

LEX LOCI: *Smith v. Cote*

Charles A DeGrandpre

Unlike the author's usual practice, this quarter's column will be devoted to the discussion of a single decision that, because of the excellence of its craftsmanship and its impact on our society, stands out from all of the other recent opinions handed down by the New Hampshire Supreme Court.

Smith v. Cote, decided July 9, 1986 answers two very important and related questions: does New Hampshire's developing common law recognize either a cause of action for wrongful birth or a cause of action for wrongful life. In a stellar opinion for a unanimous Court, Justice Batchelder set forth the Court's conclusion that recognized a wrongful birth action but refused to recognize a cause of action for wrongful life. The opinion carefully delineates the differences between these two related, but different, prenatal torts:

A wrongful birth claim is a claim brought by the parents of a child born with severe defects against a physician who negligently fails to inform them, in a timely fashion of a increased possibility that the mother will give birth to such a child, thereby precluding an informed decision as to whether to have the child.

A wrongful life claim, on the other hand, is brought, not by the parents of a child born with birth defects, but by or behalf of the child. The child contends that the defendant physician negligently failed to inform the child's parents of the risk of bearing a defective infant, and hence prevented the parents from choosing to avoid the child's birth.

The facts, as alleged by the plaintiffs, indicated that the plaintiff mother had consulted with the defendants, physicians who were specialists in obstetrics and gynecology, early in her pregnancy. However, the defendants did not immediately diagnose the mother as pregnant although her symptoms appeared to be typical pregnancy symptoms. Sometime thereafter the mother was diagnosed as being pregnant, but it was not until four months later that the mother was diagnosed as having been exposed to rubella. The mother brought the pregnancy to full term and gave birth to a child who was the victim of congenital rubella syndrome. The child, now six, is legally blind and has multiple congenital heart defects as well as motor retardation. The mother's action claimed that the defendant physicians had negligently failed to advise her of the potential for birth defects once she had been exposed to rubella and, therefore, she claimed that she was deprived of the knowledge necessary for an informed decision as to whether to give birth to a potentially impaired child.

Courageously confronting the abortion issue, the opinion recognizes the U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) as the law of the land. Since this U.S. Supreme Court decision gives a woman a right to choose to have an abortion, the Court proceeds to discuss whether or not the mother in the case before the New Hamp-

shire Court may bring an action for the wrongful birth of a child. Justice Batchelder builds the case for recognition of the wrongful birth claim by looking to traditional tort principles of negligence. The Court concludes that the plaintiff was entitled to recover since she was able to prove the four traditional elements of negligence: duty, breach, causation and injury. The Court concludes by holding that:

New Hampshire recognizes a cause of action for wrongful birth. Notwithstanding the disparate views within society on the controversial practice of abortion, we are bound by the law that protects a woman's right to choose to terminate her pregnancy. Our holding today neither encourages nor discourages this practice...nor does it rest upon a judgment that, in some absolute sense, [the child] should never have been born. We cannot (and need not, for purposes of this action) make such a judgment. We must, however, do our best to effectuate the first principles of our law of negligence: to deter negligent conduct and to compensate the victims of those who act unreasonably.

The Court then went on to determine what elements of damages are recoverable in a wrongful birth action. The Court held that the mother was entitled to recover her tangible losses. These losses will be measured, however, by her extraordinary costs. Thus, the parents may recover only "the extraordinary medical and educational costs attributable to the birth defects" and not "the entire cost of raising Heather, including both ordinary child rearing and the extraordinary costs attributable to Heather's condition." The Court also allowed the parents to recover extraordinary costs incurred both before and after their child retains majority. The Court further ruled that recovery should include compensation for the extraordinary medical care which has been given and will be provided to the child *by the parent* provided (1) these services are made necessary by the child's condition, (2) clearly exceed those ordinarily rendered by parents of a normal child, and (3) are reasonably susceptible to valuation.

The Court also allowed the parent to recover for tangible pecuniary losses such as medical expenses and counseling fees arising from their alleged emotional distress. However, regarding intangible losses such as the recovery for emotional distress, the Court followed the general New Hampshire rule and held that damages for emotional distress are not recoverable in wrongful birth actions.

The Court next turned to the wrongful life claim. The theory of this claim is that the defendant physicians owed a duty of care both to the mother and the child during the pregnancy and had breached this duty when they failed to discover the mother's exposure to rubella and failed to advise her of the possible effects of that exposure on the child's health. The claim asserts that this results in a cause of action against the doctors since, had the mother been properly informed, she would have undergone an abortion and the child would not have been born. Because the mother was not so informed, the child must bear the burden of her afflictions for the rest of her life that is the approximate cause of the injury to the child.

The Court rejected this theory because the claim failed to satisfy the fourth element of a negligence action: injury. The Court regarded "the premise of the wrongful life action that the plaintiff's own birth and suffering constitute legal injury" as flawed because:

[i]n order to recognize [the child's] wrongful life action... we must determine that the fetal [child] had an interest in avoiding her own birth, that it would have been best for [the child] if she had not been born.

The Court concluded that the wrongful life action improperly required a court to assess the worth of a child's life. The Court refused to do this, holding that "the judiciary has no business declaring that among the living are people who never should have been born."

The Court was also troubled by its acknowledgement that there are limitations of tort law on the adjudicative process in such situations. In an ordinary tort case the existence of injuries are readily and objectively ascertainable. In "wrongful life cases, however, the finding of injury necessarily hinges upon subjective and intensely personal notions as to the intangible value of life. The danger of markedly disparate and, hence, unpredictable outcomes is manifest." The Court refused to accept this responsibility and unanimously ruled that it would not recognize a wrongful life action.

This decision is forward looking, carefully balancing the various interests in our society. The rights of the family as a whole, and of women in particular, are protected, while at the same time, the limits of the adjudication process are recognized. Perhaps other courts, in other jurisdictions, have, and in the future, will, extend the protection of the negligence system to the unborn child by recognition of a wrongful life action, but it is clear that our Court will continue to develop our common law within the confines of traditional tort principles.