2020

# Is Tort Law the Tool for Fixing Reproductive Wrongs?

Christopher Robertson

# IS TORT LAW THE TOOL FOR FIXING REPRODUCTIVE WRONGS?

**CHRISTOPHER ROBERTSON***

In his 2019 book, *Birth Rights and Wrongs: How Medicine and Technology Are Remaking Reproduction and the Law*, Dov Fox offers a compelling argument for new torts allowing recovery for wrongful reproduction.[1] These torts would include three sorts of cases, those where wrongdoing (whether negligent, reckless, or intentional) caused undesired reproduction; stymied desired reproduction; or confounded reproduction, causing birth of a child different than that intended by the parents. The likely defendants in these torts are gynecologists, urologists, sperm banks, and IVF clinics.

Rife with illustrations of specific cases, Fox's book is compelling in showing the understandable frustration of those who have been wronged. When prospective parents pay a broker to receive sperm from a putative genius with movie star looks, they should not get sperm from somebody convicted of a felony and experiencing mental illness instead. When a man gets a vasectomy, the doctor should do it right and check the work when it is done. And when a parent with a hereditary disease that only infects males goes to an IVF clinic to get her female embryos implanted instead, that is what should happen.

If the law is not conforming to these expectations, it should evolve accordingly. But when thinking about the prospects for progress in tort law, as a social institution or tool, I am driven by teleological questions. Tort law has long been understood to primarily serve the purposes of compensation and deterrence, with some additional concern for punishing severe wrongdoing, and perhaps expressing social values, including redeeming the dignity of the plaintiff, as a rights-holder who deserves not to be wronged.

As for compensation, Fox says, "indeterminacy and incommensurability complicate remedies for reproductive harms, but not uniquely or prohibitively so."[2] Indeed the problem of converting injuries into dollar amounts bedevils law generally, for even an ex ante regulatory regime must overtly or implicitly wrestle with cost-benefit analysis (e.g., spending $1 million to erect guardrails on a road to save a life or prevent a disability). But the problem is most obvious in tort law, where we may well know how to add up medical bills and project

* Professor of Law and N. Neal Pike Scholar, Boston University School of Law. Thanks to Dov Fox for commenting on a preliminary draft.

[1] DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019).

[2] *Id.* at 69.

lost wages into the future, but struggle to put a dollar figure on something like suffering back pain for the rest of your life or losing the companionship of one's spouse. Those ubiquitous questions of tort law are not much easier than the question of how to evaluate the damages suffered by a parent who has a disabled child due to the IVF clinic mix-up of embryos. As Fox notes, these are ubiquitous concerns for tort law, but it muddles through them.

In practice, as the Constitution provides in the Seventh Amendment, tort law relies on layperson juries to answer these hard questions. And, in my view, they do so as well as anyone could. Fox limns the typical objection that jurors "aren't accountable in the way that legislators are beholden to their constituents."[3] But jurors *are the constituents*, and they represent their fellow constituents in the statistical sense of random selection, rather than in the distorted politics of campaign finance, lobbying, and regulatory capture, where repeat players like physicians and IVF clinics are likely to get much more sway than patients. Thus, when one considers the possibility of institutional corruption, one might well disagree with the theory that, "elected officials have greater democratic legitimacy than one-off juries."[4]

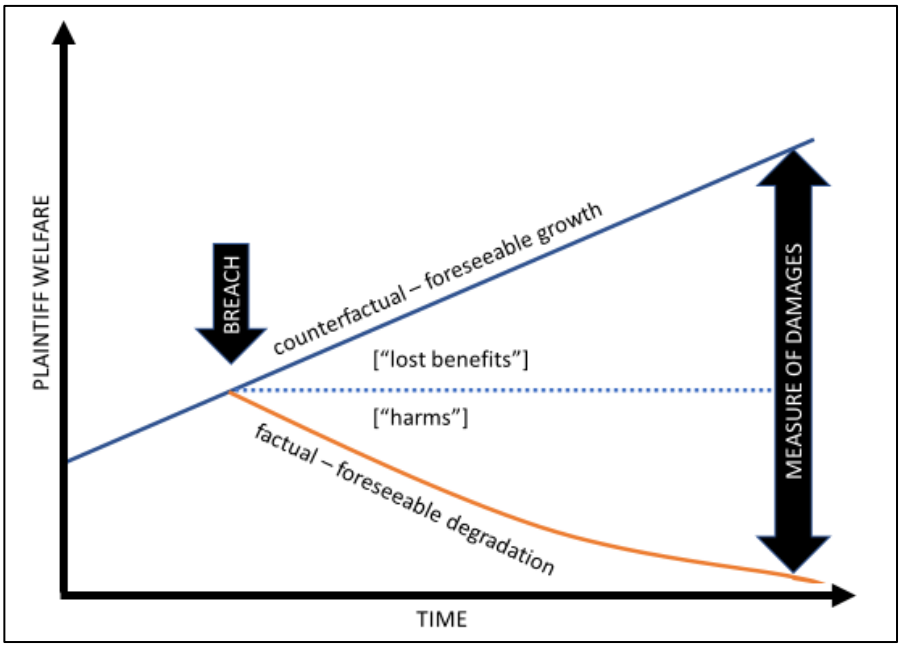
Putative reforms of jury trials, such as caps on damages or judicial powers of remittitur, wave hands at the problem of subjectivity and arbitrariness, but they typically exacerbate rather than solve it. Most such solutions are biased towards less compensation (and under-deterrence), rather than even purporting to make compensation more principled or more accurate.

Fox's book is forthright in taking on critics, such as Gregory Keating, who would single out reproductive wrongs for typically not involving real harms (e.g., losing a leg in a motorcycle accident), but instead merely depriving someone of a future benefit (e.g., a hoped-for child), even if one that is reasonably-foreseeable and bargained-for. Yet, as Figure 1 shows below, tort law has long measured damages by a comparison of the plaintiff's welfare in the counterfactual world where defendant did not breach versus the real world in which the defendant did breach. All the provable difference in welfare between those worlds is the causal effect of the wrongdoing and thus the measure of damages. There is no need to somehow sort those differences into harms suffered versus benefits lost (above and below the dotted line, representing the status quo at the moment of injury). For this reason, as Fox rightly notes, any tort plaintiff can recover for not just his lost wages frozen at the moment of the injury, but for all the future lost wages, such as a foreseeable raise in salary, that he could prove would have occurred more likely than not.

[3] *Id.* at 85.

[4] *Id.* at 25.

**Figure 1.** Conceptual Model of Damages in Tort Law.




So I think that Fox is absolutely correct in rejecting the notion that there is some sort of conceptual problem that prevents reproductive wrongs from being compensable. Yes, we *could* force defendants to give plaintiffs money for suffering reproductive wrongs.

Still, I wonder if we surveyed the potential plaintiffs in these sorts of cases, whether they would say it is more important for them to receive money compensation or to stop these sorts of accidents from happening. Scholars have noted that we have first-party insurance systems for medical bills and lost wages, but no such system for non-economic damages. If there was real demand for such compensation, a first-party insurance market would arise to provide it, even without tort law—or so the argument goes.[5] Such a solution would do the same thing Fox claims for tort law, "at least spread[ing] these costs across all patients, instead of concentrating their full force on the luckless victims who have procreation deprived, imposed, or confounded."[6]

One remarkable aspect of these sorts of cases is that, unlike many other torts, they do not involve strangers, but rather parties that have had the opportunity to voluntarily decide whether to interact together and settle the terms of that

[5] See Steven P. Croley & Jon D. Hanson, *Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law,* 108 HARV. L. REV 1785, 1802-03 (1994) (reviewing this literature and offering a rebuttal).

[6] FOX, *supra* note 1, at 71.

interaction. That makes contract law arguably a better fit than tort law, except for its cramped conception of damages, which generally excludes emotional harm. Even worse, as Fox notes, the providers of reproductive services now exploit the contractual setting to demand waivers providing them complete immunity, and even indemnification—clauses that would be unenforceable in the typical medical malpractice case.

Yet imagine that these patients were instead given the opportunity to negotiate a liquidated damages clause ex ante. Suppose one urologist says, "If I negligently perform your vasectomy, and it causes you to someday become an involuntary father, I will not even refund the costs of the procedure," but another urologist says, "I'll refund my fee," while a third offers a fee refund plus $150,000, if the worst-case scenario materializes. The consumer might take such a commitment as a sign of quality. And, even better, if he chose the provider with a substantial contingency payment, the contract might deter that provider from being negligent.

Why do not we have such a market for liquidated damages in this domain? Apparently, patients are unaware that there is a substantial risk or may be optimistic that it is unlikely to materialize for them. This sort of information asymmetry or irrational bias may well be the basis for legal intervention.

Much of Fox's book seems to be motivated by a desire to deter these sorts of wrongs in the first place. It is an empirical question, but a very difficult one, to determine whether adoption of a tort of wrongful reproduction would actually reduce the numbers of these unfortunate incidents.

The current empirical literature comparing states with higher and lower levels of malpractice liability (and changes thereto) is conflicting but suggests that higher liability exposure may be associated with only small, or perhaps no, improvements in patient safety.[7] That may be explained in part by the ubiquity of malpractice insurance and by physicians nationwide having a vague notion of liability as a bugaboo, which drives a diffuse defensive medicine reaction uncalibrated to the precise level of risk that they actually face in their jurisdiction. Future research could document whether reproductive services providers perceive their reduced risk under the status quo. In any case, one could imagine that a regulatory regime, which threatened to revoke the license of a reproductive services provider, or even brand it as rogue in the market, might have a greater deterrent effect than tort liability.

Yet, in the book's final paragraph, Fox reveals a concern that may motivate the whole project—that the United States is "a moral and political culture allergic to meaningful regulation."[8] Earlier in the book, he explains "the political economy of reproductive technology in the United States," including freighted topics of embryos and birth control, which makes meaningful regulation even

[7] See Michelle M. Mello et al., *Malpractice Liability and Health Care Quality: A Review*, 323.4 JAMA 352 (2020).

[8] FOX, *supra* note 1, at 173.

more difficult.[9] This may explain why, rather than sketching a strengthened regime of licensure and regulatory oversight to reduce the chances of these accidents happening at all, the book largely takes an ex post approach, consistent with its focus on the common law of tort, which arises only after a wrong has been committed and an injury suffered. Is it true that state court judges are better positioned to solve this social problem than legislators and agency heads? Perhaps so.

Overall, Fox's book makes a powerful case that courts can use their traditional tools of common law progress to try to address these problems, when they are presented to them. As in the case of the privacy torts, which followed the emergence of a new technology, it has happened before.

[9] *Id.* at 29.