NEWS AND VIEWS

Wrongful birth, wrongful conception, and the Irish Constitution

BRENDÁ DALEY*

1. Introduction

This paper examines the question of whether, based on the current legal situation, a claim for compensation in wrongful birth and wrongful conception cases would be successful in the Republic of Ireland. It begins with an outline of what is commonly understood by the terms ‘wrongful birth’ and ‘wrongful conception’. Analysis will then be provided of the judiciary’s approach in the United Kingdom, focusing in particular on the seminal decision in *McFarlane v. Tayside*.1 This serves to place in context the ensuing debate with regard to the situation in the Republic of Ireland, which will be addressed in detail in the latter part of the paper. Specifically, the focus of the work examines how the existence of a Constitution in the Republic of Ireland, which guarantees the right to life of the unborn child, could influence the potential issue of compensation in such cases. Evaluation of existing Irish case law on the issue of abortion and the right to life suggests that the Irish judiciary are unlikely to award compensation for the maintenance of a child until the age of majority. Nevertheless, it is the view of the author that the Irish courts will ultimately reach a position similar to that of the House of Lords in the United Kingdom in 1999 in *McFarlane*. In other words, the research appears to conclude that the Irish courts will find it difficult to reconcile payment of compensation for the upbringing of a healthy child with the positive duty incumbent upon the State to protect the right to life. However it is suggested that this conclusion may be determined by very different factors. Such a position will inevitably be influenced by the Constitutional provisions and by the notion of prudence, justice and charity rather than notions of ‘distributive justice’ alongside consideration of the ubiquitous person who avails of London transport systems.²
2. Distinguishing ‘wrongful birth’ and ‘wrongful conception’

The terms ‘wrongful birth’ and ‘wrongful conception’ should not be taken as different tags for the same issue. There has been disparity and confusion regarding this matter which has inevitably led to confusion as to the proper use of terminology. In his judgment in *McFarlane*, Lord Steyn defines ‘wrongful birth’ actions as those taken:

“…by parents of an unwanted child for damages resulting to them from the birth of the child.”

Lord Clyde in the same case adopts a different view as to the meaning of ‘wrongful conception’ and ‘wrongful birth’ stating that the claim in this case:

“…is a claim for a wrongful conception. It is brought by the parents, not by or on behalf of the child for any losses which she may suffer. It is not a claim brought by the parents for a wrongful birth, meaning by that a negligent failure to terminate pregnancy and distinct in that respect from a wrongful conception…. Nor is it a claim for a wrongful life, brought by the child alone or with the parents on the ground of a condition such that the child should not have been allowed to be born. Indeed, it is not, suggested that the child has any ground for claim.”

Academic commentary further illustrates the various interpretations relating to the two terms under review. Donnelly provides a more precise qualification, explaining that:

“Wrongful birth arises where a child is born due to negligence in the performance of an abortion or where the defendant has failed to warn the parents that the unborn child suffers from a handicap thus depriving them of the chance of having an abortion.”

In Symmons’ discussion on informed consent and wrongful birth, it is quite apparent that he understands wrongful birth cases to mean those arising where a child is born after a sterilisation procedure has failed. Indeed the very cases in Symmons analysis could more correctly be categorised as ‘wrongful conception’ as they do not all involve the birth of a child with disabilities following failed antenatal screening, thus denying the parents the option of an abortion.

Defining ‘wrongful conception’ as meaning those cases resulting in the birth of a child due to a failed sterilisation and ‘wrongful birth’ as cases brought by the parents of a disabled child born as a result of a failure to detect the congenital abnormality at the antenatal screening stage has implications for the viability of claims that may be instigated in Ireland under either of these headings.