

Proponent, SB 142

Senate Judiciary Committee

Feb. 18, 2013

Chairman King and committee members,

Good morning, I am Kathy Ostrowski, legislative director of Kansans for Life, testifying in support of Senate Bill 142, which we call, “Civil rights for the Unborn.”

The measure is based on language taken from the 2012 version of the Pro-life Protections Act, (H sub SB 313) which passed the Kansas House 88-31. SB 142 will:

- BAN any “wrongful birth/life” lawsuits claiming that the child, in essence, is a ‘damage’;
- BROADEN civil suits on behalf of wrongful death of an unborn child to be filed throughout gestation, not just after viability.

This bill brings equity to the way the unborn child is treated in the courtroom to the extent allowable under *Roe v Wade*, as confirmed in the 1989 U.S. Supreme Court *Webster* ruling. *Webster* let stand the pro-life public policy of the “Missouri preamble”:

“the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.” (*emphasis added*, [492 U.S. 490](#))

Although, under *Roe*, abortion is legal, the *Webster* Court said that it “implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion” and enforcing the protectable interests of the unborn child.

SB 142 validates that Kansas’ public policy that human life as inherently good, and that all human beings have value.

Wrongful birth lawsuits

Ten states¹ statutorily prohibit wrongful birth suits and such statutes have been consistently upheld under both the State and Federal Constitutions.

Attachment A is a portion of a Harvard Law Review paper arguing the negative societal impact of wrongful birth/life suits, in view of the struggles made by the disability community. Excerpt:

“With the completion of the Human Genome Project, scientific knowledge of genetic markers is exploding. Hundreds of tests now exist that give pregnant women the ability to detect human conditions ranging from the severely disabling to those that many people dismiss as insignificant afflictions. Such scientific advancement has not come without a cost...

Wrongful birth and wrongful life suits may exact a heavy price not only on the psychological well-being of individuals with disabilities, but also on the public image and acceptance of disability in society. Rather than focusing on a defendant's conduct, as in a traditional tort action, both wrongful birth and wrongful life suits ultimately focus on the plaintiff's disability, a status that is at least partially a societal construction. Juries in such actions are required to evaluate whether a particular disability is so horrible, from the non-disabled perspective, as to make plausible the choice of abortion or contraception by the parent, or non-existence by the disabled child.”

Many families cope with the challenges of disabling conditions; yet states that allow wrongful birth suits allow juries to give jackpot awards only to those plaintiffs who are willing to stand up in court and say “my child should have been aborted.”

Attachment B gives details on Oregon parents who last year won \$2.9 million (after seeking \$14 million) for wrongful birth. The doctors' attorney argued the test was done properly but the girl has a “mosaic” form of Down Syndrome in which all the cells do not show the chromosomal abnormality.

Certain liberal media outlets for the past year have shamelessly run with the spin that SB 142 “would allow doctors to lie to women” and “force women to deliver unwanted children”. To believe doctors await this law in order to deceive patients defies credulity. ObGyn doctors are not going to risk defying the standard of care (prosecutable under statute) which requires them to advise a plethora of prenatal testing for pregnant women at risk.

Under SB 142, physicians do not gain a shield against malpractice suits for incompetence and negligence-- but the birth of a child remains off limit as a compensable injury.

Wrongful death civil suits

In 2007, Kansas enacted Alexa's Law², allowing criminal prosecution for injury or death to the unborn during the commission of a crime against the mother. Alexa's Law protects the unborn child from fertilization through term delivery. This definition should operate in the sphere of civil litigation, and it is not barred by *Roe* from doing so.

Civil rights for the unborn is an achievable and an admirable policy and we ask that SB 142 be passed favorably from this committee. Thank you, I stand for questions.

¹ Idaho Code section 5-334; Ind. Code Ann. Section 34-12-1-1; Mich. Comp. Laws. Ann. Section 600-2971; Minn. Stat. Ann. Section 145-424; Mo. Ann. Stat. section 188.130; N.D. Cent. Code section 32-03-43; Oklahoma Statutes 63-1-741.12, Oklahoma Statutes 63-1-741.12; 42 Pa. Cons. Stat. Ann. Section 8305(b); S.D. Codified Laws section 21-55-1; S.D. Codified Laws section 21-55-1

² http://kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_054_0000_article/021_054_0019_section/021_054_0019_k/

The Disabling Impact of Wrongful Birth and Wrongful Life Actions

Wendy F. Hensel Assistant Professor, Georgia State University College of Law.

Harvard Civil Rights-Civil Liberties Law Review, Vol. 40, 2005 (*excerpts edited, with added emphasis, by KFL*)

... societal attitudes toward disability have been **challenged by prenatal genetic testing and the corresponding torts of wrongful birth and wrongful life**. For some time, tests have existed that, when used properly, could advise a pregnant woman of certain birth defects that her unborn child possessed or was likely to possess, like Down syndrome, anencephaly, or Tay-Sachs disease. With the completion of the Human Genome Project, scientific knowledge of genetic markers is exploding. Hundreds of tests now exist that give pregnant women the ability to detect human conditions ranging from the severely disabling to those that many people dismiss as insignificant afflictions.

Such scientific advancement has not come without a cost. As the number of tests has expanded, so too has the number of lawsuits alleging negligence against the medical profession. When genetic impairments are detected upon the birth of a child, some parents have chosen to sue under the **tort of wrongful birth**, claiming that they would have avoided conception or aborted their unborn child had the impairment been properly diagnosed. The **injury identified in these cases is the parents' lost choice** over whether or not to carry an impaired child to term. Alternatively or in addition to such claims, **wrongful 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**.

The controversy surrounding wrongful birth and wrongful life litigation has existed for many years and is well documented. The courts faced with these issues have overwhelmingly rejected wrongful life actions while at the same time approving those for wrongful birth. In part, this has occurred because 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. In contrast, many tort scholars who have addressed this issue have concluded that both wrongful birth and wrongful life actions should be permitted to go forward. They reason that both torts correspond well, if not perfectly, with traditional negligence principles.

In the midst of this robust public debate, there is one point of view that has received less attention — that of individuals with disabilities. Although much has been written about the impact of genetic testing as a general matter, surprisingly little legal scholarship has focused on the impact that wrongful birth and wrongful life actions might have on the community of people with disabilities. Often, the consideration tort scholars give to this viewpoint is confined to a discussion about the benefits of providing needed compensation to disabled individuals and their caregivers. Particularly in the wrongful life context, scholars have argued that the theoretical difficulty in identifying “life” as an injury does not outweigh the practical reality of an injured party who needs assistance.

The problematic aspects of wrongful birth and wrongful life actions, however, far exceed the conceptual difficulties that attach to these torts. **Wrongful birth and wrongful life suits may exact a heavy price not only on the psychological well-being of individuals with disabilities, but also on the public image and acceptance of disability in society**. Rather than focusing on a defendant's conduct, as in a traditional tort action, both wrongful birth and

Attachment A

wrongful life suits ultimately focus on the plaintiff's disability, a status that is at least partially a societal construction. **Juries in such actions are required to evaluate whether a particular disability is so horrible, from the non-disabled perspective, as to make plausible the choice of abortion or contraception by the parent, or non-existence by the disabled child.**

Since only the child's diagnosis is ascertainable at this critical point in time, the centrality of impairment in defining personhood is reinforced and inescapable. Any benefits secured by individual litigants in court are thus taxed to the community of people with disabilities as a whole, placing at risk, in the drive for individual compensation, the gains secured by collective action and identity. ...just as in wrongful life actions, the implicit underlying injury in wrongful birth actions is the impaired child rather than the mother's lost reproductive choice. Even though the courts have treated the two torts differently, they are analytically similar and lead to equally problematic... consequences.

Tort law should not serve as a tool of injustice under the guise of benevolent intervention on behalf of individuals with disabilities. Because relief to individual litigants in wrongful birth and wrongful life actions is purchased at a cost to society as a whole, **neither action should be recognized by state legislatures or the courts....** Because wrongful birth and wrongful life actions **extend compensation only to those parents who would have chosen to abort an impaired child, these torts strengthen and reinforce the message that abortion is the preferred means of "curing" disability in society.** The potential impact of such messages is troubling. As one author explained, "[t]he belief that genetic conditions are 'defects' that can be avoided perpetuates a myth that leads to personal shame and family disgrace when such an event occurs." Against this background, abortion becomes both the preferred option and the morally correct choice upon a diagnosis of defect. ...No research has been conducted to test whether there are fewer incidents of negligence in prenatal genetic testing in those jurisdictions that recognize both wrongful birth and wrongful life actions.

... For example, one court may deem Down syndrome an insufficiently severe defect to render nonexistence preferable in a wrongful life action, while another may view the situation entirely differently. [*re: reliability of genetic testing*] Likewise, the laboratory which fails to test for rubella will be liable for significantly greater damages than one who fails to test for a hereditary hearing impairment... In fact, this is true for most genetic tests available on the market, and a recent study by the Centers for Disease Control suggests that this problem is likely to become even more widespread as manufacturers market tests directly to consumers in national advertising campaigns. ...

... wrongful birth and wrongful life actions inevitably reinforce the precarious position of individuals with disabilities in society, weakening family relationships and community bonds. **Once the non-disabled are given authority to judge from a "reasonable person" perspective whether or not the disabled life is worse than no life, the power of individuals with disabilities over their own identity and self-worth is seriously diminished.** When compensation is tied to maternal testimony that abortion or contraception was preferred to an existing child, the price of assistance is simply too high. The hard fought gains secured by the disability rights movement should not be placed at risk in the drive for individual compensation.

Wrongful birth and wrongful life actions require courts to draw lines among different types of impairments, reinforcing the medical model of disability and creating deep divisions among individuals with disabilities. The objective of such litigation is not to highlight the potential richness of life with disabilities, but instead the severity of the functional impairment in order to maximize the damage award.

Oregon Couples Wins ‘Wrongful Birth’ Lawsuit

March 13, 2012 at 8:20 am , by [Holly Lebowitz Rossi](#)

<http://www.parents.com/blogs/parents-news-now/2012/03/13/trends/oregon-couples-wins-wrongful-birth-lawsuit/>

A Portland, Oregon couple was awarded nearly \$3 million in damages last week after they sued their health care providers for failing to diagnose their daughter with Down syndrome in utero. Ariel and Deborah Levy sued for “wrongful birth” because they said had they known the diagnosis, they would have opted to have an abortion.

The couple underwent a number of screening tests for Down’s syndrome, [The Oregonian](#) newspaper reports, including ultrasound screenings and bloodwork—which showed an elevated risk of the fetus having the disorder—and a procedure called chorionic villus sampling, or CVS—which showed that the fetus was did not in fact have Down’s. The Levy’s lawsuit alleged the lab that conducted the CVS mistakenly analyzed Deborah Levy’s tissue, rather than the fetus’.

The Levys learned within a week of their daughter Kalanit’s birth that she did in fact have Down syndrome. The couple, who has two older, healthy sons, sued for the estimated \$3 million additional lifetime costs they will incur to care for Kalanit. A jury, voting 12-0 after only 6 hours of deliberation, awarded the family nearly the entire amount.

More on the story here:

http://www.oregonlive.com/news/index.ssf/2009/06/rare_prenatal_testing_case_rai.html

Experts say so few parents choose to file wrongful birth suits because it forces them to take an awkward position: They must be willing to say on the record that they would have aborted the pregnancy, and that they feel a burden — albeit financial — of raising the child.

The Levys’ attorney, David K. Miller, said his clients deeply love their daughter but worried about being portrayed as heartless. Miller said they sued because they worried about providing all that their daughter would need over her lifetime. Experts testified that she will continue to need speech and physical therapy and face a concerning list of possible medical problems over her lifetime. Professionals have told the Levys that she will likely never be able to live independently, or earn a living.

Arthur Caplan, director of the Center for Bioethics at the University of Pennsylvania, said fewer than 10 such suits -- for disabilities ranging from spina bifida to severe retardation -- are filed in the U.S. each year.

The decision to get an abortion, experts say, is less difficult for many parents when the disability is a condition such as Tay-Sachs disease, which in its most common form kills most children before age 4. Ethicists wonder about the morality of such a decision when the condition is deafness, blindness, a cleft lip, obesity or a propensity to develop breast cancer or have a heart attack later in life -- all of which can be identified in the womb,

One decade-long study referenced in a policy brief by the Washington State Department of Health found that 28 percent of women who knew they'd give birth to a baby with a cleft lip or mouth deformity chose to end their pregnancies.

Attachment B