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WRONGFUL LIFE: THE TORT THAT NOBODY WANTS

I. INTRODUCTION

Although the cause of action known as wrongful life first appeared less than twenty years ago, it is still in its embryonic stage as evidenced by the fact that the legal community has not yet agreed on a single definition of the claim. In this comment, wrongful life refers to actions brought by a child who asserts that he was brought into the world in an impaired condition due to a medical practitioner's negligence. If the defendant had not breached his duty, the child would not have been born at all, nor doomed to a life of severe suffering. Wrongful life actions should be contrasted with wrongful birth actions, in which the child's parents claim that but for the defendant's negligence they would not have conceived the child, or they would have terminated the pregnancy had they been informed of the risks to the child. Even though many state courts have recognized the wrongful birth cause of action, only the California Supreme Court has recognized the child's cause of action.

This comment will focus on the reasons why most courts refuse to recognize wrongful life. Included in this analysis will be a discussion of the foundation and the development of wrongful life and wrongful birth claims; the measure of dam-

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1. 1983 by Camilla D. Cochran
3. Some commentators use the label wrongful life for actions brought by the parents as well as those brought by the child. See Note, Wrongful Life: Birth Control Spawns a Tort, 13 J. Mar. L. Rev. 401, 402 n.8 (1980). Other commentators use the label to designate "[l]awsuits on behalf of or in the name of the child, based upon such physician failures [such as failures to detect birth defects] . . ." Peters & Peters, Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action, 18 Duq. L. Rev. 857 (1980).
5. The definition of wrongful birth as used in this comment is consistent with the definition provided in Annot., 83 A.L.R. 3d 15 (1978).
ages for the infant-plaintiff who seeks compensation for being born; and the moral and philosophical questions with which courts have wrestled in dealing with wrongful life. Finally, alternatives and suggestions for overcoming the obstacles which preclude recovery for the wrongful life claimant will be offered.

II. THE FOUNDATION FOR WRONGFUL LIFE AND WRONGFUL BIRTH

Prior to Roe v. Wade, the decision legalizing abortion, neither wrongful life nor wrongful birth were viewed as legitimate causes of action. Parents would often claim that had the defendant informed them that the child would be born defective, they would have terminated the pregnancy, and courts felt that granting recovery would amount to tacit approval of an illegal act.8

In Roe, the United States Supreme Court held unconstitutional a Texas statute prohibiting abortions. The Court reasoned that a fundamental component of the fourteenth amendment to the United States Constitution is the right to privacy, which includes the right to choose whether to conceive a child or to terminate a pregnancy. The Court held that a woman has an absolute right to an abortion during the first trimester of her pregnancy.

The rights granted by the Court imply that parents may make decisions about the quality of their unborn child’s life. Thus, the Roe v. Wade decision planted the seed from which wrongful birth and wrongful life have grown: If parents may make decisions about the quality of their child’s life, then they have a right to terminate a pregnancy which, if carried to term, would result in the birth of a defective child. It follows then that anyone who negligently deprives the parents of that right should be held responsible for the natural consequences.

8. This belief is verbalized in a concurring opinion in Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967): “But, even if there were some state or foreign country where an abortion for rubella were lawful, in the face of the present strong public policy of New Jersey against such an abortion, no cause of action for damages should be recognized in New Jersey . . . .” Id. at 48, 227 A.2d at 703 (Francis, J., concurring).
of his actions.

In addition to the stimulus provided by *Roe v. Wade*, recent scientific developments have furthered the growth of wrongful life and wrongful birth causes of action. Genetic testing is often used to determine if parents, whose backgrounds indicate the presence of genetic defects, have a high probability of bearing a child with a hereditary defect. For example Tay-Sachs disease is often found among persons of Eastern European Jewish descent, and it may be diagnosed by taking a blood sample from each prospective parent.\(^{11}\) In addition to genetic counseling, amniocentesis\(^{12}\) and ultrasonography\(^{13}\) procedures may be used during pregnancy to detect defects in the unborn child. These techniques take the "mystery" out of having a child because they provide a complete picture of the unborn child, including whether or not that child will be born with any abnormalities. Because of these scientific advances, a mother who contracts rubella\(^{14}\) during the first trimester of pregnancy may discover if that disease has adversely affected the fetus; or the woman who becomes pregnant after age thirty-five can be told if the child will be born with Down's syndrome.\(^{16}\)

Without these technical devices which reveal defects in the unborn child, neither wrongful life nor wrongful birth would have achieved any recognition in the field of tort law. The person who provides genetic counseling to would-be parents or who performs techniques of determining birth defects breaches his duty to the parents if he performs those tasks negligently, and he should be liable to the foreseeable victims of his actions.

The foundation for both wrongful birth and wrongful life


12. Amniocentesis is a procedure in which amniotic fluid is drawn from the inner layer of tissue surrounding the fetus. 1 J. Schmidt, Attorney's Dictionary of Medicine A-53 (1981).

13. Ultrasonography is a "method of outlining foreign bodies or deep structures by using ultrasonic waves and tracing the resulting reflections and transmissions." 3 id. at U-7.

14. Rubella, or german measles, is a virus which "seems to affect the senses of vision and hearing of the infant. Sometimes it affects the heart as well." Id. at R-89.

15. Down's syndrome or mongolism, is a "form of idiocy the physical features of which are characterized by obliquely set eyes, open mouth, flabby muscles, soft skin, broad face, etc." 2 id. at D-107.
was established by the United States Supreme Court in its *Roe v. Wade* decision and by the scientific community's discovery of techniques capable of detecting defects, both potential and real, in an unborn child. Although this foundation seems equally strong for both claims, the courts have built upon it in a piecemeal fashion, permitting recovery for wrongful birth but denying recovery to the person upon whom the injury was actually inflicted.

### III. THE HISTORY OF WRONGFUL BIRTH ACTIONS

As stated earlier a wrongful birth action is one brought by the parents of a child born with birth defects, claiming that if they had been informed of the risks they would not have conceived a child or they would have terminated the pregnancy. The first case in which this claim was asserted was *Gleitman v. Cosgrove*. In this 1967 case the mother contracted rubella during the first trimester of pregnancy and the defendant physician failed to diagnose the illness or to warn the mother of the risks of damage to the child. As a result of the rubella the child was born with severe birth defects. In denying the parents' claim for wrongful birth, the New Jersey Supreme Court ruled that public policy precluded recovery:

> The sanctity of the single human life is the decisive factor in this suit at tort. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort.

Although the *Gleitman* court ruled that there were no damages cognizable at law, it reversed itself in 1979 with the case of *Berman v. Allen*. Mrs. Berman became pregnant at age thirty-eight and bore a child afflicted with Down's syndrome. She stated that amniocentesis should have been performed, in

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17. *Id.* at 24, 227 A.2d at 690.
18. When this decision was delivered New Jersey did not permit abortions. This fact was influential in the court's ruling. *See supra* note 8. The court also rejected a wrongful life claim. 49 N.J. at 30, 227 A.2d at 692.
19. 49 N.J. at 30-31, 227 A.2d at 693.
which case she would have terminated the pregnancy.\(^{21}\) The parents sued for damages for the medical expenses and costs of rearing the child as well as for damages for emotional anguish.\(^{22}\) The court awarded damages only for the parents' emotional anguish and denied the other requests because to do so would grant the parents the benefits of the child's love and companionship while relieving them of the responsibility of providing for the child.\(^{23}\) Thus, the New Jersey court, while recognizing the parents' right to recover, still struggled with the sanctity of human life argument.

Other courts that recognize wrongful birth actions have not limited recovery to emotional distress damages. The Texas Supreme Court dismissed the Gleitman sanctity of life argument in the case of Jacobs v. Theimer\(^{24}\) and ruled that all expenses reasonably necessary for the child's care and treatment were recoverable.\(^{25}\) Similarly, the Pennsylvania Supreme Court awarded emotional distress and costs of care damages to the parents of a child afflicted with neurofibromatosis,\(^{26}\) stating that "since the parents have suffered a substantial wrong, an action should be permitted in which the usual common law principles of damage should be applied."\(^{27}\)

The California courts recognized the wrongful birth cause of action in 1967, long before most other state courts, in Custodio v. Bauer.\(^{28}\) While other courts grappled with the sanctity of life argument and the policy of preferring birth over abortion, the Custodio court analyzed wrongful birth as it would any other tort claim and found that a doctor who failed to use due care is liable for the injuries he inflicted.\(^{29}\)

The issue in Custodio was the birth of an unwanted child, not a deformed one. Although most courts will grant relief to the parents of a deformed child, court decisions lack uniformity concerning relief available to the parents of a healthy, but

\(^{21}\) Id. at 425, 404 A.2d at 10.
\(^{22}\) Id. at 425, 404 A.2d at 13.
\(^{23}\) Id. at 432, 404 A.2d at 14.
\(^{24}\) 519 S.W.2d 846 (1975).
\(^{25}\) Id. at 850.
\(^{26}\) Neurofibromatosis is a condition characterized by "tumor[s] arising from the connective or supporting tissue of a nerve." 2 J. SCHMIDT, supra note 12, at N-39.
\(^{28}\) 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).
\(^{29}\) Id. at 312, 59 Cal. Rptr. at 470.
unwanted child. In *Terrell v. Garcia*, a Texas court refused to award damages to a mother who had undergone an unsuccessful tubal ligation and later gave birth to her fourth and unwanted child. The court reasoned that the benefits the parents would gain due to the child's birth outweighed any economic loss the parents may have suffered as a consequence of raising him. A Michigan court, however, held that the mother's lost earnings, medical and hospital expenses, damages for the pain and suffering of labor and childbirth, and the economic costs of rearing the child were recoverable. This court recognized that although the parents would receive the benefit of the child's love and affection, to place a dollar value on that benefit would be equivalent to holding "that in every case, as a matter of law, the services and companionship of a child have a dollar equivalent greater than the economic costs of support, to say nothing of the inhibitions, the restrictions, and the pain and suffering caused by pregnancy and the obligation to rear the child." The court was unwilling to go this far.

Although wrongful life and wrongful birth actions arise from the same set of facts, wrongful life has yet to achieve the recognition or acceptance of its sister claim. The public policy arguments first articulated in *Gleitman* no longer bar recovery for wrongful birth, but present a major obstacle in wrongful life actions. These arguments, which will be discussed more fully in a subsequent section, are indicative of the inconsistency in the judicial decisions which uphold the parents' rights on the one hand while denying the child's rights on the other.

**IV. INJURIES FROM WHICH WRONGFUL LIFE CLAIMS ARISE**

With the exception of California, all other state courts claim that damages cannot be granted to the infant-plaintiff because damages cannot be measured and the court is not capable of accepting that in some situations no life is better than any life. Wrongful life claims arise under a number of

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30. 496 S.W.2d 124 (1973).
31. *Id.* at 128.
33. *Id.* at 250, 187 N.W.2d at 518.
34. See, e.g., *Gleitman*, 49 N.J. at 22, 227 A.2d at 692.
different factual situations. There are three categories within wrongful life, and a brief discussion of each category will assist in a better understanding of this claim and the reason for its harsh treatment by the courts.

A. *Illegitimacy*

In this category, the injury with which the child has been afflicted is the social stigma of being born an illegitimate. In the leading case of *Zepeda v. Zepeda*, the child claimed that his father had been negligent in refusing to marry the child's mother. Although the court recognized that a "a tortious act against the individual" had been committed, it denied recovery because recognition of the infant-plaintiff's claim would encourage a host of insubstantial claims. In *Williams v. State of New York* a child was born out of wedlock to a mentally deficient mother who was raped while under the care of a state institution. The child claimed that she was deprived of property rights, a normal childhood and home life, proper parental care, and would bear the stigma of illegitimacy all her life. The New York Court of Appeals ruled against the infant-plaintiff on the grounds that, "the law knows no cure for [illegitimacy], and the policy and social reasons against providing such compensation are at least as strong as those which might be thought to favor it." In the California case of *Stills v. Gratton*, the infant-plaintiff's mother underwent a therapeutic abortion which was performed negligently and the mother later gave birth to a healthy boy. In denying recovery, the court emphasized the fact that no harm was done since the child was healthy and a

35. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).
36. Id. at 253, 190 N.E.2d at 855.
37. Id. "One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics." Id. at 260, 190 N.E.2d at 858. The court did not address the constitutional issues of due process and equal protection raised by the infant-plaintiff. Id. at 246, 190 N.E. 2d at 853.
39. Id.
40. Id. at 481, 223 N.E.2d at 344.
42. A therapeutic abortion is one performed to save the mother's life. 1 J. SCHMIDT, supra note 12, at A-17.
joy to its mother.  

It is doubtful that an illegitimate's wrongful life action will be recognized in the absence of a physical injury of a better definition of the harm of the alleged stigma. The unfair treatment to which illegitimates have been subject in the past is diminishing in today's society. The United States Supreme Court articulated a more current attitude towards illegitimates: "It is unfair and unjust for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it."  

B. Pre-Conception Injuries

1. Negligent Treatment

This category involves claims that tortious conduct upon a parent prior to conception resulted in injuries to the child. In *Renslow v. Mennonite Hospital* the mother had been given a transfusion when she was thirteen, of Rh+ blood type which was incompatible with her Rh- blood type. The error was not discovered until the mother became pregnant and bore a daughter afflicted with both brain and nervous system damages. The Illinois court ruled that the harm to the child was foreseeable so the hospital owed a duty of care to the unborn child.

While *Renslow* does not technically fall under the wrongful life heading because the child did not assert that but for the defendant's negligence she would not have been born, it is nonetheless important to an analysis of wrongful life because it establishes the physician's duty of care to the unborn child.

In this group of cases, one of the parents has undergone a sterilization operation, which, because it was negligently per-

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43. 55 Cal. App. 3d at 705, 127 Cal. Rptr. at 656.
45. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).
46. Id. at 348, 367 N.E.2d at 1251.
47. Id. at 360, 367 N.E.2d at 1255-56.
formed, did not prevent the birth of a child. For example in the tragic case of *Speck v. Finegold*, Mr. Speck suffered from neurofibromatosis and he and his wife, after having two children who also suffered from this hereditary disease, decided that he should have a vasectomy. Despite the vasectomy, Mrs. Speck became pregnant so an abortion was performed, which turned out to be unsuccessful. Although the parents went to great lengths to prevent the birth of a child, a daughter was born who suffered from neurofibromatosis. The Pennsylvania Supreme Court was evenly divided on the issue of whether the child, as well as the parents, had a right to recover for the injuries she suffered:

Where an existing infant experiences suffering and financial expense as a result of another’s negligence, that suffering and expense should be recompensed . . . . The view that we cannot calculate the value of existence as compared to nonexistence is only one such hyper-scholastic rationale used to deny a cause of action in these cases.

2. *Genetic Counseling*

Cases which fall into the category of genetic counseling usually involve the following fact situation: Parents, aware that they may be carriers of hereditary defects, undergo tests to determine if in fact they are carriers; after assurances from the physician or genetic testing facility that they will not bear a child afflicted with a hereditary defect, they conceive and subsequently give birth to a child born with the very defect they sought to prevent.

*Park v. Chessin* is a typical case: The parents conceived a child after doctors expressly informed them that there was minimal risk the child would be born with polycystic kidney

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49. 497 Pa. at 82, 439 A.2d at 115.
50. Justices Flaherty, Kauffman, and Larsen argued for the child’s wrongful life claim. Justices Roberts and O’Brien stated that the child had no basis for recovery. Justice Nix stated that not only should the child’s claim be denied, but the parents’ wrongful birth claim should be rejected. Id. at 77, 439 A.2d at 110.
51. Id. at 87, 439 A.2d at 115 (Flaherty, J., concurring in affirmance of parents’ cause of action in tort and supporting affirmance of the order of the superior court denying a cause of action to the infant plaintiff).
Although a lower court permitted the diseased infant to state a claim for wrongful life, the New York Court of Appeals reversed, citing two flaws in the claim: (1) "[I]t does not appear that the [infant] suffered any legally cognizable injury;" and (2) damages could not be ascertained.

Curlender v. Bio-Science Laboratories is the landmark case in the area of wrongful life. In this case, the court of appeal established a child's right to state a cause of action for wrongful life. Shauna Curlender was born with Tay-Sachs disease and she sought to recover damages from the defendants because genetic tests were performed negligently on her parents. After a thorough discussion of decisions rejecting the wrongful life claim, the court of appeal recognized Shauna's right to recover:

The reality of the "wrongful-life" concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.

In 1982, the California Supreme Court, in Turpin v. Sortini, agreed with the Curlender court and declared that a cause of action for wrongful life may be stated. In Turpin, the parents suspected that their daughter, the older sister of the plaintiff, was afflicted with a severe hearing impairment, but were incorrectly assured by their physician that the child's hearing was within normal limits. In reliance on those assur-

53. Id. at 407, 386 N.E.2d at 809. Polycystic kidney disease is one where many cysts become imbedded in the tissue of the kidney. 2 J. SCHMIDT, supra note 12, at P-214.
55. 46 N.Y.2d 411, 386 N.E.2d at 812.
57. The defendants in this case were Bio-Science Laboratories, Automated Laboratory Services, and Jerome Schaffer, M.D. Id. at 814, 165 Cal. Rptr. at 479.
58. Id. at 815, 165 Cal. Rptr. at 479.
59. Id. at 829, 165 Cal. Rptr. at 488.
60. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
ances the Turpins conceived a second child, Joy, who was born with hereditary total deafness. Although the Fifth District Court of Appeal rejected *Curlender* because it believed that decision did not adequately address the public policy problems which a wrongful life claim presents, and asserted that the legislature, not the judiciary, should decide this issue, the Supreme Court dismissed this argument.

C. Injuries Occurring After Conception

Within this category are two subclasses: (1) the defendant’s failure to correctly diagnose an illness contracted by the mother during the first trimester of pregnancy; and (2) the defendant’s failure to perform amniocentesis, or, if performed, to correctly interpret the results.

In the first subclass the typical fact pattern is that the mother contracted rubella during the first trimester of pregnancy. Either her physician failed to diagnose the illness or failed to warn the mother that the illness could result in the birth of a defective child. Faced with a similar situation, the New Jersey Supreme Court in *Gleitman v. Cosgrove*, denied recovery because the defendant did not cause the infant-plaintiff’s condition, and more importantly, because no damages were cognizable at law: “The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination.” Most other states have followed the *Gleitman* reasoning.

*Becker v. Schwartz* is typical of the second subclass of cases. In this instance, a 37-year-old woman conceived a child but was not informed that a woman of her age might bear a Down’s syndrome child, nor was she advised to have an amniocentesis test performed. The child was in fact born with Down’s syndrome but the New York court denied recovery for her wrongful life claim, reasoning that no recognized cause of

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61. 31 Cal. 3d at 222, 643 P.2d at 956, 182 Cal. Rptr. at 339.
63. 49 N.J. 22, 227 A.2d 689 (1967).
64. Id. at 28, 227 A.2d at 692.
action had been stated.\textsuperscript{67}

In \textit{Gildiner v. Thomas Jefferson University Hospital},\textsuperscript{68} after the parents learned that they were carriers of Tay-Sachs disease, amniocentesis was performed and the defendants assured the parents that the test results revealed no trace of the illness. Their son, however, was born with Tay-Sachs disease. In denying recovery to the infant-plaintiff, the court followed the \textit{Gleitman} "impossibility of measuring damages" argument.\textsuperscript{69}

In summary, the following arguments have been used by courts to justify denying the infant's wrongful life action: (1) the impossibility of measuring damages; (2) the public policy restriction; (3) the lack of an ascertainable standard to decide which injuries would entitle the plaintiff to relief; and (4) the legislature as arbiter of wrongful life as a permissible cause of action. Ways in which these arguments might be overcome will be discussed in the remainder of this comment.

\textbf{V. The Damages Question}

In order to understand the majority rule that the infant-plaintiff has not stated a claim upon which relief can be granted, a brief analysis of a tort cause of action is necessary. As indicated earlier, a physician owes a duty of care to the unborn child, and as the \textit{Curlender} opinion noted, no authority has "suggested that public policy considerations negate the existence of such a duty."\textsuperscript{70} The plaintiff must then show that the defendant breached the duty owed him; such breach of duty is a factual determination and examples of that breach are evident throughout the discussion of the wrongful life cases.

The infant-plaintiff may prove causation by showing that "but for" the defendant's failure to exercise due care he would not have been born because had his parents been informed of the risks involved, they would not have conceived him or they would have terminated the pregnancy. It is, therefore, necessary for the child to show that the parents sought advice\textsuperscript{71} and

\begin{thebibliography}{99}
\bibitem{67} \textit{Id.} at 401, 386 N.E.2d at 812.
\bibitem{69} \textit{Id.}
\bibitem{70} 106 Cal. App. 3d at 828, 165 Cal. Rptr. at 488.
\bibitem{71} The \textit{Curlender} court noted that the parents' failure to avail themselves of genetic testing, amniocentesis, or abortion would be an intervening cause relieving the
\end{thebibliography}
relied on the defendant's negligent information, but the very fact that the parents took steps to ascertain whether the child would be severely handicapped may be sufficient.\textsuperscript{72}

Finally, the defendant's negligence must have resulted in actual injury to the plaintiff. In a wrongful life claim, "[t]he injury, of course, is not the particular defect with which a plaintiff is afflicted—considered in the abstract—but it is the birth of plaintiff with such defect."\textsuperscript{73}

Although the infant-plaintiff in a wrongful life action has satisfied the requirements of a tort cause of action, most courts have denied recovery because damages cannot be ascertained. The usual measure of damages is the monetary amount necessary to place the victim in the position he would have occupied had he not suffered the injury. The majority of courts reason that since the plaintiff would not have existed were it not for the defendant's negligence, courts cannot place a dollar value on the position of non-existence.

The theory that any tort victim can ever be restored to his pre-injury position is a fiction. The application of this fiction to the wrongful life claim is unjust and subverts the principles of tort law which are aimed at ensuring that one who wrongfully inflicts injury upon another is held responsible for redressing that injury. By constructing this obstacle the court is, in effect, condoning the actions of the wrongdoer.

Some commentators believe that the appropriate measure of damages should be the cost of supporting a defective existence in comparison to the cost of no existence, rather than trying to place a value on non-existence itself.\textsuperscript{74} The \textit{Curlender} court recognized that the child has rights, including the right to seek a remedy for his injuries,\textsuperscript{75} and applied stan-

\textsuperscript{72} 106 Cal. App. 3d at 816-17, 165 Cal. Rptr. at 480-81. In \textit{Curlender}, the plaintiff did not assert that her parents had relied on the results of the genetic tests in deciding to conceive her, but the court ruled in her favor regardless. \textit{Id.}

\textsuperscript{73} 106 Cal. App. 3d at 828-29, 165 Cal. Rptr. at 488.

\textsuperscript{74} Peters & Peters, \textit{supra} note 2, at 865.

\textsuperscript{75} 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 488-89.
standard tort principles in granting the plaintiff damages. The court did not consider it necessary to grapple with the problem of measuring the value of non-existence and did not believe that this dilemma sufficiently justified the denial of recovery: “Although we recognize exceptions from these fundamental principles [of tort law], no departure should be sanctioned unless there is a strong necessity therefor.”

Curlender limited recovery to the pain and suffering that the child would endure during its limited life expectancy, rather than measure recovery against the life expectancy of a normal child. Because the parents had initiated a wrongful birth action, the court abstained from awarding damages for the cost of the infant’s care and held that these costs were recoverable by the parents or the child, but not both. Finally, the court permitted the infant-plaintiff to seek punitive damages if she could prove “oppression, fraud, or malice, express or implied.”

The Turpin court, however, disagreed with the Curlender rationale for assessing damages. In Turpin, the infant-plaintiff was awarded extraordinary medical expenses only, and her claim for pain and suffering and other general damages was denied. The court’s decision was based on the argument that it is impossible to measure the value of non-existence. By assenting to this argument, the court tacitly rejected Curlender’s application of standard tort principles to the wrongful life claim.

Although the Turpin decision is significant because it is the first time that a wrongful life cause of action was recognized by a state supreme court, it does not resolve the problem of assessing damages. In fact, it obfuscates the question by introducing the “benefit doctrine,” which provides that to the extent the plaintiff has received a benefit as a result of the

77. *Id.* at 831, 165 Cal. Rptr. at 489.
78. *Id.* at 831, 165 Cal. Rptr. at 490 (citing CAL. CIV. CODE § 3294 (West 1970)).
79. 31 Cal. 3d at 232, 643 P.2d at 966, 182 Cal. Rptr. at 349.
80. *Id.* at 230, 643 P.2d at 964, 182 Cal. Rptr. at 346-47.
81. See *id.* at 229, 643 P.2d at 963, 182 Cal. Rptr. at 343-44. The court criticized the Curlender decision for failing to distinguish between actions arising from prenatal injuries (*see supra* notes 45-47 and accompanying text) and wrongful life actions.
injury inflicted, damages should be mitigated.\footnote{82}{31 Cal. 3d at 230, 643 P.2d at 964, 182 Cal. Rptr. at 347.} The benefit conferred on Joy Turpin, according to the court, was "a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering."\footnote{83}{Id.} Because plaintiff's pain and suffering were outweighed by the benefit received, she was not entitled to general damages. However, the task of determining to what degree the child gives and receives love and pleasure, and offsetting that against the harm inflicted, appears to be as difficult a task as measuring the difference in value of existence versus non-existence, which the \textit{Turpin} court declared impossible.

The reasoning of the \textit{Curlender} court is more cogent: Damages for pain and suffering are recoverable; damages for extraordinary medical expenses may be awarded unless these have been granted to the parents in their wrongful birth claim.\footnote{84}{See supra note 77 and accompanying text.} Courts possess the ability to fashion a remedy if it can be shown that an injury has been negligently inflicted upon an innocent victim,\footnote{85}{Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979).} and the majority of courts' reluctance to do so indicates that other reasons may exist to deny the wrongful life claim. These concerns will be addressed \textit{infra}.

\section*{VI. The Moral Dilemma}

Those courts that have refused to recognize a cause of action for wrongful life have relied on public policy reasons. The scope of public policy is unclear but in the wrongful life debate it seems to include (1) a fear that recognition of this cause of action will open up a Pandora's box of claims; (2) the belief that this is an area best left to the legislature to decide; and (3) the hesitancy of courts to make any statement which might be construed as a denial of the sanctity of human life.

The argument that recognition of the wrongful life claim will result in too many new claims is easily countered. Wrongful life actions are normally brought with the parents' cause of action for wrongful birth. Both actions involve the same set of facts, present similar issues, and ask for similar damages so both actions may be resolved at the same time. For example, in a case which involves negligent genetic counseling, the par-
ents will normally make the following assertions: (1) That they underwent genetic testing to insure that, if they conceived a child, he would not be born defective; (2) that in reliance upon the results of those tests the parents conceived a child who was ultimately born with the very defect they feared they would pass on to him; (3) that if the tests had been properly performed, the genetic defect would have been discovered and they would never have conceived the child; and (4) that because the defendant is, in effect, responsible for the birth of a defective child, they seek damages for the medical expenses, the mother's lost wages during pregnancy and childbirth, and the parents' pain and suffering.

In the wrongful life claim the infant-plaintiff recites the same facts as his parents and states that, had the genetic tests been performed properly, he would not have been born into a life of suffering and disability. The child asks for damages consisting of medical expenses, the costs of supporting a defective condition, and the pain and suffering to which he will be subjected during his life. Since the wrongful birth and life actions may be brought at the same time, the court can ensure that there is no duplication of awards.

Moreover, the wrongful life action is only available to a limited class of plaintiffs—defective children whose parent(s) underwent amniocentesis, or genetic counseling, or who contracted an illness during pregnancy which was not properly diagnosed. The awesome spectre of thousands of infant-plaintiffs banging on the courthouse door seeking to recover for their wrongful lives is unlikely to become a reality. Even if recognition of this cause of action resulted in countless other claims, this is not sufficient reason to close the doors to injured parties. Courts have a duty to remedy harms negligently inflicted, but they have have no obligation to limit the number of legitimate claims which they may hear.

The second public policy argument employed by courts to deny infant-plaintiffs recovery is that this area requires the legislature to speak before the judiciary acts. This "passing

86. Note that if the child is born healthy but unwanted, courts may allow recovery for wrongful birth but no recovery is allowed for wrongful life. See supra notes 30-33 and accompanying text. See also Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

the buck” is an attempt by courts to avoid their primary function of interpreting the law, and suggests that courts do not wish to accept the responsibility for deciding a controversial issue, one which may subject them to criticism. In California, the legislature has spoken: “Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation thereof in money, which is called damages.” The fact that there are few precedents in this area should not cause the courts to run to the legislature for protection because by doing so the courts only provide protection to the tortfeasor.

The final public policy argument is a moral and philosophical one which revolves around a debate over the quality and sanctity of human life. Because human life is a precious commodity, it is understandable that the judiciary is hesitant to declare that no life is better than a defective life. By recognizing this cause of action and granting that a life can be wrongful, the courts may be treading into territory where they do not belong. One court expressed this hesitancy as follows:

[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 the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.

According to one author, the courts’ focus on the philosophical and moral question is misguided and the courts should shift their attention to the relationship between law and fairness. With this perspective the court would ask

89. In the case of Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), the question of whether the court should permit a child, injured by a physician during childbirth, to recover from the tortfeasor was addressed. In deciding for the child, the court stated, “[t]he absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual . . . .” Id. at 142.
90. In discussing the Gleitman decision, the Curlender court stated: “Any decision negating the value of life directly or by implication was seen by the majority in Gleitman as an impermissible expression of public policy.” 106 Cal. App. 3d at 819, 165 Cal. Rptr. at 482.
whether it is *just* to compensate the child who has been injured by being born into a life of suffering, rather than asking whether it is contrary to moral and philosophical precepts to state that no life is better than any life. By looking at the question from a fairness viewpoint, courts may be able to free themselves from the metaphysical quagmire in which they find themselves.

*Curlender* viewed the sanctity of human life argument from a different perspective. The court did not focus on the fact that but for the defendant’s negligence the child would not have been born, but stated that a true reverence for human life requires the courts to provide every life with the opportunity to seek a remedy for the wrong it has suffered. 93

Another aspect of the moral dilemma is that courts are reluctant to set standards for evaluating a less than perfect life. Courts do not want to be placed in the position of deciding the severity of the defect in order to grant recovery:

[I]f one is not born perfect, what condition less than perfect will be recognized as cognizable injury or defect? It is obviously a question of degree as all human beings have some imperfections. Would partial deafness in one ear or poor vision qualify? Will crossed or cocked eyes, a large, uncorrectable, disfiguring, discolored, facial birthmark or a cleft palate be so recognized? What about an albino? 94

In response to this argument, the defect must be one which could have been discovered and attempts made by the parents and physicians to discover it. There are some conditions which can be corrected: Poor vision can be remedied with eyeglasses, partial deafness with a hearing aid, and speech problems with therapy. There are other conditions for which there is no cure: Tay-Sachs disease, Down’s syndrome, and total hereditary deafness. A possible standard for the courts to apply would be to award damages to plaintiffs who suffer from disabilities the effects of which cannot be ameliorated. Another approach to the standard of defect problem is available if courts decline to establish criteria and allow the jury to resolve the issue. 95

By using public policy as a shield to prevent the infant-

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93. 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 489.
plaintiff from asserting his claims, the judiciary is not addressing the issues presented by technical and medical advances. "Put in another way, the law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of." Technology will always present difficult moral questions and courts must be prepared to assist society in resolving these questions.

In the context of wrongful life the courts must recognize that recent advances make it possible to prevent the birth of a defective child. When these advances fail or are negligently administered, tragic results may occur. The law must expand in order to provide a remedy for the person who suffers the consequences. Rather than protecting the wrongdoers, the courts should explicitly inform them of their liability, so that the wrongdoers will exercise more caution, resulting in fewer mistakes.

VII. Conclusion

The foregoing analysis has contrasted wrongful birth with wrongful life in an effort to show that the very arguments which inhibited the former tort action's growth, but are generally dismissed today, continue to be applied to the wrongful life controversy. The argument voicing a concern over the ability to measure damages is more of a pretext for avoiding a difficult question than of loyalty to the principles of tort law. The attempt by courts to encourage the legislature to address the question reflects a fear of criticism should the public misinterpret the judiciary's reasoning. The courts need not try to establish a criteria for the severity of the defect which would entitle the infant-plaintiff to damages. Instead, with minimum guidance from the bench, the jury is capable of deciding this question. The philosophical barriers to the wrongful life claim are actually semantic ones. The courts should articulate the issue in terms of recompensing an injured victim, rather than in terms of life versus non-life. With this perspective the courts can focus on the issue as a tort problem and free themselves from the debate over the quality of human life.

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