

A firstborn child was examined as an infant by a doctor who was a specialist in the diagnosis of speech and hearing impairments. Although the doctor should have concluded that the infant was totally deaf due to a hereditary condition, the doctor negligently concluded that the infant's hearing was normal. After the diagnosis, but before they learned that the infant was in fact deaf, the parents conceived a second child who also suffered total deafness due to the hereditary condition.

The parents claim that they would not have conceived the second child had they known of the high probability of the hereditary condition. They have sought the advice of their attorney regarding which negligence action against the doctor is most likely to succeed.

What sort of action against the doctor should the attorney recommend?

- A. A medical malpractice action seeking damages on the second child's behalf for expenses related to his deafness, on the ground that the doctor's negligence caused him to be born deaf.
- B. A wrongful birth action by the parents for expenses they have incurred due to the second child's deafness, on the ground that but for the doctor's negligence, they would not have conceived the second child.
- C. A wrongful life action by the parents for expenses for the entire period of the second child's life, on the ground that but for the doctor's negligence, the second child would not have been born.
- D. A wrongful life action on the second child's behalf for expenses for the entire period of his life, on the ground that but for the doctor's negligence, he would not have been born.

Explanation:

Negligence claims for wrongfully causing conception, birth, or life

Type of claim	Description	Damages
Wrongful pregnancy/conception	Parent's claim for birth of healthy but unwanted child	Cost of defective procedure/device Pregnancy/delivery expenses
	Eg, negligently performed vasectomy, defective contraceptive device	Cost of remedial measures Emotional distress
Wrongful birth	Parent's claim for birth of unhealthy child	Majority view: Cost of accommodating child's special needs minus benefit of having child Pain & suffering Emotional distress
	Eg, doctor failed to disclose information that would have led parent to avoid or terminate pregnancy	Minority view: no recovery
Wrongful life	Unhealthy child's claim for unwanted life	Majority view: no recovery Minority view: cost of accommodating child's medical needs
	Eg, disabled child would not have been born absent physician's negligence	

A **negligence** action based on a theory of **wrongful birth** can only be brought by a parent and requires proof that:

the parent and defendant had a **patient-doctor relationship** (duty)

the defendant negligently **failed to diagnose or inform** the parent of the substantial risk that his/her future child may suffer from a **birth defect** (breach)

had the parent known about that risk, the **child would not have been conceived or born** (causation) *and*

the parent suffered **monetary loss** due to the additional care and treatment of the child (damages).

Here, the doctor negligently failed to conclude that the parents' first child was deaf due to a hereditary condition. Because of that negligence, the parents did not learn that their future children had a substantial risk of being born deaf until after their second child had been conceived. Since the parents would not have conceived their second child had the doctor

informed them of that risk, they should file a *wrongful birth* action for expenses incurred due to the second child's deafness.

(Choice A) A *medical malpractice* action on behalf of the second child would require proof that the doctor's negligence caused the child *physical harm*. Here, though the doctor's negligence caused the child to be born, it did not cause the child to be born deaf (a hereditary condition).

(Choices C & D) A wrongful life action alleges that an unhealthy child would not have been born absent a doctor's negligence. Most states do not permit wrongful life actions. In the states that do, the action can only be brought by or on behalf of the unhealthy child—not by the parents. Additionally, those states generally limit the child's recovery to expenses attributable to the disability—not all life expenses.

Educational objective:

A wrongful birth claim allows parents to recover for the birth of an unhealthy child if they can prove that (1) the doctor negligently failed to inform them of the substantial risk that their future child may have a birth defect and (2) had the parents known about that risk, the child would not have been conceived or born.

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