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Wrongful Life: New Cause of Action Recognized Based Upon Medical Malpractice Theory


I. INTRODUCTION

While numerous courts have recognized the right of parents to maintain a cause of action for wrongful birth grounded in medical

1. E.g., Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (failure to diagnose pregnant mother's rubella and to inform her of the possible dangers to the fetus); Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981) (failure to diagnose cystic fibrosis in first born child in time to prevent second pregnancy or to timely abort); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (failure to inform mother of availability of amniocentesis procedure which could determine that child, if born, would suffer from Down's Syndrome so that fetus could be aborted); Becker v. Schwartz, 46 N.Y.2d 401, 404 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (failure to advise of the availability of amniocentesis to determine whether fetus would be born with Down's Syndrome); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981) (negligent performance of vasectomy and abortion procedures resulting in birth of child with genetic disease, neurofibromatosis); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (failure to diagnose pregnant mother's rubella and advise of the attendant risk to the fetus); Dumer v. Saint Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (failure to diagnose pregnant mother's rubella and advise of the attendant risk to the fetus).

2. "Wrongful birth" actions are those brought by the parents of children against physicians or other health care providers for the negligent failure to inform the parent, prior to conception or birth of the child, of the likelihood that the child would be conceived or born with genetic defects so that the conception could have been avoided or the pregnancy terminated. "Wrongful life" actions are brought by the child's parents or by a guardian ad litem on the child's behalf and are based upon the same negligence as the parents' cause of action for "wrongful birth." Trotzig, The Defective Child and the Actions for "Wrongful Life and Wrongful Birth", 14 Fam. L.Q. 15 (1980); Note, On Determining Liability for "Wrongful Life": Curlander v. Bio-Science Laboratories—A Step in the Right Direction?, 17 New Eng. L. Rev. 213, 213 n.1 (1981).

Historically a great deal of confusion has existed regarding the use of the terms, "wrongful birth" and "wrongful life," because of the wide range of factual situations which have been characterized as wrongful life actions. One
malpractice, the same courts have steadily refused to recognize a child's right to maintain a parallel cause of action for wrongful life. Recently, in Turpin v. Sortini, the California Supreme Court became the first high court of any state to recognize a child's right to maintain a wrongful life action based on medical malpractice. The action is brought by either the parents or a guardian ad litem on behalf of the child against a physician or other health care provider for negligently failing to inform the child’s parents of the possibility of conceiving or bearing a child afflicted with a genetic defect, thus preventing them from avoiding the pregnancy.

commentator has suggested that the term “wrongful life” has become so unintelligible that it should be discarded and replaced with the term “genetic malpractice.” Note, A Preference for Non-existence: Wrongful Life and a Proposed Tort of Genetic Malpractice, 55 S. CAL. L. REV. 477, 491 (1982). Another commentator has approached the terminology problem by creating four categories which encompass the various distinctive factual situations that have at one time or another been considered to be “wrongful life” actions. The first of these, “wrongful pregnancy,” consists of those cases where the parents of a healthy child bring suit against a physician for the birth of an unwanted child due to negligent sterilization or abortion. The second, “wrongful birth,” consists of those cases where parents bring an action against a physician or other health care provider for negligently failing to inform them of the risk of birth defects to a potential child in time to avoid conception or to terminate the pregnancy. The third, “dissatisfied life,” consists of cases brought by a child against a parent or the state for negligently allowing the status of illegitimacy to be conferred upon him or her. The fourth, “wrongful life,” consists of those actions brought by a child against a physician or other health care provider for negligently failing to inform his or her parents of the likelihood that he or she would be conceived or born with a genetic defect so that the conception could have been avoided or the pregnancy terminated. Comment, “Wrongful Life”: The Right Not To Be Born, 54 Tul. L. REV. 480, 483-87 (1980).


6. Preconception genetic counseling and testing and postconception testing are now available to determine potential and actual genetic irregularities in a couple’s offspring. Factors indicative of potential fetal risks include advanced maternal age; previously afflicted children or a family history of genetic disease; racial background, e.g., Tay-Sachs disease and sickle cell anemia, explo-
through birth control or sterilization, or, in a case where the negligence follows conception, avoiding the birth through abortion. Although the Turpin court recognized the wrongful life action and availability of special damages for the extraordinary expenses necessary to treat the child’s hereditary ailment, the court specifically rejected any recovery of general damages, including damages for physical and mental pain and suffering.\(^7\)

This four-to-two decision resolved a conflict between the second and fifth districts of the California Court of Appeal. The second district decision in Curlander v. Bio-Science Laboratories,\(^8\) had recognized a child’s cause of action for wrongful life based upon medical malpractice,\(^9\) but in Turpin v. Sortini,\(^10\) the fifth district

\(^1\) See also Capron, Tort Liability in Genetic Counseling, 79 colum. L. Rev. 618 (1979); Shaw, Genetically Defective Children: Emerging Legal Considerations, 3 Am. J.L. & Med. 333, 334-36 (1977); Note, Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling, 87 Yale L.J. 1488, 1490-96 (1978).


rejected the *Curlender* court's rationale. The California Supreme Court concluded that the court of appeal decision in *Turpin* should be vacated and that the trial court's dismissal should be reversed and the case remanded for further action.\(^{11}\) However, the high court refused to adopt fully the rationale of the *Curlender* court regarding the recognition of a wrongful life action\(^{12}\) or regarding the kinds of damages that should be awarded.\(^{13}\)

In resolving the conflict between the lower courts, the California Supreme Court constructed a theory of wrongful life that was based upon medical malpractice,\(^{14}\) drawing upon traditional theories of tort liability, current commentary of legal scholars concerning wrongful life actions, and recent decisions having a bearing upon the case. This Note analyzes *Turpin* in light of the traditional tort elements of duty, breach, causation, and damages. Consideration shall also be given to current policy arguments both supporting and opposing recognition of a cause of action for wrongful life. It will be shown in light of these considerations that the court properly found that a cause of action should lie for wrongful life based upon medical malpractice and that monetary damages are an appropriate remedy for a plaintiff-child. It will be further shown, however, that the court did not decide correctly in refusing to allow general damages to a plaintiff-child for being born impaired as opposed to not being born at all and in limiting the damages recoverable to extraordinary expenses necessary to treatment of the hereditary ailment.

II. THE FACTS

On September 24, 1976, Hope Turpin, at the time the only child of James and Donna Turpin, upon recommendation of her pediatrician was taken to the Leon S. Peters Rehabilitation Center at the Fresno Community Hospital to undergo an evaluation of a possible hearing defect.\(^{15}\) Dr. Adam J. Sortini, a licensed specialist in the diagnosis and treatment of hearing and speech defects, and other persons at the hospital examined, tested, and evaluated Hope's hearing, subsequently informing her pediatrician that her hearing was within normal limits.\(^{16}\)

Slightly more than a year later, on October 15, 1977, the Turpins learned, following a second examination and diagnoses undertaken by other hearing specialists, that Hope had been totally deaf.

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\(^{11}\) *Turpin*, 31 Cal. 3d at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

\(^{12}\) Id. at 231, 643 P.2d at 960-61, 182 Cal. Rptr. at 343-44.

\(^{13}\) Id. at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

\(^{14}\) Id. at 229-30, 643 P.2d at 959-60, 182 Cal. Rptr. at 342-43.

\(^{15}\) Id. at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339.

\(^{16}\) Id.
from the time of birth as the result of an hereditary ailment. 17 Prior to this second evaluation of Hope's hearing and to their learning of the probability that any of their offspring would inherit the same hearing defect, the Turpins conceived a second child in December 1976. 18 Joy Turpin was born on August 23, 1977, and suffers from the same hereditary deafness as Hope. 19 It was averred in the Turpin's complaint that Joy would not have been conceived had they known of Hope's hereditary deafness prior to the time Joy was conceived. 20

A complaint joining four causes of action brought by James, Donna, Hope, and Joy Turpin was filed against Sortini, the rehabilitation center, the hospital, and "various Does." 21 Of the four causes of action, only the second cause, brought on behalf of Joy, was before the California Supreme Court on appeal. This cause of action sought

(1) general damages for being "deprived of the fundamental right of a child to be born 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 will incur during her lifetime as a result of her hearing impairment. 22

The defendants demurred to Joy's complaint and "after briefing and argument the trial court sustained the demurrer without leave to amend." 23 Subsequently, the California Court of Appeal directed the entry of a judgment dismissing Joy's cause of action in the trial court so that the appellate court could consider the issue of whether or not Joy's allegations stated a cause of action. 24

III. COURT OF APPEAL DECISION

The California Court of Appeal, Fifth District, characterized Joy Turpin's complaint as a wrongful life action in which it was alleged

17. Id. at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id. The first cause of action was brought on behalf of Hope to recover for harm resulting from the delay in proper diagnosis of her condition. The third and fourth causes of action sought, respectively, special damages on behalf of James and Donna for the support and medical needs of Joy to the age of majority; and general damages for emotional distress resulting from rearing and caring for a child who is totally deaf.
23. Turpin, 31 Cal. 3d at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.
24. Turpin v. Sortini, 119 Cal. App. 3d 690, —, 174 Cal. Rptr. 128, 129 n.1 (1981). The record of the trial court contained no entry of a judgment of dismissal and the order sustaining the demurrer was nonappealable. Therefore, the trial court was ordered to enter a judgment of dismissal so the appeal could be treated as if it came from the judgment.
that the defendants' negligence in failing to properly diagnose the hereditary deafness of her older sister, Hope, resulted in Joy's being "'deprived of the fundamental right of a child to be born as a whole functional human being without total deafness . . . ."25 The sole issue considered by the court was whether Joy's allegations stated a cause of action.26 By a two-to-one majority, the court held that an impaired, but living, child has no cause of action for the injury of birth.27

In determining that no cause of action had been stated, the court of appeal rejected the prior decision of the California Court of Appeal, Second District, in *Curlender*.28 In that case, a cause of action for wrongful life was recognized based upon the negligent failure to inform prospective parents of facts needed by them to make a conscious choice not to become parents.29 In addition, the *Curlender* court found that such a child is entitled to recover damages for the pain and suffering which result from the impaired condition and any special pecuniary loss, including special medical care costs not recovered by the parents in their separate wrongful birth action.30

In *Turpin*, the court of appeal refused to follow the *Curlender* decision in recognizing a wrongful life action and in allowing damages because: (1) the criteria for changing a longstanding rule of law had not been met;31 (2) the weight of authority was totally against allowing recovery;32 (3) the damages alleged were not cognizable at law because they could not be measured;33 (4) recognition of the cause of action would be contrary to public policy which places a special premium upon human life;34 (5) recognition would spawn litigation opening up new areas of claims the nature and extent of which could not be predicted;35 (6) it would be inconsistent to hold an illegitimate birth did not result in injury, but a physically impaired birth did;36 (7) recognition could interfere with the right of parents to decide whether or not to risk having children with impairments rather than remaining childless;37 (8) recognition is not a necessary or logical extension of *Roe v.*

26. Id.
27. Id. at 690, 174 Cal. Rptr. at 128.
28. Id. at —, 174 Cal. Rptr. at 129.
30. Id. at 831, 165 Cal. Rptr. at 489.
32. Id. at —, 174 Cal. Rptr. at 131-32.
33. Id. at —, 174 Cal. Rptr. at 129-31.
34. Id. at —, 174 Cal. Rptr. at 131.
35. Id. at —, 174 Cal. Rptr. at 132.
36. Id.
37. Id.
Wade; and, (9) the right of an impaired but living child to sue for the injury of birth is better left to legislative determination.

IV. THE SUPREME COURT DECISION

The California Supreme Court recognized that Joy Turpin's wrongful life claim was presented as a medical malpractice action using generally applicable common law tort principles. The court noted the elements of a medical malpractice action in California and determined that it was reasonably foreseeable that the defendants' failure to discover Hope Turpin's hereditary ailment would directly affect her parents and their potential offspring. Additionally, the court noted that the defendants had not contended that they did not owe a duty of care either to Joy or to her parents.

Finding the plaintiff's injury to be legally cognizable, the court rejected the appellate court's analysis by saying that it was inaccurate to suggest that California's public policy established as a matter of law that under all circumstances impaired life is preferable to nonlife. The court noted that in California all adult persons have a fundamental right to control whether ordinary or extraordinary means should be used to sustain their lives. Additionally, the court found that while an unborn child in a wrongful life case cannot make a decision as to the relative value of life versus death, the law accords parents the right to protect the unconceived or unborn child's interests. The court said:

Thus, when a defendant negligently fails to diagnose a hereditary ailment, he harms the potential child as well as the parents by depriving the parents of information which may be necessary to determine whether it is in

38. 410 U.S. 113 (1973). See also Turpin, 119 Cal. App. 3d at 174 Cal. Rptr. at 133.
39. Id.
40. Turpin, 31 Cal. 3d at 229, 643 P.2d at 959, 182 Cal. Rptr. at 342.
41. Id. at 229, 643 P.2d at 960, 182 Cal. Rptr. at 343.
42. Id. at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
43. Id.
44. Id. at 231-33, 643 P.2d at 345-46.
45. Id. at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345. The court cited CAL. HEALTH AND SAFETY CODE § 7186 (West Supp. 1982). Recognizing that other jurisdictions have come to the same conclusion, the Turpin court cited to Matter of Quinlan, 70 N.J. 10, 38-42, 355 A.2d 547, 662-64 (1976) (decision by patient to permit a noncognitive, vegetative existence to terminate by natural forces was a valuable incident of her constitutional right of privacy which could be asserted on her behalf by her guardian) and Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 737-45, 370 N.E.2d 417, 423-27 (1977) (guardian ad litem could decide that not treating a resident suffering with myeloblastic monocytic leukemia was in the best interest of the incompetent resident).
46. Turpin, 31 Cal. 3d at 233-34, 643 P.2d at 962, 182 Cal. Rptr. at 345.
the child's own interest to be born with defects or not to be born at all.\textsuperscript{47}

The court, however, specifically rejected the \textit{Curlender} analysis as ignoring the essential nature of the defendant's alleged wrong and obscuring the difference between an ordinary prenatal injury and a wrongful life action by focusing on the plaintiff's condition after birth to measure the defendants' liability.\textsuperscript{48} The court also departed from \textit{Curlender} by limiting a plaintiff-child's recovery to special damages.\textsuperscript{49} The court concluded that a "reasoned, non-arbitrary award of general damages is simply not obtainable"\textsuperscript{50} and that monetary damages would not meaningfully compensate the plaintiff for the loss of opportunity not to be born.\textsuperscript{51} The court determined, however, that special damages, including the extraordinary expenses for specialized teaching, training, and hearing equipment required throughout the child's lifetime, are based on a different footing and should be allowed.\textsuperscript{52} Special damages can be readily ascertained and are commonly awarded in medical malpractice actions.\textsuperscript{53} Moreover, the extraordinary expenses are expenses that would not have occurred but for the defendants' negligence.\textsuperscript{54}

V. ANALYSIS

In reaching its decision in \textit{Turpin}, the California Supreme Court decided the case essentially as a medical malpractice action.\textsuperscript{55} Because the defendants demurred to the plaintiff's complaint, the court's decision did not demand an extensive analysis of each of the tort elements involved, but it is possible to infer from the opinion much of what is not explicitly addressed regarding duty, breach, causation, and damages. It is also possible to identify a number of policy considerations at work in the wrongful life con-

\textsuperscript{47} Id.
\textsuperscript{48} Id. at 232-33, 643 P.2d at 960-61, 182 Cal. Rptr. at 343-44.
\textsuperscript{49} Id. at 237-39, 643 P.2d at 965-66, 182 Cal. Rptr. at 348-49.
\textsuperscript{50} Id. at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 223-24, 643 P.2d at 956, 182 Cal. Rptr. at 339. The court enumerated the basic elements of a professional malpractice action:

The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual damage resulting from the professional's negligence.

\textit{Id.} at 229-30, 643 P.2d at 960, 182 Cal. Rptr. at 343 (quoting Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971)).
text that influenced the court in reaching its decision. What follows is an explication of the Turpin court's resolution of the many issues that were involved in developing its theory of a wrongful life action.

A. Duty

To be held liable in a negligence action, the defendant must owe the plaintiff a legal duty. Whether a duty exists in a particular situation is essentially a legal conclusion, based on how far the law is willing to extend liability. This determination rests largely upon the plaintiff's ability to show that the injury sustained was a foreseeable result of the defendant's conduct and that, as a matter of public policy, a duty should exist.

Generally, it has been argued that courts should refuse to rec-
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cognize a duty on the part of a defendant-physician to a plaintiff-
child in a wrongful life action for any of three reasons: (1) public
policy favors defective existence over nonexistence in all situa-
tions;61 (2) no duty of care can be owed a person not in being at the
time of the alleged negligence;62 and (3) prior to conception, or af-
ter conception in utero, it would not have been actually possible
for the unborn plaintiff-child to have decided between life and non-
existence, so a child cannot be said to have been injured by any
failure to inform his or her parents of potential genetic defects.63
While the Turpin court does not focus specifically on the duty is-

As previously noted, the Turpin court held that California pub-
lic policy does not establish as a matter of law that in all circum-
stances impaired life is preferable to nonlife.64 The court opined
that considering the short, painful life spans of many of the chil-
dren afflicted with genetic defects, it could not “assert with confi-
dence that in every situation there would be a societal consensus
that life is preferable to never having been born at all.”65 Thus, the
court rejected the argument that public policy favors existence
over nonexistence in all situations.66

Regarding the second reason for rejecting the cause of action,
the court explained that all the parties had agreed67 that the fact
that the defendants' allegedly negligent act occurred prior to plain-
tiff's birth was of no moment, because California, like other juris-
dictions recently addressing the issue, had abandoned the
arbitrary limitation denying recovery for injuries inflicted prior to
birth.68 Additionally, the court recognized that no distinction
should be drawn between preconceptional and postconceptional
negligence.69

61. See, e.g., Berman v. Allan, 80 N.J. 421, 429, 404 A.2d 8, 12-13 (1979); Park v.
Chessin, 60 A.D.2d 80, 90-91, 400 N.Y.S.2d 110, 116 (1977) (Titone, J.,
dissenting).
62. Cohen, supra note 56, at 213; Robertson, supra note 56, at 1402-03; Note,
Torts—An Action For Wrongful Life Brought On Behalf Of The Wrongfully
Conceived Infant, supra note 56, at 714-16.
63. Comment, "Wrongful Life": The Right Not To Be Born, supra note 2, at 489-90;
Note, A Preference for Nonexistence: Wrongful Life and a Proposed Tort of
Genetic Malpractice, supra note 2, at 492.
64. Turpin, 31 Cal. 3d at 233-34, 643 P.2d at 962-63, 182 Cal. Rptr. at 345-46; see
supra notes 44-45 and accompanying text.
65. Id. at 234, 643 P.2d at 963, 182 Cal. Rptr. at 346.
66. Id. at 233-34, 643 P.2d at 962-63, 182 Cal. Rptr. at 345-46.
67. Id. at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
68. Id.; see Rogers, supra note 6, at 732.
69. Turpin, 31 Cal. 3d at 230-31, 643 P.2d at 960, 182 Cal. Rptr. at 343. For an analy-
Third, the court concluded that the fact that the child cannot prior to conception or birth make a decision, as to whether or not birth with defects is preferable to nonexistence, should not bar recognition of the physician's duty. The court noted that a number of recent wrongful birth cases recognize that when a doctor or other health care provider negligently fails to diagnose a hereditary defect, the parents are deprived of the opportunity to make an informed decision as to whether to conceive and bear a handicapped child. This information would be important to parents because in deciding whether or not to bear a child, parents take into account their own interests, as well as those of their potential child. Additionally, the court found that when a defendant-physician negligently fails to diagnose an hereditary ailment, he harms the potential child, as well as the parents, by depriving the parents of information which may be necessary to determine whether it is in the child's own best interest “to be born with de-


70. Several commentators have suggested an alternative approach to the duty issue that could have been adopted by the Turpin court based upon a section of the Restatement (Second) of Torts. See, e.g., Comment, “Wrongful Life”: The Right Not To Be Born, supra note 2, at 490-91; Note, Wrongful Life: A Modern Claim Which Conforms To The Traditional Tort Framework, supra note 55, at 141-42. RESTATEMENT (SECOND) OF TORTS § 311 (1965) provides:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or
(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or
(b) in the manner in which it is communicated.

Further, comment b to § 311 provides:

The rule stated in this section finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine.

71. Turpin, 31 Cal. 3d at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345.
72. See supra note 1.
73. Turpin, 31 Cal. 3d at 233-34, 643 P.2d at 962, 182 Cal. Rptr. at 345.
74. Id.
fects or not to be born at all.”

Finally the court said:

75 We do not . . . deny recovery to an infant who is injured when a doctor negligently fails to provide treatment chosen by the infant’s parents even though we cannot determine whether the infant would have agreed with the parents’ choice of treatment. Similarly, it appears anomalous to deny recovery simply because it was not possible for the “child-to-be” to make a choice. In the preconception or fetal stage, as in childhood, it is parents who nearly always make medical choices to protect their children’s interests.

The court said that the defendants had not alleged that they owed no duty of care either to Joy or to her parents,76 and “it was reasonably foreseeable that Hope’s parents and their potential offspring would be directly affected by defendants’ negligent failure to discover that Hope suffered from a hereditary ailment . . . .”

The theory that the defendants owed the plaintiff a duty was therefore adopted by the court based upon the foreseeability of the harm and consideration of public policy.

B. Breach

Whether or not the defendants breached their duty to the plaintiff-child in a wrongful birth action is generally a question of fact for the jury.79 Because the defendants in Turpin demurred to the plaintiff’s complaint, the court did not thoroughly analyze the element of breach.

One commentator indicates that in a negligence action for wrongful life, actual misfeasance on the part of the defendant must exist for a breach of duty to occur;80 the defendant must have been affirmatively negligent. Another commentator, however, suggests that it should make no difference whether the defendant-physician’s negligence is based upon an act (misfeasance) or omission (nonfeasance):81

75. Id.; see Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (a patient has a right to information material to making intelligent decisions as to treatment of disease); see also Capron, supra note 56, at 597-98.
76. Turpin, 31 Cal. 3d at 234 n.9, 643 P.2d at 962 n.9, 182 Cal. Rptr. at 345 n.9.
77. Turpin, 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
78. Id.
82. Id. at 148 (footnote omitted).
It is manifest in the *Turpin* opinion that the court recognized that a breach of duty resulting in harm to the plaintiff did in fact occur when the defendants misdiagnosed Hope's condition and transmitted the erroneous information to the family's pediatrician. Through this conduct which directly affected the plaintiff, defendants clearly did not exercise the degree of skill, knowledge, and care ordinarily exercised by other members of their profession under similar circumstances. The future child had a right to have her parents informed of the probability that any child they might conceive would suffer from hereditary deafness, so that they might determine on her behalf whether birth with defects was preferable to nonexistence. In this case, the ultimate harm resulting from the breach of duty was that Joy Turpin was "born with an hereditary ailment rather than not being born at all."

C. Causation

According to Prosser, "Causation is a fact. It is a matter of what has in fact occurred. A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which so far contributed to the result that without them it would not have occurred." In order to fix liability upon the defendant in any negligence action, the plaintiff must meet the burden of proving both cause in fact and legal or proximate cause. Conduct is a cause in fact if the injury resulting from the conduct would not have resulted but for the act in question or "if it was a material element and a substantial factor in bringing it about." Unless reasonable men could not differ, determination of materiality and substantiality is ordinarily made by the jury. Legal or proximate cause is "[a] reasonable close causal connection between the conduct and the resulting injury." Substantive conceptions about the scope of liability and defenses distinguish cause in fact from legal or proximate cause.

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86. *Id.* at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344.
88. *Id.*, § 30, at 143, § 38, at 208-09, § 41, at 241.
89. *Id.*, § 41, at 238-39.
90. *Id.*, § 41, at 240.
91. *Id.*, § 45, at 289.
92. *Id.*, § 30, at 143.
mate cause. For instance, the doctrine of foreseeability is a significant factor in determining when the necessary degree of proximity is present to elevate a cause in fact to proximate cause.93 According to one commentator, “If one accepts the idea that the damage the child is suing for [in a wrongful life action] is not its deformity, but rather its birth... proximate cause presents little obstacle to the child's recovery.”94 From this perspective, the defendants in Turpin cannot be said to have caused, in fact, the defect from which the plaintiff presently suffers. Indeed, it is clear in Turpin that the court found that the defendants could have done nothing to have provided the plaintiff with an opportunity “to be born as a whole, functional human being without total deafness.”95 Nevertheless, one commentator would argue that because the defendants' conduct occurred prior to conception rather than after, the defect would not have resulted but for their negligent conduct and that the conduct should also be determined to be the legal or proximate cause.96 Still, the real injury in Turpin is not Joy's hereditary deafness, but, rather, it is her having been born with hereditary deafness instead of not being born.97 It was averred in the complaint that if the defendants had not failed to inform her parents of Hope's genetic defect that Joy would never have been conceived.98 Thus, by not informing her parents of Hope’s hereditary deafness, and, thereby, preventing Joy's conception, the defendants' conduct was both the cause in fact and the legal and proximate cause of her injury.

D. Damages

In dealing with the element of damages, the Turpin court noted that other courts have refused to allow a child's claim for pain and

95. Turpin, 31 Cal. 3d at 231, 643 P.2d at 961, 182 Cal. Rptr. at 344.
97. Turpin, 31 Cal. 3d at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.
98. Id. at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339. In Turpin, the defendants demurred to Joy's averment as to what her parents would have done had they known of Hope's hereditary deafness. In future cases the truth of such an averment may be subject to the scrutiny of the jury as a part of the determination of cause in fact and proximate cause. There is some discussion by commentators as to whether a subjective or objective test should be applied. E.g., Comment, “Wrongful Life”: The Right Not To Be Born, supra note 2, at 491-92; Note, Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling, supra note 6, at 1509-10.
suffering on the grounds that it is not possible in any rational way to determine whether the plaintiff in a wrongful life action has in fact suffered an injury by being born. A wrongful life case presents the question of the value of impaired existence versus nonexistence. Because of the compensatory nature of damages in tort, "the jury generally compares the condition plaintiff would have been in but for the tort, with the position the plaintiff is in now, compensating the plaintiff for what has been lost as a result of the wrong." The court concluded that in a wrongful life context a rational nonspeculative determination of a specific monetary award for general damages, including compensation for pain and suffering, appeared "to be outside the realm of human competence." The court emphasized that jury members would have no frame of reference from which to measure such damages and asserted that the tort benefit doctrine would have to be applied by the jurors to balance any benefits resulting from the defendants' conduct against the detriments.

Similarly, the court rejected the plaintiff's argument that general damages are routinely awarded in medical malpractice cases for pain and suffering and mental distress and that juries are equally as competent to assess appropriate damages in wrongful life cases. In addition, the court refused to accept the plaintiff's argument that the difficulty of ascertaining damages should not totally prevent any recovery of general damages.

Citing two recent decisions, Borer v. American Airlines, Inc. and Baxter v. Superior Court, the court concluded that general damages would not "in any meaningful sense compensate the plaintiff for the loss of the opportunity not to be born . . . ."

100. Id. at 236, 643 P.2d at 963-64, 182 Cal. Rptr. at 346-47.
101. Id. at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347.
102. Id.
103. Id.
104. Id.
105. RESTATEMENT (SECOND) OF TORTS § 920 (1965). This section provides:
   When the defendant's tortious conduct has caused harm to the plaintiff or to his property 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.
106. Turpin, 31 Cal. 3d at 236-37, 643 P.2d at 964, 182 Cal. Rptr. at 347.
107. Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
108. Id.
111. Turpin, 31 Cal. 3d at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347.
Moreover, according to the court the damage assessment in both of those cases was less problematic than in *Turpin*.  

While the court rejected any recovery of general damages, it viewed Joy Turpin's claim for special damages, the extraordinary expenses for specialized teaching, training, and hearing equipment, to be on different footing. The court held that the extraordinary expenses clearly would not have occurred but for the defendants' negligence and that they are the kind of pecuniary losses that are readily ascertainable and commonly awarded in medical malpractice actions. Additionally, the court noted that an award of these special damages in a wrongful life action may not only be necessary for the well-being of the child, but in some instances it may be vital to his or her survival.

To further substantiate its position, the court said that an award to cover extraordinary expenses is consistent with the tort benefit doctrine in that the plaintiff-child receives no benefit to offset the pecuniary interests that are harmed. The court noted that while such damages may not "remove the heartache or undo the harm" they can relieve financial burdens. The court also asserted that awarding special damages would act as a deterrent to further negligent acts by the defendants and others assuming similar duties.

Finally, the court reasoned that a child's receipt of necessary medical expenses should not be dependent on the availability of parents who can sue and recover, nor should they be limited to the time when parents remain legally responsible for providing such care. The court held that where a defendant's breach of duty is the proximate cause of such expenses, the defendant should be held liable for the cost of care borne by the parents and the child.

While the court's award of special damages undoubtedly will help the wrongful life plaintiff, and the reasons that are cited for doing so seem sound, the refusal to allow general damages cannot

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112. *Id.*

113. *Id.* at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348.

114. *Id.* at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.


118. *Turpin*, 31 Cal. 3d at 239 n.15, 643 P.2d at 966 n.15, 182 Cal. Rptr. at 349 n.15.


120. *Id.*
be viewed with the same approval. Justice Mosk stated in his dissent:

An order is internally inconsistent which permits a child to recover special damages for a so-called wrongful life action, but denies all general damages for the very same tort. While the modest compassion of the majority may be commendable, they suggest no principle of law that justifies so neatly circumscribing the nature of damages suffered of a defendant's negligence.\(^{121}\)

Indeed, the court's reasons for denying general damages are not convincing. It is a settled principle of tort law in California that the plaintiff is to be awarded any damages that naturally flow and proximately result from the defendant's breach of duty.\(^{122}\) Can it honestly be said that the plaintiff's pain and suffering is less proximately a result of the defendants' negligence than the plaintiff's extraordinary expenses? Both are suffered by the plaintiff as a result of the basic injury of being born with a defect rather than not being born at all.\(^{123}\) It is clear that the plaintiff's position has been changed by the defendants' tort.\(^{124}\) The fact that nonpecuniary damages are less certain than pecuniary damages should not bar

\(^{121}\) Id. at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349 (Mosk, J., dissenting).

\(^{122}\) CAL. CIVIL CODE § 3333 (West 1970) provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment, proximately caused thereby, whether it could have been anticipated or not." See Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433, 226 P.2d 173, 176, 56 Cal. Rptr. 13, 18 (1967), where the court said: "Fundamental in our jurisprudence is the principle that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer."

\(^{123}\) As the Curlender court said: "The reality of the 'wrongful-life' concept is that such a plaintiff both exists and suffers, due to the negligence of others." Curlender, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (emphasis in original). One commentator has written: "If the physicians' negligence has caused the birth of a tortured child that the mother, speaking on her own behalf and on behalf of her child, would have sought to avoid, then he has also caused the child's pain and suffering that inevitably coincides with that birth." Note, Wrongful Birth: Judicial Reticence with an Emerging Tort: The Negligent Performance of Genetic Counseling—Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), 6 U. DAYTON L. REV. 115, 130 (1981) (emphasis added).

\(^{124}\) Plaintiff's position has been changed from a state of nonexistence without pain and suffering before the negligence to a state of existence with pain and suffering after the negligence. Comment, "Wrongful Life": The Right Not To Be Born, supra note 2, at 496; Note, Wrongful Life And A Fundamental Right To Be Born Healthy: Park v. Chessin, Becker v. Schwartz, supra note 56, at 555-56.

While the primary purpose for awarding damages is compensation, a plaintiff's damage award seldom, if ever, returns a plaintiff to the exact status which existed prior to an injury. "The damage award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not originally, a money loss, but one that ordinarily may be measured in money." D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES
recovery of the nonpecuniary damages.\textsuperscript{125} As the plaintiff argued, such damages are routinely recoverable in other medical malpractice actions.\textsuperscript{126}

The \textit{Turpin} majority sees "the threshold question of determining whether the plaintiff has in fact suffered an injury by being born with an ailment as opposed to not being born at all" as being the problem.\textsuperscript{127} The majority says that a jury has no frame of refer-

\begin{quote}
§ 3.1, at 135 (1973). In the wrongful life context, one commentator has suggested:

The individual who seeks wrongful life recovery is not looking for court approval to allow him to die so that he may return to nonexistence. Instead, such person should be awarded damages to the extent of compensating him for the fact that he may not be returned to the pre-tort state.

Note, \textit{Liability for Wrongfully Causing One To Be Born: Development of a Tort for \textquotedblleft Wrongful Life,\textquotedblright} 10 U. West L.A. L. Rev. 55, 61 (1978) (footnote omitted). But another commentator favors the substitutionary approach adopted by the \textit{Curlender} court:

\begin{quote}
\[ \text{[T]he Curlender court saw the injury, in this instance, as birth with a defect, which resulted in the painful existence of the plaintiff. The purpose of the damage award as defined by Curlender, is to compensate for the wrongful pain and suffering causes by the defendant's negligence. It is thus unnecessary to focus on a determination of the value of life and nonlife.} \]
\end{quote}

A traditional tort negligence concept—the award of damages on the basis of pain and suffering—should be applied in place of the wrongful life concept upon proper proof of the child's actual pain and suffering. By measuring damages in terms of the wrongful pain and suffering of the child, a look into the metaphysical calculations as to the value of life and nonlife is avoided.


\begin{quote}
125. "The requirement of certainty has relatively little application to nonpecuniary items of personal injury, such as pain and suffering." S. Schreiber, DAMAGES: IN PERSONAL INJURY AND WRONGFUL DEATH CASES 25 (1965). The United States Supreme Court has held: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount." Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 562 (1931). \textit{See also} City of Kennett v. Katz Constr. Co., 273 Mo. 279, 202 S.W. 558 (1918).

\begin{quote}
126. \textit{E.g.}, Capelouto v. Kaiser Found. Hosp., 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972) (trial court must instruct jury on the infant plaintiff's pain and suffering even though the infant could not testify on her own behalf).

\begin{quote}
127. \textit{Turpin}, 31 Cal. 3d at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346. Here, by returning to the metaphysical issue of nonexistence versus existence in regard to the computation of pain and suffering damages, the court appears to be backing away from its earlier conclusion that the defendants' negligence had resulted in a cognizable injury to the plaintiff. The real problem for the court, however, is assessing the value of the general damages. If the real problem was whether the plaintiff had in fact suffered injury, the court would have had no basis upon which to approve the award of special damages which it
ence from which to deal with that question. While that may be true, jurors are generally not instructed to determine damages for pain and suffering by basing the amount awarded upon how much money they, as individual jurors, would be willing to accept for experiencing the same quantity of pain and suffering. In recent products liability cases involving diethystilboestrol (DES), the courts are in fact determining damages based on a comparison of the value of life with pain and suffering and nonexistence.

What determined were the proximate result of the defendants' negligence. The plaintiff's pain and suffering, as much as the expenses necessary to treat the hereditary ailment, stem from the defects suffered by the child. Perhaps as one commentator says:

Although compensatory damages may be difficult to ascertain in wrongful life cases, if they are shown to exist, recovery should not be denied totally. A practical approach, both in terms of measurement and limitation, is to award traditional tort damages stemming solely from the defects suffered by the child rather than balancing existence with nonexistence.

Note, Wrongful Life: A Modern Claim Which Conforms To The Traditional Tort Framework, supra note 56, at 155. Another commentator says that non-existence has no value and, therefore, the determination of damages in a wrongful life case should be based upon a weighing of the benefits and burdens of the plaintiff's existence. Note, A Cause of Action For "Wrongful Life": [A Suggested Analysis], supra note 56, at 62-67. A combination of the approaches of these two commentators would appear to provide a reasonable basis for the determination of general damages.

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Turpin, 31 Cal. 3d at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347. One commentator suggests that the lack of frame of reference on the part of jurors does not present a particularly unique problem:

[J]urors can never actually experience a plaintiff's life in its "normal" state before an injury or in the injured state that resulted from a defendant's actions. An imaginative leap is always required; the more severe the injury the greater the leap. There will, for example, always be an element of empathetic speculation in a jury's assessment of what it means for a person to be irreversibly blind, deaf, or comatose, or of the harm in losing the enjoyment of life's activities when one departs "this vale of tears" for the "great hereafter." So, too, a thoughtful assessment of damages requires an imaginative leap in the case of a child with congenital defects in order to account for the condition the child would have been in had the defendant acted properly. There may be some situations in which common understanding would lead to the conclusion that it would be better to be dead (or never to have existed)—and it is for the finder of fact to determine just how much better it would be.

Capron, supra note 6, at 658-59 (emphasis in original) (footnotes omitted).

D. Dobbs, supra note 124, § 8.1, at 545: "Not only can pain not be measured by a market, it is not to be measured by the 'Golden Rule' either—that is, the jury is not to be told to award an amount they would personally take to undergo the plaintiff's injuries." See also Restatement (Second) of Torts § 912 comment b (1965).

In recent products liability cases involving diethystilboestrol (DES), the courts are in fact determining damages based on a comparison of the value of life with pain and suffering and the value of nonexistence. Phillips v.
makes the identical determination so difficult in the wrongful life context?

Application of the tort benefit doctrine would be appropriate in the determination of general damages. As one commentator says:

Under this balancing analysis, a jury would consider the severity of the child's defect. Where the child's deformity was slight, the jury might find that the burden of living with the defect is offset by the benefits of life, and deny the child recovery. Where the deformity was severe, however, the jury might find that this burden outweighed any benefits, and award the child compensation. The amount of award would reflect the difference between the burden of life with defects and the benefits of life. The more severe the handicap, the less beneficial the child's existence, and the greater the award.131

While this explanation is directed to damages as a whole, the Turpin court has adopted a sound position in refusing to balance non-pecuniary benefits against pecuniary injuries.132 There is no reason why the benefit doctrine would have to be applied to both general and special damages.133 When instructing the jury regarding general damages, the court can simply require the jury to balance the benefits against the detriments and inform them that the net could amount to zero.134 Such a determination might well be partly intuitive, but juries are frequently called upon to make intuitive, "black box" decisions.135 A separate instruction would of course be given concerning special damages.

Recognition of general damages would allow the plaintiff to be fully compensated for his or her lost opportunity not to be born. An award of general damages could ease some of the plaintiff's discomfort and help pay the plaintiff's attorney fees for which he or

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131. Comment, "Wrongful Life": The Right Not To Be Born, supra note 2, at 498.
133. D. Dobbs, supra note 124, § 1.2, at 7 (The damages can be varied according to what is appropriate in the situation.).
134. This has been suggested in the wrongful birth context and it should apply equally as well in wrongful life cases. Robertson, supra note 56, at 1448.
135. Wrongful life claims should be treated as questions of fact for the jury. See supra text accompanying note 79. "A determination of the validity of a plaintiff's wrongful life claim, as well as an assessment of appropriate damages for the injury, is more appropriately left to the 'black box' decisionmaking of a jury rather than being precluded as a matter of law." Note, A Reassessment of "Wrongful Life" and "Wrongful Birth"—Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), supra note 56, at 791. For a discussion of the "black box" function of a jury, see Higgenbotham, Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 Tex. L. Rev. 47, 56 (1977). Higgenbotham writes: "By the term 'black box decisions' I mean the difficult decisions that remain arbitrary in the sense that they can only be based on the specific equities of each individual case and cannot convincingly be explained on wholly logical grounds."
she is otherwise uncompensated.\textsuperscript{136} It is not appropriate for the court to force the plaintiff into a position where he or she must give up essential medical care, upon which his or her very life may depend, in order to pay an attorney. Finally, recognition of general damages should act as a further deterrent\textsuperscript{137} to negligent conduct on the part of physicians and other health care providers engaged in the kind of activities which could result in denial of a child’s limited right not to be born.

E. Policy

One commentator, Rogers, has explained the reluctance of many courts to recognize a wrongful life action as a manifestation of residual opposition to abortion.\textsuperscript{138} This, he says, is evident in the willingness of the same courts to recognize causes of action brought by plaintiffs in the ordinary prenatal tort context.\textsuperscript{139} Rogers suggests that this kind of arbitrary line drawing is clearly exemplified by the DES cases.\textsuperscript{140} In these cases, he says, DES was prescribed to the mothers during pregnancy to prevent the spontaneous abortion (miscarriage) of fetuses; and while the drug prevented the spontaneous abortion, it also caused the plaintiffs to be born with defects.\textsuperscript{141} In the wrongful life cases like Turpin the negligent conduct, at least in part, is that the doctors had failed to timely inform the parents that their offspring may be born genetically defective. Timely notice under these circumstances would allow the parents in the best interest of their offspring to choose not to conceive or, in the case where conception has already occurred, to request a eugenic abortion (performed to prevent the birth of genetically defective offspring). Rogers notes that in the DES cases, just as in the wrongful life actions, the alternative to being born with defects is nonexistence, and yet the courts have raised none of the objections to damages that they have raised in the wrongful life actions.\textsuperscript{142}

This kind of underlying prolife sentiment may at least partially explain the reluctance of the Turpin court to award general damages. A commentator who noted this influence in earlier wrongful

\begin{footnotes}
\item[137] Turpin, 31 Cal. 3d at 239 n.15, 643 P.2d at 966 n.15, 182 Cal. Rptr. at 349 n.15 (damages for extraordinary expenses are viewed as a deterrent of future negligence).
\item[138] Rogers, supra note 6, at 754.
\item[139] Id. at 753-54.
\item[140] Id. at 754-55.
\item[141] Id. at 736-37, 754-55.
\item[142] Id. at 754-55.
\end{footnotes}
life cases wrote: "[T]he primary and perhaps only distinction between wrongful life claims and other pre-natal torts is the unavailability of in utero treatment in the circumstances of the former: the only alternatives are defective birth or eugenic abortion." It is interesting that the Turpin court explicitly states that in a case where negligent genetic counseling or prenatal testing resulted in a failure to diagnose a defect that could be treated in utero, the plaintiff-child would have a prenatal tort claim. Under these circumstances, a plaintiff would be entitled to a full range of damages flowing from the physician's negligence.

The Turpin court has taken a step, however, that no other high court, thus far, has been willing to take. It has developed a theory which recognizes a wrongful life cause of action. This counterbalances the traditional prolife policies and establishes a child's limited right not to be born with a defect. This right is grounded upon public policy which does not, in all situations, support the concept that life with defects is superior to nonlife and upon the fact that parents generally make medical choices to protect their children's interests both before and after birth. Thus, as held in Curlender, a physician has a duty to inform parents effectively, so that they have the information necessary to decide whether to conceive or bear a child when there is a predictable risk of congenital defects.

The Turpin opinion indicates concern about the necessity of deterring the negligent conduct of physicians and other health care providers that would prevent parents from determining whether it is in a child's interest to be born with defects or not to be born at all. The opinion, however, does not emphasize the need to deter such negligence in order to lower public and private expenditures required for the care of persons who are genetically impaired.

143. Id. at 756.
144. Turpin, 31 Cal. 3d at 231 n.8, 643 P.2d at 961 n.8, 182 Cal. Rptr. at 344 n.8.
145. Id. at 230-31, 643 P.2d at 960, 182 Cal. Rptr. at 343. The Turpin court said that had Joy's deafness been caused by the negligent treatment of her mother during pregnancy or prior to conception, Joy would have been entitled to recover general damages against the negligent party. Id. See Capeluto v. Kaiser Found. Hosps., 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972) (infant entitled to instruction on damages for pain and suffering in medical malpractice action); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (range of damages stemming from a physician's negligence).
146. Turpin, 31 Cal. 3d at 233-34, 643 P.2d at 962-63, 182 Cal. Rptr. at 345-46.
147. Id.
148. Id.
149. Id. at 239 n.15, 643 P.2d at 966 n.15, 182 Cal. Rptr. at 349 n.15.
150. See Note, A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice, supra note 2, at 506. Care of persons with genetic disease provided through public and private expenditures costs over two bil-
One commentator has suggested that these costs could be reduced significantly by recognizing the wrongful life tort.\textsuperscript{151} This view is supported by the theory of tort law that assigns the cost of harm to the "cheapest cost avoiders."\textsuperscript{152} If this policy had been adopted by the \textit{Turpin} court the reluctance to allow general damages may have vanished.

Some courts\textsuperscript{153} and commentators\textsuperscript{154} have expressed concern that recognition of the wrongful life cause of action might encourage children to bring suits against their parents based on that theory. This presented no problem for the \textit{Turpin} court because of the recent enactment of section 43.6 of the California Civil Code which prohibits any action "against a parent of a child based upon the claim that the child should not have been conceived, or, if conceived, should not have been allowed to have been born alive."\textsuperscript{155} Even without such a statute, however, it is unlikely that a cause of action against a parent for wrongful life would be recognized because of the fundamental nature of parental rights to make decisions concerning procreation.\textsuperscript{156} As a practical matter most wrongful life suits are brought by parents on behalf of their children, and therefore it is not likely that many actions would be

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\item \textsuperscript{151} Note, \textit{A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice}, supra note 2, at 505-506.
\item \textsuperscript{152} See generally, G. CALEBRESI, THE COST OF ACCIDENTS 130-40 (1970).
\item \textsuperscript{153} See e.g., Park v. Chessin, 60 A.D.2d 80, 94-95, 400 N.Y.S.2d 110, 118 (1977) (Titone, J., dissenting). The possibility of such suits is also discussed in \textit{Curlender}, 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.
\item \textsuperscript{155} \textit{CAL. CIV. CODE} § 43.6 (West 1982) provides:
\begin{itemize}
\item (a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.
\item (b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.
\item (c) As used in this section "conceived" means the fertilization of a human ovum by a human sperm.
\end{itemize}
\item \textsuperscript{156} See \textit{Doe v. Bolton}, 410 U.S. 179 (1973); \textit{Roe v. Wade}, 410 U.S. 113 (1973); \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972); \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965). These cases can be read to indicate that parents possess procreational rights protecting them against wrongful life actions brought against them by their children. See also Note, \textit{A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice}, supra note 2, at 504 n.161.
\end{itemize}
Even if suits were brought by guardians ad litem, it is not likely that they could prevail because of the parental procreative rights.

VI. CONCLUSION

*Turpin v. Sortini* marks a significant achievement in the effort to overcome the obstacles to recognition of a wrongful life action grounded in medical malpractice. The California Supreme Court has determined that in some instances life with pain and suffering is less desirable than not having been born at all, and that public policy does not support the rejection of a wrongful life action as a matter of law. The court determined that a doctor or other health care provider owes a preconceptional and postconceptional duty to a child to inform his or her parents of any likelihood of a genetic defect, so that the parents might make an informed decision on behalf of the child prior to birth as to whether life with defects is preferable to nonexistence.

The *Turpin* court does not skirt the issue, but clearly acknowledges that the alleged injury to the child is being born with defects and the lost opportunity not to be born. For the most part, the court is successful at fitting the cause of action into the traditional tort framework. The weakest link in a generally well-reasoned opinion is the refusal to allow a recovery of general damages which, as Justice Mosk noted in his dissent, is inconsistent with the determination that special damages should be awarded. The court should reconsider this aspect of its decision and allow jurors to make a determination in each individual case whether and to what extent general damages should be awarded.

Overall, the decision in *Turpin* is a step forward toward assuring that injured children will be compensated and that physicians and others who are engaged in genetic counseling and prenatal testing (or in any other area of medical practice that could have a bearing on whether a child will be conceived or born) will more carefully undertake their responsibilities. While recognition of wrongful life actions based on medical malpractice will undoubtedly increase medical costs, the costs may be offset to some extent through the prevention of suffering and through savings realized by both individuals and society due to the decreased need to care for genetically defective children and adults. Whether or not courts in other jurisdictions will follow the California Supreme

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157. *Note, A Cause of Action for “Wrongful Life”: [A Suggested Analysis]*, supra note 56, at 75. One commentator has noted, however, that this observation fails to consider the fact that a guardian ad litem might be chosen to represent the child's interest against a parent. Cohen, *supra* note 56, at 231 n.140.
Court in adopting this kind of wrongful life decision remains to be seen, but a relatively well-reasoned model to follow now exists for those courts inclined to do so.

David G. Dales '83