

**BURDENED BY LIFE: A BRIEF COMMENT  
ON WRONGFUL BIRTH AND WRONGFUL  
LIFE**

*Brady Begeal\**

INTRODUCTION .....870  
I. ASSESSING DAMAGES AND THE LAW IN NEW YORK .....871  
II. CRITICISM OF WRONGFUL LIFE AND WRONGFUL BIRTH  
    ACTIONS, GENERALLY .....874  
CONCLUSION .....876

---

\* J.D., Albany Law School 2011; B.A., Organizational Communication, Keuka College 2008. Upon graduation, Brady will be working for the firm Coughlin & Gerhart, LLP, in Binghamton, New York.

This article was previously published on the *Albany Government Law Review Fireplace* on March 28, 2011. See Brady Begeal, *Burdened By Life: A Brief Comment on Wrongful Birth and Wrongful Life*, ALB. GOV'T L. REV. FIREPLACE (Mar. 28, 2011), <http://aglr.wordpress.com/2011/03/28/burdened-by-life-a-brief-comment-on-wrongful-birth-and-wrongful-life/>.

## INTRODUCTION

In *Roe v. Wade*,<sup>1</sup> the U.S. Supreme Court held that “[t]he right to privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>2</sup> Over the past several decades, prenatal torts like wrongful birth and wrongful life have developed from the judicially recognized right to have an abortion. Nearly all of the states recognize wrongful birth claims, and four accept wrongful life claims.<sup>3</sup> What do these two actions entail? Although there are many permutations of how either action can arise, and sometimes they carry a different label, a typical fact pattern for both actions goes as follows:

A woman becomes pregnant and begins the typical process for pre-natal care. She goes to the doctor for check-ups and the doctor monitors the pregnancy and guides the expecting mother through each stage. Then, during the pregnancy, a risk that the unborn child will be born with birth defects becomes apparent to the doctor. At some point, the doctor acts negligently in some way, perhaps by a failed diagnosis, failing to proscribe the proper course for the woman to take, proscribing an improper method, or simply failing to warn the mother of the risks of which the doctor is aware. Finally, the woman gives birth, but the baby is born with some kind of severe birth defect or impairment. This is where the two actions diverge.

An action for wrongful birth is brought by the mother. Essentially, she argues that but for the negligence of the doctor, she would have decided to have an abortion and terminate the pregnancy.<sup>4</sup> The mother argues that she has lost a right to which she is entitled to; the right to make an informed decision as to whether or not to have a child with birth defects. Now, since the child has been born—and born with birth defects—the parent or parents demand damages associated with having to raise a disabled child.

An action for wrongful life is also brought by the parents, but it

---

<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 153.

<sup>3</sup> Jillian T. Stein, *Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims*, 40 SETON HALL L. REV. 1117, 1131–33 (2010). Those states that recognize wrongful life are California, Maine, New Jersey, and Washington. Those states that do not recognize wrongful birth are Georgia, Kentucky, Michigan, Missouri, and North Carolina.

<sup>4</sup> *Procanik by Procanik v. Cillo*, 478 A.2d 755, 760 (N.J. 1984).

is brought on behalf of the newborn child.<sup>5</sup> Here, the child argues that had the doctor not been negligent, the child would have been aborted, and that the child has suffered damages for having to live with a disability, rather than never being born at all. Thus, in states that permit actions for wrongful life, they require the infant plaintiff to prove that, but for negligence of defendant, the infant would not have been born.<sup>6</sup>

### I. ASSESSING DAMAGES AND THE LAW IN NEW YORK

One of the major problems raised by these two prenatal torts, aside from the apparent ethical and moral issues, is the difficulty of assessing damages. In an attempt to remedy the difficulty attached to measuring the harm caused by the birth of a disabled child, most states strictly limit the damages plaintiffs can seek in wrongful birth and wrongful life actions. In fact, in all of the states who recognize wrongful life, and the many of the states who recognize wrongful birth, recovery is limited to “special damages.”<sup>7</sup> These damages amount to extraordinary costs associated with raising a child with a severe disability.<sup>8</sup> Since both the state and federal governments have programs that provide funding for families raising a child with a disability, damages will often be offset by this amount, and a plaintiff will only receive special damages in the amount of expenses beyond those covered by government programs. Thus, most states do not allow a mother to recover damages for emotional distress or pain and suffering associated with going through with a pregnancy that she would have otherwise terminated and giving birth to a child that she otherwise would not have had.<sup>9</sup> Nonetheless, some supporters of wrongful birth actions argue that a legally cognizable injury has occurred, for which there should be a full remedy, despite the ethical concerns, and that limiting recovery to special damages is unfair to the plaintiff.<sup>10</sup>

---

<sup>5</sup> Kate Wevers, *Prenatal Torts and Pre-Implantation Genetic Diagnosis*, 24 HARV. J.L. & TECH. 257, 265 (2010).

<sup>6</sup> *Rossi by Rossi v. Somerset OB-GYN Assoc.*, 879 F. Supp 411, 412 (D. N.J. 1994).

<sup>7</sup> Stein, *supra* note 3, at 1131–33; Karen E. Schiavone, *Playing the Odds or Playing God? Limiting Parental Ability to Create Disabled Children Through Preimplantation Genetic Diagnosis*, 73 ALB. L. REV. 283, 325–26 (2009).

<sup>8</sup> Schiavone, *supra* note 7, at 325.

<sup>9</sup> Stein, *supra* note 3, at 1131.

<sup>10</sup> Michael T. Murtaugh, *Wrongful Birth: The Courts' Dilemma in Determining a Remedy for a "Blessed Event,"* 27 PACE L. REV. 241, 250 (2007).

New York does not permit actions for wrongful life,<sup>11</sup> but does recognize claims for wrongful birth.<sup>12</sup> The New York Court of Appeals faced these two claims in *Becker v. Schwartz*.<sup>13</sup> As to wrongful life, the court concluded that “[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to philosophers and the theologians.”<sup>14</sup> However, as to claims for wrongful birth, the court concluded that “[p]laintiffs state causes of action in their own right predicated upon a breach of a duty flowing from defendants to themselves, as prospective parents, resulting in damage to plaintiffs for which compensation may be readily fixed.”<sup>15</sup>

Although New York does recognize an action for wrongful birth, plaintiffs are not permitted to recover for “emotional harm based on the birth of a live infant with physical injuries.”<sup>16</sup> However, a plaintiff alleging wrongful birth may seek damages “for emotional harm suffered as a result of an independent injury.”<sup>17</sup> Thus, in a case where a physician negligently performed a chemical abortion, which caused the mother to have to “decide whether to seek an out-of-state late-term abortion or give birth to a child likely to have congenital defects . . . [s]uch allegations may support a finding of injury independent of the birth of an impaired child.”<sup>18</sup> Legally, this distinction creates a fine line, but the practical result is an enormous limitation on monetary damages.

The New York Court of Appeals just recently decided a case on wrongful birth.<sup>19</sup> In *Foote v. Albany Medical Center Hospital*, plaintiffs, Kristi Foote and Tim Sheridan, gave birth to a boy, Quinton George Sheridan.<sup>20</sup> The child was born with Joubert Syndrome, a condition where the child has defects in the brain

---

<sup>11</sup> *Id.*

<sup>12</sup> *Becker v. Schwartz*, 386 N.E.2d 807, 811–14 (N.Y. 1978).

<sup>13</sup> After the case was decided, many other states adopted the same point of view, recognizing actions for wrongful birth but disallowing actions for wrongful life. See Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 158 (2005).

<sup>14</sup> *Becker*, 386 N.E.2d at 812.

<sup>15</sup> *Id.* at 813.

<sup>16</sup> *Sheppard-Mobley v. King*, 830 N.E.2d 301, 304 (N.Y. 2005).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 305.

<sup>19</sup> *Foote v. Albany Med. Ctr. Hosp.*, 944 N.E.2d 1111 (N.Y. 2011).

<sup>20</sup> *Foote v. Albany Med. Ctr. Hosp.*, No. 4724-05, 2008 WL 2310948, at \*1 (N.Y. Sup. Ct. June 5, 2008).

that cause severe developmental and behavioral disabilities.<sup>21</sup> During the pregnancy, the mother had seen several doctors at different medical facilities.<sup>22</sup> Tests and sonograms were performed, and although a brain abnormality was detected early on, the mother was never made aware of the defect by subsequent doctors and medical staff that treated her.<sup>23</sup> Plaintiffs commenced an action for wrongful birth, alleging that had they been warned of this brain disorder earlier, they would have elected to terminate the pregnancy.<sup>24</sup> However, by the time the mother was informed of the disorder, she was more than 6 months pregnant and therefore legally denied that option.<sup>25</sup>

Plaintiffs sought damages for “the extraordinary expenses involved in caring for their severely disabled child, including medical treatment and supplies, surgical treatment, physical therapy, vision therapy, occupational therapy, a home health aide, and special educational services.”<sup>26</sup> Defendants moved for summary judgment, arguing that there were no extraordinary expenses because expenses are, and will continue to be, covered by certain government programs.<sup>27</sup> A medical expert presented a “life care plan” indicating that the government agencies would provide a “basic floor of opportunity,” but for the child to have “optimal care,” out-of-pocket spending by the parents would be required.<sup>28</sup> The Supreme Court granted defendants’ motion for summary judgment, but the Appellate Division reversed, holding that there was a triable issue of fact as to whether raising the child would require extraordinary expenses.<sup>29</sup>

Hearing the appeal, the Court of Appeals affirmed the Appellate Division. It held that “a question of fact exists whether there is a difference between the resources provided by government programs and the extraordinary medical and other treatment or services necessary for the child during minority.”<sup>30</sup> While this holding has little effect on the substantive wrongful birth law, it does seem to broaden the availability of damages available. Essentially, the court pronounced that wrongful birth

---

<sup>21</sup> *Id.* at \*1–2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at \*2.

<sup>25</sup> *Id.*

<sup>26</sup> *Foot v. Albany Med. Ctr. Hosp.*, 944 N.E.2d 1111, 1112 (N.Y. 2011).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1113.

claims are available to parents even where government programs are paying and will continue to pay for their additional costs. Thus, the court has seemed to open the door to recovering costs associated with providing a disabled child with life opportunities *above* the “basic floor of opportunity” covered by the government.

## II. CRITICISM OF WRONGFUL LIFE AND WRONGFUL BIRTH ACTIONS, GENERALLY

Not surprisingly, controversy has surrounded wrongful life and wrongful birth actions, in both a legal and ethical sense. Because these actions require assessing not the value of a life, but the value of a life that is “wrongful,” courts have had particular difficulty. In such cases, courts must perform an “evaluation not only of law, but also of morals, medicine, and society.”<sup>31</sup> It can be argued that these two actions amount to nothing more than “a community pronouncement, via a government institution, that an individual’s life with impairments is worse than nonexistence, or that a reasonable person would have aborted a now-living child.”<sup>32</sup>

Both actions by their very nature pinch an ethical nerve and, according to the courts, one more so than the other. Most courts and state legislatures agree that wrongful life actions, more so than wrongful birth actions, are difficult to swallow.<sup>33</sup> It boils down to the inherent nature of the wrongful life action: “the assertion by [the] infant plaintiffs [is] not that they should not have been born without defects, but that they should not have been born at all. The essence of the infant’s cause of action is that it’s very life is wrongful.”<sup>34</sup> The typical tort remedy is to place the plaintiff in the position he would have been had the defendant not been negligent. In a wrongful life action, had the defendant not been negligent, the plaintiff never would have been born. This is one reason why courts have overwhelmingly found wrongful life actions to be unpalatable, as compared to wrongful birth actions.

The prevailing ethical argument against legal recognition of wrongful life and wrongful birth actions is that it condones human eugenics.<sup>35</sup> By recognizing these actions as legitimate, the

---

<sup>31</sup> *Schroeder v. Perkel*, 432 A.2d 834, 841 (N.J. 1981).

<sup>32</sup> Hensel, *supra* note 13, at 173.

<sup>33</sup> Wevers, *supra* note 5, at 265.

<sup>34</sup> *Procanik by Procanik v. Cillo*, 478 A.2d 755, 760 (N.J. 1984).

<sup>35</sup> Hensel, *supra* note 13, at 260–61; Stein, *supra* note 3, at 1117.

courts and the state legislatures are approving the notion that society is better off without people with disabilities. It is precisely for this reason that some states have rejected wrongful birth and wrongful life actions.<sup>36</sup> Preventing “lawsuits leading to eugenic abortions of deformed or unwanted children”<sup>37</sup> has been held to be a legitimate state interest and “reflect[s] the state’s view that a handicapped child should not be deemed better off dead and of less value than a ‘normal’ child.”<sup>38</sup> Furthermore, statutes eliminating these causes of action have been said to “prevent the practice of medicine . . . from becoming coerced into accepting eugenic abortion as a condition for avoiding . . . wrongful birth lawsuits.”<sup>39</sup> This fear of the legislature is understandable. Recognition of these causes of action could encourage physicians to recommend eugenic abortions if there is even a minuscule chance the fetus is developing with an impairment, so as to avoid the possibility of legal liability.<sup>40</sup> This could ultimately lead to the elimination of the genetically impaired.<sup>41</sup>

Another criticism of wrongful life and wrongful birth actions is that these actions seem to be inherently discriminatory towards the disabled.<sup>42</sup> These actions stand at odds with the federally recognized rights of citizens with disabilities to live free from discrimination and on equal terms with those who are not disabled. Landmark humanitarian legislation like the Americans with Disabilities Act represents the commitment of this nation to ending discrimination against individuals with disabilities. These ideals are undermined by the legal recognition of claims like wrongful birth and wrongful life.<sup>43</sup> When it comes to a claim by a newborn for wrongful life—where the injury caused by the doctor’s negligence is having to live with a disability, rather than

---

<sup>36</sup> *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 819–21 (Pa. Super. Ct. 1993); *see also Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13–15 (Minn. 1986).

<sup>37</sup> *Dansby*, 623 A.2d at 821.

<sup>38</sup> *Id.* at 820.

<sup>39</sup> *Jenkins v. Hospital of Medical College of Pennsylvania*, 585 A.2d 1091, 1101 (Pa. Super. Ct. 1991). *See Darpana M. Sheth, Better Off UnBorn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans With Disabilities Act*, 73 TENN. L. REV. 641, 642 (2006). *See also Stein, supra* note 3, at 1138 (according to one study, eighty percent of babies prenatally diagnosed with Down Syndrome are aborted).

<sup>40</sup> *Stein, supra* note 3, at 1138.

<sup>41</sup> *Id.*

<sup>42</sup> *Sheth, supra* note 39, at 642.

<sup>43</sup> *Stein, supra* note 3, at 141.

not living at all—the above conclusion seems nearly inescapable.<sup>44</sup> Even actions for wrongful birth seem to involve discounting the value of human life with a disability.<sup>45</sup>

#### CONCLUSION

Parents undoubtedly face daunting emotional and financial burdens when they raise a child who has a disability. However, allowing an action for wrongful birth or wrongful life is not the answer. These claims encourage eugenic abortions, by both parents and by medical providers alike. For someone who is actually living life with a disability, recognition of these causes-of-action must seem disrespectful and morally reprehensible, if not utterly revolting. While many courts and state legislatures, like New York, have limited the damages that can be sought by plaintiffs, this is not enough. Instead, state legislatures should reevaluate this line of prenatal torts, and send a message that respects those living with disabilities, and encourages life. Alternative routes of compensation for parents, such as increased funding for those parents so that out-of-pocket expenses are minimized, should be considered. Such an approach would be a better public policy alternative than permitting lawsuits that carry significant eugenic and discriminatory implications.

---

<sup>44</sup> *Id.*

<sup>45</sup> Sheth, *supra* note 39, at 648.