁹³ this element is limited to instances in which a third party claims emotional distress damages

186. *See id.* § 54, at 361.

187. *See Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 536 (Wis. 1989) (dismissing the emotional distress claims because the parents had not shown physical injury).

188. *See Blair, supra* note 71, at 924. For example, Texas does not require plaintiffs to show physical injury to successfully plead a claim for negligent infliction of emotional distress. *See id.* *But see Meracle*, 437 N.W.2d at 536, where the court stated that:

The rule that a claim for the negligent infliction of emotional distress must be accompanied by physical injury is important and strikes "the appropriate balance between the rights of injured parties to obtain a remedy for a wrong, and the rights of defendants to be free from potentially unlimited liability and the meritless claims."

(quoting *LaFleur v. Mosher*, 325 N.W.2d 314, 317 (Wisc. 1982)).

189. *See KEETON, supra* note 32, § 54, at 361.

190. *See id.* at 362.

191. *See id.*

192. *See Blair, supra* note 71, at 927 (considering a wrongful birth scenario in which medical providers made errors administering a test for Tay-Sachs which, if done correctly, would have indicated the presence of the fatal illness in the unborn child).

193. *See id.* at 928.

associated with witnessing harm to another.¹⁹⁴ Since adoption agencies owe a duty of care directly to adoptive parents, no third party is involved and the distress associated with a breach of this duty is fully recoverable by the parents.¹⁹⁵ Thus, the bystander rule is inapplicable in wrongful adoption cases.¹⁹⁶

Another common fear expressed by courts unwilling to extend coverage of emotional distress damages is that the injuries forming the basis of the claim may be only temporary or minor in nature.¹⁹⁷ However, it is puzzling why this concern should apply to wrongful adoption plaintiffs given that their emotional distress symptoms are likely to continue over the duration of their disabled child's life and beyond. Finally, some courts express the concern that allowing recovery for emotional distress against wrongful adoption defendants would unfairly punish them.¹⁹⁸

However, there are two counter-arguments which undermine this contention. First, some states already incorporate claims of emotional distress into punitive damages awards, thereby suggesting that defendants are not being *unfairly* punished by having to account for inflicting emotional distress damages.¹⁹⁹ Second, even if the effect of such an award outside of punitive damages does "punish" defendants, it is still not inconsistent with public policy to place the burden of accounting for these damages on the defendant.²⁰⁰

In negligent misrepresentation cases and cases in which the defendant's conduct is fraudulent but not outrageous, courts can and should compensate plaintiffs for negligent infliction of emotional distress. To accommodate this interest, however, courts may have to forego the physical injury constraint, something they have been willing to do in extreme cases that compare favorably with wrongful adoption scenarios.²⁰¹

D. Punitive Damages

The intentional nature of fraud-based wrongful adoption claims lends itself to punitive damage awards.²⁰² However, the limitations on grants of

194. See KEETON, *supra* note 32, § 54, at 365; see also Blair, *supra* note 71, at 928.

195. See Blair, *supra* note 71, at 929.

196. See *id.*

197. See generally KEETON, *supra* note 32, § 54, at 361.

198. See *id.*

199. See Merrit, *supra* note 161 and accompanying text.

200. See KEETON, *supra* note 32, § 54, at 361.

201. Marty Juman has experienced difficulties in establishing that the defendant's conduct was the proximate cause of his heart attacks. Telephone Interview with Marty Juman (January 9, 2000).

202. See Blair, *supra* note 71, at 903. Cf. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 105 (2d ed.1980) (arguing that an alleged fraud must be, "gross, oppressive, or aggravated" to generate punitive damages unless there is a breach of trust or some other

punitive damages generally suggest that courts should avoid relying on them as an exclusive source of recovery in wrongful adoption suits. In many cases, punitive damages do not fit within the framework of a wrongful adoption lawsuit. For example, courts generally award punitive damages only if a fraudulent misrepresentation is made maliciously or willfully,²⁰³ a standard that may be impossible to establish in a wrongful adoption case. On the other hand, some courts infer the intentional conduct necessary to justify punitive damages from an entity's reckless disregard for the truth,²⁰⁴ arguably a standard that some wrongful adoption cases might meet.²⁰⁵

Other courts insist that the fraud be directed at the public in order for an individual plaintiff to recover punitive damages.²⁰⁶ Within the unique setting of wrongful adoption claims, it will be difficult to establish that an adoption agency directs its conduct at the public unless that agency's policy is to intentionally misrepresent the histories of all of its adoptees. Finally, one must consider the track record: no court has yet awarded punitive damages in a wrongful adoption case.²⁰⁷

While states vary with respect to the grounds necessary to establish a claim for punitive damages, a cursory examination of some common principles demonstrates why it would be a mistake for courts to rely solely on punitive damages as a way of fully compensating aggrieved parents in wrongful adoption cases. First, to satisfy a punitive damages claim, the defendant's conduct must demand attention by establishing one of the policy reasons for imposing punitive damages, which it may fail to do.²⁰⁸ Second, the defendant's conduct must be egregious, an element that usually requires some degree of malice or evil motive,²⁰⁹ which may also be hard to prove. Other states interpret this requirement as necessitating a "conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton."²¹⁰ Third, since courts generally

recognizable tort).

203. See SCHLUETER & REDDEN, *supra* note 202, at 431.

204. See *id.* at 431-32.

205. See *supra* text accompanying note 164.

206. See SCHLUETER & REDDEN, *supra* note 202, at 105.

207. See *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 290 (Minn. 1992); see also *Roe v. Catholic Charities*, 588 N.E.2d 354, 361 (Ill. App. Ct. 1992).

208. See, e.g., KEETON, *supra* note 32, § 2, at 9. The relevant considerations include: "punishing the defendant, . . . teaching the defendant not to do it again, and . . . deterring others from following the defendant's example." *Id.* Wrongful adoption claims arguably satisfy the last two reasons for imposing punitive damages.

209. See *id.* § 12, at 9-10; see also *Roe*, 588 N.E.2d at 361 (suggesting that the court denied plaintiff's claim for punitive damages because his case lacked aggravating circumstances).

210. See KEETON, *supra* note 32, § 2, at 10; see, e.g., *M.H.* 488 N.W.2d at 290 (reversing the appellate court's leave to amend the complaint and add a claim for punitive damages because the

perceive punitive damages as a windfall to plaintiffs,²¹¹ many judges use their discretion to withhold this dangerous remedy from the jury,²¹² thereby providing another reason why punitive damages are rarely awarded.

Only the *Juman* court entertained the possibility that a fraud-based wrongful adoption case might support an award of exemplary damages.²¹³ In rejecting the contention that the defendant's actions must be directed at the public in order to establish punitive damages, the court allowed the plaintiffs to retain their demand for punitive damages.²¹⁴ This aspect of the case is still before the New York courts.

While a fraud-based wrongful adoption claim may establish a basis for imposing punitive damages,²¹⁵ it is almost impossible to find support for such an award in a negligent misrepresentation case. Indeed, it is generally acknowledged that plaintiffs may not recover punitive damages for mere negligence absent a contrary statutory provision.²¹⁶ In some states, plaintiffs can recover punitive damages if the defendant's conduct amounts to gross negligence or recklessness.²¹⁷ Gross negligence typically differs from regular negligence in that the former requires purposeful or willful misconduct,²¹⁸ a standard that some wrongful adoption defendants might satisfy. However, other states allow recovery for punitive damages only when the gross negligence incorporates wantonness or recklessness, or when the offender exhibits a gross disregard for the safety of others.²¹⁹

The single greatest problem with supporting punitive damage awards in wrongful adoption cases is the likelihood that such awards would be motivated by juror sympathy towards emotionally disturbed victims. Some juries may award punitive damages in wrongful adoption cases for the admittedly appropriate purpose of deterring future wrongful conduct or punishing past wrongful behavior. However, other juries may award punitive damages in wrongful adoption cases because of a desire to compensate victims for their emotional suffering, either implicitly (through

plaintiffs did not establish that the defendant deliberately disregarded the safety of others). The court of appeals had allowed the plaintiffs to add a claim for punitive damages merely because of the intentional nature of their cause of action, intentional misrepresentation. *See M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 100 (Minn. Ct. App. 1991).

211. *See KEETON, supra* note 32, § 2, at 14.

212. *See id.*

213. *See Juman*, 663 N.Y.S.2d at 490.

214. *See id.*

215. *See supra* note 202 and accompanying text.

216. *See, e.g., Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927) (holding constitutional an Alabama statute allowing juries to assess punitive damages in cases of wrongful death due to mere negligence).

217. *See Williams v. Wilson*, 972 S.W.2d 260, 263 (Ky. 1998).

218. *See Cooper v. County of Florence*, 412 S.E.2d 417, 418 (S.C. 1991); *see also Kellar v. People's Natural Gas Co.*, 352 N.W.2d 688, 693 (Iowa Ct. App. 1984).

219. *See Ellis v. Golconda Corp.*, 352 So. 2d 1221, 1225 (Fla. 1st DCA 1977).

discussions among jurors out of the judge's earshot) or explicitly (by a judge's instructions to the jury to consider emotional distress in calculating a punitive damages award). Although awards in the former case are appropriate and necessary, awards in the latter case are misguided and establish a bad legal precedent. Courts should heed this phenomenon, and recognize injury where it lies—in the mental torment associated with being victimized by improper adoption agency conduct.

Theoretically, punitive damages seem a viable alternative source of compensation for seriously emotionally disturbed victims of wrongful adoption. Realistically, punitive damages are a worthless option as exemplified by the almost universal rejection of such awards in wrongful adoption cases. Therefore, courts should only award punitive damages when such an award does not serve as a proxy for emotional distress damages.

V. CONCLUSION

Since its short history began, the tort of wrongful adoption has captured the interest of many in the legal community. As the typical stances against wrongful adoption claims weakened, vulnerable areas of the cause of action emerged and gained scholarly attention. The early commentators emphasized imposing a duty to disclose on adoption agencies. The case law that followed established that adoption agencies can no longer make intentional misrepresentations about an adoptee to prospective parents. Further, adoption agencies cannot negligently make misleading statements about an adoptee, and several cases hold that agencies cannot escape liability by remaining silent.

The academics then shifted their attention to the need for adoption agencies to investigate the backgrounds of children they place. Armed with arguments to support this ideal, few stopped to consider the potential questions concerning the nature and scope of a reasonable investigation. With overlooked problems often leading to litigation, it is not too far-fetched to argue that imposition of a duty to investigate could bankrupt the business of many private agencies unable to afford the legal expenses associated with arranging adoptions.

The problem of unfulfilled loss has resurfaced over the course of the short history of wrongful adoption, although it has never garnered significant scholarly attention. Courts must recognize that emotional distress damages are often an appropriate component of either a fraud or negligence-based claim for wrongful adoption, and that punitive damages should only be utilized to fill their proper role as a reminder to wrongdoers who violate public policy. Through expansion of the traditional notions of recovery, courts can better compensate those who are already victims. By failing to compensate victims of wrongful adoption for their gravest

injuries, we punish those who are already shouldering more than their share of a societal burden.