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Wrongful Life—Impaired Infant's Cause of Action Recognized: *Curlender v. Bio-Science Laboratories*

Wrongful life[1] actions in behalf of physically or mentally impaired infants have been consistently barred in all jurisdictions where brought,[2] including California.[3] Although the factual contexts have varied, the courts have uniformly held that the infant plaintiffs have suffered no injury cognizable at law.[4] The

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1. The term "wrongful life" has been applied to both infants' and parents' causes of action in various factual contexts since 1963. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E. 2d 849, *appeal denied*, 27 Ill. 2d 626 (1963), *cert. denied*, 379 U.S. 945 (1964) (healthy infant sued father because infant was born an adulterine bastard); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (parents and defective infant sued physician for failure to inform parents of possible birth defects); Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979) (parents and defective infant sued physician for unsuccessful sterilization and abortion). Regardless of the context, the plaintiff alleges that the defendant either failed to prevent the infant's birth or denied the parents their right to prevent it. Most courts today limit their usage of "wrongful life" to actions brought in behalf of the infant and distinguish the parents' action for the same wrong as one for "wrongful birth" or "wrongful conception." *See, e.g.*, Berman v. Allan, 80 N.J. 421, 423, 404 A.2d 8, 9-10 (1979); Speck v. Finegold, 408 A.2d 496, 502 (Pa. Super. Ct. 1979). The case which is the subject of this Casenote limits the term wrongful life "to those causes of action *brought by the infant* alleging that, due to the negligence of the defendant, birth occurred." Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 817, 165 Cal. Rptr. 477, 481, *hearing denied*, No. 2 Civ. 58192 Div. 1 (Cal. Sept. 4, 1980).

Care should be taken to distinguish wrongful life causes of action from prenatal tort claims. While wrongful life actions have been consistently denied, prenatal tort claims are commonly recognized by the courts. *See* 43 C.J.S. *Infants* § 219 (1978). The plaintiff in a prenatal tort case alleges not that he was wrongfully born, but that absent the defendant's negligence either prior to conception or during pregnancy, he would have been born normal and healthy. *E.g.*, Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (infant stated cause of action for injuries resulting from negligent Caesarean section on the mother two years before infant's birth). In a wrongful life case there is no claim that the defendant caused or increased the risk of the infant's defect, only that he failed to prevent the infant's birth. *E.g.*, Berman v. Allan, 80 N.J. 421, 427, 404 A.2d 8, 11 (1979).

2. *See, e.g.*, Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

3. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976). "No court has yet recognized the tort [citation omitted], and we are not persuaded that this court should be the first." *Id.* at 705, 127 Cal. Rptr. at 656.

4. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 429, 404 A.2d 8, 12 (1979); Speck v. Finegold, 408 A.2d 496, 508 (Pa. Super. Ct. 1979).

courts have concluded that it is impossible to determine whether nonexistence is preferable to impaired life and therefore whether impaired life represents a compensable injury.[5] The court in *Curlender v. Bio-Science Laboratories*[6] perceived no such impossibility and, holding contrary to every other standing decision on wrongful life, recognized the infant plaintiff's cause of action. The California Supreme Court's denial of the defendants' petition for hearing suggests that the decision is more than a mere aberration.[7]

In 1977, Hyam and Phillis Curlender retained the defendant laboratories to perform blood tests designed to reveal whether they carried genes that could cause Tay-Sachs disease[8] in their offspring. Relying on the defendants' negative findings,[9] Mrs. Curlender conceived and gave birth to the plaintiff, Shauna. Shortly after her birth, doctors found that Shauna had Tay-Sachs disease. The impaired infant, by and through her father, filed a complaint for wrongful life[10] against the testing laboratories, alleging that their negligence in giving "incorrect and inaccurate" information to her parents was the proximate cause of her birth and subsequent suffering.[11]

The defendants demurred to the complaint, arguing that

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5. *See* note 35 *infra.*

6. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477, *hearing denied,* No. 2 Civ. 58192 Div. 1 (Cal. Sept. 4, 1980).

7. The petition for hearing was denied September 4, 1980. No. 2 Civ. 58192 Div. 1 (Cal. Sept. 4, 1980). For interpretation of such a denial, see Phillips v. Bartolomie, 46 Cal. App. 3d 346, 351, 121 Cal. Rptr. 56, 60 (1975) (quoting Di Genova v. State Bd. of Educ., 57 Cal. 2d 167, 178, 367 P.2d 865, 871, 18 Cal. Rptr. 369, 375 (1962)) (although denial does not express approval, it is "not without significance"); Allstot v. Long Beach, 104 Cal. App. 2d 441, 446, 231 P.2d 498, 501 (1951) (denial means lower court did not decide incorrectly). *But see* People v. Triggs, 8 Cal. 3d 884, 890, 506 P.2d 232, 236, 106 Cal. Rptr. 408, 412 (1973) (under some circumstances such a denial "is to be given no weight").

8. A fatal, hereditary disease of the nervous system that develops soon after birth and has a 25% probability of occurring in the offspring of Eastern European Jewish parents when both are carriers of Tay-Sachs genes.

9. The defendants allegedly represented to the plaintiff's parents that only one of them carried Tay-Sachs genes and thus dispelled their concern about possibly impaired offspring. Opening Brief for Appellant at 3, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

10. The "wrongful life" characterization of the action was applied by both the trial court and court of appeal. 106 Cal. App. 3d at 817, 165 Cal. Rptr. at 481. A simultaneous action for "wrongful birth" was filed by the infant's parents. *Id.* at 817 n.7, 165 Cal. Rptr. at 481 n.7. *See also* Opening Brief for Appellant at 5 n.1. Both actions allege that if the parents had been informed of the probability of impaired offspring they would have prevented conception or obtained an abortion.

11. 106 Cal. App. 3d at 815, 165 Cal. Rptr. at 480.

Stills v. Gratton[12] was controlling. *Stills* denied wrongful life recovery to a healthy infant born following an unsuccessful abortion, because his only injury was illegitimate birth. The trial court in *Curlender* sustained the demurrer without leave to amend and dismissed the complaint. Because of this procedural disposition, the court of appeal accepted as true all material facts properly pleaded.[13] Therefore, negligence was presumed, and the only question was whether the plaintiff had stated a cause of action.

The court of appeal determined that *Stills* was not controlling and treated the *Curlender* case as one of first impression.[14] The court reasoned that the *Stills* infant was born healthy and thus suffered no injury; whereas the *Curlender* infant was born with painful defects, a very real injury.[15] With *Stills* distinguished, the court went on to hold that the defendants had breached a duty of reasonable care owed directly to the not-yet-conceived infant and that the breach had resulted in the plaintiff's birth with painful defects.[16] The difficult question was whether that injury is cognizable at law.[17] Holding that it is, the court reasoned that a wrongful life plaintiff does not claim a right not to be born;[18] therefore, it is immaterial that the plaintiff would not exist absent the defendants' negligence,[19] and no comparison of nonlife to impaired life is necessary. What is important, reasoned the court, is that "a plaintiff both *exists* and *suffers*, due to the negligence of others,"[20] and so "may recover from the person in fault a compensation therefor."[21] Thus the court subordinated the difficult metaphysical questions of wrongful life recovery to "the principle that there should be a remedy for every wrong committed."[22]

The *Curlender* court characterized Shauna's injury as birth with defects,[23] but then focused on the pain and suffering of the

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12. 55 Cal. App. 3d 698, 127 Cal. Rtpr. 652 (1976) (the only California wrongful life case prior to *Curlender*).
13. 106 Cal. App. 3d at 815, 165 Cal. Rptr. at 479-80.
14. *Id.* at 814, 165 Cal. Rptr. at 479.
15. *Id.* at 825, 165 Cal. Rptr. at 486.
16. *Id.* at 828, 165 Cal. Rptr. at 488.
17. *Id.*
18. *Id.* at 830-31, 165 Cal. Rptr. at 489.
19. *Id.* at 829, 165 Cal. Rptr. at 488.
20. *Id.*
21. *Id.* at 829, 165 Cal. Rptr. at 488-89 (quoting CAL. CIV. CODE § 3281 (West 1970)).
22. *Id.* at 830, 165 Cal. Rptr. at 489.
23. *Id.* at 828-29, 165 Cal. Rptr. at 488.

defects while ignoring the noncognizable nature of the *birth.* This characterization gave the injury the appearance of a cognizable prenatal tort and freed the court to allow recovery. This analysis and treatment of the injury led the court to an erroneous distinction of *Stills*, a questionable conclusion on causation, and a judicial declaration that nonlife may be preferable to a life with defects.

The rationale given in *Stills* for denial of the infant's claim was not that he had suffered no injury, but that the injury he had suffered was not cognizable at law.[24] In *Zepeda v. Zepeda,*[25] which also denied a healthy, illegitimate infant's claim of wrongful life, the court outlined the disadvantages of illegitimacy and observed that "it would be pure fiction to say that the plaintiff suffers no injury."[26] The infant's claim in each case was denied because the negligence complained of resulted not only in their illegitimacy, but also in their life; and to compensate impaired life would have "vast" legal implications and a "staggering" social impact.[27]

Wrongful life cases present the difficult question of whether the defendant, who concededly caused the birth, can also be said to have caused the defect that accompanied the birth. Although the *Curlender* court found causation by treating the birth and defect jointly as one injury,[28] other courts distinguish the two elements and refuse to attribute the defect to the defendant's conduct. In *Berman v. Allan,*[29] the infant alleged through her guardian ad litem that she was born with Down's Syndrome due to the defendant doctors' failure to inform her parents of the availability of amniocentesis. In denying her action, the court noted that the defendants neither caused "the mongoloid condition nor increased the risk that such a condition would occur."[30] The court in *Becker v. Schwartz*[31] reached the same conclusion

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24. 55 Cal. App. 3d at 705-06, 127 Cal. Rptr. at 656-57.

25. 41 Ill. App. 2d 240, 190 N.E.2d 849, *appeal denied,* 27 Ill. 2d 626 (1963), *cert. denied,* 379 U.S. 945 (1964).

26. *Id.* at 255, 190 N.E.2d at 856.

27. 55 Cal. App. 3d at 705, 127 Cal. Rptr. at 656 (quoting 41 Ill. App. 2d at 258, 190 N.E.2d at 858). *Zepeda* warned that recovery would encourage litigation by "all others born into the world under conditions they might regard as adverse." 41 Ill. App. 2d at 260, 190 N.E.2d at 858.

28. 106 Cal. App. 3d at 828, 165 Cal. Rptr. at 488.

29. 80 N.J. 421, 404 A.2d 8 (1979).

30. *Id.* at 427, 404 A.2d at 11.

31. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

on similar facts.[32] One justice, concurring with the majority on this issue, observed: "The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor."[33] Thus, while the *Curlender* concept of a "causal link"[34] between the negligence and the defect is plausible, most courts, like *Berman* and *Becker,* employ the language of "proximate cause" or "cause in fact." In these more common terms the defendants' conduct is superseded by the parents' own genes as the cause of the defect, and the finding of causation in *Curlender* becomes questionable.

Whether the defendant laboratories "caused" only the plaintiff's birth or whether they "caused" the plaintiff's birth with defects, the court erred in declaring the injury cognizable at law. To award damages for impaired life is to make the determination that nonlife is preferable, and that determination requires a comparison between nonlife and impaired life that no court is capable of making. Such a comparison "transcends the mechanical application of legal principles"[35] and would be better left to "the representatives of the people."[36]

The *Curlender* court misinterpreted this judicial reluctance to attempt a comparison of nonlife and impaired life as an inability to *measure* damages[37] and argued that such an excuse is insufficient to bar recovery to an injured plaintiff. However, the reason for denial of wrongful life claims is not so much the diffi-

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32. *Id.* at 410-11, 386 N.E.2d at 811-12, 413 N.Y.S.2d at 899-900.

33. *Id.* at 418, 386 N.E.2d at 816, 413 N.Y.S.2d at 904 (Wachtler, J., concurring in part and dissenting in part). *Accord,* Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 770-71, 233 N.W.2d 372, 374 (1975).

34. 106 Cal. App. 3d at 828, 165 Cal. Rptr. at 488.

35. 46 N.Y.2d at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898. The *Stills* court concluded: "The issue involved is more theological or philosophical than legal." 55 Cal. App. 3d at 705, 127 Cal. Rptr. at 656. *See also* Gleitman v. Cosgrove, 49 N.J. 22, 63, 227 A.2d 689, 711 (1967) (Weintraub, C.J., dissenting in part). "Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so." *Id.*

36. Zepeda v. Zepeda, 41 Ill. App. 2d at 263, 190 N.E.2d at 859. *Accord,* Park v. Chessin, 60 A.D.2d 80, 91-92, 400 N.Y.S.2d 110, 116-17 (1977) (Titone, J., dissenting), *modified,* 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *Cf.* Speck v. Finegold, 408 A.2d 496, 499 (Pa. Super. Ct. 1979) (discusses how wrongful death was first recognized through the legislature rather than through the courts).

37. 106 Cal. App. 3d at 819, 165 Cal. Rptr. at 482 (interpretation of rationale in Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)); *Id.* at 824-25, 165 Cal. Rptr. at 486 (interpretation of rationale in Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976)).

culty of measuring or computing damages[38] as it is the difficulty of determining whether damages are due. If courts could determine that an infant has suffered a compensable injury by being born, mere difficulty in computing damages "would not bar recovery."[39]

Some commentators concede that the injury alleged in wrongful life cases is birth, but suggest that courts should not blindly presume that life is always preferable to nonlife.[40] They cite recent right-to-die cases[41] as evidence of a new willingness by the courts to conclude that under some circumstances nonlife or death *is* preferable to a painful, miserable life. However, a closer comparison of the two types of cases reveals a lifetime of difference.

Right-to-die cases normally deal with noncognitive, vegetative patients who are being kept "alive" by various artificial instruments. The issue is not their preference (nor their guardian's preference) for death, but rather their right of privacy, their right to be free from nonconsensual invasion of their bodily integrity.[42] As the condition worsens and more artificial intervention is required, a point is reached where the individual's right of privacy exceeds the state's interest in preserving life.[43] At that point courts recognize a right to die. By constrast, since a wrongful life plaintiff complains of life, he necessarily claims a right not to be born,[44] a right which no court has recognized.[45]

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38. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 694 (E.D. Pa. 1978) (also involved an infant born with Tay-Sachs); Berman v. Allan, 80 N.J. 421, 428-29, 404 A.2d 8, 12 (1979); Williams v. State, 18 N.Y.2d 481, 483-84, 223 N.E.2d 343, 344, 276 N.Y.S.2d 885, 886-87 (1966).

39. Karlsons v. Guerinot, 57 A.D.2d 73, 80-81 n.3, 394 N.Y.S.2d 933, 938 n.3 (1977).

40. Comment, Berman v. Allan, 8 HOFSTRA L. REV. 257, 263-64 (1979); Comment, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480, 496-98 (1980); Note, *A Cause of Action For "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58, 65-66 (1970).

41. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

42. "It is the issue of the constitutional right of privacy that has given us most concern, in the exceptional circumstances of this case." *In re* Quinlan, 70 N.J. at 38, 355 A.2d at 662.

43. *Id.* at 40-41, 355 A.2d at 664.

44. *Curlender* erroneously denied that such a claim was at issue. 106 Cal. App. 3d at 830-31, 165 Cal. Rptr. at 489.

45. "Fundamental to the recognition of such a cause of action is the notion that the defendant has violated some legal right of plaintiff's . . . . However, a legal right not to be born is alien to the public policy of this State to protect and preserve human life." Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978). *Accord*, Becker v. Schwartz, 46 N.Y.2d

Furthermore, a court's order granting permission to remove artificial life supports is *not* a judicial declaration that death is preferable to a vegetative existence, but merely a granting of agency allowing an individual to thus exercise his rights if he so chooses. There is no compulsion, and no monetary award nor compensation is involved. By contrast, when a court awards damages to an impaired infant born because of negligence, it rules that the defendants should have prevented the birth and that nonlife would have been preferable. In other words, allowance of wrongful life recovery prefers nonlife by penalizing the failure to prevent life. Allowing a person to choose to die states no preference and penalizes no one.[46]

One of the most dangerous effects of the *Curlender* decision is its possible impact on parents' rights and family relationships. By declaring impaired life a cognizable injury, the court opened the door to suits by impaired children against their parents. *Curlender* called such a concern "groundless,"[47] but in the same paragraph the court conceded that if parents are adequately informed of the risks of impaired offspring and then choose to conceive and give life anyway, "we see no sound public policy which should protect those parents from being answerable" to their offspring.[48] Fear of a lawsuit could deter from parenthood those persons who desire to accept the known risks of bearing impaired children[49] and thus infringes their right of procreative choice. Such persons, if they did conceive and were informed of an impaired fetus, could be forced into an abortion to avoid the potential costs of litigation and thus forced as well against their possible religious convictions.[50] These concerns are valid, not "groundless."

The *Curlender* court was motivated in its decision by a desire to deter negligent genetic counseling and by the moral principle that every wrong should have a remedy. However, both

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401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

46. The courts also distinguish between the two types of actions. The same court that granted the right to die in *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976), also denied the infant's claim of wrongful life in *Berman v. Allan* three years later. *See also* Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1502 n.56 (1978).

47. 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.

48. *Id.*

49. Zepeda v. Zepeda, 41 Ill. App. 2d at 260, 190 N.E.2d at 858.

50. Brief of Amici Curiae at 16-17, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

ends may be satisfied without granting recovery to the infant. The parents of the *Curlender* infant brought a separate action in their own behalf for "wrongful birth."[51] Unlike wrongful life actions, such parental actions are commonly recognized in California[52] and other jurisdictions.[53] This wide acceptance indicates that most courts consider recovery of damages by the parents as adequately satisfying the requirements of both deterrence and justice.

Some would argue that allowing only the parents to recover still leaves uncompensated the pain and suffering of the impaired infant.[54] However, the law has long recognized that some of life's adversities will always to uncompensated as *damnum absque injuria,* damage without wrong.[55] The fact that a complainant may have suffered is not enough. There must be a violation of a legal right or there is no cause of action. As the court noted in *Howard v. Lecher*:[56] "Ideally, there should be a remedy for every wrong. This is not the function of the law, however, for '[e]very injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.' "[57]

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51. Opening Brief for Appellant at 5 n.1.

52. In both *Stills* and Custodio v. Baur, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), the parents were allowed recovery for all consequential damages.

53. *See, e.g.,* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (Tay-Sachs case in which the parents were allowed recovery while the infant's action was denied); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

54. This is not entirely true since the typical juror may have in mind the pain and suffering of the infant when determining a fair award for the parents.

55. 1 AM. JUR. 2d *Actions* § 70 (1962).

56. 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (Tay-Sachs case that denied parents damages for emotional suffering; lower court's grant of medical costs and funeral expenses was not appealed).

57. *Id.* at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 366 (quoting Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969)).