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NOTES

WRONGFUL LIFE RECOGNIZED IN WASHINGTON: HARBESON V. PARKE-DAVIS

David C. Jarratt

I. INTRODUCTION

In the recent Washington Supreme Court case of *Harbeson v. Parke-Davis, Inc.*,¹ the court held that a child with a birth defect may recover special damages for the tort of wrongful life. The wrongful life cause of action involves a suit on behalf of an infant-plaintiff for damages sustained as a result of being born with a birth defect or disease. The claim is that the physician-defendant failed to inform the plaintiff's parents of the potential defect, allowing the continuation of a pregnancy that could have been terminated.

By recognizing this novel cause of action, the Washington court has refused to follow the majority of jurisdictions in the United States and has joined California as the only states allowing the wrongful life claims. This note will analyze the Washington court's holding and its reasons for deviating from the majority rule. It will also examine the cogent reasons for rejecting the wrongful life cause of action.

II. THE FACTS

The wrongful life claim in *Harbeson* is based upon medical care which Mrs. Jean Harbeson received at an Army medical center while her husband was a member of the Air Force. In 1970, Mrs. Harbeson learned that she was an epileptic and was given Dilantin, an anticonvulsant drug, to control her seizures. She began taking the drug after their first child was conceived, and in 1971 she gave birth to a healthy, normal child.

After they were transferred to a base in Washington, the Harbesons decided to have more children, but were concerned about Mrs. Harbeson's continued use of Dilantin. She informed three different doctors of their concerns and inquired about the

1. ____ Wash. 2d ____, 656 P.2d 483 (1983).

risks involved. Each of the doctors responded that the drug could cause cleft palate and temporary hirsutism, but did not draw any correlations between Dilantin and other birth defects.

The Harbesons relied upon the doctors and Mrs. Harbeson became pregnant twice, giving birth in 1974 and 1975. During both of these pregnancies she continued to take Dilantin as prescribed by the doctors. As a consequence, both of the children suffer from growth deficiencies, developmental retardation, and other physical and developmental defects. Had the Harbesons been informed of the potential of birth defects from the use of Dilantin during pregnancy, they would not have had any other children.

The case was tried in a Washington federal district court pursuant to the Federal Tort Claims Act.² Before giving a judgment, the federal court certified the questions of law to the Washington Supreme Court.

III. THE HOLDING

A. *Wrongful Birth*

In addition to the cause of action for wrongful life, a claim for wrongful birth existed in *Harbeson*. In contrast to a wrongful life suit, which is brought by the child born with a defect, a wrongful birth suit is brought by the parents of an unhealthy child. The claim can arise either from a failure to inform the parents of a potential defect in the child or by negligent performance of a procedure to prevent birth of a defective child.³

The court in *Harbeson* held that parents have "a right to prevent the birth of a defective child and health care providers a duty correlative to that right."⁴ This duty requires health care providers to give their patients information as to the possibility that a future child will be born with defects, so that the potential parents can decide whether to avoid the conception or birth of a child.⁵ The damage recovery in such a case may include (1) medical and hospital expense attributable to the child's birth and condition and (2) damages for emotional injury suffered by the parents as a result of the birth of the child.⁶

The court's holding on the wrongful birth issue is not a new innovation in American law,⁷ although *Harbeson* is a case of first

2. 28 U.S.C. §§ 1346(b), 2402, 2674-80 (1976).

3. *Harbeson*, ___ Wash. 2d ___, 656 P.2d at 488.

4. *Id.* at 491.

5. *Id.*

6. *Id.* at 493.

7. *See, e.g., Speck v. Finegold*, ___ Pa. Super. ___, 408 A.2d 496 (1979).

impression on the question in Washington. The wrongful birth claim was, however, closely tied by the court to the novel wrongful life claim, and the reasoning used by the court in the former question was carried over to the latter.

B. *Wrongful Life*

Whereas the wrongful birth cause of action has become fairly common, wrongful life is a concept that has achieved little acceptance in American law. The cause of action has been rejected in eight of the jurisdictions that have examined the issue,⁸ and only California has upheld the right to sue for wrongful life.⁹ And even in California, while the infant plaintiff can sue for special damages, he is prohibited from claiming general damages.¹⁰

With the *Harbeson* decision, Washington has joined California in accepting wrongful life as a valid claim for relief. The court in *Harbeson* allowed the children born with defects to sue their physician for failure to inform Mr. and Mrs. Harbeson of the risks of defects.¹¹ This failure prevented the Harbesons from terminating the pregnancies. The standard of conduct which the court placed upon physicians is the standard of the "average practitioner,"¹² and the duty which the physician owes to the child may even extend to a child not yet conceived at the time of the negligent act or omission.¹³ The only limit placed upon this duty to unconceived children is that the duty extends only to those children "foreseeably endangered by his conduct."¹⁴

IV. ANALYSIS OF THE HOLDING

A. *Arguments Against Wrongful Life*

Unfortunately, the court in *Harbeson* brushed over the argu-

8. Alabama, *Elliot v. Brown*, 361 So.2d 546 (Ala. 1978); New Jersey, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); New York, *e.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Ohio, *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); Pennsylvania, *Speck v. Finegold*, ___ Pa. ___, 439 A.2d 110 (1981); South Carolina, *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980); Texas, *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); Wisconsin, *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

9. *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).

10. *Turpin v. Sortini*, 31 Cal. 3d 220, 235-36, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346-47 (1982).

11. *Harbeson*, ___ Wash. 2d ___, 656 P.2d at 495.

12. *Id.* at 497.

13. *Id.* at 495.

14. *Id.*

ments against wrongful life claims with very little analysis or thought. These arguments have merit and deserve to be carefully considered before any court follows the *Harbeson* decision.

1. *Tort Damages and Causation*

The basic rule of tort damages is that compensation should be paid to restore the plaintiff as nearly as possible to the position he was in prior to the occurrence of the tort.¹⁵ In wrongful life cases, however, this principal of tort law is impossible to apply. To place the child in a position he would have been in if the defendant had not been negligent would be to make the child non-existent, since the claim is that absent the physician's negligence, the child never would have been born.¹⁶ Obviously, this is impossible, and it makes a mockery of the traditional basis for compensatory damages.

In addition, by allowing recovery in wrongful life causes of action, the physician may well be required to pay damages for abnormalities that were in no way caused by his negligence. For example, defects caused by genetic flaws in the parents are not created by the fact that the physician failed to inform the parents of a potential defect. The physician's only negligence is a failure to inform, which then results in a birth. And yet, under wrongful life, the physician is required to pay damages not only for the birth, but for defects which he neither caused nor could cure. To require, therefore, that the physician pay damages for such defects is unfair, especially when it is the parents who bring the child into being and it is their genetic flaws which cause the damage. Finding the physician liable necessarily stretches traditional notions of proximate cause to an unreasonable degree.

2. *Value of Life*

Implicit in the acknowledgment of wrongful life claims is the notion that the child would be better off never having been born than to live a life with defects. Neither the court in *Harbeson* nor the California decisions present any evidence that such is actually the case. Indeed, whether it is better to have never been born at all rather than to have been born with defects is a mystery which is far beyond the realm of any court's ability to solve.¹⁷ It is also quite probable that weighty evidence can be produced to show that persons born with defects can lead happy, useful lives in our

15. RESTATEMENT (SECOND) OF TORTS § 901 (1977).

16. *Speck v. Finegold*, ___ Pa. Super. ___, 408 A.2d 496, 508 (1979).

17. *Id.*

society.

A second argument made in this area is that the infant plaintiff in a wrongful life suit has not suffered any wrong by being brought into existence.¹⁸ No wrong exists since the law has always considered life more precious than non-life; the value placed on life is pronounced in both the Constitution and Declaration of Independence.¹⁹ Nowhere in these documents or in American law does it say that a handicapped life is less cherished than a nonhandicapped life.

3. *Claims Against Parents*

With the acceptance of wrongful life as a valid cause of action, the door is wide open for claims by children against their parents when the child has been born with some type of defect. The child may claim parental negligence for failure to terminate the pregnancy which resulted in the handicap. In fact, the California decision which validated wrongful life claims suggested that such claims against the parents would be proper in certain settings.²⁰

To allow claims against parents for wrongful birth could make the parents liable for damages to their own child even when the odds of having a defective child are small or when the parents are morally opposed to abortion. Chief Justice Weintraub of the New Jersey Supreme Court recognized this danger in 1967:

Implicit (in wrongful life claims), beyond the claim against a physician for faulty advice, is the proposition that a pregnant woman who, duly informed, does not seek an abortion, and all who urge her to see the pregnancy through, are guilty of wrongful injury to the fetus, and indeed that every day in which the infant is sustained after birth is a day of wrong. To recognize a right not to be born is to enter an area in which no one can find his way.²¹

Claims for wrongful life by a child against his parents would clearly restrict the parents' decision of whether to have a child or not, since there would be a well-founded fear that suits could result from the birth.

B. *Weakness of the Harbeson Rationale*

The court in *Harbeson* stated two main reasons for embracing wrongful life as a valid cause of action. Upon close examination

18. *Berman v. Allen*, 80 N.J. 421, 428-29, 404 A.2d 8, 12 (1979).

19. U.S. CONST. art. V, XIV; The Declaration of Independence para. 2 (U.S. 1776).

20. *Curlender*, 106 Cal. App.3d at 829, 165 Cal. Rptr. at 488.

21. *Gleitman v. Cosgrove*, 49 N.J. 22, 63, 227 A.2d 689, 711 (1967).

and analysis, however, these reasons appear not very compelling. The first reason given by the court was that it would be illogical to permit wrongful birth claims and not wrongful life claims, especially since the child's medical needs will not disappear when the child reaches majority.²² But it is not really so illogical in light of the reasons advanced for denying the wrongful life claims. As shown, wrongful life suffers from serious problems in the areas of damages, causation, the value of life, and claims against parents. Those problems, especially on damages and claims against parents, do not necessarily apply to wrongful birth cases. Therefore, wrongful birth and wrongful life are not completely interchangeable. Because of the legal and policy difficulties, it may well be illogical to accept wrongful life as a valid claim for relief.

Additionally, the court reasoned that imposing a duty owed to the child would help foster the objectives of prenatal testing and genetic counseling, while at the same time discouraging malpractice.²³ It is possible that wrongful life claims could foster these objectives, but they are already fostered through the use of wrongful birth claims. Failure to accept wrongful life as a cause of action would not leave physicians free to ignore prenatal testing and genetic counseling, since they would be aware of the potential wrongful birth suits which could await them. A new cause of action, therefore, is not needed to foster the stated objectives; the presently available cause of action is sufficient.

V. CONCLUSION

The *Harbeson* decision is of major importance in American tort law, especially since Washington rejected the majority rule and is the first state to follow California in recognizing wrongful life as a valid cause of action. Nonetheless, there are serious legal and social problems associated with wrongful life, and these problems are themselves strong and compelling reasons to reject the cause of action. The courts of other states should carefully analyze such problems before following the *Harbeson* decision.

22. *Harbeson*, ___ Wash. 2d ___, 656 P.2d at 495.

23. *Id.* at 496.