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A WRONG WITHOUT A REMEDY: LEAVING PARENTS AND CHILDREN WITH A HOLLOW VICTORY I NLAWSUITS AGAINST UNSCRUPULOUS SPERM BANKS

Yaniv Heled
Georgia State University College of Law

Timothy Lytton
Georgia State University College of Law

Liza Vertinsky
Emory Law School

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A WRONG WITHOUT A REMEDY: LEAVING PARENTS AND CHILDREN WITH A HOLLOW VICTORY IN LAWSUITS AGAINST UNSCRUPULOUS SPERM BANKS

YANIV HELED*
TIMOTHY LYTTON**
LIZA VERTINSKY***

For over six years, parents of children conceived with sperm purchased from the Atlanta-based sperm bank Xytex have sued the company for debilitating genetic conditions allegedly originating from the sperm. These lawsuits rely on a wide range of different legal theories, including fraud, negligent misrepresentation, breach of warranty, professional negligence, product liability, unfair trade practices, unjust enrichment, and battery. Until recently, state and federal courts in Georgia dismissed these claims as tantamount to claims for wrongful birth, a cause of action rejected by the Supreme Court of Georgia in 1990. The Supreme Court of Georgia recently distinguished several of the plaintiffs' theories of recovery from wrongful birth, finally enabling pending claims against Xytex to proceed to discovery. However, this may prove to be a hollow victory because the recovery available under viable claims against Xytex is likely to be insufficient to finance plaintiffs' litigation efforts. The Supreme Court of Georgia has, for practical purposes, left the victims of unscrupulous sperm banks without a remedy.

TABLE OF CONTENTS

I. THE REJECTION OF WRONGFUL BIRTH CLAIMS IN GEORGIA.....	119
II. VIABLE CLAIMS AGAINST XYTEX.....	122
III. POLITICS OVER POLICY	124

* Professor of Law, Georgia State University College of Law.

** Distinguished University Professor and Professor of Law, Georgia State University College of Law.

*** Associate Professor, Emory Law School.

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INTRODUCTION

On October 18, 2000, James Aggeles walked into the offices of Atlanta-based sperm bank Xytex and offered to donate his sperm.¹ He was a handsome man, six-feet-four-inches tall, with blue-green eyes and wavy brown hair. He was interviewed by Xytex employee Mary Hartley, who completed a donor application for him. Aggeles told Hartley that he had received multiple academic degrees and was working toward a Ph.D. at Georgia Tech and that he had a clean medical history and no criminal record. After thirty minutes with Hartley, Aggeles underwent a ten-minute physical examination to confirm that he had no noticeable deformities. He was then promptly assigned the donor number 9623. Xytex started selling Aggeles's sperm immediately and continued to do so for the next sixteen years. Xytex touted him to potential buyers as "one of our best donors whose sperm is rarely available" and "a man of high integrity, extremely intelligent, and college educated."² Through Xytex sales of his sperm, Aggeles became the biological father of at least 36 children.³

As it turns out, on the day Aggeles first walked into Xytex's offices, he had just dropped out of college and was working as a janitor.⁴ His medical records prior to October 2000 contained diagnoses of schizophrenia, narcissistic personality disorder, drug-induced psychotic disorder, and grandiose delusions.⁵ He had been hospitalized at least twice as an adult for these conditions for periods of more than two weeks, and throughout the sixteen years during which he continued donating sperm at Xytex, Aggeles was periodically admitted to psychiatric treatment centers for suicidal outbursts and psychotic episodes.⁶ During most of this time, he had no university degrees of any kind.⁷ He did, however, have a criminal record that included multiple

1. All information regarding the events surrounding Xytex's recruitment of James Aggeles as sperm donor are taken from plaintiffs' pleadings in the cases subsequently brought against Xytex as well as court decisions issued in these cases. *See* Brief of Petitioner-Appellant at 2-3, *Norman v. Xytex Corp.*, 830 S.E.2d 267 (Ga. Ct. App. 2019) (No. A19A0445); *see also* Brief for Respondent-Appellee at 2-3, *Norman v. Xytex Corp.*, 830 S.E.2d 267 (Ga. Ct. App. 2019) (No. A19A0445); Brief of Petitioner-Appellant at 2, *Zelt v. Xytex Corp.*, 766 F. App'x 735 (11th Cir. 2019) (No. 18-11164); Brief of Respondent-Appellee at 2, *Zelt v. Xytex Corp.*, 766 F. App'x 735 (11th Cir. 2019) (No. 18-11164); *Doe v. Xytex Corp.*, 2016 U.S. Dist. LEXIS 94213, at *5-6 (N.D. Cal. July 19, 2016); *Doe v. Xytex Corp.*, 2017 U.S. Dist. LEXIS 43623, at *3-5 (N.D. Cal. Mar. 24, 2016); Complaint at ¶¶ 11-16, *Norman v. Xytex Corp.*, No. 2017CV298536 (Ga. Super. Ct. Nov. 30, 2017).

2. Complaint at ¶ 14, *Norman v. Xytex Corp.*, No. 2017CV298536 (Ga. Super. Ct. Nov. 30, 2017).

3. *Id.* at ¶15.

4. *Id.* at ¶21.

5. *Id.* at ¶ 12.

6. *Id.* at ¶ 23.

7. *Id.* at ¶ 13.

arrests for burglary, trespassing, DUI, and disorderly conduct.⁸ He served eight months in jail for burglary in 2005 while he was on Xytex's active donors list.⁹

During this time, Xytex promoted itself as "an industry leader in reproductive services with a commitment to unsurpassed quality controls."¹⁰ The company's website explained that trained counselors investigated donors' personal and family health histories.¹¹ Xytex assured prospective parents that donors underwent medical, psychological, and genetic evaluations, with follow-up testing every six months.¹² The sperm bank told clients that it would update them with any new medically significant information about donors.¹³ However, even after discovering the truth about Aggeles, Xytex failed to inform parents who had conceived children with his sperm, and the company continued selling it to eager buyers.¹⁴

Parents who purchased Aggeles's sperm from Xytex filed more than a dozen lawsuits starting in 2015, alleging that the company's misrepresentations caused genetic abnormalities in children conceived with the sperm, which burdened their families with the costs of treating a variety of resulting adverse health conditions.¹⁵ Theories of recovery in these lawsuits included fraud, negligent misrepresentation, professional negligence, product liability, breach of warranty, unjust enrichment, and unfair trade practices.¹⁶ Plaintiffs filed many of these lawsuits in Georgia, where state and federal trial courts dismissed their claims.¹⁷ These courts endorsed Xytex's assertions that all the plaintiffs' theories amounted to claims for wrongful birth, a

8. *Id.* at ¶ 23.

9. *Id.* at ¶ 14.

10. *Id.* at ¶ 16.

11. *Id.* at ¶ 16.

12. *Id.* at ¶ 18.

13. *Id.*

14. *Id.* at ¶ 37.

15. See Georgia cases: *Zelt v Xytex*, Civil Action No. 1:17-CV-4851-TWT (N. Dis. Georgia February 22, 2018); *Jane Doe v Xytex*, Opinion and Order, Civil Action No. 1:16-CV-1729 TWT (N. Dis. Georgia March 3 2017); *Jane Doe 1 and Jane Doe 2 v Xytex*, Order on Defendant's Motion to Dismiss, Civil Action 2016CV274895 (Superior Court of Fulton County Georgia December 15, 2016); *Norman v Xytex Corp*, 830 S.E.2d 267 (Ga. Ct. App. 2019) (No. A19A0445); *Collins v Xytex*, Final Order Granting Defendant's Motion to Dismiss, Civil Action No. 2015CV259033 (Superior Court of Fulton County Georgia October 20, 2015); *Cruz v Xytex*, First Amended Complaint Civil Action 2018CV307445 (Superior Court of Fulton County Georgia September 27, 2018); see also cases outside of Georgia including: *Jane Doe v Xytex*, 2:16 CV 06621 JAK AG (Central District of California 2016); *Jane Doe v Xytex*, Order Granting in Part and Denying in Part Motion to Dismiss, X2017 WL 1112996 (N. D. California March 24, 2017); *Doe v Xytex*, 8:16-cv-02091-JDW-TBM (Middle District of Florida, 2017); *Doe v Xytex*, 1:16-cv-01692-DAP (N. Dis. Ohio, 2016); *Jane Doe 1 v Xytex*, Civil Docket for MDL, Case # CAN/3:16-cv-02935 (2016).

16. *Id.*

17. *Id.*

cause of action rejected by the Supreme Court of Georgia in 1990.¹⁸ However, in an appeal from one of these dismissals, the Supreme Court of Georgia, while reaffirming its rejection of recovery for wrongful birth, recently held that allegations against Xytex would support compensation for other losses suffered by children and their parents.¹⁹

Unfortunately for parents and their children injured by Xytex's misconduct, this may prove to be a hollow victory. It is likely that the damages recoverable under the Supreme Court's analysis will be insufficient to finance further litigation of this kind or generate liability exposure capable of incentivizing unscrupulous, or merely careless, sperm banks to provide clients with reliable information regarding their donors. Tort litigation has historically played a significant role in the regulation of health and safety in a variety of areas, and it has the potential to do so in the regulation of sperm banks, but only if the available damages can support a viable business model for filing lawsuits.

In addition, the limitation on damages in this context may give rise to an especially cruel irony. As explained below, the Supreme Court of Georgia refuses to permit parents to collect damages for wrongful birth, including the costs of rearing a severely disabled child, for largely symbolic reasons—because “a parent cannot be said to have suffered an injury in the birth of a child”²⁰ and because the Court is “unwilling to say that life, even life with severe impairments, may ever amount to a legal injury.”²¹ In its affirmation of the unquestionable value of every severely disabled child to its parents, the Court denies those parents the resources necessary to properly care for their children. The Court's decision offers a cautionary tale about how the affirmation of moral principle may, in practice, ill-serve the very people it aims to protect.

This article analyzes the Xytex litigation in Georgia and its broader implications for the regulation of reproductive tissue providers. Part I explains the rejection of wrongful birth as a theory of recovery in Georgia and its

18. Order on Def's Mot. to Dismiss, *Norman v. Xytex Corp.*, No. 2017CV298536 (Ga. Super. Ct. Fulton Cnty. 2018); Order on Def's Mot. to Dismiss, *Doe v. Xytex Corp.*, No. 1:16-CV-1729-TWT, 2017 WL 1036485 (N.D. Ga. Mar. 17, 2017); Opinion and Order, *Doe 1 v. Xytex Corp.*, No. 1:16-CV-1453-TWT, 2017 WL 1036484 (N.D. Ga. Mar. 17, 2017); Final Order Granting Def's Mot. to Dismiss, *Collins v. Xytex Corp.*, No. 2015CV259033, 2015 WL 6387328 (Ga. Super. Ct. Oct. 20, 2015); Order, *Zelt v. Xytex Corp.*, No. 1:17-CV-4851-TWT, 2018 WL 1014627 (N.D. Ga. Feb. 22, 2018), *aff'd*, 766 F. App'x. 735 (11th Cir. 2019); Final Order, *Cruz v. Xytex Corp.*, No. 2018CV307445 (Ga. Super. Ct. 2019).

19. *Norman v. Xytex Corp.*, 848 S.E.2d 835, 837 (Ga. 2020), *reconsideration denied* (Oct. 19, 2020).

20. *Id.* at 839 (quoting *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 655-56 (Ga. 1984).

21. *Id.* (quoting *Atlanta Obstetrics & Gynecology Group v. Abelson*, 398 S.E.2d 557, 561 (Ga. 1990)).

application to claims against Xytex. Part II analyzes the Supreme Court of Georgia's circumscription of available damages in claims against Xytex. Part III discusses the implications of the Supreme Court of Georgia's decision for the regulation of providers of reproductive tissue.

I. THE REJECTION OF WRONGFUL BIRTH CLAIMS IN GEORGIA

In the 1990 case of *Atlanta Obstetrics & Gynecology Group v. Abelson*, the parents of a child born with Down syndrome sued a physician who failed to properly counsel the mother concerning the risks of pregnancy at age thirty-seven and to inform her of the availability of diagnostic testing for chromosomal abnormalities in the fetus.²² The parents sued the physician for medical malpractice and sought compensation for the extraordinary child-care expenses necessitated by the child's disability.²³ Addressing the four elements of the parents' negligence claim against the physician—duty, breach, causation, and injury—the Supreme Court of Georgia recognized that the physician breached a duty of care to the mother “to impart relevant information to a patient concerning his or her medical condition.”²⁴ However, the Court rejected the plaintiffs' claim for lack of causation and refused to recognize the birth of a child as a legal injury.²⁵

In analyzing the lack of causation, the Court held that the genetic abnormality that caused the child's Down syndrome “was already in existence when the parents first came into contact with the physician[,]” and, therefore, “the defendants cannot be said to have caused the impairment”²⁶ This part of the Court's holding is somewhat perplexing. The parents alleged that, had the physician informed them of the availability of diagnostic testing, they would have tested the fetus, obtained results indicating a chromosomal abnormality, and aborted the pregnancy.²⁷ Thus, the physician's negligent failure to inform the mother of the availability of diagnostic testing was a factual cause of the child's impairment because, had the physician not been negligent, the child would not have been born with Down syndrome. Moreover, the risk of giving birth to a child with a chromosomal abnormality is precisely the foreseeable risk that gives rise to the duty of care that the physician breached by failing to inform the mother of the availability of diagnostic

22. 398 S.E.2d at 558

23. *Id.* at 558.

24. *Id.* at 561.

25. *Id.* at 563.

26. *Id.* at 560–61.

27. *Id.* at 563–564.

testing. Thus, the physician's negligence was also a proximate cause of the child's impairment.

It is possible that the Court's emphasis on the fact that the chromosomal abnormality was already in existence prior to the parents consulting the physician is meant to suggest that the physician's negligent failure to inform the mother of the availability of testing did not increase the risk of giving birth to a child with Down syndrome. From this, one might conclude that the physician owed the mother no duty to render assistance to protect her from a risk that he did not create. However, the court at the outset of its analysis recognizes that the physician owed the mother this very duty "to impart relevant information to a patient concerning his or her medical condition."²⁸ The duty of a physician to render assistance to patients by providing them relevant information concerning medical risks arises out of multiple features of the doctor-patient relationship, such as the patient's justifiable reliance on the physician for such information.

The incoherence of the Court's analysis of causation suggests that the key to understanding its rejection of wrongful birth claims lies in its refusal to recognize the birth of a child as a legal injury—a refusal rooted in an unarticulated disapproval of abortion. As the Court explained, "an action for 'wrongful birth' is brought by parents of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child."²⁹ In other words, the Court refused to recognize the negligent deprivation of a woman's constitutionally protected right to terminate a pregnancy as compensable in tort law. In dicta, the Court went so far as to suggest that it would deny recovery even for "intentional treatment or advice that has deprived the parents of the opportunity to abort a fetus and thereby avoid the birth of an impaired child."³⁰ The Court declared that its judgment was informed by "the value which our society places upon human life in general and on the lives of children in particular," and it revealed its moral intuitions regarding the decision to terminate a pregnancy by explaining that "we instinctively recoil from the notion that parents may suffer a compensable injury on the birth of a child."³¹ The Court cast an aspersion on the character of claimants seeking compensation for the costs of rearing an unwanted child, asserting that "any recovery . . . should be for the sole purpose of guaranteeing the welfare of the child, however, once parents have obtained

28. *Id.* at 561.

29. *Id.* at 559–60.

30. *Id.* at 559.

31. *Id.*

recovery of such expenses, there is no assurance that the funds will be expended on behalf of the child³²—a consideration that is not mentioned with regard to any other class of medical malpractice claim. Recognizing the political nature of the issue but seeking to obscure the political judgments underlying its decision, the Court held that “wrongful birth actions shall not be recognized in Georgia absent a clear mandate for such recognition by the legislature,”³³ despite a trend among a majority of state supreme courts recognizing wrongful birth.³⁴

Several lower courts in Georgia relied on *Abelson* to dismiss claims against Xytex.³⁵ One case, *Norman v. Xytex Corp.*, eventually reached the Supreme Court of Georgia.³⁶ In that case, a child conceived with sperm donated by Aggeles was diagnosed with attention-deficit hyperactivity disorder (“ADHD”) and an inherited blood disorder, which was not attributable to his biological mother.³⁷ By the age of fifteen, the child had been hospitalized multiple times for extended periods for suicidal and homicidal ideations, uncontrollable behavior, erratic mood swings, and depression.³⁸ His parents discovered that he frequently searched the internet for ways to kill his brother and himself.³⁹ His ongoing treatment includes regular sessions with a therapist and a psychiatrist, anti-psychotic medication and anti-depressants, and almost constant supervision to monitor his behavior and mood.⁴⁰

The child’s parents sued Xytex for fraud, negligent misrepresentation, professional negligence, product liability, breach of warranty, unjust enrichment, and unfair trade practices.⁴¹ The trial court dismissed these claims, holding that they were all claims for “wrongful birth camouflaged as some other tort.”⁴² The Court of Appeals affirmed, explaining that all of these claims by the parents “directly relate to the fact that, had they known the

32. *Id.* at 562.

33. *Id.* at 560.

34. DAN DOBBS, *THE LAW OF TORTS* § 369 (2d ed. 2017) (noting that “almost all of the courts considering” wrongful birth claims “have allowed some kind of recovery.”).

35. See e.g., *Norman v. Xytex et al.*, Order on Defendants Motion to Dismiss, No. 2017CV298536 (Ga Super. Ct. 2018); *Collins v. Xytex et al.*, 2015 WL 6387328 (Ga Super. Ct. 2015); *Doe 1 v. Xytex*, 2017 WL 1036484 (Ga. Super. Ct. 2017).

36. Appellants’ Principal Brief at 5, 7, *Norman v. Xytex Corp.*, 2020 Ga. LEXIS 662 (2020) (No. S19G1486).

37. All information regarding the circumstances surrounding the Normans’ complaint is taken from the Normans’ pleadings in the case. See Complaint, *supra* note 1, at ¶ 36.

38. Complaint at ¶ 36, *Norman v. Xytex Corp.*, No. 2017CV298536 (Ga. Super. Ct. Nov. 30, 2017).

39. *Id.*

40. *Id.*

41. Order on Def’s Mot. to Dismiss, *Norman v. Xytex Corp.*, No. 2017CV298536 (Ga. Super. Ct. 2018). See Complaint, *supra* note 1, at ¶¶ 44-45, 47-48, 50-51, 55, 57, 60, 62-63, 65, 68.

42. Order on Def’s Mot. to Dismiss, *Norman*, No. 2017CV298536.

health, educational, and criminal history of Donor #9623, they would not have purchased his sperm”⁴³ That is, the parents’ various theories of recovery all asserted that the alleged misconduct by Xytex deprived them of the opportunity to avoid the birth of the child, which, since Georgia law does not recognize wrongful birth claims, does not constitute a legal injury.

On appeal, the Supreme Court of Georgia reaffirmed the principle that the existence of a child cannot constitute a legal injury. The Court explained that “[c]laims seeking damages for the expenses of raising a child cannot be maintained, because such claims are premised on the child’s life as the injury”⁴⁴ and “Georgia law does not recognize claims for damages that depend on life as an injury.”⁴⁵ However, the Court rejected the lower courts’ characterization of all the parents’ claims as tantamount to wrongful birth, opening several pathways to recovery.

II. VIABLE CLAIMS AGAINST XYTEX

The Supreme Court of Georgia identified three categories of claims that the parents could pursue against Xytex that it distinguished from wrongful birth. None of these claims, explained the Court, “depend on life as an injury.”⁴⁶ One category of such claims includes those that “essentially amount to ordinary consumer fraud.”⁴⁷ For example, recovery for fraud, negligent misrepresentation, and breach of warranty would include “damages for the difference in price between the cost of the sperm they received and the fair market value of the sperm that Xytex told them they were getting.”⁴⁸ Remedies for claims alleging violation of the state’s Fair Business Practices Act could include injunctive relief, general damages, and punitive damages for intentional violations.

The Court also distinguished claims for recovery based on Xytex’s wrongful failure to disclose information after the child’s birth.⁴⁹ The child was born in 2002, but the parents did not learn of Aggeles’s medical history and criminal record until 2017.⁵⁰ If the parents could present evidence that reliance on Xytex’s misrepresentations delayed their efforts to obtain a

43. *Norman v. Xytex Corp.*, 830 S.E.2d 267, 270 (Ga. Ct. App. 2019), *aff’d in part, rev’d in part*, 848 S.E.2d 835 (Ga. 2020).

44. *Norman v. Xytex Corp.*, 848 S.E.2d 835, 837 (Ga. 2020), *reconsideration denied* (Oct. 19, 2020).

45. *Id.* at 841.

46. *Id.* at 841–44.

47. *Id.* at 837.

48. *Id.* at 843.

49. *Id.* at 843.

50. *Id.* at 843.

diagnosis and begin treatment, and that this exacerbated the child's condition, they could recover additional expenses attributable to the delay.⁵¹

Finally, and somewhat cryptically, the Court suggested that the parents might be able to recover for preconception injuries to the child that "are not premised on the child's life as an injury."⁵² According to the Court, "Georgia law has recognized that a cognizable claim may exist for pre-birth injuries to a child without deeming the child's existence an injury,"⁵³ and "[a]ny such claims the Normans have brought are not wrongful birth claims and should not have been dismissed on that ground."⁵⁴ The examples cited by the Court are recovery for injuries to fetuses *in utero* caused by automobile accidents or food poisoning which rendered the children disabled.⁵⁵ The Court also cited the example of preconception injuries caused by parents' exposure to toxic chemicals at work before the children were conceived, which caused the children to be born with severe congenital disabilities.⁵⁶ The Court concluded that,

in both pre- and post-conception cases, Georgia law has recognized that a cognizable claim may exist for pre-birth injuries to a child without deeming the child's existence an injury. Any such claims the Normans have brought are not wrongful birth claims and should not have been dismissed on that ground.⁵⁷

However, the Court added in a footnote that it would "not attempt to apply these legal principles to the Normans' complaint on a claim-by-claim basis."⁵⁸

Unfortunately, the examples do not shed much light on this third pathway to recovery. According to the Court's analysis, the measure of damages is the touchstone of impermissible claims for wrongful birth that characterize the life of a child as an injury.⁵⁹ The measure of damages is the difference between the parents' situation caused by the defendant's negligence and the situation that the parents would have occupied in the absence of the defendant's negligence. If the latter does not include the existence of the injured

51. *Id.*

52. *Id.* at 841.

53. *Id.* at 842.

54. *Id.*

55. *Id.* at 841 (first citing *Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E.2d 727 (Ga. 1956); then citing *Worthy v. Beautiful Restaurant, Inc.*, 556 S.E.2d 185, 186, 187 (Ga. App. Ct. 2001).

56. *Norman*, 848 S.E.2d at 841–42 (citing *Hitachi Chem. Electro-Products, Inc. v. Gurley*, 466 S.E.2d 867 (Ga. App. Ct. 1995).

57. *Norman*, 848 S.E.2d at 842.

58. *Id.* at 842, n.9.

59. *Id.* at 840 ("Graves and Abelson establish a key principle that affects the viability of the Normans' claims: life can never amount to a legal injury. . . . Claims seeking damages for the expenses of raising a child cannot be maintained, because such claims are premised on the child's life as the injury.").

child, then the claim is one for wrongful birth. Such claims suggest that the parents would have been better off without the child that they currently have—a view that the Court refuses to endorse by awarding compensation.

In *Abelson*, the archetypal claim for wrongful birth, had the physician not negligently failed to inform the parents about diagnostic testing, they would have obtained a test, discovered the chromosomal anomaly, aborted the pregnancy, and their child would not have existed. By contrast, in the cases of injury *in utero*, had the defendants not been negligent, the fetuses would have remained unharmed, and the same children would have been born without the disability. Similarly, in the cases of preconception injuries, had the defendants not negligently exposed the parents to toxic chemicals, the parents' gametes would not have been altered, and the same children would have been born without congenital disabilities.

It is not clear how one could characterize the preconception injuries to the child in the *Xytex* case in a way that does not require characterizing the life of the child as an injury. Had *Xytex* not misrepresented the donor's information, the parents would not have purchased his sperm, and the child who suffered injury would not have been conceived. The measure of damages might be the difference between the child they have and no child, or the child they have and another child. Either way, the claim suggests that the parents would have been better off without the child they currently have. In the *in utero* and preconception injury examples provided by the Court, it is possible to imagine the child the parents have in the absence of the defendants' misconduct. In the *Xytex* case, it is not possible to imagine the same child in the absence of the defendants' misconduct because the defendants' misconduct was a necessary condition for the conception and, therefore, the existence of the child. This third pathway to recovery appears to be a dead end.

III. POLITICS OVER POLICY

We suspect that the politics of abortion circumscribed the Supreme Court of Georgia's analysis of the issues presented by the *Xytex* litigation. The Court began its opinion with a strong and unqualified reaffirmation of the assertion in *Abelson* that a woman suffers no legal injury when the misconduct of a defendant deprives her of an opportunity to terminate a pregnancy.⁶⁰ The opinion's opening sentence is reminiscent of political rhetoric in opposition to abortion rights: "[r]espect for life and the rights proceeding

60. *Id.* at 837.

from it are at the heart of our legal system and, broader still, our civilization.”⁶¹

So volatile are the politics of abortion in Georgia that the Court declined to even consider the possibility of limiting the scope of *Abelson*'s holding in ways that would render it inapplicable to claims against sperm banks for misrepresentation.⁶² According to the Court, “wrongful birth claims typically arise when parents claim they would have aborted the child had they been fully aware of the child's condition.”⁶³ In *Abelson*, the missed opportunity to abort a pregnancy arose because of a physician's post-conception negligence in failing to inform the mother of a preexisting condition of the fetus.

The claims against Xytex are distinguishable on two grounds. First, the claims against Xytex involve preconception misrepresentations.⁶⁴ Consequently, the parents in the Xytex litigation do not complain that they were deprived of the opportunity to abort the pregnancy. Instead, they allege that Xytex's wrongdoing deprived them of essential information necessary to make an informed choice regarding conception.⁶⁵ The Court should have at least considered arguments presented by the briefs that *Abelson*'s unwillingness to recognize loss of the opportunity to terminate a pregnancy as a legal injury does not require a court to reject deprivation of informed consent in conceiving a child as a legal injury.⁶⁶

Second, the parents' claim in *Abelson* arose in conjunction with a fetal abnormality that existed prior to the physician's negligence. The parents passed down the genetic anomaly that created the fetal abnormality. The physician's negligence consisted of a subsequent failure to provide information that would have eliminated the risk of giving birth to a disabled child. By contrast, in the Xytex litigation, the sperm bank's misrepresentations took place prior to the existence of the fetal abnormality, and the sperm bank passed along the genetic anomaly to the parents when it sold them the sperm. In the Xytex litigation, the sperm bank created the risk of giving birth to a disabled child. The Court should have at least considered the possibility that

61. *Id.* (quoting *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653 (Ga. 1984)).

62. Caroline Kelly, ‘Everything is at stake’: How abortion became a key issue in the Georgia senate runoff, CNN POL. (Jan. 2, 2021), <https://www.cnn.com/2021/01/02/politics/georgia-senate-runoff-abortion/index.html> [<https://perma.cc/6952-SJDE>] (on the volatility of abortion politics in Georgia).

63. *Norman*, 848 S.E.2d at 839.

64. *Id.* at 837–838.

65. *Id.* at 838.

66. *Id.* For a thoughtful and robust analysis of tort recovery for violation of a parent's interests in exercising choice over conception, parenthood, and particular offspring traits, see DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019).

Abelson's restriction of liability in cases where a physician fails to eliminate a preexisting risk of giving birth to a disabled child should not extend to instances where a provider of reproductive tissue creates that risk.

The Xytex litigation is not about abortion—the parents have never claimed that they would have terminated the pregnancy under any circumstances. Instead, it is about parents' rights to make informed choices about the type of children they wish to conceive.⁶⁷ The Court refused to recognize this distinction and to grapple with the question of what role traditional common law tort actions should play in protecting parents' interests in choosing the attributes of their offspring.⁶⁸ Without any analysis, the Xytex litigation expands the scope of impermissible wrongful birth claims beyond those implying judicial support for abortion to any claim resting on the premise that parents would be better off without the child they currently have. The claims of parents misled by sperm banks appear to have been swept up into the penumbra of the moral intuitions about abortion underlying the *Abelson* decision. It seems fair to say that the Court's opinion in the Xytex litigation did more to cast a shadow over the parents' claims than to shed light on them.

The Court's recognition of other theories of legal injury is likely to have little effect on curbing misconduct by reproductive tissue providers. The Court suggested that parents could recover for additional losses caused by a sperm bank's wrongful failure to disclose information following the birth of the child, on the theory that earlier disclosure would have prompted preventive treatment sooner.⁶⁹ However, the Court in *Abelson* argued that there was no principled way to distinguish extraordinary costs of raising a disabled child from the ordinary costs of childrearing. According to the Court, "awarding of one without the other requires a contortion of the traditional rule of recoverable damages that defies all logic and explanation."⁷⁰ Isolating the extraordinary costs of raising a disabled child attributable to delay in disclosure of information from the ordinary costs of childrearing seems no less subject to this objection. Moreover, the *Abelson* court raised concerns about whether allowing recovery for extraordinary costs of raising a disabled child would continue after the age of majority and whether damages would include mental pain and suffering.⁷¹ The Court insisted that these questions are better suited to legislative policymaking than judicial resolution.⁷² Indeed, the

67. *Id.* at Ch. 9 (analyzing legal interests in choosing offspring with particular traits).

68. *Id.*

69. *Id.* at 843.

70. *Atlanta Obstetrics & Gynecology Group v. Abelson*, 398 S.E.2d 557, 561 (Ga. 1990)

71. *Id.* at 562.

72. *Id.* at 563.

Court presented this separation of powers argument as its primary justification for rejecting wrongful birth as a theory of recovery. Curiously, in the Xytex litigation, the Court seems untroubled by this issue. These inconsistencies suggest that the justification for extending *Abelson's* rejection of wrongful birth claims to recovery for preconception misrepresentation by reproductive tissue providers may have less to do with the capacity of courts to calculate damages and limits on judicial discretion than with signaling the Court's "respect for life."⁷³

Recovery based on consumer protection theories would be insufficient to finance litigation. The Court suggested that recovery for fraud would entitle parents to "damages for the difference between the cost of the sperm they received and the fair market value of the sperm that Xytex told them they were getting"⁷⁴—\$1600 in the case that reached the Court.⁷⁵ Claims under the Georgia Fair Business Practices Act would yield general damages of similar magnitude. Constitutional limits on punitive damages would limit recovery even in the most egregious of cases involving intentional wrongdoing to less than ten times the amount of compensatory damages.⁷⁶ Such sums are not enough to cover even the costs of bringing suit, much less provide a sufficient incentive for a plaintiffs' attorney receiving a contingency fee.⁷⁷

Liability exposure plays a vital role in incentivizing product sellers and service providers to exercise reasonable care in reducing the risk of harm to consumers.⁷⁸ In the case of providers of reproductive tissue, this would mean taking reasonable care to verify the accuracy of information provided by donors. Liability would also hold unscrupulous sperm banks accountable for violating the justifiable reliance of their clients—reliance that firms like

73. *Norman*, 848 S.E.2d at 837.

74. *Id.* 843.

75. Video Recording of Oral Argument at 24:45, *Norman v. Xytex Corp.*, 848 S.E.2d 835 (Ga. 2020) (No. S19G1486), <https://www.gasupreme.us/watch/oa-05-21-2020/> [<https://perma.cc/G4UJ-SDJF>]; Christine Van Dusen, *A Georgia sperm bank, a troubled donor, and the secretive business of baby making*, ATLANTA MAGAZINE (Feb. 13, 2018), <https://www.atlantamagazine.com/great-reads/georgia-sperm-bank-troubled-donor-secretive-business-babymaking/> [<https://perma.cc/L735-MYCV>]. *Norman* oral arguments transcript (on file with authors).

76. *State Farm Mut. Auto. Ins., Co. v. Campbell*, 538 U.S. 408, 416-17 (2003); Ga. Code Ann. § 51-12-5.1(g) (LexisNexis 2020) (exemplary damages cannot exceed \$250,000).

77. General Business Trial Group, *Rising Lawsuit Costs Linked to Decrease in Tort Filings*, MORGAN & MORGAN (Oct. 4, 2017), <https://www.businesstrialgroup.com/news/rising-lawsuit-costs-decrease-tort-filings/> [<https://perma.cc/76R2-Q3R3>].

78. See Timothy D. Lytton, *Exposing Private Third-Party Food Safety Auditors to Civil Liability for Negligence: Harnessing Private Law Norms to Regulate Private Governance*, 27 EUR. REV. PRIVATE L. 353, 370-376 (2019) (arguing that liability exposure improves the quality and consistency of professional services—citing examples from medicine, financial accounting, legal practice, law enforcement, youth services—and analyzing the institutional mechanisms that translate liability signals into changes in organizational behavior).

Xytex induce through aggressive marketing. Moreover, liability exposure and civil litigation frequently complement the regulatory efforts of government agencies and often improve their performance.⁷⁹ This is especially important in the case of sperm banks, given the lack of federal regulation and the paucity of state requirements to screen sperm donors for genetic disease.⁸⁰

Unless claims for the extraordinary costs of raising a disabled child due to a reproductive tissue provider's delay in disclosing information concerning the donor's medical history are calculable, allowed by the courts, and sufficient to finance litigation, the Supreme Court of Georgia's decision in the Xytex litigation will produce little more than two cruel ironies. First, in the name of defending the moral principle that no parent would ever be better off without the child that they currently have, the Court deprives parents of money damages necessary to care for the special needs of that child. Second, by unreflectively applying the anti-abortion intuitions underlying *Abelson's* rejection of wrongful birth claims to preconception misrepresentation by sperm banks, the Court has missed an opportunity to reduce misconduct that leads to avoidable genetic abnormalities, potentially increasing the number of terminated pregnancies. Given the issues that remain unresolved, one can only hope that the next time the issue of a reproductive tissue provider's liability for misrepresentation reaches the Court, it will focus more on policy than on politics.

79. See, e.g., Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1843, 1849 (2018) (documenting how tort litigation enhances the regulatory policymaking through issue framing, information disclosure, agenda setting, gap filling, industry self-regulation, and jurisdictional variation); TIMOTHY D. LYTTON, *OUTBREAK: FOODBORNE ILLNESS AND THE STRUGGLE FOR FOOD SAFETY* (2019) 21-22, 94-99, 147-152, 227-231 (demonstrating how tort litigation and liability exposure complement government efforts to regulate food safety).

80. Yaniv Heled, *The Regul. of Genetic Aspects of Donated Reprod. Tissue—The Need for Federal Regulation*, 11 COLUM. SCI. & TECH. L. REV. 243 (2010).