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### Better to Have Never Been Born? Wrongful Life Litigation

By [SHERRY F. COLB](#)

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In the Brave New World of reproductive technology, the possibilities are endless. But when mistakes are made, things can go terribly wrong. That is what happened in the case of Josephine and Gerard Paretta.

The couple visited a fertility treatment center to pursue in vitro fertilization with an egg donor. Unbeknownst to the Paretas, however, their chosen egg donor was a carrier of cystic fibrosis (CF), a serious genetic disorder for which a patient often requires surgery, medication and intensive care throughout her life. Gerard Paretta, the father and sperm donor, turned out to have been a carrier of CF as well.

In a tragic outcome that perhaps should not have come as a surprise to their doctors, the baby that was conceived and implanted in Josephine Paretta was born with the disease. Her parents named her Theresa.

The Paretas and their child subsequently brought a lawsuit against the doctors for failing to reveal the egg donor's carrier status and for failing to test Mr. Paretta for the CF gene.

The New York trial court held - in the case of *Paretta v. Medical Offices for Human Reproduction* - that the parents could go forward with their negligence suit against the doctor. The court refused, however, to permit the baby's lawsuit to go to trial. This ruling was based on flawed philosophical

assumptions about the nature of existence.

### **An Earlier New York Decision Was Also In Error**

In *Becker v. Schwartz*, a 1978 decision that did not involve fertility treatments, the New York Court of Appeals - the highest judicial body in New York - confronted a related issue. In that case, a mother and father sued their doctors in their child's name, because the doctors had failed to inform them that older pregnant women run a heightened risk of delivering a baby with Down's Syndrome. The doctors also failed to test for the condition during the mother's pregnancy.

As a result of these failures, the woman did not learn of her child's mental handicap until after the baby was born. The court dismissed the child's complaint, holding that no one has the right to be born free of disease.

In *Paretta*, the New York court decided that the earlier precedent in *Becker* disposed of the question whether a child could sue her mother's doctor for wrongful life. The *Paretta* court said that the same rights should attach to children conceived naturally as attach to children conceived through assisted reproductive techniques.

Both *Becker*, the earlier precedent, and *Paretta*, the current case, were wrongly decided.

### **The Morally Agonizing Nature of Wrongful Life Suits**

A wrongful life suit, by definition, raises painful and deeply troubling questions about the value of human life. People bring such suits against their doctors only when they feel that they were harmed in some way because their child was born. Had the doctor done his job properly, the claim goes, this child would not exist. There is no way to avoid entirely the normative implications of such a statement.

The least controversial form of wrongful life litigation occurs when a doctor performs a surgical sterilization or its equivalent, and the couple subsequently conceives and has a child. By suing under those circumstances, the couple indicates that however much they love their child, the doctor obviously failed in surgically preventing conception and should bear some of the cost of that failure. The parents have nothing against their child in particular; they just did not want to have a child.

The more gut-wrenching form of wrongful life litigation occurs when the parents in question do want a child. They just don't want this child. The message here is far more personal to the specific baby born to them.

To say this, of course, is not to detract in any way from the suffering of families whose children come into the world with illnesses and abnormalities. It is only to point out that the wish implicit in the lawsuit - a wish that is at least comprehensible to most people - is that the baby in question had never been born.

### **The Difference Between Wrongful Life Litigation and Other Personal Injury Suits**

Suing a doctor for wrongful life is thus very different from suing a doctor because one's child is sick as a result of the doctor's negligence. In the latter case, a doctor might, for example, have used forceps during delivery in a negligent fashion and thereby blinded the child or impaired the use of a

limb. The existence of the child goes unquestioned; the only issue is the harm that the doctor did to that child (and therefore to the child's family).

A sickness that is genetically programmed into a child, by contrast, can only be "prevented" (given current medical technology) by preventing the child himself from coming into existence. Due care in the practice of medicine, in other words, represents the care a doctor might take to help a family avoid the child's being born at all. It is crucial to understand this essential feature of wrongful life litigation if one is to grapple with the moral questions that it raises.

### **The Case for Wrongful Life Recovery**

Despite the implicit claim that their child should not have been born, families that bring such suits can legitimately assert that their suit is primarily about the distribution of expenses. They can honestly say that they love the child they now have and will do what is necessary to take care for him. Such care, though, will be costly, however willing they are to undertake it.

Furthermore, the costs involved are ones that their doctor was causally responsible for imposing. A woman who - as alleged in *Becker* - would have aborted a fetus with Down's Syndrome - as it was her legal right to do - would have benefited from the knowledge that women over 35 are at increased risk of giving birth to a Down's baby. She would also have benefited from undergoing testing that reflects this heightened risk.

Similarly, the doctor in the *Paretta* case who brought together the sperm of Gerard Paretta and the egg of a donor, when both carried the CF gene, allegedly acted in a medically negligent manner. The plaintiffs claim that it was the doctor's obligation to have revealed the donor's CF carrier status and to have performed genetic tests that would have exposed Gerard's status. The doctor then should have informed the patients of his findings and helped them select an alternate donor.

However much a family loves its baby, the costs of caring for a child suffering from CF are debilitating and accrue as a direct result of the doctor's alleged negligence. Therefore, the expenses should be shifted - at least in part - to the person whose errors were responsible for that state of affairs.

The error alleged in *Paretta* may be more egregious, moreover, than the alleged error in the 1978 *Becker* case. From the perspective of most people, the decision not to combine a particular person's sperm with another particular person's egg in a laboratory is far easier, and less freighted, than the decision to terminate a pregnancy in the second trimester due to a positive result for Down's Syndrome.

A woman might therefore decide to bear a Down's baby, even after having an amniocentesis done with the intention of terminating such a pregnancy. It is far less likely, however, that a couple - knowing that an egg donor carries a genetic disease - will choose nonetheless to receive an egg from that donor for fertilization and implantation. In the *in vitro* case, it was the latter decision of which the doctors - allegedly through negligence - deprived the couple in question.

### **What About the Baby?**

Once we allow that there are valid reasons for people to sue for the "wrongful" existence of their child, the question arises whether the child himself should also be able to sue the doctors that helped

create him.

Consider what a child who brings such a suit is claiming. He is saying something along the following lines: "I, the child who should not have been born, hereby sue the doctor whose negligence led to my existence." At first glance, such a claim might seem incoherent.

Ordinarily, when we bring a lawsuit, we have two contrasting scenarios in mind. The first scenario is the present reality, in which - as a result of someone's negligent or intentional misconduct - we have suffered an injury for which we wish to be compensated. The second scenario is a hypothetical, counterfactual scenario, in which the defendant refrained from his misconduct, and we did not suffer the injury. It is the disparity between these two scenarios that allows damages to be calculated.

To make this contrast clearer, consider the following example. Jane Doe goes to her doctor with an ear infection. The doctor prescribes an antibiotic called "bactrim," after failing to look at Jane's chart, which indicates clearly that Jane is allergic to bactrim. As a result, Jane suffers serious respiratory distress and fever for a week, until the doctor figures out that the bactrim is causing her suffering. Jane subsequently sues the doctor.

In what I have called the "first scenario," Jane has suffered pain, discomfort, and a substantial risk of death because of her doctor's negligence. For this, she wishes to be compensated. In the second, counterfactual scenario, Jane's doctor looked at her chart before prescribing, gave her amoxicillin instead of bactrim for her infection, and all was well.

It is then the disparity between Jane's condition in the first scenario and Jane's condition in the second that gives rise to her cause of action against the doctor.

But what if the patient's complaint against the doctor is that she, Jane, exists? In scenario one, the doctor failed to prevent the birth of the child, and the child therefore came into existence with a genetic condition such as Down's Syndrome or Cystic Fibrosis. In scenario two, there was no pregnancy (because of genetic testing) - or there was a pregnancy, but it was terminated after a positive test for Down's Syndrome. Either way, in scenario two, the patient does not exist.

It is the disparity between these two scenarios - a painful existence and no existence at all - of which the patient complains. How do we calculate which of these two scenarios is better for the person whose existence is at issue? And further, what does it mean to say that it would have been better for a person not to have been born?

### **Not Such a Strange Question After All**

The reason it seems strange to pose such a comparison is that it is in some sense meaningless to speak of what it would be like for Jane Doe if Jane Doe did not exist. There would, by the very premise of the question, be no Jane to experience the state of not existing. That does not, however, necessarily mean that it is incoherent to compare existence with nonexistence.

Most of us believe that suffering is an evil, and that when suffering becomes intense enough, it might be worse than death. The prospect of death, for example, might not induce a prisoner of war to talk, but the threat of torture could. It is accordingly comforting to learn that a loved one's death was "mercifully quick" rather than lengthy and painful.

These sentiments express the view that at least under some circumstances, nonexistence might be better for the person who does not exist than life. It is not that the dead person has an identity in which he suffers less than his alter ego, the living and suffering version of him. Rather, it is that the suffering of the existing person is so great as to make life not worth living anymore, from that person's own perspective.

When life is experienced in that way, then it makes perfect, tragic, sense for the person in question to wish either that he were dead (and thus in a state in which he ceases to exist at all) or that he had never been born in the first place.

In a poem written in his later years, for example, nineteenth century philosopher Heinrich Heine said: "Sleep is lovely, death is better still, not to have been born is of course the miracle."

All this is not to say that a plaintiff who suffers and wants to recover damages necessarily wishes that she had not been born. It also does not mean that in some cosmic sense, the plaintiff "should" not have been born. To acknowledge that suffering may be greater than would justify existence, however, is to say that there are burdens and expenses that will be borne by the person who comes into existence (and not just by her family).

Furthermore, because her disorder is physiologically inseparable from her existence, those expenses are associated directly with that existence. By bringing a suit, she claims that the doctor whose negligence brought her into being should therefore have to bear at least some of the resulting financial costs.

One might say that many people who exist believe their parents made a selfish and bad choice to give birth to them. How many teenagers have said to their parents in anger, "I never asked you to have me, so don't expect me to be grateful that you did!"

Because of the physical invasiveness of deciding otherwise, our courts have held that a woman has an absolute right to bear a child with whom she is pregnant, no matter how difficult that child's life will be for him.

The doctor, however, has no such right to bring people into existence. Therefore, when he does, and his actions negligently eliminate choices that families currently have the right to make, he ought to be held responsible for his actions. That responsibility extends, moreover, not only to the parents whose decision it should have been whether to have the child but also to the child whose suffering (and whose very existence) can be attributed to the doctor's mistakes.

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