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HAYMON v. WILKERSON: THE WRONGFUL BIRTH CAUSE OF ACTION EMERGES IN THE DISTRICT OF COLUMBIA

"In sorrow thou shalt bring forth children."
Genesis 3:16

The medical malpractice action known as wrongful birth[1] owes its genesis to judicial as well as scientific advancement.[2] In 1973, the Supreme Court recognized a woman's constitutional right to terminate her pregnancy in *Roe v. Wade*, based upon a fundamental right to privacy.[3] The world of

1. It is important to distinguish "wrongful birth" from two similar causes of action. *See generally* Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15 (1978 & Supp. 1987).

A "wrongful conception," or "wrongful pregnancy," action is asserted by the parents and is based on the theory that but for the doctor's negligence in performing a sterilization procedure or in administering birth control, a healthy child would not have been born. *See* Flowers v. District of Columbia, 478 A.2d 1073, 1076-77 (D.C. 1984) (the court refused to recognize a cause of action based on the rationale that parents faced with the birth of a healthy, though perhaps unwanted child have suffered no damage); Silva v. Howe, 608 S.W.2d 840, 842 (Tex. Civ. App. 1980) (parents of healthy child born after unsuccessful vasectomy not entitled to costs of rearing and educating an unwanted child). *But see* Ochs v. Borrelli, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982) (ordinary child-rearing expenses awarded for the birth of an unplanned child where birth resulted from negligent and unsuccessful tubal ligation).

A "wrongful life" action is asserted by the child, or the parents on its behalf, and claims that but for the doctor's negligence, the child would not have been born to experience life in an impaired state. The difference between this action and wrongful conception is who may assert the claim and the success with which it will meet. Courts have almost unanimously rejected wrongful life as a valid cause of action based on the rationale that the infant has suffered no cognizable legal injury. *See* DiNatale v. Lieberman, 409 So. 2d 512, 513 (Fla. Dist. Ct. App. 1982) (child born with defects does not have a cause of action against anyone on account of being born); Becker v. Schwartz, 46 N.Y.2d 401, 411-12, 413 N.Y.S.2d 895, 900-01, 386 N.E.2d 807, 812 (1978) (a child does not have a fundamental right to be born as a whole, functional human being and the law is incapable of determining damages based on a comparison of life in an impaired state and nonexistence); *see also* Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 18 (1980). *But see* Turpin v. Sortini, 31 Cal. 3d 220, 233-34, 643 P.2d 954, 962-63, 182 Cal. Rptr. 337, 345-46 (1982) (court allowed child's wrongful life action for doctors failure to diagnose hereditary deafness of a sister; if parents had known the high probability that other children would be born with the disease, they would not have conceived); *see also* Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 CALIF. L. REV. 1278 (1983).

2. Smith v. Cote, 128 N.H. 231, 238-39, 513 A.2d 341, 345-46 (1986).

3. 410 U.S. 113 (1973). In an earlier line of cases, the Court established the existence of a fundamental right to personal privacy. *See* Griswold v. Connecticut, 381 U.S. 479 (1964); Eisenstadt v. Baird, 405 U.S. 438 (1971). Where a fundamental right is involved, the Court

medicine has experienced rapid technological development in the area of human genetics since the inception of a woman's legal right to abortion.[4] The recent discovery of safe and effective means[5] of diagnosing genetically-based disorders has consequently created a new area of legal liability in tort.[6] Wrongful birth causes of action are a direct outgrowth of this progression. This medical malpractice claim is based upon two fundamental tenets of tort law: 1) injured parties must be compensated for their losses; and, 2) wrong-doers must be deterred from committing future wrongs.[7] Both courts and legislatures[8] have responded by recognizing wrongful birth as a means of furthering a public policy of ensuring safe and effective care in genetic counseling and prenatal testing.[9]

Recently, in *Haymon v. Wilkerson*,[10] the District of Columbia Court of Appeals joined a growing number of jurisdictions in recognizing wrongful birth as a valid cause of action. As more jurisdictions follow this trend, the medical community is put on notice that genetic counseling and prenatal testing must be performed in accordance with the prescribed standard of care. As a consequence, the fear of potential liability will deter future negligent conduct. The result will be a reduction in the number of "wrongful"

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has held that state regulations limiting the right must be justified by a compelling state interest. *See Griswold*, 381 U.S. at 485. Thus, in *Roe*, a woman's privacy right to an abortion is limited by the state's compelling interest in the health and potential life of the fetus at the point of viability. *See Roe*, 410 U.S. at 159-60. The Court determined that viability occurs at the time when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." *See id.* at 160.

4. The ability to predict genetic disorders prior to conception has expanded, allowing doctors to advise prospective parents of the risk of bearing a genetically defective child so this knowledge may be included in the couple's procreative plans. *See* Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1492-93 (1978).

5. Amniocentesis, largely experimental in the early 1970s, has become common medical practice for identifying genetic defects, chromosomal anomalies and the sex and blood type of the fetus. *See* Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 95-97 (1974).

6. The growth of medical knowledge in the area of birth defects and the subsequent development of sophisticated procedures for testing the genetic make-up of the fetus coincides with the growth of birth-related claims. *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 720 (1982). *See also* Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 620 (1979).

7. PROSSER AND KEETON ON THE LAW OF TORTS § 4 at 20-25 (W. Keeton, D. Dobbs, R. Keeton & D. Owen eds. 5th ed. 1984) [hereinafter PROSSER & KEETON].

8. *See infra* notes 63-75 and accompanying text.

9. In Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978), the cause of action was based on an improper diagnosis of the amniocentesis report. *Id.* The court emphatically stated that "[s]ociety has an interest in insuring that genetic testing is properly performed and interpreted." *Id.* at 696.

10. 535 A.2d 880 (D.C. 1987).

births. Thus, simply informing prospective parents of their risk of bearing a handicapped child at the pre-conception stage, as well as informing them at the post-conception stage that the fetus the woman is carrying is defective, affords parents the constitutionally guaranteed option of whether to bear and raise a handicapped child.

This Note will examine the moral and ethical issues surrounding the wrongful birth cause of action, the District of Columbia's Court of Appeals difficulty in arriving at a fair and uniform measure of damages for guidance in subsequent suits, and the future of the cause of action *vis-a-vis* possible legislative action.[11]

WHAT CAN BE WRONGFUL ABOUT A BIRTH?

In a standard medical malpractice action, the plaintiff must establish that the physician owed a duty of care, that the physician breached that duty and that the resulting damage to plaintiff was proximately caused by that breach.[12] The standard of care requires a physician to "have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing."[13] Unlike traditional malpractice actions, a wrongful birth claim is unique in that although it involves an allegation of medical malpractice, there is no assertion of physical injury.[14] Instead, the claim is based upon the negligent invasion of the parents' right to decide whether to conceive or bear a physically and/or mentally impaired child.[15]

A wrongful birth claim may arise out of three distinct circumstances: 1) the failure of a physician or genetic counselor to inform parents of the risk of conceiving a defective child; 2) the failure of a physician to perform a prenatal diagnostic test with due care; or, 3) the failure of a physician or other health care provider to accurately report the results of a prenatal diagnostic test.[16] To establish a claim of wrongful birth, a woman must allege that the negligence constituted a departure from the recognized standard of care, that had the physician recommended an amniocentesis she would have

11. For purposes of this discussion, it is assumed that both parents have agreed upon the decision to abort the fetus. However, in the event of spousal opposition, the Supreme Court has recently reaffirmed its holding that a state requirement of spousal consent to an abortion is constitutionally repugnant. *See* Conn v. Conn, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 109 S. Ct. 389 (1988); *see also* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 69 (1975).

12. Psychiatric Inst. of Washington v. Allen, 509 A.2d 619, 623-24 (D.C. 1986).

13. PROSSER & KEETON, *supra* note 7, at 187.

14. Smith v. Cote, 128 N.H. at 242, 513 A.2d at 348.

15. *Id.*

16. *See* Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2017 n.4 (1987).

submitted to the procedure, that the results would have revealed the child would be born defective, and, finally, that upon being told this fact the woman would have terminated her pregnancy.[17]

The issue presented to the District of Columbia Court of Appeals in *Haymon v. Wilkerson* was whether parents may recover extraordinary costs for the "wrongful birth" of their child born with birth defects. The court ruled that parents of a child born with Down's Syndrome, a genetic disorder characterized by mental retardation, together with other physical defects,[18] may recover extraordinary medical expenses resulting from the birth of their defective child.[19] The court of appeals reversed the trial court decision and remanded the case for a determination of damages in accordance with this holding.[20]

The appeal arose when the trial court granted the defendant doctor's motion to dismiss for failure to state a claim upon which relief may be granted.[21] Plaintiffs' medical malpractice action was based primarily upon the obstetrician's negligence in failing to recommend and perform a diagnostic test known as amniocentesis.[22] Plaintiffs contended that they were thereby deprived of the right to make an informed decision whether to terminate the pregnancy, a constitutional right guaranteed to them by the Supreme Court's decision in *Roe v. Wade*.[23]

The plaintiff, Ms. Haymon, was thirty-four years old at the time of her pregnancy and was concerned about the risks of giving birth. She consulted her doctor several times regarding the possibility of an amniocentesis being administered. Dr. Wilkerson, the defendant, assured Ms. Haymon that the test was unnecessary. Ms. Haymon subsequently gave birth to a daughter afflicted with the genetic disorder known as Down's Syndrome.[24]

The wrongful birth claim arose in *Haymon v. Wilkerson* because of the doctor's failure to advise Ms. Haymon of the risks involved in giving birth to a child at a later age, coupled with the failure to administer an amniocentesis which could have detected the child's Down's Syndrome.[25] The plaintiffs

17. *Haymon*, 535 A.2d at 882.

18. *See infra* note 24.

19. *Haymon*, 535 A.2d at 886.

20. *Id.*

21. *Id.* at 881.

22. *Id.* at 881-82.

23. *Id.* at 882. It should be mentioned that wrongful birth is subject to a caveat, *i.e.*, were the Supreme Court to overrule *Roe*, the wrongful birth action would *ipso jure* disappear. *See, e.g.*, Smith v. Cote, 128 N.H. at 239, 513 A.2d at 346. ("[W]e believe that *Roe* is controlling; we do not hold that our decision would be the same in its absence.").

24. *Haymon*, 535 A.2d at 881.

25. Amniocentesis is usually performed before the twentieth week of pregnancy. The procedure involves the insertion of a small spinal needle through the woman's abdomen. Fetal

claimed that this negligence represented a departure from the established standard of obstetric care.[26] The resulting harm to plaintiffs was the deprivation of the knowledge that Ms. Haymon was carrying a child afflicted with Down's Syndrome.[27] Their claim for damages derived from an estimation of the medical and other health care expenses that are attributable to the child's affliction.[28]

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cells are withdrawn and are allowed to incubate for three to four weeks, at which point the cells are examined for any chromosomal abnormalities. The test is 99% accurate. Some of the genetic disorders which are detectable include Down's Syndrome (mongolism), cystic fibrosis, Tay-Sachs disease (disorder characterized by blindness, severe mental retardation and death before age four, most common among those of Jewish ancestry), galactosemia (disorder involving improper assimilation of galactose, found in milk products and fatal if undiagnosed), adrenogenital syndrome (disorder usually in females, characterized by abnormal genitalia), sickle cell anemia and hemophilia. *See* AM. ACADEMY OF PEDIATRICS & AM. COLLEGE OF OBSTETRICS AND GYNECOLOGISTS, *Guidelines for Perinatal Care*, 209 (1983). *See also* Friedman, *supra* note 6, at 100-102. However amniocentesis is not without inherent risks. The maternal risk is minimal (minor cramping and loss of amniotic fluid) but the risk of fetal loss is .05%. AMERICAN COLLEGE OF OBSTETRICS AND GYNECOLOGISTS, TECHNICAL BULL. 108 ANTENATAL DIAGNOSIS OF GENETIC DISORDERS 5 (1987).

The American College of Obstetricians and Gynecologists reports that it is now standard medical practice to offer prenatal advice to women who will be 35 or older when their child is born. However, it cautions that 35 is largely an arbitrary age and physicians should be flexible when answering inquiries from women who are less than 35 years of age, considering the importance of the risk involved. *Id.* at 2.

The case at bar is a poignant example of the need for flexibility in medical standards because Ms. Haymon was 34 years old at the time of her pregnancy. At the age of 30, a woman faces a 1/952 chance of giving birth to a child with Down's Syndrome; at age 31, 1/909; at age 32, 1/769; at age 33, 1/602; at age 34, 1/485; and at age 35, 1/378. *Id.* One article points out that eighty percent of infants born with Down's Syndrome are born to women who are under 35 years of age, even though the risk is higher in women in their late 30's and 40's. Thus, it is argued that if a greater proportion of women were offered amniocentesis, the number of detected cases of Down's Syndrome would increase. DiMaio, Baumgarten, Greenstein, Saal & Mahoney, *Screening for Fetal Down's Syndrome in Pregnancy by Measuring Material Serum Alpha-Feto Protein Levels*, 317 NEW ENG. J. MED. 342 (1987). Live birth statistics report that the distribution of births in 1983 was as follows: women aged 24 and under, 45.6%; women aged 25-29, 31.5%; women aged 30-34, 17.2%; women aged 35-39, 5%; and women aged 40-44, .7%. NAT'L CENTER FOR HEALTH STATISTICS, 1 VITAL STATISTICS OF THE UNITED STATES, 1983: NATALITY (DHHS Publication No. (PHS) 87-1113) (1987)). In that same year, Down's Syndrome occurred in 8.3% of total births. NAT'L. INST. OF HANDICAPPED RESEARCH, U.S. DEPT. OF EDUC., SUMMARY OF DATA ON HANDICAPPED CHILDREN AND YOUTH (1985).

26. *Haymon*, 535 A.2d at 881.

27. The wrongful birth action may arise in the context of other detectable genetic diseases. *See, e.g.*, Blake v. Cruz, 108 Idaho 253, 254, 698 P.2d 315, 316 (1985) (child born with congenital defects as a result of physician's negligence in failure to diagnose mother's rubella in early pregnancy); Goldberg v. Ruskin, 128 Ill. App. 3d. 1029, 1031, 471 N.E.2d 530, 531-32 (1984) (child born with Tay-Sachs disease; parents' wrongful birth action based upon physician's negligence in not informing them of risk of disease and availability of testing), *aff'd*, 113 Ill.2d 482, 499 N.E.2d 406 (1986).

28. *Haymon*, 535 A.2d at 881.

In determining whether to allow recovery of damages, the District of Columbia Court of Appeals began its inquiry by distinguishing *Haymon* from a prior case, *Flowers v. District of Columbia*.[29] On appeal, the defendant, Dr. Wilkerson, contended that the rationale in *Flowers* should apply in the instant case and thereby bar plaintiffs' recovery.[30] *Flowers* was a "wrongful conception" case in which the plaintiff alleged that her physician had negligently performed a sterilization procedure, and, as a proximate cause, plaintiff became pregnant and gave birth to a healthy child.[31] The court resolutely declined to recognize "wrongful conception" as a valid cause of action in the District of Columbia based upon its difficulty in reconciling public policy concerns with fundamental tort principles.[32]

In *Flowers*, the plaintiff urged the court to treat her case as a typical medical malpractice action, requiring the application of two tort doctrines, the "benefit rule"[33] and the "avoidable consequences" doctrine,[34] in order to determine the amount of recovery. The court wrestled with the application of these damage-determining rules, but ultimately failed to reconcile plaintiff's claim for damages with overriding public policy concerns.

The *Flowers* court began by noting that applying the "benefit rule" would require the finder of fact to place a dollar amount on the tangible, as well as intangible benefits, of having a healthy child and then offset that figure with the cost of rearing the child. The court feared that parents seeking recovery would be "strongly tempted to denigrate the child's value to the extent possible in order to obtain as large a recovery as possible."[35]

The application of the "avoidable consequences" doctrine would require the plaintiff to establish that she could not have reasonably avoided the consequences of the doctor's negligence which resulted in the birth of a healthy child. The court suggested that a judge or jury would be "required to consider whether abortion or adoption are reasonable means to avoid the conse-

29. 478 A.2d 1073 (D.C. 1984).

30. Brief for Appellee at 5, *Haymon* (No. 86-1594).

31. *Flowers*, 478 A.2d at 1074.

32. *Id. See also* Note, Flowers v. District of Columbia: *Another Court Refuses to Settle the Question of Damages in Wrongful Conception Cases*, 34 CATH. U.L. REV. 1209 (1985).

33. RESTATEMENT (SECOND) OF TORTS § 920 (1979) summarizes the benefit rule:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

34. *Id.* at § 918 which states in pertinent part that, "[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure."

35. *Flowers*, 478 A.2d at 1076.

quences of raising a healthy child."[36] This line of reasoning is inconsistent. The abrupt conclusion the court reached is that consideration of such highly personal matters as the parents' beliefs about adoption and abortion is improper for the adversarial process of a court of law.[37]

The *Flowers* court found support in the legislative history of the District of Columbia Council's stated public policy in favor of strong family relationships.[38] The court, taking a paternalistic stance, observed that a child who learns he was not wanted by his parents would have a destabilizing effect on the family unit:

> We are also convinced that the damage to the child will be significant; that being an unwanted or 'emotional bastard,' who will someday learn that its parents did not want it, and, in fact, went to court to force someone else to pay for its raising, will be harmful to that child.[39]

The final reason that a wrongful pregnancy claim could not be sustained was that shifting of the financial burden of raising a healthy, unwanted child to the defendant doctor would be disproportionate to the amount of culpability involved.[40] The court's opinion noted that a majority of jurisdictions has so held based upon identical public policy grounds.[41] However, this result does not resolve the issue of how the parents of an unwanted child can shoulder the burden of raising the child.

Most significantly, the fatal flaw of *Flowers*, as the dissent aptly points out, is that the decision wholly ignores a public policy which demands that a wrongdoer be held responsible for the foreseeable consequences of his negligent acts.[42] Fortunately, *Haymon* picks up where *Flowers* falters.[43] It is not entirely evident from *Haymon* why the court views a doctor who performs a negligent sterilization procedure as any less culpable than one who negligently misinforms or fails to inform parents of their risk of bearing a handicapped child. The court is perhaps more comfortable with permitting recovery in *Haymon* simply because the child involved is handicapped, advancing the idea that factual differences may yield different results. It has

36. *Id.* at 1077 n.4.

37. *Id.* at 1077.

38. *Id.* The court found that § 16-4501 of the District of Columbia Code sets forth a policy of encouraging a stable family environment and allowing wrongful conception claims would only serve to undermine this policy. D.C. CODE ANN. § 16-4501 (Supp. 1988).

39. *Id.* at 1077 n.5 (citing Wilbur v. Kerr, 275 Ark. 239, 244, 628 S.W.2d 568, 571 (1982)).

40. *Id.* at 1077.

41. *Id.* at 1075 n.2.

42. *Id.* at 1078-83 (Ferren, J., dissenting).

43. *Haymon*, 535 A.2d at 882. "Thus, the only issue before this court is that which was expressly reserved for future resolution in *Flowers v. District of Columbia* . . . ." *Id.*

been suggested that a significant factor underlying a court's reasoning in a wrongful conception case may be the parents' motivation in seeking the sterilization.[44] Because the *Flowers* plaintiff asserted that she could not afford another child, it is likely that the court simply disfavored her motives.

In order to clarify the court's reasoning for disallowing recovery to the plaintiff in *Flowers* while subsequently allowing recovery in *Haymon*, the court further distinguished the two cases by ruling that Dr. Wilkerson's reliance on *Flowers* was inappropriate; the claimed injury and damages sought by Ms. Haymon were completely distinct from those involved in *Flowers*.[45] While the Haymons sought only extraordinary medical costs associated with raising a handicapped child,[46] Ms. Flowers claimed *all* costs associated with raising a healthy child until the age of eighteen.[47] In addition, the nature of the right involved in the two cases differed dramatically. The Haymons were deprived of a fundamental right, namely, that they were not informed that the fetus Ms. Haymon was carrying was malformed. Consequently, they were unable to make an informed decision whether to terminate the pregnancy.[48] In *Flowers*, the negligently performed sterilization procedure did not divest Ms. Flowers of a constitutionally protected right.[49]

Both the substantive factual differences as well as the public policy concerns explain the distinction between *Flowers*, a wrongful conception case, and *Haymon*, a case involving wrongful birth. Nevertheless, the consequences leave room to doubt whether this distinction is sound. For example, a doctor in the District of Columbia who performs a negligent sterilization procedure is completely immune from liability if a healthy child is born, but a doctor who negligently fails to detect a genetic disease will be culpable if an unhealthy child is born. An approach based on a policy of holding wrongdoers responsible for the harm proximately caused by their negligent acts leads to a more uniform as well as equitable result.

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44. *See* 83 A.L.R.3d 15, at 24. *See also* Troppi v. Scarf, 31 Mich. App. 240, 254-57, 187 N.W.2d 511, 518-19 (1971) (woman with seven children was negligently supplied a tranquilizer rather than a contraceptive by defendant pharmacist and court denied recovery stating that damages suffered could be greatly offset by benefit of having a healthy although unplanned child). *But see* Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934) (sterilization of husband was necessary to save wife "from the hazards to her life which were incident to childbirth.").

45. *Haymon*, 535 A.2d at 884.

46. *Id.* The Haymons conceded on appeal that they had undertaken to give birth to a healthy child. *Id.*

47. *Flowers*, 478 A.2d at 1074.

48. *Haymon*, 535 A.2d at 882.

49. *Id.* at 884.

MORAL AND ETHICAL CONSIDERATIONS

Wrongful birth claims are a logical and necessary development in the area of tort law,[50] yet courts have stepped into this realm both cautiously and reluctantly.[51] Indeed, the moral and ethical issues wrongful birth raises can be troublesome. The controversy centers around avoiding birth by the abortion of a less-than-perfect infant because a woman who asserts that the birth was wrongful must contend that had she known the fetus she was carrying was defective, she would have chosen to abort. Abortion in this context is referred to as "eugenic abortion."[52] Historically, the term "eugenic" referred to the production of healthy offspring as a means to achieve race purification.[53] Today, the practice of eugenic abortion allows parents to make a conscious decision not to give birth to an inferior offspring if they so choose. This type of "God-playing" raises sensitive moral and ethical issues; parents may be prompted to use diagnostic tests such as amniocentesis to abort a fetus simply because it is not of the desired sex. Another wrinkle is whether women who are morally or religiously opposed to abortion are precluded from bringing suit based on the rationale that even had they known they were carrying a defective fetus, they would not have chosen to terminate their pregnancy. An issue also arises as to whether a Catholic woman may be barred from asserting a claim since her faith prohibits abortion.

The *Haymon* court allowed the plaintiff to allege that she had no moral or religious objections to undergoing an abortion in order to meet her burden of establishing a prima facie case.[54] One foreseeable problem with this assertion is that it is put forth by the plaintiff *post facto*. This matter of timing may require the finder of fact to delve into the subjective opinions of a plaintiff, a precarious territory in which to journey. At this juncture it is unclear whether a defendant-doctor may challenge the plaintiff's allegation by using

50. Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 467, 656 P.2d 483, 488 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984).

51. *See, e.g.*, Schroeder v. Perkel, 87 N.J. 53, 68, 432 A.2d 834, 841 (1981) (where the New Jersey Supreme Court stated that "the problems of wrongful conception and wrongful birth involve an evaluation not only of law, but also of morals, medicine and society").

52. "An abortion undertaken to prevent the birth of a genetically defective child is term[ed] 'eugenic' while one to prevent harm to the mother-to-be is termed 'therapeutic.'" Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 816 n.6, 165 Cal. Rptr. 477, 480 n.6 (1980).

53. In the late 19th century, the eugenics movement gathered momentum. Its philosophy was based on the idea that mental retardation is genetically inherited and that such genetically inferior people should be prevented from reproducing. As a result, many states enacted statutes requiring the mentally retarded to be sterilized. *See* Note, *In re* Truesdell: *N.C. Adopts Two New and Conflicting Standards for Sterilization of Mentally Retarded Persons*, 64 N.C.L. REV. 1196, 1200-01 (1986).

54. *Haymon*, 535 A.2d at 882.

her moral or religious objections to abortion as a means to bar her from recovery.

The practice of eugenic abortion can carry with it both sensible and pragmatic justifications. Because sound medical technology now exists to determine the genetic health of a fetus *in utero*,[55] doctors and other health care providers must be encouraged to avail themselves of competent use of these procedures. For some, there is something morally repugnant about aborting a defective fetus because it is not perfect.[56] However, solely from an economic standpoint, the decision to abort may be a sound one.[57]

This view recognizes that caring for a handicapped child can place severe financial hardship on a family. For example, forty per cent of those afflicted with Down's Syndrome have congenital heart defects.[58] In addition, they face an increased risk of developing cataracts because of defects in the lenses of the eyes, are particularly susceptible to infections, and have a twenty to fifty fold increased risk of contracting leukemia.[59] The extraordinary costs parents may incur as a result of caring for a child susceptible to a host of additional maladies can be staggering.[60] Further, in a world of finite resources, perhaps it is best to prevent births of those individuals who may require more than their fair share. Another related consideration from the handicapped child's perspective is the quality of life the child faces, depending upon the severity of the afflictions. Bringing into existence a child that is severely mentally and/or physically handicapped may be considered unduly cruel.[61]

The *Haymon* court deftly circumvents discussion of such murky, highly

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55. "Amniocentesis, as well as fetoscopy, chorionic villus sampling, ultrasound examination and cytogenic assessment are some of the tests currently employed in prenatal genetic diagnosis." *See* STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 19 (1985).

56. However, a conference held in London related to the costs and benefits of a genetic screening program reported: "There is evidence that a conscientious objection to abortion on the grounds of fetal abnormality is the view only of a minority of our society." *Screening for Fetal and Genetic Abnormality*, 2 LANCET 1408 (1987).

57. One author postulates that, given indications that the world is soon to be overpopulated, genetic planning and screening, along with a eugenic program, would serve as "more rational and humane alternatives to regulation of the population than premature death, famine and war." *See* Smith, *Genetics, Eugenics and Public Policy*, 1985 So. ILL. L. J. 435, 453 (1985).

58. The Haymons have incurred more than $100,000 in medical expenses due primarily to the treatment of their daughter's heart defects. The Washington Post, Feb. 8, 1988, at D1, col. 1.

59. Patterson, *The Causes of Down Syndrome*, SCI. AM., Aug. 1987, at 52-60.

60. *See, e.g., supra* note 58.

61. *See* Comment, *Busting the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221, 240 (1975) ("It is conceivable . . . that a point could be reached under which a handicapped life would no longer be preferable to non-existence.").

debatable moral issues by relying solely on tort principles of compensation for losses and deterrence. In permitting wrongful birth suits, courts further a public policy encouraging the safe and effective use of genetic counseling and prenatal testing. As a consequence, both doctors and other health care providers become cognizant that they face liability for negligent treatment in this area, and thus are encouraged to use due care. State legislatures may enact legislation enabling wrongful birth plaintiffs to pursue judicial remedies, lending credence to a court's decision.

LEGISLATIVE AND JUDICIAL RESPONSE

Because the District of Columbia has no controlling precedent for the "wrongful birth" of children born with birth defects, it was customary for the court to look to other courts for guidance.[62] Currently, sixteen states[63] recognize wrongful birth as a valid claim, either as a result of judicial or legislative action. Six states prohibit wrongful birth claims.[64] In Minnesota, both wrongful birth and wrongful conception suits may no longer be maintained due to the legislative overruling of a prior court decision. In 1977, the Minnesota Supreme Court, in *Sherlock v. Stillwater Clinic*,[65] allowed parents

62. Blair v. Prudential Ins. Co. of America, 472 F.2d 1356, 1361-62 (D.C. Cir. 1972).

63. Alabama, *see* Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (interpreting Alabama law); California, *see* Andalon v. Superior Court, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984); Florida, *see* Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Illinois, *see* Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986); Michigan, *see* Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209 (1981); New Hampshire, *see* Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986); New Jersey, *see* Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); New York, *see* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 815 (1978); North Carolina, *see* Gallagher v. Duke Univ. Hosp., 638 F. Supp. 979 (M.D.N.C. 1986) (applying North Carolina law); Pennsylvania, *see* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (interpreting Pennsylvania law); South Carolina, *see* Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981) (applying South Carolina law); Texas, *see* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Virginia, *see* Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Washington, *see* Harbeson v. Park-Davis, Inc., 98 Wash.2d 460, 656 P.2d 483 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984); West Virginia, *see* James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); and Wisconsin, *see* Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

64. Five states have enacted statutes specifically prohibiting wrongful birth. *See* IDAHO CODE § 5-334 (Supp. 1986); MINN STAT. § 145.424 (1987 Supp.); MO. ANN. STAT. § 188.130 (Vernon Supp. 1987); S.D. CODIFIED LAWS ANN. § 21-55-2 (Supp. 1986); UTAH CODE ANN. § 78-11-24 (1986 Supp.).

One state, through court action, prohibits wrongful birth actions. *See* Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985) (claims for relief for wrongful birth of defective children not recognized absent clear mandate from the legislature), *cert. denied*, 479 U.S. 835 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987). *But see* Gallagher, 638 F. Supp. at 982 (limiting *Azzolino* to wrongful birth claims involving postconception misconduct).

65. 260 N.W.2d 169 (Minn. 1977).

to recover compensatory damages in a wrongful conception suit. Seven years later, the Minnesota state legislature enacted into law a statute specifically overruling the decision, as well as prohibiting suits based upon wrongful birth.[66] In 1986, the Minnesota Supreme Court addressed the constitutionality of this statute and held that it did not violate either the equal protection or the due process clauses of the United States Constitution because no state action was involved. The court viewed the doctor-patient relationship as purely private.[67] Furthermore, the court held that the statute did not violate the Minnesota constitution which protects rights and remedies at common law not provided for by statute.[68] Here, the legislature has clearly precluded the parents' right to bring a negligence action based upon the wrongful birth or wrongful conception of a child.[69]

One commentator has persuasively argued that statutory prohibitions against wrongful birth suits do in fact violate both the due process and equal protection clauses of the fourteenth amendment.[70] Due process rights are infringed upon by the precluding statutes that interfere with the constitutionally protected right to privacy that accompanies a woman's decision to terminate a pregnancy and are not justified by a compelling state interest.[71] Moreover, because statutes prohibiting wrongful birth suits affect women who may choose to abort in their first trimester, where no compelling state interest is present, they violate an individual's constitutional right to due process.[72]

Wrongful birth preclusion statutes also violate the constitutional equal protection clause by creating a classification which is not rationally related to a legitimate governmental interest.[73] The class, composed of parents who would have chosen to abort a defective fetus if they had known of its infirmities, are prohibited from suing health care providers for the negligent interference with their procreative rights. Because a fundamental right is involved, the statute must survive strict scrutiny and further a compelling state interest. As under the due process analysis, no legitimate state interest is present.[74] Based on the strength of this argument, it is unlikely that the

66. MINN. STAT. § 145.424, Subd. 2 (1984) provides: "No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted."

67. Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 13 (Minn. 1986).

68. *Id.* at 14.

69. *Id.* at 14-15.

70. *See* Note, *supra* note 23, at 2023-34.

71. *See id.* at 2023.

72. *See id.* at 2023-27.

73. *Id.* at 2027-34.

74. *Id.*

District of Columbia Council would pass legislation prohibiting wrongful birth suits.

In Maine, for example, the state legislature passed a law specifically granting parents the right to sue for wrongful birth but the statute limits damages to those costs associated with the "disease, defect or handicap" of the child.[75] In the District of Columbia, should the legislators choose to act, this type of statute is a likely result of the *Haymon* decision.

MEASURE OF DAMAGES: THE FORMULA FOR RECOVERY

In *Flowers*, one reason the court was unable to grant recovery for ordinary child-rearing costs was due to the speculative nature of the damages alleged.[76] In *Haymon*, however, the court found the claim for extraordinary costs associated with raising a handicapped child "well within the methods of proof available in personal injury cases."[77] Because Ms. Haymon appealed the dismissal of her claim for extraordinary medical costs only, the court of appeals declined to consider any other measure of recovery.

At least one court has permitted the recovery of all costs associated with the birth and subsequent raising of a defective child.[78] A small minority of courts have allowed parents to recover for emotional distress resulting from the birth of an impaired infant.[79]

The *Haymon* court found most persuasive the extraordinary costs rule adopted by the New Hampshire Supreme Court in *Smith v. Cote*.[80] In *Smith*, the court noted that in wrongful birth suits, a special rule limiting recovery of damages was necessary to avoid a windfall for the parents. The court borrowed the expectancy rule of damages from contract law to arrive

75. ME. REV. STAT. ANN. tit. 24, § 2931, Sec. 3 (1985) provides: "Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child."

76. *Haymon*, 535 A.2d at 885.

77. *Id.*

78. *Robak*, 658 F.2d at 478-79 (a tortfeasor is responsible for all damages arising out of his tort; the court did not allow an "offset" for raising a healthy child). Prior to *Robak*, no court had calculated damages. *See* Note, Robak v. U.S.: *A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 726 n.8 (1982).

79. *See* Berman v. Allan, 80 N.J. at 427-28, 404 A.2d at 14-15 (parents' claim for money damages for mental and emotional anguish they suffered and will continue to suffer on account of child's condition not an impossible task for the trier of fact); *see also* Note, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REV. 527, 537-38 (1984) (discussion exploring broad acceptance on part of courts to recognize emotional distress as a legitimate injury). *But see* Becker v. Schwartz, 46 N.Y.2d at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902 (claims for relief based on mental and emotional anguish suffered by the parents in giving birth to a child with Down's Syndrome denied as too speculative).

80. *See* Smith v. Cote, 128 N.H. at 243-45, 513 A.2d at 348-50.

at a clearer, more equitable result. The court thereby recognized that wrongful birth plaintiffs have typically planned to give birth to and raise a healthy child; however, the defendant's negligence has frustrated their expectations by depriving them of the knowledge that an unhealthy child would be born.[81] The extraordinary costs rule, allowing recovery of only medical and educational expenses attributable to the child's impairment, serves to put plaintiffs where they expected to be financially, that is, as the parents of a healthy child.[82]

Another quagmire in which the District of Columbia court and others find themselves is whether recovery should be limited to expenses incurred only during the child's minority, or whether recovery should extend into the child's majority.[83] The District of Columbia Court of Appeals did not address this issue because it reviewed the sufficiency of the claim solely in the context of a motion to dismiss for failure to state a recognizable claim. The court directed the trial court, upon remand, to determine whether District of Columbia common law or statutory law would apply.[84]

In *Haymon*, the plaintiffs' child was both physically and mentally handicapped and will be for life. Ordinarily, the parents' legal duty to support a child terminates when that child reaches majority.[85] A statutory exception has been wisely carved out whereby parents may be liable for the support of a mentally ill child who is hospitalized after attaining majority.[86] Where a child is physically disabled yet able to care for himself and earn a living, the court has refused to impose a duty upon the parents to support a child after majority.[87] Recently, in a precedent-setting case decided subsequent to *Haymon*, the District of Columbia Court of Appeals has ruled that parents have a common law obligation to support post-majority age children that are

81. *Id.* at 244, 513 A.2d at 349.

82. *Id.*

83. *See, e.g.*, Phillips v. United States, 575 F. Supp. 1309, 1317 (D.S.C. 1983) (extraordinary costs recoverable based on a forty year life expectancy); *Smith v. Cote*, 128 N.H. at 245, 513 A.2d at 350 (extraordinary costs recoverable beyond child's minority); James G. v. Caserta, 332 S.E.2d at 882-83 (recovery permitted beyond minority since child will not be self-sufficient upon reaching majority); Harbeson v. Parke-Davis, 98 Wash. at 477-78, 656 P.2d at 492-93 (damages for parents' emotional distress is recoverable throughout life of the child). *But see* Bani-Esraili v. Lerman, 69 N.Y.2d 807, 808, 505 N.E.2d 947, 948, 513 N.Y.S.2d 382, 383 (1987) (wrongful birth plaintiffs only entitled to extraordinary costs incurred during child's minority since parents' obligation to support child terminates upon child reaching majority).

84. *Haymon*, 535 A.2d at 886.

85. *See* D.C. CODE ANN. § 16-916 (1981 & Supp. 1988); Spence v. Spence, 266 A.2d 29, 30 (D.C. 1970).

86. *See* D.C. CODE ANN. § 21-586 (1981 & Supp. 1988) (relatives of mentally ill persons are financially responsible for the hospital care of such persons).

87. Nelson v. Nelson, 379 A.2d 713, 714 (D.C. 1977).

physically or mentally disabled and are not hospitalized.[88] This decision will allow wrongful birth claimants such as the Haymons to recover extraordinary expenses throughout the child's life.[89] In light of the fact that substantial medical expenses will continue to accrue beyond the child's majority, this recent modification of District of Columbia common law achieves a more equitable result.[90]

The court of appeals decision in *Haymon* leaves the issue of damages largely unresolved because plaintiffs sought only extraordinary medical expenses related to the wrongful birth of their daughter. The recent decision mandating post majority payments in child support cases will aid wrongful birth claimants in recovering medical costs spanning the life of the child. However, subsequent case law or legislative rulings will be called upon to address two final issues, namely, whether ordinary, as well as extraordinary costs may be claimed in support of raising a defective child, and whether parents may recover on the basis of mental and emotional distress related to the birth of a less-than-perfect infant?

CONCLUSION

Wrongful birth suits are gaining recognition and acceptance in both state courts and legislatures. In deciding *Haymon v. Wilkerson*, the District of Columbia joins a growing number of jurisdictions enforcing the validity of these claims. Survival of the claim depends upon the courts and legislatures striking a balance between the importance of the overall benefits to society and the potential threatening costs. The repercussions can be manifold and significant. Fear of potential liability may discourage physicians from entering the field of obstetrics and gynecology because of the increased cost of malpractice insurance. Unfortunately, a physician faced with a wrongful birth suit may face a heavy financial burden commensurate with the child's afflictions.

Those doctors who remain in the field may be forced to pass the higher cost of malpractice premiums along to the health care consumer in the form of higher fees. In addition, the existence of the wrongful birth claim may

88. Nelson v. Nelson, 548 A.2d 109, 117 (D.C. 1988) (Parties of no relation to those in the 1977 case bearing the same name).

89. Due to improved medical care, those afflicted with Down's Syndrome may enjoy a life of more than thirty years. For comparison, in 1929, the average life span was nine years. *See* Patterson, *supra* note 58.

90. A novel device for treating the payment of damages where recovery was calculable beyond the child's minority was conceived in Robak v. United States. Here, the court imposed a reversionary trust for the amount of the recovery bestowed and, in this manner, the defendant was assured that the parents would not come into a windfall should the child die before the loss period. *See Robak*, 503 F. Supp. at 983.

raise the frequency in which genetic counseling and prenatal testing is performed. This, in turn, will increase the instances of defective fetuses detected and lead ultimately to a rise in eugenic abortions performed each year. Opponents of abortion in this context are not likely to be supportive of such an action and may be effective in voicing their concerns to their state legislatures.

Substantial societal benefits stand to be gained as a result of this trend in tort reform. The wrongful birth action relies firmly on *Roe v. Wade* and serves to reaffirm a very important fundamental right of a woman to terminate her pregnancy and demonstrates respect for a couple's procreative plans. Most importantly, the wrongful birth action, based on resolutely sound tort principles, functions as a strong deterrent to medical malpractice in the area of genetic counseling and prenatal testing and fairly compensates victims for their losses. Detection of genetic abnormalities affords parents the option of deciding whether to bear the extra costs associated with the birth and care of a handicapped child.

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