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Wrongful Life and Wrongful Birth: The Devaluation of Life with Disability

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Abstract: In this article, the author argues that both wrongful life and wrongful birth suits promote attitudes that devalue the lives of people with disabilities. She begins by accounting for the nature and history of wrongful life and wrongful birth suits and presents key cases for each kind of suit. She moves on to argue that in wrongful life suits, the plaintiff must claim that non-existence is preferable to a life with disabilities. The defense and acceptance of such a claim contribute to the conceptualization of life with disability as a personal tragedy. In the wrongful birth cases analysed by the author, parents argue that they would have terminated their pregnancies if properly informed of the impairment-related risks. In light of the parents' admission, the author argues that in suits of this nature, the injury to parents is the child born, not the deprivation of informed choice. While parents are forced to take up the language of harm and burden – language that reinforces ableism – to qualify for the financial compensation awarded in wrongful life and wrongful birth cases, the responsibility for improving the lives of disabled people should be borne by society and taken up as a human rights issue.

This article argues that both wrongful life and wrongful birth legal suits promote attitudes that devalue the lives of people with disabilities. I will begin by accounting for the nature and history of wrongful life and wrongful birth suits and present key Canadian cases for each kind of suit, as well as the literature that critiques such suits. I then argue that in wrongful life suits, the plaintiff must claim that non-existence is preferable to a life with disabilities. The defense and acceptance of such a claim contribute to the conceptualization of life with disability as a personal tragedy. In wrongful birth cases, parents argue that they would have terminated their pregnancies if properly informed of the impairment-related risks. In light of the parents' admission, I argue that in suits of this nature, the injury to parents is the child born, not the deprivation of informed choice. Parents are forced to take up the language of harm and burden. While they must use language that reinforces ableism to qualify for the financial compensation awarded in wrongful life and wrongful birth cases, the responsibility for improving the lives of disabled people should be borne by society and taken up as a human rights issue.

These suits are important because they promote ableism and have thus drawn the attention of disability scholars. Within disability rights discourse, advocates have been critiquing legal approaches to disability because disability is being shaped in problematic ways through the decisions made and language used in case law. Wrongful life and wrongful birth suits are contributing to discrimination against persons with disabilities by associating disability with harm and by rendering disability a problem for which individuals can seek compensation. Disability scholars have taken interest in legal approaches to disability and deserve to have a voice at the table. It is thus of vital importance that legal discourse include the disability critique and acknowledge the disabling implications to wrongful life and wrongful birth suits.

Literature Review

My primary research includes case law from the Ontario Superior Court of Justice as well as the Supreme Court of Canada. In *McDonald-Wright* v. *O'Herlihy*, [2005] CanLII 13806 (On S.C.), the Ontario Superior Court of Justice considered the trial jury's ruling against Audrey McDonald and her son Beau, who was born with a neural tube defect. This case marked the separation of wrongful birth and wrongful life suits; plaintiffs must now establish a separate breach of care for each. When the nature of the harm inflicted on Beau was explored, the plaintiff argued that Beau's claim "is not predicated on the right not to be born" (p. 12). Instead, the plaintiff was arguing that "the wrong consists in a failure to inform Audrey McDonald of Beau's condition in a timely manner in order to allow her to make an appropriate decision."

Brought to the Ontario Superior Court of Justice, *Bovington* v. *Hergott*, [2006] Can LII 39460 (On. S.C.), involved a wrongful life claim against a physician who failed to disclose the risks of taking Clomid, a fertility drug that causes twin pregnancies; premature birth resulted in impairment. During this case, the following was argued: "[B]ut for the prescription of the fertility drug, these two children would not have been born. It is impossible to restore these children to a position they would have been in, i.e., non-existence, but for the negligence" (p. 3.1). This argument is a recurring theme in wrongful life cases.

In the wrongful birth suit *R.H.* v. *Hunter,* [1996] O.J. No. 4477 (Gen. Div.), brought before the Ontario Superior Court of Justice, physicians were found to be negligent for failing to refer the plaintiff to genetic counselling. The court ruled in favour of the parents, and they were awarded $3 million. This money was allocated in the following way: general damages, awarded to both parents likely for their pain and suffering; special damages, including any out-of-pocket expenditures; the mother's loss of future income; and future care, including medical needs, aids to daily living, accommodation, transportation, education, vocational work, professional services, respiratory assistance, and attendant care.

In *Arndt* v. *Smith*, [1997] 2 S.C.R. 539, brought to the Supreme Court of Canada, Carol Arndt sued her physician for not informing her of the impairment-related risks associated with a pregnant woman contracting chicken pox. Arndt argued that had Smith "advised her of the risk of injury to her fetus, she would have terminated the pregnancy and avoided the costs she now incurs" (p. 539). Smith contended that Arndt would have kept her baby regardless and so the physician should not be held responsible for the deprivation of informed choice.

Brought to the Supreme Court, *Krangle* v. *Brisco*, [2002] 1 S.C.R. 205, involved the Krangles suing their physician for the cost of care for Mervyn Krangle, who was born with Down syndrome. According to the plaintiffs, Dr. Morrill had failed to advise Mrs. Krangle of the availability of amniocentesis, a test that would have led to a diagnosis of Down syndrome; had Krangle known, "she would have had an abortion" (p. 2). The trial judge had awarded the Krangles for the "pain, suffering, anguish associated with his brain and his development" (p. 20) until Mervyn reached adulthood; the Supreme Court upheld this ruling.

In addition to case law, I will draw from scholars who have critically analysed wrongful life and wrongful birth suits in Canada and the United States. In "The birth torts: Damages for wrongful birth and wrongful life" (2005) and "Wrongful life and the logic of non-existence" (2006), Dean Stretton acts as a proponent of these kinds of legal suits. He presents the arguments found in the disability critique and aims to dismantle those arguments. He thus represents the most formidable objections to my position.

With the exception of Stretton, the secondary literature used in this article is predominantly written by disability scholars. These scholars give voice to the implications that wrongful birth and wrongful life suits have for persons with disabilities. Carol Thomas (1999) sets the scene in so far as she describes disability as social in *Female Forms: Experiencing and Understanding Disability*. While Thomas does not specifically address legal suits, her work is important to include here because she reinforces the definition of disability that I use in my arguments. In "Courts and wrongful birth: Can disability itself be viewed as a legal wrong?", Lori B. Andrews and Michelle Hibbert (2000) ask whether the push to remediate impairment can be discriminatory. Richard Hull (2006) further argues in "Cheap listening? – Reflections of the concept of wrongful disability" that these suits pathologize and individualize disability, thereby stymieing efforts to address systemic disabling conditions in our social context.

In more complex arguments, Darpana Sheth (2006) and Wendy F. Hensel (2005) both explore the defense that wrongful birth promotes reproductive autonomy. They demonstrate that autonomy is actually constrained in ableist contexts, and, far from promoting freedom, these cases justify disability discrimination. I will be drawing from Hensel's "The disabling impact of wrongful birth and wrongful life actions" especially when building my case against wrongful life and wrongful birth arguments.

Wrongful Life and Wrongful Birth Suits: Promoting the Devaluation of Life with Disability

The Problem with Wrongful Life Suits

According to disability rights advocates, wrongful life suits are predicated on the devaluation of life with disability – that non-existence is preferable to life with disability – an admission that must be made by the child born with disabilities. If not for the failure of the physicians to inform parents, the pregnancy would have been terminated and the child would not have been born. The injury is therefore the life with disability. The alternative, had there been no injury, would be non-existence, the termination of a pregnancy. Hensel describes the wrongful life argument in the following way: "[W]rongful life actions have been initiated in the impaired child's name. Because the alleged negligence did not actually cause the child's impairment, but instead enabled the child to come into being, the operable injury is the child's life itself, with non-existence identified as the preferred alternative" (2005: 143).

Hensel goes on to argue that wrongful life suits tend to be less successful than wrongful birth suits because "in part … courts have found it more palatable to identify lost parental choice as the injury than to answer the metaphysical question of whether non-existence is ever preferable to life, however burdened" (143).

Granted, in *McDonald-Wright* v. *O'Herlihy*, the case built on behalf of Beau McDonald involved the denial that non-existence is preferable to life with disability. The plaintiff instead meant to claim damages for the costs involved in living with a disability. This case was ruled against, however, and would thus not serve as a compelling precedent for plaintiffs in the future who wish to claim wrongful life. Indeed, the defendants countered that wrongful life claims are impossible without first positing that the birth ought not to have happened, indeed that termination is preferable.

The injury would be life itself; physicians are injurious to the extent that they caused, through failure to disclose information, the birth and life of someone with a disability (Hensel 2005). In these cases, physicians did not cause the disability, for they were not directly responsible for the impairment-related risks associated with chicken pox or fertility drugs. Therefore, the only way the impairment could have been prevented would be if informed parents opted for abortions.

It is perhaps important to note that plaintiffs in wrongful life suits are seeking compensation for the damages done to them as a result of being born, and these damages involve the pricey cost of care. Successful wrongful life cases focus less on the claim that non-existence is preferable to life with disability (a claim they argue is justification for the dismissal of many cases) and more on "awarding damages for the child with the disability" (Andrews and Hibbert 2000: 422). Disability so often results in economic loss that wrongful life suits might serve as a remedial mechanism.

Nonetheless, it may be problematic to seek monetary compensation from physicians for the costs incurred on the basis of having a disability. According to disability rights advocates' social model, disability ought to be understood not as an individual feature but instead as a range of barriers that prevent persons from fully functioning. That is, disability ought to be understood according to how social contexts fail to respect difference (Thomas 1999). The injuries associated with disability would not exist if not for social, economic, physical, and attitudinal barriers. Persons with disabilities might thus be seeking justice in the wrong place; instead of blaming physicians and demanding monetary compensation for their cost of care, they should perhaps demand the redress of the failure on the part of institutions in their lives to provide adequate accommodations. Hull echoes my argument: "[S]ocial policy should be directed at tackling the processes and conditions that *give rise* to cycles of deprivation and experiences of radically unequal life changes rather than penalizing those who happen to be unfortunate enough to find themselves victim to such processes and conditions (2006: 56, emphasis in the original).

Stretton (2005, 2006) argues that sometimes non-existence is preferable to certain kinds of life. People who are tortured, for instance, might in those moments prefer death. If we acquiesce to this point, we ought to consider whether we fail to recognize nuances to disability when we dismiss the claim that non-existence is preferable to life with disability. Indeed, because systemic barriers exist, life is not easy for persons, for example, with mobility-related devices or who are dependent on social support. Even when not taking into account the social structures that disable people, impairments themselves might require scrutiny, such as when impairments lead to severe pain or early death.

While I concede to the possibility that some conditions render non-existence preferable to life, I nevertheless stop short of arguing that non-existence is preferable to life with disability, even when the disability is severe. It is important to assess specific and severe disabilities, but this exercise runs the risk of drawing lines in the sand, of ranking and ordering which disabilities ought to be valued as neutral difference and which ought to be treated as deviation. The conclusion that non-existence is preferable stems from long-standing negative attitudes towards disability, for such a conclusion presupposes that a life can be solely constituted of ability/disability. The determination that life with disability is not worth living fails to account for the myriad other aspects to living; people with disabilities still have families, friendships, goals, talents, educations, careers, romance, and so forth. A failure to acknowledge everything that constitutes a life indicates that statements found in wrongful life suits are steeped in stereotypes and erroneous assumptions about what life with disability is like, and so those involved in wrongful life suits should not be in the position to make value judgments about what such a life entails. Therefore, wrongful life cases only serve to reinforce negative attitudes and perpetuate discrimination towards disability.

The Problem with Wrongful Birth Suits

In the spirit of *McDonald-Wright* v. *O'Herlihy*, I intend to establish separate arguments for wrongful life and wrongful birth suits. The injury incurred in wrongful birth suits is sometimes referred to in the literature as the deprivation of choice. Parents argue that they were unable to make fully informed decisions due to their physicians' failure to provide sufficient medical advice. In other words, patients were unable to make informed decisions regarding their pregnancies because they were not equipped with important information that would weigh on the decision.

Parents must also argue that they would have terminated their pregnancies if they had been fully informed. When *Arndt* v. *Smith* reached the Supreme Court, the crucial question examined was whether Arndt would have terminated her pregnancy had she been informed of the availability of testing that would have identified genetic impairment. She lost her case because the trial judge, and later the judges presiding at the Supreme Court, determined that she would not have followed through with an abortion even if she had known about her child's diagnosis of impairment. The arguments made in *Arndt* v. *Smith* demonstrate that the mother's informed decision to terminate pregnancy is a necessary criterion to satisfy in order to justify wrongful birth: "wrongful birth and wrongful life claims do not compensate every individual who is deprived of the ability to make an 'informed' reproductive choice" (Sheth 2006: 666). That is, the deprivation of informed choice is not the basis for wrongful birth claims, because a plaintiff must also argue that had she been fully informed, she would have opted for an abortion.

Therefore, the harm caused by physicians in wrongful birth suits is the child born, not the deprivation of informed choice. Indeed, according to Hensel, "The misleading rhetoric of choice and opportunity has allowed the tort of wrongful birth to garner widespread legal recognition" (2005: 167) even though choice is not entirely the issue. She goes on, "[I]t is not lost choice in the abstract that is actionable, but the lost opportunity to abort the impaired child or to prevent conception." If the harm were simply the lack of reproductive choice, then it would not matter what the choice was. Therefore, the injury done to parents is that they had an infant with disabilities; they are seeking compensation for having such an infant in their lives.

In this light, the infant born is understood to be a burden. I presented the social model of disability and how this model unearths societal attitudes about human variation. In Hensel's words, "Rather than focusing on the inherent physiological limitations of individuals, this model emphasizes social forces in constructing the experience of disability" (2005: 147). In wrongful birth suits, life with disability is regarded not only as a personal tragedy but also as a burden that parents must shoulder. That parents must express regret for having their child indicates that they are suffering for having in their lives a child with disabilities. The social model of disability makes clear that the tendency to attribute the language of burden to disability is a function of discriminatory attitudes towards difference and furthermore is a tendency that does not properly account for the ways in which disability is a structural problem rather than an individual lacking.

However, disability does involve social barriers, and, as long as those social barriers exist, parents contend with at least the burden of having to pay for accessibility accommodations and medical care. In *R.H.* v. *Hunter*, the cost of care, amounting to $3 million, was extensive. As long as we do not live in a utopia where difference would be respected and systemic injustice would be redressed, perhaps there is a place for wrongful birth suits, one might argue.

I would hold, however, that while wrongful birth suits might fill a gap that has yet to be solved, they are nevertheless problematic because they only serve to compensate parents who are willing to identify their children as unwanted injuries. According to Hensel, “No matter how compelling the need … no assistance will be extended to the family who would have chosen to embrace or simply accept the impaired child prior to his birth” (2005: 172). She continues, “[A]ssistance is provided only to those willing to openly disavow their self-worth and dignity” (177). For disability rights scholars, suits of this nature involve the devaluation of persons with disabilities in order for parents to qualify for funds. Parents like Arndt, who would choose to have their children despite the disabilities involved, are not entitled to compensation. Therefore, they are left in the cold, left to deal with the cost of care themselves.

Krangle v. *Brisco* involves the question of whose burden Mervyn will become, even well into adulthood, and such a question presupposes that the problem of disability is still meant to be solved at the individual level. However, there would no longer be a need to assign blame, nor to demand compensation, if our social context no longer disabled people on the basis of difference. Wrongful birth is problematic to the extent that parents can only qualify for compensation when they identify their children as injuries. Due to systemic injustice, they are put into a position where they must call their children burdens in order to afford the cost of care. People with disabilities and their parents ought to qualify for financial support on the basis of human rights, on the basis of equality, rather than because disability is a legal injury.

Conclusion

I have sought to demonstrate that the value judgments made in wrongful life and wrongful birth suits have implications for the disability community. By affirming the parents’ rights to discriminate against disability, courts in effect justify disability discrimination (Sheth 2006). Legal tort laws can only entail language of injury in so far as people are understood as being less than the standard of normalcy or health. Disability comes to be seen as an injury, something located in the individual, and something for which someone ought to be held at fault.

Yes, accommodations are costly, and tort law provides a way for unprepared parents to seek compensation and support. They would have support, however, if social structures and policies created a context whereby difference was treated with respect and the equality rights to which people are entitled were honoured. Wrongful life and wrongful birth suits do more than simply fill in a gap left by systemic injustice. Suits of this nature force disabled people and their parents into corners, force them to take up the language of harm and to identify disability as a burden or a tragedy in order to qualify for funding. Furthermore, the process of laying the blame only localizes disability in the individual, rendering disability a problem for individuals to solve rather than a human rights issue that is the state’s responsibility to address. Wrongful life and wrongful birth suits are not simply a necessary evil for seeking compensation in a society that does not accommodate diversity. Rather, these suits are further contributing to discrimination against persons with disabilities by associating disability with harm and by rendering disability a problem for individuals to work out and for which they must compensate.

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