Which Cord Do We Cut?
An Expansion of Juvenile Protections in Medical Malpractice

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April 12, 2012
It is often said that “[c]hildren are the world’s most valuable resource and its best hope for the future.”¹ Because of this recognition, society properly places a high value on protecting children. This value is evidenced by the gold standard of juvenile law: the best interest of the child doctrine.² The ultimate purpose of juvenile law is to protect the vulnerable in society; yet problems arise when juveniles, who traditionally possess few actionable Constitutional rights,³ exercise the same fundamental rights as adults.

This conundrum is exemplified in the arena of abortions obtained by minors. The Constitution provides for a fundamental right of privacy through which a woman may obtain an abortion for an unwanted pregnancy.⁴ This fundamental right encompasses adults, as well as minors.⁵ But are the legal remedies for minors who experience negligently performed abortions sufficient to undergird the legitimate exercise of her fundamental rights?

This article will analyze whether the current case law and statutes in Texas promote legal consistency and coherency while simultaneously protecting the best interest of the child for juveniles who engage in their fundamental right to obtain an abortion. This paper will further analyze this issue by examining how the current laws protect minors with respect to illegal abortions and “wrongful suits.” Lastly, this paper will explore possible remedies that promote the best interest of the child by providing legal redress to minors desiring to file a medical malpractice claim based on abortion.
Illegal or Criminal Abortions

Symone T., a twelve-year-old girl, obtained an abortion after being raped. She subsequently filed a medical malpractice suit to recover compensation for neurological damage allegedly suffered as a result of the abortion. Symone was unable to recover any damages because the abortion was illegally obtained at 24.7 weeks. The statute mandated that no abortions be granted past viability at 24 weeks.6

This case, although adjudicated in New York,7 highlights a grave legal problem as applied to minors in Texas: illegal abortions. If an abortion is illegally obtained in Texas, there can be no civil recovery of claims.8 Similarly, it is a crime for a doctor or other healthcare provider to assist a woman in obtaining an illegal abortion.9 An abortion can be illegally (criminally) obtained by a minor under two scenarios: 1) if obtained past the point of viability at 24 weeks or 2) if obtained without the appropriate parental notification or judicial bypass.10 The theory behind this rule is rooted in common law. Traditionally, a person who willfully engages in illegal activity cannot enjoy the fruit of his crime if the injury is “a direct result of his [or her] knowing and intentional participation in a criminal act.”11 This rule is rational as applied to traditional crimes for adults. However, the rigidity of the common law could not contemplate a scenario like Symone’s. In this case, is Symone, a twelve-year-old girl, capable of knowing and intentionally participating in the criminal act of obtaining an abortion past viability when she becomes pregnant as a result of rape? Juveniles making any legal claim relating to an
abortion procedure should always be viewed as a victim and as a child and not as an adult or a criminal.

In the case of illegal abortions, the juvenile protectionist philosophy of maintaining the best interest of the child should supersede common law precedent. There is no rational benefit to preventing recovery in a scenario like Symone’s. An illegally obtained abortion by a minor should never be a bar to recovery. To assume that a child, at any age before majority can have the intent to commit an illegal abortion is extreme. If a minor has no ability to create a binding contract, then a that same minor should not be able to have the capacity to consent to an illegally obtained abortion. Adults in a similar factual situation may possess the proper capacity to realize that the actions they are pursuing are illegal. But a minor who undergoes an illegal abortion cannot comprehend the potential physical, mental, or legal repercussions of what may come as a result of the procedure. As such, the juvenile must be provided with sufficient legal remedies, despite the illegally obtained procedure. Allowing for civil remedies for abortions illegally obtained by minors will promote deterrence for the healthcare providers conducting the procedures and will protect the best interest of the child by providing a legal remedy for a child who may have severe medical or psychological damage as a result of negligence surrounding the abortion procedure. An illegal or criminal abortion obtained by a juvenile should never be considered as a bar to recovery for malpractice claims.

Currently a juvenile’s parent or guardian may sue on the child’s behalf, or the child may wait until eighteen to sue on his own behalf. Juveniles wishing to file a malpractice claim can file at age eighteen and the provision will toll until age twenty, or until the juvenile
reasonably should have been aware that the issue occurred.\textsuperscript{14} This statute is relatively common; most states employ something similar. In most malpractice scenarios, tolling as a procedural safeguard for juveniles provides a sufficient protection of legal rights. However, in the scenario of abortion malpractice, a juvenile exercises adult rights and may experience grave medical and psychological consequences as a result of a negligently obtained abortion. Thus, the seemingly only reason that juveniles are unable to sue based on malpractice for abortion on their own behalf is because of their minority. But if the issue at hand is a fundamental right (abortion), then a juvenile should possess a corresponding right to sue with a claim based on malpractice at any time and should not need to wait until the age of eighteen.

“Wrongful” Suits

An emerging area of medical malpractice suits is the so-called “wrongful suits,” including wrongful pregnancy, wrongful birth, and wrongful life.\textsuperscript{15} Wrongful birth cases have gained momentum in recent years. In 2012 an Oregon court granted a husband and wife $3 million in damages filed under a wrongful birth suit for a misdiagnosis fore their child born with Down’s Syndrome.\textsuperscript{16} This case has gained much national scrutiny, but in Texas this type of claim has been an established precedent since 1975.\textsuperscript{17} In wrongful birth cases, the legal claim is that but for the misdiagnosis and negligence of the doctors, the parents would have sought an abortion. The child, and the subsequent medical expenses associated with the child’s life, would have never existed. Thus, the parents generally seek monetary damages to help recoup expenses.

A wrongful birth action is conceptually similar to a wrongful life action. In a wrongful birth action, parents seek damages for a child born with birth defects. The claim for damages is based on the cost to parents of raising an unexpectedly defective child. In a wrongful life action,
the child seeks damages, through a next friend, parent, or guardian for being born with a birth
defect rather than not being born. Texas does not recognize a wrongful life claim.\textsuperscript{18}

A cause of action based on wrongful birth was first recognized in Texas in Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). The case involved a claim by the parents of a child born with birth defects caused by the mother contracting rubella during pregnancy. The claim was that the defendant was negligent in failing to diagnose the rubella in the mother. The Texas Supreme Court allowed damages, but only for expenses reasonably necessary for the care and treatment of the child’s impairment. The parents were not awarded any noneconomic damages for pain and suffering.\textsuperscript{19}

Some Courts were reluctant to award damages, ruling that it was impossible to weigh the economic and emotional costs of raising an impaired child against the intangible joys of parenthood and hold that “birth does not constitute a compensable injury.”\textsuperscript{20} Since the mid-1970s, more than twenty states have recognized wrongful birth actions that enable parents to collect some or all of their child care expenses if they can prove negligence. Many states will only allow actual damages of medical bills, etc. and will not award any actual costs for other financial concerns because the courts continually confirm that the non-tangible benefits of having a child outweigh the negatives.

To win a wrongful birth case, parents must successfully argue that they would have terminated the pregnancy had they been fully informed. They should also be able to argue that they face steep medical expenses because of their child’s health condition. The fear that wrongful birth awards are tantamount to an official endorsement of abortion has spurred about a third of states to prohibit these lawsuits, and others limit monetary awards to payments for medical costs without allowing higher punitive payouts.
The relevant cases endorsing wrongful birth involve adults and not juveniles. However, the factual scenarios involved do not preclude this type of situation happening to a juvenile. In Nelson v. Nelson, a woman received prenatal information from her doctor indicating that she was not a carrier of Duchenne muscular dystrophy and that she was no more likely than other women to carry the disease. The plaintiff alleged that “had they known of the risk that their child would be born with the disease, they would have terminated the disease” and that the test for the disease was negligently performed.\(^21\) This scenario is not exclusive to adults, yet if the same factual scenario happened to a juvenile, the juvenile would not be able to bring suit on her own until reaching the age of majority. Although the likely occurrence of such similar factual instances is rare for juveniles, the law must fill in the gaps and provide a remedy nonetheless. In light of the public scrutiny of wrongful birth cases, the law should allow for juveniles to sue on their own behalf at any point after receiving an abortion for a claim of negligence or wrongful birth.

**Remedies**

The Texas Constitution states that, “[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”\(^22\) But it seems that minors who seek abortions in Texas are disenfranchised and deprived of the privileges and protections of legal remedies that similarly situated adults would receive. It is well-established law that juveniles operate under constitutional disabilities.\(^23\) Kids have rights that are exercised via their parents or guardians. But when you provide juveniles with a powerful fundamental right, (the right to privacy as exercised through the obtaining of an abortion), the legal remedies afforded to juveniles become insufficient. At common law, juveniles under fourteen were considered
incapable of establishing the necessary mens rea for crimes.\textsuperscript{24} This supports the fundamental idea of juvenile law that the goal is rehabilitation, not punishment.\textsuperscript{25} Rehabilitation should be the goal when considering policy determinations for medical malpractice as it relates to minors and abortions. But currently, the effect of illegal abortion and wrongful suits upon juveniles acts more as punishment than rehabilitation.

If the Constitution grants juveniles access to certain fundamental rights, the legal system should afford appropriate and proportional remedies that would remove legal disabilities that bar suits by young persons who have received abortions. In \textit{Planned Parenthood v. Danforth}, the U.S. Supreme Court struck down a statute requiring an unmarried woman under the age of eighteen to obtain parental consent to have the abortion. The Court established that “[c]onstitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”\textsuperscript{26} If the goal of the juvenile law system is protectionist, then young women who find themselves in an unwanted pregnancy and undergo an abortion procedure should be able to file a suit on their own. To remedy this problem, a proposed addition to the Texas Penal Code and Malpractice Code would simply read: “A juvenile who obtains an abortion without the proper parental consent or judicial bypass or who obtains an abortion after viability at 24 weeks gestation is considered to have had an illegal abortion. An illegal abortion shall not be a bar to civil recoveries of malpractice for persons under the age of eighteen.”
Furthermore, a necessary remedy for a juvenile who undergoes an abortion procedure and seeks to file suit is to lower the age for which a juvenile can file a malpractice claim. The Supreme Court of Texas notes that it is within the authority of the legislature to accomplish such a task: “We do not doubt the Legislature's power to remove a minor's legal disabilities and thus lower below eighteen the age at which a person may sue on his or her own behalf . . . .”\(^\text{27}\)

Currently a juvenile who has an abortion operates under a disability and cannot sue on her own behalf until the age of majority. A parent or guardian must file suit on her behalf as a next friend, but this remedy is insufficient as it relates to abortion.

A major consideration for a juvenile seeking an abortion is parental notification. The purpose of the judicial bypass for a minor’s consent to an abortion is to provide a judicial alternative when the parent, for whatever reason, is not the appropriate medium for the child’s consent. Similarly, when the child undergoes an abortion, oftentimes the parent or guardian is not the appropriate representative to file a malpractice suit on the child’s behalf. If the minor is able to obtain the abortion procedure, then the minor should be able to file suit on her own behalf as soon as necessary and should not be required to wait until she turns eighteen or to have to depend on a parent or guardian to assume that responsibility. In *Planned Parenthood v. Danforth*, the Court noted that “[a]ny independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right to privacy of the competent minor mature enough to become pregnant.”\(^\text{28}\) Based on this right of privacy that supersedes parental rights, a child should be able to sue on her own behalf after the abortion without any parental assistance. Thus, lowering the legal age by which a juvenile may bring suit after
an abortion becomes necessary. Where there is a legal right, there should be a sufficient legal remedy and the requirement that parents sue on the child’s behalf is insufficient in this circumstance.29

Lastly, to provide the full spectrum of rights to both juvenile parents who obtain abortions and to children who are born as a result of the alleged negligence abortion or healthcare professionals, adding a provision allowing suits for wrongful life will allow further legal alternatives for those children who experience great medical trauma in their lives. There are many people who are morally opposed to the legal analogy proposed by wrongful life suits. The idea of proposing that but for the negligence of the healthcare provider, the child would never have been born appears as an ethical stretch for many people. However, logically, it is simply a corollary for wrongful birth cases where parents sue on their own behalf. If the law allows for the parents to sue on their own accord for a child who may suffer medical troubles as a result of some negligence, why not add a further lay of legal protection to allow a child to bring suit. The ultimate goal behind wrongful birth and wrongful life suits is to protect the child by providing an ability to obtain monetary damages that will assist with medical expenses which can be ongoing throughout life. Because protection of children is the ultimate goal and because wrongful life is such a close logical corollary to wrongful birth, it is beneficial to offer both legal avenues.

It should be noted that the scope of the proposed remedies will not drastically alter any firmly rooted legal traditions. Approximately 78,000 women in Texas obtain abortions each year, however the number of minors who obtain abortions in Texas yearly
is relatively small, less than 3500 in 2007. Of those, very few will likely need to file malpractice claims. Thus, the scope of the proposed changes in this article will be limited and narrowly tailored to abortion for juveniles specifically. The remedies proposed are contemplated as a preventative measure, to provide the juvenile who is granted fundamental Constitutional rights the ability to ensure that those rights are exercised safely and with legal protections.

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2 Black’s Law Dictionary 181-82 (9th ed. 2009). Although traditionally the best interest of the child standard relates to child custody, adoption and guardianship, the principle as a whole relates to policy determinations for juvenile law. Thus, when attempting to address the idea of abortion as it relates to minors, the best interest of the child should be maintained at all times.
3 See e.g., Troxel v. Granville, 530 U.S. 57, 60 (2000) (Grandparents petition for rights to visit their grandchildren. The court held that this “unconstitutionally interferes with the fundamental right of parents to rear their children.”). Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (The liberty interest of parents includes the right to “direct the upbringing and education of children under their control.”). See, also Stanley v. Illinois, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect…”(citation omitted)). Thus, many Constitutional rights granted to children are exercised on their behalf by parents. The notable exception to this is the Constitutional right to privacy and abortion, which a juvenile may fully exercise on her own accord.
5 See Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Interestingly, in many other areas, minors are not able to exercise the full spectrum of their constitutional rights until adulthood. The fundamental right to marry and to contract are not fully recognized until adulthood, yet the right to privacy and specifically abortion, is deemed so fundamental to the ordered scheme of liberty that minors’ rights to these cannot be abridged.
7 The cases cited in this article stem from other states that have similar laws to Texas. Medical malpractice cases for abortion are rare; this is even more so true with respect to minors. Despite the rarity, the factual scenarios that occur in other states are just as likely to occur in Texas. The issue of illegal abortion is similarly a situation that, although there are no current cases on the matter, would potentially be a problem, given the proper factual scenario. Thus, this article is largely preventative in nature and takes a proactive rather than reactive approach.
8 Other states that bar recovery for illegal abortions include New York, California, Georgia and Tennessee.
11 See supra note 6, at 610.
12 D. Kramer, Legal Rights of Children 501-3 (2d ed. 1994).
13 The civil remedies contemplated in this article are money damages. The claims in these cases will almost always be under the medical malpractice umbrella.
Wrongful pregnancy is beyond the scope of this paper, because wrongful pregnancy rarely occurs with juveniles and it is a claim that is not recognized by Texas. See Flax v. McNew, 896 S.W.2d 839 (Tex. App. 1995). Wrongful pregnancy occurs when a woman undergoes a tubal ligation or other permanent sterilization measures and subsequently becomes pregnant. Some states allow recovery for 1) prenatal and postnatal expenses; 2) pain and suffering of mother during pregnancy and delivery, 3) loss of consortium, 4) cost of a second sterilization procedure, 5) lost wages, 6) emotional distress, 7) pain and suffering associated with the corrective procedure, 8) permanent impairment. Recovery is not granted for the educational, financial and other costs associated with raising a child. Girdley v. Coats, 825 S.W.2d 295 (Mo. 1992).


Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (A cause of action exists for wrongful birth and parents may recover “the expenses necessary for the care and treatment of a child’s physical impairment, when those expenses were proximately caused by negligent prenatal advice.”).

Nelson v. Nelson, 678 S.W.2d 918, 925 (Tex. 1984) (stating that there is no cause of action in Texas for wrongful life).

See supra note 17.


Nelson, 678 S.W.2d at 919.


See supra note 3.


Id at 493.


Danforth, 428 U.S.52 at 75.

An example of a proposed revision to the Texas Civil Practice & Code to lower the age when a minor could sue: “A person is not under a legal disability if the person is under eighteen and filing a claim relating to negligence surrounding an abortion procedure.”