COMMENTS

Wrongful Life: A Misconceived Tort — An Introduction

By Hon. George A. Brown*

An appropriate conceptual analysis of the difference between a claim for wrongful birth and one for wrongful life has rarely been made. This is so even though the first case on the subject came down some fifteen years ago.[1] This comment will assist greatly in clarifying an existing mass of conflict and confusion in the cases that have dealt with claims for wrongful birth and wrongful life, and should be welcomed as filling a gap that has existed too long.

As is pointed out in the comment, the only common element between the two types of claims is that both arise from the alleged negligence of the genetic counselor. The mother's claim for wrongful birth rests upon the injury to her by virtue of the genetic counselor's failure to inform her of the risk of her child's disability, resulting in the mother's being deprived of the right to make an informed choice between aborting the fetus or giving birth to a defective child.

On the other hand, a claim for wrongful life rests in the child for having been born and is predicated upon the assumption that life itself is an injury. A determination of the extent of the injury, that is, the amount of the damage, must necessarily involve a comparison between life and nonexistence. In this regard, a number of complex questions arise, one of which is the insuperable legal problem of placing a value on no life at all,

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[1] *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967), *overruled in part*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

that is, on nonexistence. Certainly the courts are not equipped to venture into this vacuum. Recognition of a cause of action for wrongful life also brings into operation all sorts of other conceptual, constitutional, and public policy considerations, all of which are described in detail in the comment.

Most courts that have dealt with the subject properly recognize an action for wrongful birth as being within the parameters of accepted tort principles and public policy. On the other hand, only one case to my knowledge, *Curlender v. Bio-Science Laboratories,*[2] has authorized a cause of action for wrongful life.

Strangely, the *Curlender* case inexplicably relies in part upon *Roe* v. *Wade*[3] as being supportive of its decision.[4] In *Roe* v. *Wade,* however, the United States Supreme Court held that a state may not restrict a woman's right to abort during the first trimester of pregnancy.[5] While *Roe* prevents a state from relying upon a state public policy against abortion to deny a cause of action for wrongful birth, the case has the direct opposite effect upon a cause of action for wrongful life. This is true because the recognition of the mother's right to freely choose between giving birth and aborting necessarily negates the notion that an unborn child has any rights arising from freedom to choose between being aborted or being born. Thus, in this regard, *Roe* v. *Wade* really stands for the proposition that, during the first trimester of pregnancy, the fetus is not a person and has no rights. Accordingly, to rely upon that case, as the court did in *Curlender,* to judicially create a cause of action for wrongful life is not only illogical but a misapplication of the principles of that case.

The comment argues, and in my opinion correctly concludes, that a state's limited ability to restrict abortions because of its preference for potential life[6] should be exercised by the legislature — not the courts — as the legislature is the only body authorized and fully capable of establishing public policy in this highly explosive and sensitive area. To argue otherwise is to obliterate the constitutional line between the legislative and judi-

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[2] Curlender v. Bio-Science Labs., 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980).

[3] 410 U.S. 113 (1972).

[4] *See* Curlender v. Bio-Science Labs., 106 Cal. App. 3d 811, 820, 165 Cal. Rptr. 477, 483 (2d Dist. 1980).

[5] Roe v. Wade, 410 U.S. 113, 164 (1972).

[6] *See* Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

cial functions.

A sequela of recognizing a wrongful life suit against the consultant is to authorize an action by a child against its own parents for having made the decision not to abort. *Curlender* in fact suggests this startling result.[7] Quite clearly such a claim runs counter to the mother's freedom of choice expressed in *Roe* v. *Wade*. Moreover, the probability of such claims was found so abhorrent by the California Legislature that it quickly acted to establish a public policy to the contrary by outlawing such claims.[8]

The fact is that the courts are neither authorized nor equipped to adequately deal with this evolving area of great public concern. A willingness to make the attempt obviously derives from an understandable concern for the plight of the defective and handicapped. Compassion and emotion, however, lead to result-oriented jurisprudence and the usurpation of value judgments in the area of public policy that are clearly within the ken of the legislative branch. Judicial effort to correct a perceived evil without regard to constitutional principle, judicial precedent, or adequate conceptual analysis, or without consideration of the proper division of authority between the judicial and legislative branches leads to bad law. After all is said and done, good law — not bad law — should be the primary objective and concern of all of us.

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Recent advances in prenatal genetic counseling have expanded the scope of malpractice liability. Parents and children have both brought tort actions for negligent prenatal genetic counseling. The child's "wrongful life" claim is a unique and difficult moral

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[7] Curlender v. Bio-Science Labs., 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (2d Dist. 1980).

[8] *See* Ch. 331, § 43.6, 1981 Cal. Stats. 169.