A Wrongful Case for Parental Tort Liability

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Malek and Daar [M&D] argue that parents have a duty to employ prenatal genetic diagnosis (PGD) if they undergo IVF knowing they are at risk of transmitting a serious genetic condition. Although M&D limit their analysis to parents already undergoing PGD, in which they say the parental obligation is strongest because the benefits are significant and the parents' burdens small, they make clear that the overall structure of their analysis is applicable to parental decisions generally.

The legal dimension of M&D's proposal is most analogous to suits for wrongful life brought on behalf of the child in which the child complains of the harm of (in)actions that led to its birth.(1) Under the proposal, the harm to the child is being born with a seriously disadvantageous genetic condition, resulting from the parents' negligent failure to undergo PGD. Our comments address the dubious need for this proposal, the unfair burden it places on parents with a need for PGD in comparison to those who do not need the procedure to conceive, the use of a questionable negligence standard, and the proposal's vagueness about the types of conditions warranting the intervention. We leave largely aside the most commonly-asserted problem with wrongful life suits: the only other option concerning the child who is actually born is not to have been born at all, for *that* child could not be born in the hypothesized unharmed state.(2)

The ethical dimension of M&D's proposal is rooted in autonomy and fairness. The autonomy argument is that offspring without disabling genetic conditions enjoy a greater range of future choices, a nonstarter if the PGD-approved individual would be a different child. The argument also presumes choices for nondisabled children will be better than disabled children's, rather than simply different. The fairness argument invokes equality of opportunity, deriving an obligation to inject some similarity of life chances into the natural lottery. But this begs the question of whether the requisite equality of opportunity should be understood as similarity of talents or instead as similarity of opportunity to use one's talents, whatever these are, successfully.

Uncertain need for the legal duty. M&D characterize the legal duty in several different ways, each responding to a different supposed legal problem. (For a fuller discussion of what these problems might be, see 3). One characterization is that it is a breach of duty for third parties, such as reproductive practitioners, to fail to inform patients undergoing IVF about the possibility of PGD. The problem of such potential failures is already targeted by wrongful birth lawsuits brought by parents against providers for the additional costs of raising a child with a disability that otherwise would not have been born. M&D contend this third-party duty can be extended to parents, but without explaining why the responsibilities of parents are analogous to those of third parties.

Secondly, M&D characterize the legal duty in terms of responsibility of parents to care for their children. Certainly the public has an interest in ensuring that children are not neglected, which is protected through child protection statutes and abuse prevention programs. From the parental duty of non-negligence to their children, M&D extrapolate their proposal, but as we argue below serious questions arise about whether non-neglect requires prenatal optimization of the child's makeup through PGD.

M&D's third understanding of the legal duty is that parental failure to undergo PGD given IVF and knowledge of a risk of serious genetic disease is a private wrong against the resulting child, giving rise to the child's right to sue the parent in tort. Presumably, in such a lawsuit the child would recover, as damages, the difference between the child in his/her actual state and his/her hypothesized state without the disorder not tested for. Whether the parents would be considered to have mitigated damages by providing effective opportunities relevant to the child's actual state, and how the parent might pay such compensation without compromising normal child-rearing activities and expenditures, are not addressed by M&D.

Unfair burden on parents undergoing PGD. M&D make a remarkably strong claim: "that once parents initiate the reproductive process, they have a duty to execute that process in a manner that produces the least harm to a resulting child." Offsetting benefits to parents or to others such as siblings are not to be included in the calculation. If generalized to all reproduction, this requirement of reproductive harm-minimization would be violated by any parental failure to minimize risks of harm to the resulting child, from cocaine use to the occasional drink of alcohol to a job with risks of toxic exposure to the failure to reduce a multiple pregnancy. This alone imposes a very strong standard on parents, one that it is difficult to extrapolate from its supposed legal source in non-neglect. For the harm-minimization claim to be based in non-neglect, the parental duty not to harm must be construed not as the duty to refrain from subjecting children to serious risks of avoidable harm, but as the duty to minimize harms to which their children are at risk.

Moreover, M&D do not clarify whether risks of harm are to be calculated absent offsetting benefits to the child and thus whether the approach is pure harm-minimization, or whether the calculation is a form of harm/benefit ratio maximization. If the claim is pure harm-minimization, parents may not to take risks for their children even when there might be benefits. Such harm-minimization surely does not come within the general proscription of child neglect. Yet if offsetting benefits are included, the duty of harm minimization has become a duty of harm/benefit ratio maximization. Indeed, M&D appear to understand harm-minimization as harm/benefit ratio optimization, writing reproachfully that "The law's reluctance … to require that parents make optimal choices on behalf of their existing offspring is understandable in light of the deference parental autonomy enjoys in American life." (p. 15) Such a conception of parental duty surely goes far beyond the general understanding of avoiding child neglect. Moreover, it places a significant new limit on the liberty of reproducing parents undergoing IVF that is not placed on parents generally, arguably treating such parents in an unfairly differential manner.

Negligence. In arguing that that parents who fail to engage in reproductive harm-minimization are negligent, M&D rely on the law of child neglect, analogizing the parent forsaking PGD to the parent not acquiring needed medical care on behalf of his/her child. Setting aside whether this analogy begs the question of the need for the PGD, and construing the parental duty to seek medical care in terms of harm minimization, negligence is equated with non-harm-minimization. The failure to meet the minimum standard of care for parenting is the failure to minimize harms. In other areas of negligence law, however, the failure to meet a minimum standard of care is not ratcheted up to the requirement of harm-minimization. Physicians are not required to minimize harm to their patients, for example. Even impositions of strict liability require only marketing of products that are not unreasonably dangerous, in contrast to the marketing of products that harm-minimize. Even more debatable, the M&D proposal equates harm-minimization with ensuring genetic normality.

Vagueness about conditions warranting PGD. The paradigm condition cited by M&D is ARPKD, described as having a 13-50% probability of death during infancy and an 82% probability of 10-year survival after infancy, often with need for treatment of hypertension, kidney or liver transplant. Manifestations of the disease vary depending on the mutation. M&D do not state if PGD can predict phenotypic disease severity, or whether it matters on their view whether it can. Harm minimization, however, would require parents even to avoid a condition with a high survival probability but requiring treatment of hypertension during childhood.

Finally, there seems to be no actual problem this tort theory is needed to address: is there need to incentivize parents undergoing IVF to choose PGD? We are unaware of evidence that parents in these circumstances forego PGD in significant numbers, or that parents who do not choose PGD fail to provide adequately for children thus born, or that children born with serious genetic diseases when these births were avoidable by PGD need to obtain compensation from their parents regardless of the lives these children actually lead. Without such evidence, it seems problematic to risk introducing a new cause for litigation based on biological characteristics that might for this reason stigmatize individuals at risk of transmitting the characteristics claimed to be damaging. And, as well, to stigmatize children who express these characteristics by casting them as potential adversaries of their own parents and thus as potential despoilers of their families.

References

1. Seana Valentine Shiffrin, “Wrongful Life, Procreative Responsibility, and the Significance of Harm,” *Legal Theory* 5 (1999): 117-148.

2. Dan Brock, “The Non-Identity Problem and Genetic Harms: The Case of Wrongful Handicaps,” *Bioethics* 9(3) (1999): 269-275.

3. I. Glenn Cohen, “Intentional Diminishment, the Non-Identity Problem, and Legal Liability,” *Hastings Law Journal* 60 (2008): 347-375.