Wrongful Life, Turpin v. Sortini

Janet A. Laufer
MEDICAL MALPRACTICE
WRONGFUL LIFE

Turpin v. Sortini


I. INTRODUCTION

IN THE PAST FIFTEEN YEARS, several state appellate courts have considered wrongful birth and wrongful life causes of action. While the modern trend is to allow wrongful birth causes of action, few courts have permitted wrongful life actions to be maintained. On May 3, 1982, the California Supreme Court, in Turpin v. Sortini became the first state high court to allow a wrongful life cause of action. This casenote will examine the reasoning of the Turpin court in allowing the wrongful life claim. While Turpin appears to signal a new trend in this area of tort law, there is little doubt that it will generate much criticism. Some commentators will suggest that the Turpin court went too far; others that it did not go far enough. This article will explore the policy considerations surrounding both sides of the issue.

II. TURPIN v. SORTINI: THE FACTS, HOLDING AND RATIONALE

On September 24, 1976, James and Donna Turpin took their daughter,
Hope, to the Leon St. Peters Rehabilitation Center at the Fresno Community Hospital for evaluation of a possible hearing defect.\textsuperscript{10} Hope was examined and tested by Adam J. Sortini, a hearing specialist, who advised Hope's pediatrician that her hearing was normal.\textsuperscript{11} In December of 1976, the Turpins conceived a second daughter, Joy, who was born on August 23, 1977.\textsuperscript{12} In October 1977, the Turpins learned that Hope was "stone deaf" as the result of an hereditary ailment. Joy was then diagnosed as suffering from the same total deafness as Hope.\textsuperscript{13}

The Turpins filed a complaint setting forth four causes of action,\textsuperscript{14} including a cause of action brought on behalf of Joy seeking: (1) general damages for being "deprived of the fundamental right of a child to be born as a whole functional human being without total deafness"; and (2) special damages for the "extraordinary expenses for specialized teaching, training and hearing equipment" which she would incur during her lifetime as a result of her hearing impairment.\textsuperscript{15} The trial court dismissed the action as to Joy, and the Fifth District California Court of Appeal affirmed the dismissal.\textsuperscript{16}

While the appeals court relied on the majority of other wrongful life cases in denying the cause of action,\textsuperscript{17} the California Supreme Court determined that Joy could recover special damages in her wrongful life suit.\textsuperscript{18} At the same time, however, the latter court said Joy could not recover general damages.\textsuperscript{19}

In denying recovery for general damages, the court acknowledged that the defendants had breached a duty owed to Joy and the Joy's birth was the proximate cause of the breach.\textsuperscript{20} However, the court emphasized that "the obvious
tragic fact is the plaintiff never had a chance 'to be born as a whole, functional human being without total deafness'; if defendants had performed their jobs properly, she would not have been born with hearing intact, but — according to the complaint — would not have been born at all.'21 The court disagreed with other decisions which have suggested that awarding damages to a severely handicapped, or suffering child would “disavow” the value of life22 and pointed out that other areas of the law have recognized that impaired life is not always preferable to nonlife.23 Nevertheless, the court concluded:

With respect to general damages, the harmed interest is the child’s general physical, emotional and psychological well-being, and in considering the benefit to this interest which defendant’s negligence has conferred, it must be recognized that as an incident of defendant’s negligence the plaintiff has in fact obtained a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering. Because of the incalculable nature of both elements of this harm-benefit equation, we believe that a reasoned, non-arbitrary award of general damage is simply not obtainable.24

Still, the court upheld Joy’s claim for special damages,25 recognizing that parents’ recovery in a wrongful birth action26 does not extend to expenses the child may incur when parents are no longer responsible for the child’s care.27

offspring would be directly affected by defendant’s negligent failure to discover that Hope suffered from a hereditary ailment . . . ” (and thus the defendants did owe Joy a duty). Id. The issue of duty, however, is debatable. One author argues that since Roe reserved to the mother the decision of whether to have an abortion (at least in the first trimester of pregnancy), the child has no “right not to be born” to exercise, and thus no duty was owed to it. See Brown, Wrongful Life: A Misconceived Tort — An Introduction, 15 U.C.D. L. REV. 445, 446-47 (1981). Another author disagrees with this contention, saying: “the child is merely asserting that the decision of whether the child would have been better off not having been born should be left with . . . its parents.” Capron, Tort Liability in Genetic Counseling, 79 COLUM. L. REV. 618, 654 (1979).

121 Cal. 3d at __, 643 P.2d at 961, 182 Cal. Rptr. at 334.
12Id. at __, 643 P.2d at 962, 182 Cal. Rptr. at 345. In Berman v. Allan, 80 N.J. at 430, 404 A.2d at 13, the New Jersey Supreme Court suggested that awarding damages for wrongful life would “disavow” the value of life.
1231 Cal. 3d at __, 643 P.2d at 962, 182 Cal. Rptr. at 345. The court referred to California’s “living will” statute. This statute permits an adult “to make a written directive instructing his physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.” Cal. Health and Safety Code § 7186 (West Supp. 1982).
1241 Cal. 3d at __, 643 P.2d at 964, 182 Cal. Rptr. at 347. The court followed the “benefit” doctrine in tort damages, which says: “When the defendant’s tortious conduct has caused harm to the plaintiff . . . and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.” Maben v. Rankin, 55 Cal. 2d 139, 144, 358 P.2d 681, 686, 10 Cal. Rptr. 353, 358, (1961) quoted in Turpin, 31 Cal. 3d at __, 643 P.2d at 964, 182 Cal. Rptr. at 347.
12531 Cal. 3d at __, 643 P.2d at 966, 182 Cal. Rptr. at 349.
12In a separate cause of action, Joy’s parents sought to recover for medical expenses which they would incur on Joy’s behalf during her minority. Id. at __, 643 P.2d at 956, 182 Cal. Rptr. at 339. This is the usual scope of damages awarded in wrongful birth actions. See Capron, Tort Liability in Genetic Counseling, 79 COLUM. L. REV. 618, 658-60 (1979).
12731 Cal. 3d at __, 643 P.2d at 965, 182 Cal. Rptr. at 348. The court also noted that allowing the child to recover these expenses “should also help ensure that the available tort remedies in this area provide a comprehensive and consistent deterrent to negligent conduct.” Id. at __, 643 P.2d at 966 n.15, 182 Cal. Rptr. at 349 n.15.

Published by IdeaExchange@UAkron, 1983
The court explained:

[W]e believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child’s own medical care. If such a distinction were established, the afflicted child’s receipt of necessary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when parents remain legally responsible for providing such care.28

In addition, the court said “[w]e believe that it is consistent with the basic liability principles . . . to hold defendants liable for the cost of such care, whether the expenses is to be borne by the parents or by the child.”29

A short concurrence in this decision suggested that “basic changes of the kind sought here are better left to the Legislature.”10 The dissenting opinion argued that general damages, as well as special damages, should be recoverable in this case.31

III. WRONGFUL BIRTH AND WRONGFUL LIFE CAUSES OF ACTION: A BRIEF HISTORY

The first wrongful life action brought before an appellate court was Zepeda v. Zepeda.32 This action was brought on behalf of an illegitimate infant against the child’s father, alleging that the father wrongfully induced the child’s mother to engage in sexual relations, thus causing the child’s conception.33 The Illinois Appellate Court denied the child’s claim, stating:

Recognition of the plaintiff’s claim means creation of a new tort: a cause of action for wrongful life. The legal implications of such a tort are vast, the social impact could be staggering. . . . Encouragement would extend to all others born into the world under conditions they might regard as adverse.34

34 1 Ill. App. 2d at 243, 190 N.E.2d at 851. There is a fundamental difference between this action and the action of a deformed or impaired child. Cases such as the former are now most commonly referred to as “dissatisfied life” cases. Comment, “Wrongful Life”: the Right Not to be Born, 54 Tul. L. Rev. 480, 485-86 (1980). There has been some suggestion that had the first wrongful life cases been brought by physically or mentally deformed children, the law in this area would have developed differently. See, e.g., Note, Medical Malpractice: Wrongful Birth, Preconception Torts, Duty to Inform of Genetic Risks, 13 Akron L. Rev. 390, 395 (1979).

https://ideaexchange.uakron.edu/akronlawreview/vol16/iss2/7
As noted before, the first wrongful life case involving an impaired child was *Gleitman v. Cosgrove*. There, Mrs. Gleitman's physician had advised her that her child, Jeffrey, would be born normal, despite his knowledge that Mrs. Gleitman had had rubella (commonly known as German measles) at an early stage of her pregnancy. Jeffrey Gleitman developed impaired sight, hearing, and speech. The Gleitmans brought a wrongful life action on Jeffrey's behalf and a wrongful birth suit on their own behalf. Both causes of action were denied by the New Jersey Supreme Court, which stated:

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 life with 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.

Twelve years after *Gleitman*, the New Jersey Supreme Court again had a wrongful birth/wrongful life claim before it in *Berman v. Allan*. Shirley Berman became pregnant with Sharon Berman when she was thirty-eight years old. She was under the care of two obstetrician/gynecologists, Dr. Allan and Dr. Attardi. The physicians failed to perform an amniocentesis on Shirley to determine whether the child she was carrying had Downs syndrome. Following Sharon's birth with Downs syndrome, the Bermans brought a wrongful life claim on behalf of Sharon and a wrongful birth claim on their own behalf. While the New Jersey Supreme Court once again denied the child's wrongful...
Eighteen months before the Berman decision, in Park v. Chessin, the New York Supreme Court, Appellate Division, became the first appellate court to allow a claim for the wrongful life of a child born with a genetic defect. That decision, however, was reversed in Becker v. Schwartz. Thus, the only wrongful life action in the United States that had ever been completely successful before Turpin was Curlender v. Bio-Science Laboratories. In Curlender, Phillis and Hyum Curlender retained defendant laboratory to determine if they were carriers of Tay-Sachs disease. The laboratory performed the test and inaccurately informed the Curlenders that they were not carriers of Tay-Sachs. Subsequently, Phillis Curlender gave birth to Shauna Curlender, who had Tay-Sachs. The Curlenders brought a wrongful life action on behalf of Shauna, seeking: (1) damages for the costs of Shauna’s care; (2) damages for emotional distress and the deprivation of seventy-two and six-tenths years of her life; and (3) punitive damages of three million dollars. The California Court of Appeal allowed the wrongful life claims for the costs of Shauna’s care, and punitive damages. The court limited damages for emotional distress saying:

We reject as untenable the claim that plaintiff is entitled to damages as
if plaintiff had been born without defects and would have had a normal life expectancy. Plaintiff's right to damages must be considered on the basis of plaintiff's mental and physical condition at birth and her expected condition during the short life span . . . anticipated for one with her impaired condition.55

The court went on to say:

[W]e reject the notion that a "wrongful life" cause of action involves any attempted evaluation of a claimed right not to be born. In essence, we construe the "wrongful-life" cause of action by the defective child as the right of such child to recover damages for the pain and suffering to be endured during the limited life span available to such a child and for any special pecuniary loss resulting from the impaired condition.56

Thus, the Curlender court allowed a greater extent of recovery than the California Supreme Court did in Turpin.57

Only four months before the California Supreme Court handed down its opinion in Turpin, the Supreme Court of Pennsylvania examined the same wrongful life issues in Speck v. Finegold.58 In Speck, Frank Speck Jr. suffered from neurofibromatosis,59 a genetic disease. He and his wife had two children, both of whom inherited the disease.60 The couple decided not to have anymore children and Mr. Speck went to Dr. Finegold for a vasectomy.61 After the vasectomy was performed and Mr. Speck was pronounced sterile, Mrs. Speck became pregnant.62 Subsequently, the Specks engaged Dr. Schwartz to perform an abortion on Mrs. Speck. Although Dr. Schwartz performed the abortion and told Mrs. Speck that she was no longer pregnant, Mrs. Speck nevertheless gave birth

55Id.
56Id. at 830, 165 Cal. Rptr. at 498.
57Id. at 830-31, 165 Cal. Rptr. at 498.
58Perhaps one reason for the differences in the Turpin and Curlender recoveries is the extent of the child's impairment. The Supreme Court of California suggested as much in Turpin:

In this case in which the plaintiffs only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all. Other wrongful life cases, however, have involved children with much more serious, debilitating and painful conditions, and the academic literature refers to still other, extremely severe hereditary diseases.

31 Cal. 3d at 20, 643 P.2d at 966, 182 Cal. Rptr. at 345-46.
59Neurofibromatosis, an extremely disfiguring disease, is "a familial condition characterized by developmental changes in the nervous system muscle, bones and skin and marked superficially by the formation of multiple pendunculated soft tumors with areas of pigmentation." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 886 (26th ed. 1981).
60439 A.2d at 110 & (Pa. Sup. Ct. 1981). This case was decided on December 31, 1981, four months before Turpin was decided.
61"Neurofibromatosis, an extremely disfiguring disease, is "a familial condition characterized by developmental changes in the nervous system muscle, bones and skin and marked superficially by the formation of multiple pendunculated soft tumors with areas of pigmentation." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 886 (26th ed. 1981).
62439 A.2d at 113.
63Id. This case is admittedly different from the typical wrongful life action where the parents, had they been accurately advised of the possibility of a deformed birth, would have chosen not to have the child. Comment, "Wrongful Life": The Right Not To Be Born, 54 TUL. L. REV. 482, 485 n.34 (1980). Still, the policy issues in this wrongful life action are basically the same.
64439 A.2d at 113.
The Specks brought wrongful life and wrongful birth actions against Dr. Finegold and Dr. Schwartz. The Pennsylvania Supreme Court justices were equally divided as to whether Francine's wrongful life action could be maintained, and hence the intermediate appellate court decision denying the cause of action stood.

The opinion of one of the justices was strongly critical of courts which have denied recovery for wrongful life. He noted a policy consideration not considered by the Turpin court, nor any other court which has considered wrongful life, but one worthy of acknowledgement:

Existence in itself can hardly be characterized as an injury, but when existence is foreseeably and inextricably coupled with a disease, such an existence, depending upon the nature of the disease, may be intolerably burdensome. To judicially foreclose consideration of whether life in a particular case is such a burden would be to tell the diseased, possibly deformed plaintiff that he can seek no remedy in the Courts and to imply that his alternative remedy, in the extreme event that he finds his life unduly burdensome, is suicide. No court in the land would directly send such a message to these plaintiffs. We deem it unfortunate that some Courts have indeed sent that message by implication.

Justice Flaherty agreed with the Curlender court that damages in a wrongful life case should include general damages for suffering as well as special damages for expenses. A second opinion in this case declared:

Any argument that this life of suffering is not the natural and probable consequence of appellees' misconduct is rank sophistry.... To permit such a wrong to go unredressed would provide no deterrent to professional irresponsibility and would be neither just nor compatible with this Commonwealth's principles of tort liability.

Nevertheless, another opinion in Speck took the opposing viewpoint, pointing out that "none of the highest appellate courts of other jurisdictions has recognized such a cause of action." A fourth opinion even suggested that

---

63 Id. This demonstrates what some parents must go through to avoid having a deformed child despite the Roe decision.
64 Id. The trial court dismissed Francine's wrongful life claim, and the Pennsylvania Court of Appeals affirmed the dismissal.
65 Id. at 111.
66 This opinion was by Justice Flaherty, in which Justice Larsen joined.
67 Where the plaintiff suffers from neurofibromatosis or Tay-Sachs there is a much stronger case for allowing a wrongful birth claim than where the plaintiff suffers from a hearing defect. 31 Cal. 3d at __, 643 P.2d at 954, 182 Cal. Rptr. at 345-46.
68 Id. at 118. This opinion, written by Justice Kauffman, was joined by Justices Larsen and Flaherty.
69 Id. at 116. This opinion, written by Justice Roberts and joined by Chief Justice O'Brien pointed out

Id. at 116. This opinion, written by Justice Kauffman, was joined by Justices Larsen and Flaherty.
70 Id. at 116. This opinion, written by Justice Roberts and joined by Chief Justice O'Brien pointed out

https://ideaexchange.uakron.edu/akronlawreview/vol16/iss2/7
to allow wrongful life claims might be a societal attempt to control genetics, "merely ploys for the extermination of a weaker group by a stronger and more powerful one."" 

Thus there were two completely opposing viewpoints in Speck; one seeking to allow recovery for both special and general damages in a wrongful life suit, the other advocating no recovery at all for wrongful life. Both sides expressed valid concerns and both views find ample support in the academic community. Until Turpin, there appeared to be no way that a court could reconcile the two views.

IV. TURPIN V. SORTINI: A FRESH APPROACH TO WRONGFUL LIFE

In a meritorious decision, the California Supreme Court acknowledged the validity of both views, and combined the best of both in Turpin. In wrongful life cases the alleged injury is the life of the child. This creates a problem for our courts since traditionally our common law has highly valued human life. Furthermore, basic tort principles do not support recovery for general damages in wrongful life suits. Traditional tort law applies an objective "reasonable man" standard to determine existence of an injury. Thus, in order to recover under traditional tort law, the child bringing the wrongful life claim would have to prove by a preponderance of the evidence that a reasonable person would conclude that the child is so impaired that he would have been better off never to have been born. The inherent problem with this is the difficulty in determining what a reasonable person would conclude. This question really lends itself to a subjective standard, which is an "unwarranted departure from traditional tort law." Such a departure is not one to be made by the courts, but should be left to the legislatures.

that "[e]ven Curlender . . . has recently been called into question by a subsequent panel of that same intermediate Appellate Court in Turpin." Id.

"Id. at 119. This opinion was written by Justice Nix.

"The Speck court considered the claims for general and special damages collectively, not independently as the Turpin court did.

"There is considerable commentary opposing allowance of claims for wrongful life. See, Comment, supra note 8. Commentary supporting the cause of action include: Capron, Tort Liability in Genetic Counseling, 79 COLUM. L. REV. 618 (1979); Comment, "Wrongful Life": The Right Not To Be Born, 54 TUL. L. REV. 480 (1980).

"It has been suggested that wrongful birth claims should allow for a portion of the parent's compensation to be put into a reversionary trust for the child to "protect the child from his parent's irresponsibility." This, however, would not compensate the child should his parents not bring a wrongful birth action first. See Comment, supra note 8.

"Id. at 459.

"Id.


"See W. PROSSER, supra note 8.

"An objective standard derived from community values does not rationally inform such an intensely personal evaluation." Comment, supra note 75, at 461.

"Id. at 461-62.

Even if there were a basis in tort law for such claims, there is a major problem in establishing damages.\(^3\) Again, this determination lends itself to a highly subjective, personal approach which could create a great deal of inconsistency among verdicts.

While the "disavowing the value of life" approach some courts\(^4\) have taken is unsound, as Turpin points out, a monetary award for pain and suffering is not going to significantly improve the plaintiff's condition.\(^5\) Likewise, a court does not encourage suicide by denying such damages.\(^6\) If a wrongful life plaintiff is in such miserable condition that he or she contemplates suicide, it is unlikely that the economic ability to purchase a new television, or take a trip around the world, will convince him or her that life is worthwhile.\(^7\)

Special damages for wrongful life, on the other hand, do have a basis in tort principles.\(^8\) By breaching a duty owed to the parents, the defendant has caused the parents to bear the extra cost of bringing up the diseased or handicapped child. Should the child live long enough, this damage extends to the child's own expenses in obtaining medical care, special training, and the like.\(^8\) The benefit doctrine need not be applied,\(^9\) so there is no need to balance impaired life against nonlife in assessing damages.

Furthermore, awarding special damages for wrongful life serves a significant policy goal of deterrence.\(^9\) While recovery in wrongful life claims may suffice as such a deterrent against negligent genetic counseling,\(^9\) it might not hold defendants completely responsible for the wrong because pecuniary losses of the child are not taken into account.\(^9\) As one author puts it:

The most obvious consequences [of allowing damages for wrongful life] will be the assessment of damages in an increasing number of cases if physi-

\(^{31}\text{Id. at } \ldots, 643 P.2d at 963, 182 Cal. Rptr. at 346.}

\(^{41}\text{See, e.g., Berman v. Allan, 80 N.J. at 427, 404 A.2d at 13.}

\(^{51}\text{31 Cal. 3d at } \ldots, 643 P.2d at 962, 182 Cal. Rptr. at 345.}

\(^{61}\text{One opinion in Speck suggested that to disallow wrongful life claims would be to encourage suicide for diseased or handicapped children. 439 A.2d at 115.}

\(^{71}\text{However, Capron argues that: Although a monetary judgment for pain and suffering cannot make them "whole," any more than it actually does for most injured persons, it may provide some balm for the inner wounds of congenitally defective children if it is spent so as to bring some compensating joy, and the feeling of being "special" in a good sense, into their lives." Caprin, Tort Liability in Genetic Counseling, 79 Colum. L. Rev. 618, 655 (1979).}

\(^{81}\text{Special damages are the pecuniary damages covering expenses for the impaired child's care and training, which the court in Turpin said could be recovered.}

\(^{91}\text{See 31 Cal. 3d at } \ldots, 643 P.2d at 965, 182 Cal. Rptr. at 968.}

\(^{92}\text{Id. at } \ldots, 643 P.2d at 966, 182 Cal. Rptr. at 348-49.}

\(^{93}\text{Id. at } \ldots, 643 P.2d at 966 n.15, Cal. Rptr. at 349 n.15. See also Capron, supra note 87, at 660.}

\(^{94}\text{See Comment, supra note 8, at 467. Contra, Capron, Tort Liability in Genetic Counseling, 79 Colum. L. Rev. 618, 658, 660 (1979).}

\(^{95}\text{"[T]he absence of an entire category of damages — those suffered by the child — can be expected to result in underdeterrence because there is no assurance that the jury in setting the amount to be collected by the parents will take the excluded category of harm into account." Capron, supra note 87, at 658.}

https://ideaexchange.uakron.edu/akronlawreview/vol16/iss2/7
cians and others who provide health care to people planning families fail either to make use of the new information and techniques of clinical genetics or to refer patients to persons who are more knowledgeable in that field. . . . The recognition of a right of recovery does not create the costs but merely shifts the burden of bearing them from the injured parties to the person whose wrong brought them into being.\textsuperscript{94}

One consequence of permitting the child-plaintiff in a wrongful life action to recover only special damages is that children who will never be independent of their parents or guardians\textsuperscript{95} have no remedy in the courts. On the surface this might strike one as unfair. The extremely deformed child who dies at an early age cannot recover, while the deaf child who lives a long life can recover. Nevertheless, both children will have their pecuniary losses covered for their entire life span.

V. CONCLUSION

While much disagreement exists in the courts and the academic community as to whether a diseased or handicapped child should be able to collect damages from a genetic counselor, physician, or other person who wrongfully caused his or her birth, the California Supreme Court reconciled both views in \textit{Turpin v. Sortini}. By disallowing general damages for pain and suffering, it recognized that such a claim invites a subjective approach inconsistent with basic tort principles. At the same time, the court recognized that compensating a plaintiff’s parents for wrongful birth may not suffice in providing a source of funds for special care that a diseased or handicapped child needs. Additionally, the court recognized the important function of deterrence served by allowing pecuniary damages for wrongful life. No doubt courts will continue to struggle with wrongful life causes of action, but \textit{Turpin} provides a much needed framework for evaluating these cases.

\textsc{Janet Ann Laufer}

\textsuperscript{94}Id. at 660.

\textsuperscript{95}For instance, children who die before reaching the age of majority.