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Torts

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Torts

Torts; wrongful life actions

Civil Code §43.6 (new).

AB 267 (McAlister); STATS. 1981, Ch 331

In *Curlender v. Bio-Science Laboratories*,¹ the California Court of Appeal held that a wrongful life cause of action² exists on behalf of a child born with a genetic defect³ if the birth can be traced directly to a breach of a legal duty to adequately inform the prospective parents of the facts necessary for an intelligent choice not to become parents.⁴ Existing case law also allows the parents a cause of action against a physician when malpractice results in the birth of a healthy child.⁵ The defendant is allowed to offset the damages by an amount equal to the benefit a child would bring to the parents and the amounts chargeable to the parents as a result of their failure to mitigate the defendant's losses.⁶ Although existing case law remains inconclusive on third party liability for wrongful life,⁷ Chapter 331 provides that the failure or refusal of the parents to prevent the live birth of the child will not be a defense in any action against a third party or be considered in determining the damages.⁸ Moreover, to nullify dictum in *Curlender* which could allow a genetically impaired child a cause of action against its parents,⁹ Chapter 331 prohibits a cause of action against the parents based upon the claim that the child should not have been conceived¹⁰

1. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

2. *Id.* at 817, 165 Cal. Rptr. at 481 (court interpretation of "wrongful life").

3. *See also id.* at 825, 165 Cal. Rptr. at 486 (wrongful life cause of action based upon illegitimacy not recognizable at law in California); *Stills v. Gratton*, 55 Cal. App. 3d 698, 705-06, 127 Cal. Rptr. 652, 656-57 (1976).

4. *See* 106 Cal. App. 3d at 811, 165 Cal. Rptr. at 477. *But see* *Turpin v. Sortini*, 119 Cal. App. 3d 69, 174 Cal. Rptr. 128, 129-33 (1981).

5. *See* 106 Cal. App. 3d at 817, 165 Cal. Rptr. at 481; 55 Cal. App. 3d 698, 707-08, 127 Cal. Rptr. 652, 657-59 (citing *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974)); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 312-13, 59 Cal. Rptr. 463, 469-70 (1967).

6. *See* 55 Cal. App. 3d 698, 705-09, 127 Cal. Rptr. 652, 656-59; 251 Cal. App. 2d 303, 318-26, 59 Cal. Rptr. 463, 473-78.

7. *Compare* *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) *with* 119 Cal. App. 3d 690, 174 Cal. Rptr. 128.

8. *See* CAL. CIV. CODE §43.6(b).

9. *See* 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.

10. *See* CAL. CIV. CODE §43.6(c) (definition of "conceived"). *See also id.* §29 (unborn child deemed existing person so far as may be necessary for its interests in the event of its subsequent birth).

or, if conceived, should not have been born alive.¹¹

COMMENT

The possibility of creating a cause of action for wrongful life in the child against the parents has stirred controversy in tort law.¹² In *Curlender*, the Second District Court of Appeal emphasized that allowing a cause of action for wrongful life would partially recompense the handicapped child for his or her pain and suffering and any special pecuniary loss resulting from the impaired condition.¹³ The Court in articulating the role of the law in shaping social welfare policy in this context tacitly recognized the need for genetic counseling in family planning.¹⁴ These arguments apparently have yielded to the notion that no decision should be made that encourages either family discord¹⁵ or abortions intended to avoid liability or thwart any defense or reduction in damages in actions against third parties.¹⁶ This also seems consistent with the United States Supreme Court interpretation of the due process clause establishing the freedom of a couple to marry, establish a home, and bring up children as a fundamental human right.¹⁷

In accord with this interpretation of the due process clause, the Fifth District California Court of Appeal has recognized the right of otherwise childless parents to decide to risk giving birth to a handicapped child by refusing to allow a minor to sue the parents or third parties for genetic defects.¹⁸ In *Turpin v. Sortini*,¹⁹ the Court noted that the determination of damages in a wrongful life action would require measuring the value of life with defects against "the nonexistence of life itself,"²⁰ a comparison that is more philosophical than legal²¹ and runs counter to the belief that a value cannot be placed upon a human life.²² Furthermore, the Court feared that allowing a child to bring a suit against the parents or third parties would open enormous areas of litigation com-

11. See *id.* §43.6(a).

12. See, e.g., *Zepeda v. Zepeda*, 41 Ill. App. 3d 240, 190 N.E.2d 849 (1963); *Tedeschi, Tort Liability for "Wrongful Life,"* 7 J. FAM. L. 465 (1967); *Liability to Bastard for Negligence Resulting in His Conception*, 18 STAN. L. REV. 530 (1966); *Ploscowe, An Action for "Wrongful Life,"* 38 N.Y. U. L. REV. 1078 (1963).

13. See 106 Cal. App. 3d at 827-32, 165 Cal. Rptr. at 487-90.

14. See *id.* at 826-27, 165 Cal. Rptr. at 486-87. See generally *Tedeschi, Tort Liability for "Wrongful Life,"* 7 J. FAM. L. 465 (1967).

15. See *Ploscowe, An Action for "Wrongful Life,"* 38 N.Y.U. L. REV. 1078, 1080 (1963).

16. See 55 MINN. L. REV. 58, 59 (1970).

17. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

18. See *Turpin v. Sortini*, 119 Cal. App. 3d 690, 697-98, 174 Cal. Rptr. 128, 133 (1981).

19. 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981).

20. See 119 Cal. App. 3d at 693, 174 Cal. Rptr. at 130.

21. See *id.* at 693-97, 174 Cal. Rptr. at 130-32.

22. See *id.*

pounded by the ill-defined elements of the proposed tort.²³ Since Chapter 331 is silent on the issue of third party liability for failing to adequately inform prospective parents of the possibility of parenting a genetically defective child,²⁴ California case law remains inconclusive on this aspect of third party liability for wrongful life.

23. *See id.* at 696, 174 Cal. Rptr. at 132.

24. *See generally* CAL. CIV. CODE §43.6.

Torts; defamation—child abuse

Civil Code §48.7 (new).

AB 42 (Young); STATS. 1981, Ch 253

Support: Attorney General; Department of Social Services; California Parent Teachers Association; National Organization for Women.

Chapter 253 expressly prohibits a person charged with child abuse¹ from bringing a civil defamation² action for libel³ or slander⁴ against the minor, the minor's parents or guardians, or any witness while charges of abuse are pending before the trial court.⁵ Although civil defamation actions based on statements made in judicial proceedings usually are foreclosed because of the absolute privilege of judicial proceedings,⁶ Chapter 253 clarifies this area of the law.⁷ The prohibition applies to civil defamation actions based on statements made by the minor, the minor's guardian or parents, or any witness that are reasonably calculated to promote the prosecution of the criminal charges.⁸ In addition, Chapter 253 provides for the tolling of the applicable statute of limitations⁹ while criminal charges of abuse are pending before a

1. *See* CAL. PENAL CODE §11165(g) (definition of child abuse).

2. *See* CAL. CIV. CODE §44 (definition of defamation). *See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §§271-333 (8th ed. 1974) [hereinafter cited as WITKIN]; 6 CAL. JUR. 3d *Assault* §§128-310 (1973) [hereinafter cited as *Assault*].

3. *See* CAL. CIV. CODE §45 (definition of libel); WITKIN, *supra* note 2, §§279-281; *Assault*, *supra* note 2, §129.

4. *See* CAL. CIV. CODE §46 (definition of slander); WITKIN, *supra* note 2, §288; *Assault*, *supra* note 2, §129.

5. CAL. CIV. CODE §48.7(a).

6. *See id.* §47(2)(2). *See also* *Imig v. Ferrar*, 70 Cal. App. 3d 48, 55, 138 Cal. Rptr. 540, 543 (1977) (absolute privilege allowed for statements made preliminary to judicial proceedings); *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 867, 100 Cal. Rptr. 656, 660 (1972) (absolute privilege allowed for preliminary conversations between a prospective witness and an attorney); *King v. Borges* 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414, 417 (1972) (absolute privilege allowed for communications to a public agency designed to prompt official action by the agency).

7. *See* CAL. CIV. CODE §48.7.

8. *Id.* §48.7(a).

9. *See* CAL. CIV. PROC. CODE §340(3) (there is a one year statute of limitations on libel and slander actions).

trial court.¹⁰ The criminal charges are not considered to be pending for this purpose, however, after criminal charges of abuse have been dismissed, a judgment pronounced, or during an appeal from a judgment.¹¹ Furthermore, a pleading in response to a complaint for defamation need not be filed until thirty days after the criminal charges of abuse are no longer pending before the trial court.¹²

At the commencement of a civil defamation action based on a statement that the plaintiff committed an act of child abuse, the complaint must state that the action is not barred by the provisions of Chapter 253.¹³ Failure to include the statement will be grounds for demurrer.¹⁴ In addition, Chapter 253 provides that the prevailing party is entitled to attorney's fees and costs if a demurrer is sustained on the basis that the complaint violates the provisions of Chapter 253.¹⁵ Finally, when a minor, the minor's parents or guardians, or a witness informs a prosecutor of the filing of a complaint that may come within the prohibition of Chapter 253, the prosecutor must provide the informing party with a copy of the provisions prohibiting the filing of a defamation action while the criminal charges are pending before the trial court.¹⁶

10. CAL. CIV. CODE §48.7(a).

11. *Id.*

12. *Id.* §48.7(b).

13. *Id.* §48.7(c).

14. *Id.*

15. *Id.* §48.7(d).

16. *Id.* §48.7(e).

Torts; suits by individuals to enjoin violations of civil rights

Civil Code §52 (amended).

AB 2243 (Waters); STATS. 1981, Ch 521

Support: Friends Committee on Legislation

The Unruh Civil Rights Act,¹ enacted by the California Legislature in 1959,² guarantees an individual's right to full and equal accommodations, advantages, facilities, privileges, or services in business establishments.³ The Ralph Civil Rights Act of 1976⁴ provides that all persons have a right to be free from violence, or intimidation by threat of vio-

1. *See* CAL. CIV. CODE §51.

2. *See* CAL. STATS. 1959, c. 1866, §1, at 4424.

3. CAL. CIV. CODE §51. *See also id.* §51.5 (prohibits a business establishment from discriminating against any person because of race, creed, religion, color, national origin, or sex).

4. *See id.* §51.7.

lence, committed against their persons or property because of race, color, religion, ancestry, national origins, political affiliation, sex, or position in a labor dispute.⁵ Existing law allows the Attorney General or any district attorney or city attorney to bring a civil action for preventive relief whenever there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance that denies the full enjoyment of the rights secured under these acts.⁶ Preventive relief may include a permanent or temporary injunction, temporary restraining order, or other order directed against the person or persons responsible for the pattern or practice of resistance.⁷ Chapter 521 supplements existing law by allowing the aggrieved person whose civil rights have been violated to bring a civil action for preventive relief.⁸

COMMENT

Prior to the enactment of Chapter 521, it was not clear whether the individual whose civil rights had been violated could bring an action for preventive relief because existing law only provided that the Attorney General, a district attorney, or a city attorney could bring this type of action.⁹ The wording of this provision of existing law, and the absence of any language implying a right of an individual to bring suit for preventive relief, led to the conclusion that an aggrieved individual could not bring suit for preventive relief.¹⁰ The California Supreme Court, however, in *Burks v. Poppy Construction Co.*,¹¹ allowed an individual to seek injunctive relief under the Unruh Civil Rights Act even though that act does not expressly provide for injunctive relief.¹² Chapter 521 resolves this conflict by expressly permitting an aggrieved person whose civil rights have been violated to bring suit for preventive relief.¹³

5. *Id.*

6. *Id.* §52(c).

7. *Id.*

8. *Id.*

9. Compare CAL. STATS. 1978, c. 1212, §1, at 3927 (amending CAL. CIV. CODE §52) with *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

10. See CAL. STATS. 1978, c. 1212, §1, at 3927; 1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION 296 (4th ed. 1972) (where a statute creates a right and also provides the remedy, the remedy is exclusive; it implies the negation of any other remedy).

11. 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

12. See *id.* at 470, 370 P.2d at 317, 20 Cal. Rptr. at 613.

13. See CAL. CIV. CODE §52(c).

Torts; agricultural nuisance

Civil Code §3482.5 (new).

AB 585 (Thurman); STATS. 1981, Ch 545

Support: Department of Food and Agriculture; California Chamber of Commerce

Existing law defines a nuisance as anything that is injurious to health, offensive to the senses, or interruptive of the free use and enjoyment of property, navigable bodies of water, or public parks, squares, streets, or highways.¹ Chapter 545 represents an attempt by the legislature to prevent nuisance suits against established agricultural operations that result in the removal of agricultural land from production.² Chapter 545 provides that no agricultural operation³ will become a public or private nuisance because of a change in the conditions of the locality⁴ if it has been in operation for more than three years and was not a nuisance at the time it was established.⁵ Moreover, Chapter 545 requires that the agricultural operation must be conducted for commercial purposes and in a manner consistent with proper and accepted standards of similar operations in the same locality.⁶ Chapter 545 does not apply to agricultural operations or appurtenances that obstruct the customary free passage or use of navigable waters or any public park, square, street, or highway,⁷ nor does it invalidate state-wide provisions that regulate agriculture by defining specific activities or appurtenances as a nuisance.⁸ Finally, Chapter 545 prevails over contrary provisions of any political subdivision.⁹

1. See CAL. CIV. CODE §3479. See also *id.* §§3480, 3481 (definition of public and private nuisances); CAL. PENAL CODE §§372, 373a (person committing a public nuisance is guilty of a misdemeanor).

2. See Assemblyman John E. Thurman, Newsletter, Agricultural Nuisance Suits Discouraged Under New Law, Feb. 19, 1981.

3. See CAL. CIV. CODE §3482.5(e) (agricultural activity, operation, facility, or appurtenance shall include, but not be limited to, the production, cultivation, growing, and harvesting of any agricultural commodity including timber, viticulture, apiculture, horticulture, dairying and the raising of livestock, fur-bearing animals, fish, poultry, or any practices performed by a farmer or on a farm including preparation for or delivery to market, storage, or carrier).

4. Compare *id.* §3482.5(a) with *Gelfand v. O'Haver*, 33 Cal. 2d 218, 220-21, 200 P.2d 790, 791-92 (1948) (plaintiff may establish unnecessary method of operation other than showing a failure to follow methods usually employed in same locality).

5. See CAL. CIV. CODE §3482.5(a).

6. See *id.*

7. See *id.* §3482.5(b).

8. See *id.* §3482.5(c). See generally CAL. AGRIC. CODE §§5401, 5904 (infested premises, plants); CAL. FISH & GAME CODE §6456 (water constituting a nuisance); CAL. HEALTH & SAFETY CODE §§2271, 2272 (mosquitos and other insects; manner of abatement), 14875 (weeds), 14880 (nuisance); CAL. WATER CODE §§13000-13951 (Porter-Cologne Water Quality Control Act).

9. See CAL. CIV. CODE §3482.5(d).