



Wrongful Birth and Wrongful Life Actions

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1. Introduction

It seems strange, to have a claim against birth or life. Wrongful birth and wrongful life claims arise when a child or a parent sues a physician, alleging either that, due to genetic defects negligently not foreseen during the normal course of prenatal screening, either the child should not have been born (wrongful life-claim for damages for pain and suffering and economic costs of treatment, filed by the handicapped person) or the parent was deprived of the legal opportunity to terminate the pregnancy (wrongful birth-claim for damages for the costs of treatment, plus pain and suffering award, filed by parents).¹

These causes of action are both rather new and very peculiar. This is obvious, from the starting point that generally, actions for wrongful life are not permitted (a child cannot seek damages for being born handicapped), but in an important number of jurisdictions, actions for wrongful birth are allowed. The alleged loss, though, is more or less the same in both cases. We must not overlook this crucial point, because of the different framing of the injury – ‘I was born handicapped, I should not have been born, I suffer, I want damages’ in the first case and ‘if I had known my child has a severe genetic problem, I would have terminated the pregnancy and avoid the loss’, the first stressing on pain and suffering of a person and the second focusing on the loss of an informed legal choice. How the action is brought before a court is irrelevant, compared to the undisputed fact that we have a disabled child and we are seeking damages because this child is alive and not dead. This is why, at least I, find it a legal ‘trick’, that actions for wrongful life, of course filed by parents too, are generally disallowed, but actions for wrongful birth are not. What a smart lawyer won’t achieve through one door, she will get from the one right next to the closed one.

This said, choices are immensely important, and choices about the birth of a child even more. The law on informed consent, as strenuous as it has been to develop somehow during the last fifty years, has showed that a choice is something



of value, even unconnected to physical injury as such. The problem is that the usual question of a physician advising a person about her own health so that she takes the risks and her personality is protected is not applicable in wrongful birth/wrongful life actions. In this latter case, choices 'pass through' another human being's death, a being, who certainly did not ask to be conceived or born.

2. Wrongful Birth/Life Actions Today

Wrongful birth actions were first recognized in the US in *Berman v. Allen*.² After *Roe v. Wade*,³ legalizing abortions under certain conditions, the second step seemed rational: if I have the right to an abortion, then negligent genetic counseling deprives me from this right, hence the wrongful birth claim. Negligence here means that the physician either neglected to see a major fetal defect (the usual case: ultrasound 'failure' problems etc), neglected to warn the patient that a certain sterilization procedure may fail, that a particular illness of the pregnant woman may harm the fetus or negligence because a fetus has not been successfully aborted in an abortion procedure.⁴

First note: it is doubtful whether we should accept that the legalization of abortions confers a 'right' on women to abort; at best, this is a solution of an emergency situation and not the exercise of a right.⁵ I compare this to prostitution: it may be 'legal', or 'not criminal', in a sense, in some cases and states, but we would be quite reluctant to declare that there is a right to prostitution, in its classic sense. A decent society, no matter how liberal it may be, should not insist on a right, in its technical sense, to abort a fetus. In Greece, a country notably liberal in the abortion problem, we only say that in some cases, abortion is not punishable by criminal law-and we end the matter there.

Anyway, wrongful birth actions are a fact now, not only in many states of the US, but also in England and in France, as in other countries too. In France, in the famous *Nicholas Perruche* case the Supreme Court accepted the wrongful birth claim for a baby born with severe genetic defects (Nicholas was born deaf, mute and legally blind, as his mother had contracted an undiagnosed rubella infection while pregnant). This decision led to a grave societal resistance, where doctors allied with right-to-life and disability groups and 'raised hell' against the Supreme Court's decision. Obstetricians and gynecologists, who saw their insurance premiums rise vertically, went on a strike, refusing to perform any more prenatal screening tests. The French Parliament-perhaps after the persistent lobbying by the doctor's associations- was quick to respond, as much as it could, to this crisis, with *Loi (law) 2003-303*, 4th March 2002, titled 'Solidarity for handicapped persons'. Art. 1 states that no one may claim to have been harmed by being born. The statute effectively eliminated wrongful life actions, that is, actions filed by



the handicapped person itself, claiming that she suffered damage because she was allowed to be born (at all).

As for the wrongful birth claim, filed by the parents for their own losses, the statute in France allows the action only if the doctor's negligence was particularly severe. Now, why this is important and why this changes the legal principles involved remains to me a mystery. After all, actions for medical negligence have nothing to do with intentional behavior, and to form a cause of action as 'alive' when fault is severe, and 'dead' when negligence is not 'gross' does not sound correct. At least in Greek civil law, this distinction of negligence bears no consequence whatsoever when answering the question of whether a particular cause of action exists.⁶ The central point is whether there has been an illegal act or omission, fault, loss and causal connection between these last two. The French Parliament sought to compromise the opposed positions, and the social turmoil caused, but I think resolved the issue on the wrong point.

Damages for the wrongful birth of a handicapped child have been very troublesome for the courts (a first indication, I think, that 'something is wrong here'). The selection has been: a. damages for medical costs related to pregnancy and birth b. damages for the extraordinary medical expenses attributable to the child's affliction c. damages for the parents' emotional distress for having and raising a severely handicapped child d. damages for the deprivation of the parents' options to terminate the pregnancy (and probably, many other relevant heads of damages). One could start citing court decisions from common and civil law jurisdictions, accepting one form of damages and rejecting another, or even the numerous and equally strong dissents of judges in the same cases, on the very existence of the cause of action, or on the type of damages, which should be awardable and those, which should not be. It has been almost entertaining to read the material on wrongful birth, which, if also joined by the views of legal theorists, results into a picture where every combination seems legitimate and possible but, simultaneously, seen from a different angle, everything sounds almost preposterous.⁷

A major point is, of course, whether, if these actions are disallowed (purely theoretical question, as this does not seem likely), we are going to insulate from liability all physicians engaged in prenatal screening.⁸ If this was the case, I suppose every medical student in the country would seek this specialty right away—a profession where no one is liable for nothing! The rule would also strip away any motive to be careful—at least for those who believe that liability rules make physicians more careful in their jobs.⁹ Perhaps, though, other measures could have this deterrent effect, in cases of negligent genetic counseling, I mean that perhaps we could replace the liability rules as a deterrent tool with other measures. Which could, arguably, also lead to two kinds of medical professionals, those who are liable under the usual legal rules and those who are not, and this is a major concern too.



3. Disability and a decent society

Perhaps, though, other solutions are better to resolve this deep societal and philosophical, and not only legal, debate. Perhaps, initially, we should start re-constructing the institutions, which would help change the views and attitudes of citizens about disability. Because cases of wrongful birth are essentially cases about disability.¹⁰ In a decent community, understanding disability, it would not be a fact that a baby missing one arm, should have been aborted and that, if this fetus had not been aborted, then her mother could file a claim that her personality has been harmed by such a child.¹¹ I understand perfectly that this is a rather 'light' wrongful birth case, as we have seen cases where the medical complications have been so much more severe. But I wonder whether we can make a list, which will have to draw a line, comparing disabilities for which compensation is owed and choice has been harmed and those for which compensation is not owed and choice has not been harmed. It has been several years obstetricians and other related professionals in Greece have been trying to come up with a list like this and as yet, there is no outcome.

Returning to this notion of a decent society, perhaps we should channel our efforts in providing funds to help parents with disabled children and to train our able children in their schools how to deal with the disability question (some good training for adults too would be also quite desirable...). It seems at least a paradox, on one side to promote the Olympic games for the disabled athletes and to constantly seek methods of making the disabled people's lives better (if indeed, we are) and, on the other hand, to award damages when disabled children are born, sending the extremely clear message to everyone concerned, that their lives are not worth living.¹² It is undisputable that this second line of action severely undermines (totally defeats, I believe) the first. And since we are absolutely obliged to choose, the first line of action certainly must not end up being the loser.

Notes:

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1. There is a number of different tort claims described by such terms as 'wrongful birth' or 'wrongful life'. I will not deal here with the cases where a healthy child was born, although they also represent a very interesting legal problem-whether parents can seek damages for the birth of a healthy child.
2. 80 N.J. 421 (1979), reversing *Gleitman v. Cosgrove*, 49 NJ 22, 1967, which had rejected both wrongful birth and wrongful life claims.
3. 410 US 113, 1973.
4. *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (1979), modified 497 Pa. 77, 439 A.2d 110 (1981). (Only) in this type of cases, negligence is mainly unconnected to information and is related to the improper performance of a medical procedure.



5. Even if the usual crux of the wrongful birth action is the deprivation of the right to make an informed decision whether to continue a pregnancy or not, the truth is that this right is founded on the 'right' to abort a fetus.
6. Actually, according to the Greek civil law of damages, the distinction between negligence and intention makes no difference either.
7. For example, read this title: 'Tort Liability for Causing One to be Born, 83 ALR 3d 15, 1978' and then, stand back as a citizen of a decent country, as a member of a close connected community, and think, knowing nothing of the debate, whether this is something for the courts to discuss? (All right, I accept the criticism: where is the decent society? Where is the close connected community? This is, I believe, the real problem).
8. It is true that physicians are liable also under disciplinary and criminal law. But civil liability for medical negligence is, arguably, the most important liability basis.
9. I think that this is correct, that the threat of liability will certainly persuade many physicians to attend more conferences, train better etc, but this has also been debated.
10. It is true that in some jurisdictions wrongful actions also pertain to healthy children, but the main ethical and legal controversy over wrongful birth/life actions has always referred to the birth of unhealthy children.
11. In all three wrongful birth claims in Greece, which have been reported, the baby's problems were missing limbs and/or fingers. As yet, Greece does not recognize the wrongful birth action, no matter how serious the disability is.
12. This is the message sent by the law supporting these actions, as understood by the organizations of people with disability, many judges, lawyers and others (and as I see it too). There are, of course, different views, seeing 'loss' here only in a legal sense (which does not also mean that the child should not be alive), as law is not all-embracing.