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## Teaching Harbeson

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Like many torts teachers, I assign students *Harbeson v. Parke-Davis*,<sup>1</sup> a wrongful-birth/wrongful-life case decided by the Washington Supreme Court in 1983, as part of a chapter on damages.<sup>2</sup> *Harbeson* is a useful case, but it is also quite difficult, partly for procedural reasons<sup>3</sup> but also because of the substance.

One of the plaintiffs, Jean Harbeson, was receiving medical treatment at a military hospital while her husband, Leonard Harbeson, was in the Air Force. During her first pregnancy Jean was diagnosed with a seizure disorder, and to prevent seizures her physicians prescribed Dilantin, manufactured by Parke-Davis. Michael was born in 1971, and although he was normal and healthy, Leonard and Jean were concerned that Jean's having taken Dilantin would pose health risks for any future children. After inquiring of their physicians, they were told that there was a risk of cleft palate and hirsutism. Leonard and Jean decided that those risks were acceptable; in 1974 Jean gave birth to Christine, and in 1975 to Elizabeth. Both daughters suffered from fetal hydantoin syndrome.<sup>4</sup> FHS resembles Down syndrome.<sup>5</sup>

One of the many reasons I teach this case is to illustrate what is unique about wrongful birth/life cases; many students assume they are just another form of medical malpractice, where something goes wrong and the baby suffers injury. What distinguishes wrongful birth/life cases is the fact that a *baby* is the result of the defendant's negligence, not the *injury* that ordinary or

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1. 98 Wash.2d 460, 656 P.2d 483 (1983).
2. I divide the chapter on damages into three sections, one of which is "related parties" and includes wrongful death, wrongful life/birth, loss of consortium, and bystander cases.
3. The suit arose under the Federal Tort Claims Act but was then certified by the federal district court to the Washington Supreme Court in order to determine whether under Washington law the judge should recognize a cause of action for wrongful birth or wrongful life.
4. Since *hydantoin* is simply the chemical name for the active ingredient in Dilantin, the name of the syndrome could be understood as "Dilantin syndrome."
5. FHS is characterized by "mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects." *Harbeson*, at 463; 656 P.3d at 486.

garden-variety medical malpractice cases involve (like brain damage as a result of negligently delaying the baby's passage through the birth canal).<sup>6</sup>

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In my third year of teaching torts, our daughter Robin was born. Robin is the third of my four children, and, while the births of our first two children had not been uneventful, we thought we were relatively ready for the day that my wife Priscilla's labor got serious. As it turned out, she was closer to giving birth than she thought, and it took some effort while I sped along the highway in our Volkswagen Vanagon for her to avoid giving birth in the car. In those days before cell phones we couldn't call ahead to the hospital or to the doctor, but as soon as we arrived and the nurses checked Priscilla's condition they told the doctor to come right away. Just moments after he arrived, Robin made her appearance, and everyone was pleased that Priscilla's pregnancy had been brought to a successful conclusion. The rest of the morning was filled with further care for Priscilla, Robin's first meal, and the usual care for a newborn.

Around noon the pediatrician came to do the standard initial screening. I was able to watch him through a window while he listened and looked and palpated this new creature. I expected him to be his usual playful self, as he had treated our older children, but he seemed entirely businesslike. After about twenty minutes he emerged, and before I could engage him in our usual banter, or receive congratulations for my new daughter, he simply said, "Where's Priscilla?" I led him down the hall to her room and he closed the door behind us. "I don't know yet for sure, but I think Robin has Down syndrome," he said. He described the characteristics that led him to his conclusion, emphasizing that only a chromosome test would tell for sure. But the moment he said the words I remembered my first impression of looking at Robin. She looked like her great-uncle Tommy, who had had Down syndrome. I remembered wanting to ask the nurse, "Is there a way you can tell whether somebody has Down syndrome?" but I had lost that thought in the euphoria of a successful delivery and the busyness of those initial minutes. I had so completely dismissed the thought that I was actually shocked to hear

6. *Harbeson* actually looks as though it should have been a garden-variety claim for personal injury on behalf of Christine and Elizabeth, but it all revolves around the facts of the case. Today, for example, medication is available to women with seizure disorders that allows them an acceptable level of seizure prevention (though not as good as Dilantin) during pregnancy. Even if no alternative medication had been available, if Jean Harbeson could have chosen to forgo the control of her seizure disorder during her pregnancy in order to insure the birth of a healthy child, then proper medical care would have resulted in the birth of two normal children instead of two children with FHS. The measure of damages, while by no means easy, would be similar to personal injury cases that we had already studied.

But it is clear from the court's opinion that, given the state of medicine as it then existed, Jean and Leonard Harbeson had only two choices: take the risk of having a child with FHS or have no more children. In their complaint they alleged that, if they had been given proper medical advice, they would have chosen the latter. The court is then confronted with the question of whether (in the wrongful *birth* action) the *parents* should be awarded damages for the burden of children they would not have chosen if they had been properly advised (this is the wrongful *birth* cause of action), and whether (in the wrongful *life* action) the *children* should be awarded damages for a life they did not choose.

our pediatrician say the words "Down syndrome." But I knew instantly that he was right.

Ever since, in teaching *Harbeson* I have had a special interest in the court's response to the Harbesons' legal claim that they were owed compensation because their children were a result of someone else's negligence. One of the first questions to confront is whether it is possible to award compensation without reaching the legal conclusion that the parents were made worse off by having a child with such significant disabilities. Before I assign *Harbeson*, I have the students read a prior case, *University of Arizona Health Sciences Center v. Superior Court*,<sup>7</sup> which arose from a negligently managed sterilization procedure. The parents sought damages for the birth of a normal, healthy child (their fourth), and the court chose a remedy that awarded damages based on the increased cost (both financial and emotional) from having an unplanned child, offset by whatever benefit the child might provide. (The dissent complained that the parents would be forced, on pain of losing their legal recovery, to minimize the benefit from their unplanned child.)

I usually take advantage of this moment to point out to my students that many births—as it happens, my own included<sup>8</sup>—result from an unplanned pregnancy. Whenever that occurs in part through some alleged negligence (a failed condom, an inaccurate dose of the pill, etc.), should that be the occasion of legal compensation to the parents? Students often seem impatient with the questions and ready to turn the page to study loss of consortium or the collateral source rule. Some suggest that damages in such cases are almost never appropriate because the parents have usually failed to "mitigate"<sup>9</sup> the harm through abortion or adoption.<sup>10</sup> Others find no difficulty in the Arizona

7. 136 Ariz. 579, 667 P.2d 1294 (1983).

8. In fact, in my case it was quite the contrary. Though my parents never contemplated a suit against the doctors who treated my mother (among other reasons, I suspect that if someone acted negligently it was more likely my parents than the medical personnel), my parents had planned only my oldest brother, and at the time my mother became pregnant with me, they had three sons under the age of four. My mother was quite insistent when she visited the obstetrician to get assurances that his remedies were up to the task. "Don't worry," he told her (a line which I quote to my students), "If you have another child it will be a miracle." If laughter hasn't erupted by then, I add, "The jury's still out on that question." The laughter is in part a nervous response; the students are acutely aware that their classmates (and their instructor) may have drawn sharply differing conclusions from widely varying life experiences.

9. It takes a little bravery for a student to suggest this option, since many people would be offended at the idea that abortion could be considered just a "mitigation" measure. But I try not to exhibit discomfort when students make this argument; rather than address whether abortion should be expected as a form of mitigation, I suggest that it hardly solves our problem for this reason: it would only shift the controversy into a new and perhaps even less tractable venue. If abortion (or adoption, for that matter) is viewed as a desperate measure called for in desperate circumstances, the defendant would be liable for the damages of putting the parents in a position where such desperate measures were preferable. Even the most ardent prochoice advocate would not claim that the experience of having an abortion comes at no cost to the parents. Parents who chose adoption or abortion—but did so only because the defendant's negligence put them in that undesired situation—should then be entitled to sue for the trauma of being forced to go through that experience, and juries would have to decide how much compensation should be due.

10. Indeed, the dissenting opinion in the Arizona case suggests that if wrongful birth claims are recognized at all, they would have to include an offset for the parents' failure to mitigate damages.

court's procedure for weighing the detriment attributable to the child's birth against the offsetting benefit that the child provides. Although I have strong personal views on the morality of contraception and abortion, I try to spend less time arguing for a particular moral position and more time pointing out the law of unintended consequences. For example, in the Arizona case an award of damages to the parents, by reducing the financial burden on them (presumably one of the reasons they chose sterilization after three children were born), might actually make them more enthusiastic about the birth of this unplanned child. Yet in order to award damages the court would have to find that the child made the parents worse off, and would actually have to measure how much worse off they were. By contrast, those who find the entire line of reasoning abhorrent and want the courts to state, as a matter of public policy, that all children are a blessing to their parents, must explain how such parents, particularly those whose unplanned children have disabilities, are going to pay for their upkeep. One of the benefits of studying *Harbeson* is in seeing how one's views on the merits of ideologically polarizing issues may not translate easily into a legal rule. At the same time, observing the way in which a legal rule plays out may lead to reflection on the truth of basic principles that we might be inclined to assume are self-evident. I hope that students, in wrestling with the tough issues in *Harbeson*, feel they can speak their minds freely, even at the risk of being misunderstood by their classmates or by their professor.



One of the techniques I have used to encourage class participation is to hand out name cards at the beginning of the year, with the student's first and last name printed (landscape mode) on 8<sup>1</sup>/<sub>2</sub>-by-11 card stock. I then fold the sheet in half, and three-hole punch it at the top of the fold so that students can carry it in a notebook and display it on the front edge of the desk to signal to me that they are ready to participate in the class discussion for that day. Early in the year I cold-call on students, but as the year wears on I prefer to take volunteers. Because I begin with negligence (rather than intentional torts), the discussion of the damages issues related to negligence cases falls in the first semester, when I am still calling on students. I look out into a classroom of about seventy-five students, pick out a name, and ask that student to give me the facts of the case, explain the court's holding, and then respond to questions about whether that holding makes sense in light of what we have learned thus far about the purposes of the tort system.

One year I had called on a student to brief the *Harbeson* case, and together we had teased out most of its salient features, including the core facts, the procedural history, and the court's resolution of the wrongful birth issues. As I was getting ready to ask the student about the wrongful life aspect of the opinion, a hand shot up in the back of the room, posing the following question: "I can understand how the parents could state a claim for the first child born with this syndrome, but why did the parents wind up with two children like this?" More often than not when I teach *Harbeson*, somebody asks a question along these lines, so I was ready with my usual answer, which comes in two parts. The first explanation is that the diagnosis of the syndrome

wouldn't necessarily be immediate. I know several parents of children with Down syndrome whose children were not diagnosed at birth, but at some later stage of development when the effects of Down syndrome began to display themselves in a more noticeable fashion, or when a more alert healthcare provider raised the issue. I speculated that the Harbeson parents might have been in a similar situation. But second, even if they had detected some anomaly with Christine, they might not have associated it with the consequences of taking Dilantin. After all, they had consulted with their physicians before Christine's birth, and the symptoms Christine displayed did not match what had been described as the potential side effects from taking Dilantin during pregnancy. So Leonard and Jean would not have known that if Jean were to get pregnant again while taking Dilantin, she would be at risk of having another child with the same characteristics as Christine's.

Having answered the student's question (or so I thought), I then turned back to the student who had started briefing the case in order to resume our discussion. But before I could ask the next question, he provided his own answer to the question the other student had asked: "No, the parents didn't know." I was quite sure there was nothing in the case report, certainly nothing in what I had excerpted for the students, that would permit such a definitive statement, so I immediately suspected that the student was speaking from some personal knowledge of the case. This was only a vague impression from his tone of voice, and as I stalled for time to think where to go next, I verbalized my thought: "Uh, do you know the family?" At almost the same time I looked more closely at his name card: Michael Harbeson. This was not exactly a coincidence: I'm sure that I had picked his name, as I gazed out on the sea of student namecards, because it happened to be the same as the name of the plaintiff in the case. I had thought at the time that it was just a coincidence, but as my mind raced to try to catch up with the reality of the situation, Michael answered my question: "Yes, they're my sisters."



I wasn't sure how many of Michael's fellow students had known what, in retrospect, now seemed an obvious fact.<sup>11</sup> But they were all quite intent on observing how I reacted to this revelation. In my own mind I was frantically replaying the conversation of the last twenty minutes, searching for anything embarrassing for which I ought to apologize. It was as though I had been having a conversation about somebody and discovered to my shock (and chagrin) that the subject of my conversation had been listening to me for the last twenty minutes. As it happened, I could think of nothing I especially wanted to retract; because my own parenting put me in a position similar to that of Michael's parents, I had taken a position they probably would have been comfortable with. Nonetheless, I experienced what some have described

11. *Harbeson* originated in the Eastern District of Washington, where Gonzaga Law School is located. The medical care that was the subject of the suit was provided at an Army hospital in western Washington. The facts of the case identify the oldest child of the Harbesons as Michael, who would be about the right age to be attending law school. Why this didn't even occur to me when I first called on Michael is a mystery.

as the feeling a first-year student gets when being called on early in law school: a near-drowning experience in which one's life flashes before one's eyes.

Every year when I teach *Harbeson*, I tell my students about what happened that year, because it illustrates several useful points. First, it reminds both my students and me that occasionally the power roles between student and teacher are reversed. That helps me stay more humble and, I hope, makes them more confident. Second, it reminds me for one brief shining moment that for every name in a casebook, often a victim of some horrific injury or humiliating experience, there is a real person out there. It's not a bad idea to ask the question: How might my discussion of this case change if, after discussing all of the features of the case, a student raised his hand and said of the plaintiffs (or the defendants), "They're my sisters"? I quickly confess to the students that, despite reliving this experience every year, I continue to exploit moments of levity presented by the cases that I teach.

And I'm not sure that a little bit of levity is out of place. Just as a surgical team's repartee may help distract them from the disorienting closeness of the mystery of life and death, we who teach law weave in and out of the mysteries of love and suffering, parenthood and death. Sometimes humor is a means of keeping us on the surface of something that we fear might otherwise drown us. The intimacy we experience with our students must be treated with respect, but also with the same astonishment at our own absurdity that the intimacy of sexuality evokes.

To put it another way, sometimes we think we're only teaching *Harbeson* but discover instead that we're also teaching *Harbeson*. Think about it.