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# Recent Developments: Wrongful Birth

Lee Eidelberg

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## Wrongful Life

by Jeffrey Thompson

The tort of "wrongful life" is frequently confused with the more established tort of "wrongful birth." A wrongful life action is different from a wrongful birth action in that "wrongful life" denotes a cause of action brought by the infant himself on allegations that his very existence is wrongful, and that "but for" the negligence of the defendant he would not exist; "wrongful birth" claims are brought by parents who claim that they would have avoided conception or terminated the pregnancy had they been properly advised of the risk of birth defects to the potential child. In a "wrongful life" action the wrong sought to be vindicated is the birth itself and not birth under one set of circumstances as opposed to another. Am. Jur. 2d New Topic Serv., *Right to Die; Wrongful Life* §63 (1980).

The term "wrongful life" first appeared in two cases involving illegitimate infant plaintiffs. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849, cert. denied, 379 U.S. 945 (1963); *Williams v. State*, 18 N.Y. 1 481, 276 N.Y.S.2d 885 (1966). In both cases, the claims were rejected because the courts found that the plaintiff had not suffered a legally compensable wrong. The string of wrongful life cases which have a bearing on the case at bar concern children born with severe birth defects.

An important case in this field is *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1976) (child born with severely impaired sight, speech, hearing and mental ability as a result of the rubella his mother contracted early in pregnancy). Although decided before *Roe v. Wade*, 410 U.S. 113 (1973), *Gleitman* has become the mainstay of the argument against wrongful life actions. The Court denied recovery upon the grounds of inability to measure damages and public policy:

"The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence,

but it is impossible to make such a determination. This Court cannot weigh the value of impairments against the non-existence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies."

49 N.J. at 28, 227 A.2d at 693.

In 1980 California departed from unanimous contrary precedent and became the first jurisdiction to allow recovery under a wrongful life claim. *Gurlender v. Bio-Science Laboratories*, 106 Cal.App.3d 811, 165 Cal.Rptr. 477 (1980), hearing denied, Civ. No. 58192 (Cal. Sup. Ct. Sept. 4, 1980). In *Curlender*, the infant's parents hired the defendant laboratory to administer tests to determine whether they were carriers of Tay-Sachs Disease. The tests were negligently performed, producing incorrect information on the Curlenders' status as carriers; subsequently the plaintiff was born with Tay-Sachs Disease. The California Court of Appeals for the Second District ignored the arguments of *Gleitman* and its progeny to find for the infant, reasoning that technological advances and the decision in *Roe v. Wade* had profoundly changed the way in which "wrongful life" should be viewed. The court refused to compare existence with non-existence, but focused instead upon the fact that "[t]he reality of the 'wrongful life' concept is that the plaintiff both exists and suffers, due to the negligence of others." 106 Cal.App.3d at 289, 165 Cal.Rptr. at 488 (emphasis on original). Thus, it was argued that damages could be awarded upon the basis of ordinary tort principles for the pain and suffering to be endured.

Although thought by some to be the precedent needed to pave the way for general recognition of the "wrongful life" tort, any speculation raised by *Curlender* may have been premature in light of the recent decision in *Turpin v. Sortini*, 119 Cal.App.3d 690, 174 Cal.Rptr. 128 (1981). In *Turpin*, the plain-

tiff, Joy Turpin, was born deaf after Adam Sortini, the defendant physician failed to properly diagnose a hereditary hearing defect in Turpin's older sister.<sup>1</sup> Joy's parents contended that, had they known of the defect, the plaintiff never would have been conceived. Following *Curlender's* lead a claim was made against the physician in Joy's name alleging that, as a result of Sortini's negligence Joy Turpin had been deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness.

The lower court sustained the defendant Sortini's demurrer and the California Court of Appeals affirmed, reasoning that *Curlender* should be rejected as "...unsound under established principles of law and... a Sortie into the areas of public policy clearly within the competence of the legislature." 119 Cal. App. 3d at \_\_\_, 174 Cal.Rptr. at 129. *Turpin* attacks the *Curlender* decision on three grounds: inability to measure damages, considerations of public policy and the dangers of opening up enormous new areas of claims. The *Turpin* decision points out that the normal measure of damages in tort actions is compensatory, thereby requiring the court to compare the plaintiff's present condition with the condition the plaintiff would have been in if the defendant had not been negligent. Judge Brown, writing for the majority in *Turpin*, finds *Curlender's* disregard of whether or not the plaintiff would have existed to be an avoidance of the fundamental problem of awarding damages in a wrongful life claim. Drawing support from *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1976), and *Speck v. Finegold*, 268 Pa. Super. Ct. 342, 408 A.2d 496 (1979), Brown retreats to the majority opinion that the law is incapable of making a comparison between life in an impaired state and nonexistence.

In the area of public policy *Turpin* can not bring itself to agree with *Curlender's* basic assertion that every wrong deserves a remedy. The court can find no support, either statutorily or at common law, for the proposition that a fundamental right exists to be

born as a whole functional human being. Instead it finds only problems in developing appropriate standards by which to determine whether a child has been born defectively enough to warrant recovery; a job which is viewed as more legislative than judicial.

No link can be found between *Roe v. Wade* and an infant's right to non-existence. *Turpin* prefers to return to the persistent opinion that life, no matter how defective, is preferable to non-existence. Interestingly enough, the court makes no effort to discuss the implications of recent decisions concerning the right to die.

Almost as a "make-weight," the *Turpin* opinion finishes with the assertion that "...justified concern [exists] that the recognition of a cause of action in these circumstances would open up enormous new areas of claims..." 119 Cal.App. 3d at \_\_\_, 174 Cal. Rptr. at 132. Not surprisingly, the court finds this to be an unwelcome factor which was totally ignored by *Curlender*. Having concluded thus, *Turpin* attempts to move California back into line with *Gleitman* and its progeny. See *Eisenbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 56 N.Y. 2d 401, 413 N.Y.S. 2d 895 (1978).

The *Turpin* decision has created a split of authority at the California intermediate appellate level. *Danley v. Sup. Ct. Merced County*, 64 Cal. App. 594, 222 P. 362 ( ); 16 Cal. Jur. 3d. *Courts* §152 n.41 (1974). All eyes must now turn to California's Supreme Court for a resolution of this conflict. *Turpin v. Sortini*, hearing granted (Cal. Sup. Ct. Aug. 6, 1981). It will be that court's task to either affirm the principles and ideals of *Curlender* or to return to *Gleitman's* fold, thereby replacing the tort of "wrongful life" back in the realm of philosophers, theologians and legislators.



## Wrongful Birth

by Lee Eidelberg

Lawyers and law students alike should take note of the recent emergence of a new tort. Current advancements in the field of medical science, together with the developments in the law since *Roe v. Wade*, 410 U.S. 113 (1973), are contributing to the establishment of the "wrongful birth" action. A "wrongful birth" action is brought by the parents of a child who claim that they would have avoided conception or terminated the pregnancy if they had been properly advised of the risk of birth defects to the potential child. Note, "Wrongful Life": *The Right Not To Be Born*, 54 Tul. L. Rev. 480, 484 (1980).

Several arguments have been raised to support the contention that an action for wrongful birth is non-compensable. Defendant-physicians often argue that they are not the proximate cause of the injury because, in the case of a fetal defect, they did not cause the defect. See *Smith v. United States*, 392 F. Supp. 694 (N.D. Ohio 1975). A physician's negligent failure to diagnose a fetal defect, however, may be viewed as the proximate cause of birth of a deformed child. *Gildner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D.Pa. 1978), but cf. *LaPoint*

*v. Shirley*, 409 F. Supp. 118 (W.D.Tex. 1976). An additional argument is that the public policy consideration that recovery for wrongful birth would permit fraudulent claims and open the courts to a flood of litigation. However, this contention is substantially weakened by wrongful birth cases recognizing the court's ability to distinguish between meritorious and non meritorious claims, as well as identifying society's need for legal redress in this area. *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72 (1968).

Denial of recovery has also been predicated on the theory that the child is a blessing to the parents and "to allow damages in a wrongful birth suit... would mean that the physician would have to pay for the fun... which the plaintiff... will have in the rearing and education of the child." *Shaheen v. Knight*, 11 PaD. & C.2d 41, 43 (Lycoming County. 1957). However, there is substantial case law to support the contrary proposition that the birth of a child with a deformity that could have been detected during pregnancy, is not a blessing. See e.g. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (noting that where a mother must spread her care, society, and comfort over a larger group, and where this change in family status can be measured economically, it should be compensable).

Furthermore, support may be drawn from decisions such as *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1963), for the argument that parents should be allowed to plan the size of their families. Thus, parent plaintiffs may marshal the argument that their legal option to abort their unborn fetus was denied by the negligence of Appellant, and the resulting birth of their defective child was therefore wrongful and compensable. *Gildner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D.Pa. 1978) (applying Pennsylvania law); *Berman v. Allan*, 80 N.J. 421, 414 A.2d 8 (1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis2d 766, 233 N.W.2d 372 (1975).