Golden Gate University Law Review

Volume 12 | Issue 2 Article 4

January 1982

A Cause of Action for "Wrongful Life" in California: Breech Birth or Abortion?

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NOTES

A CAUSE OF ACTION FOR "WRONGFUL LIFE" IN CALIFORNIA: BREECH BIRTH OR ABORTION?

I. INTRODUCTION

Medical advances during the last fifteen years in the fields of genetic testing and prenatal diagnosis of fetal defects have created a new plaintiff. This plaintiff's cause of action, termed "wrongful life," alleges that the defendant's negligence caused her[1] birth and thereby made manifest the pain and suffering of her genetic defects.

Most American courts have denied the infant plaintiff access to the courts by holding that she has not suffered any injury assessable under American tort law. Within the California Court of Appeal, two districts have recently arrived at opposite conclusions, and the issue is being reviewed by the California Supreme Court.[2] In *Curlender v. Bio-Science Laboratories*[3] the California Court of Appeal for the Second District reviewed and rejected arguments advanced in major cases from other jurisdictions which refuse to recognize plaintiff's purported cause of action. Holding that the plaintiff had stated a cause of action, *Curlender* developed a new theory of recovery. One year later,

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1. The plaintiffs in the two major wrongful life cases reviewed in this Note happened to be female, as are the majority of plaintiffs mentioned herein. Therefore, the feminine gender will be used when referring generally to a wrongful life plaintiff. However, in this context, the feminine includes the masculine.

2. Turpin v. Sortini, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981), *rev'd* (May 3, 1982) (No. S.F. 24319). *See* editor's note at the end of this Note.

3. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2nd Dist. 1980).

the California Court of Appeal for the fifth District decided *Turpin v. Sortini*,[4] rejecting the *Curlender* analysis and refusing to recognize the plaintiff's cause of action for wrongful life.

In so doing, the *Turpin* majority failed to recognize the import of the *Curlender* decision, dismissed its reasoning as "narrow, humanistic,"[5] "without analysis,"[6] "unsound,"[7] "unwise"[8] and "conclusional,"[9] and thereby failed to address and explain its conclusion that *Curlender*'s groundbreaking holding, unique reasoning, and policy bases were unjustified and unworkable within modern tort law.

After tracing the history of the major wrongful life cases in this country, this Note will assess the conflict between *Turpin* and *Curlender* and show why *Curlender*'s unique reasoing conforms to modern tort law and compels recognition of a child's cause of action for wrongful life.

II. BACKGROUND

A. Overview

Zepeda v. Zepeda[10] was the first wrongful life case in this country. Joseph Zepeda, born an illegitimate child, brought suit against his father, Louis Zepeda.[11] The court found that the plaintiff's complaint contained all the elements of a willful tort[12] and it also stated that an illegitimate child suffers an injury, but it refused to allow the plaintiff's cause of action.[13] The court said that the plaintiff protested his very birth and thus called this new tort "wrongful life."[14] The court believed that under this

4. 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (5th Dist. 1981), *rev'd* (May 3, 1982) (No. S.F. 24319).

5. *Id.* at 697, 174 Cal. Rptr. at 132.

6. *Id.* at 695, 174 Cal. Rptr. at 131.

7. *Id.* at 692, 174 Cal. Rptr. at 129.

8. *Id.* at 697, 174 Cal. Rptr. at 132.

9. *Id.* at 695, 174 Cal. Rptr. at 131.

10. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

11. In *Zepeda*, the plaintiff alleged that his illegitimate status was due to his father's actions in inducing his mother to engage in sexual relations. The inducement was a promise of marriage. However, the defendant was already married and, though the plaintiff was conceived and born, the promise was not kept. *Id.* at 245, 190 N.E.2d at 851.

12. *Id.* at 259, 190 N.E.2d at 858.

13. *Id.* at 258, 190 N.E.2d at 857.

14. *Id.* at 259, 190 N.E.2d at 858.

new theory of wrongful life, any unliked physical characteristic, including a hereditary disease, would be actionable.[15] The main concern of the court was not the flood of litigation that might result from suits by illegitimates, but rather the multifarious circumstances and physical characteristics that might constitute an injury and therefore be actionable under a wrongful life theory.[16] If this new cause of action was to be accepted, the court thought that it should be declared by the legislature.[17]

In *Williams v. State*,[18] the New York Court of Appeals also faced a plaintiff who claimed injury due to her illegitimacy. The suit was brought not against her father, however, but against the state mental institution where her mother had been confined.[19] The *Williams*' court could find no basis for ruling that an illegitimate child has suffered an injury recognized by law.[20] Focusing on the circumstantial nature of the claimed injury, the court stated that, "being born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court."[21]

In a concurring opinion, Judge Keating expressed what, for later courts, would become the main impediment to recognition of a wrongful life cause of action:

> Damages are awarded in tort cases on the basis of a comparison between the position the plaintiff would have been in, had the defendant not committed the acts causing injury, and the position in which the plaintiff presently finds herself. The *damages* sought by the plaintiff in the case at bar *involve a determination as to whether non-existence* or nonlife *is preferable to life* as an illegiti-

15. *Id.* at 260, 190 N.E.2d at 858.

16. *Id.*

17. *Id.* at 263, 190 N.E.2d at 859.

18. 18 N.Y.2d 481, 276 N.Y.S.2d 885 (1966).

19. Plaintiff Christine Williams was conceived when her mother was raped by an unidentified assailant while she was confined as a patient in a New York mental facility. The child alleged that the state was negligent in its care, custody and supervision of her mother and in failing to protect her from physical attacks. The plaintiff claimed injuries from illegitimacy and deprivation of a normal childhood, including deprivation of proper care, support and rearing because her mother was mentally deficient. The court, however, addressed illegitimacy as the main injury. *Id.* at 482, 276 N.Y.S.2d at 886.

20. *Id.*

21. *Id.* at 484, 276 N.Y.S.2d at 887.

> mate with all the hardship attendant thereon. It is impossible to make that choice.[22]

Both the belief that the child's cause of action required a valuation of nonexistence against life and a judicial reluctance to make or even allow to be made such a determination recur in all the later cases, except *Curlender*.

In *Gleitman v. Cosgrove*[23] the New Jersey Supreme Court became the first court to address a wrongful life suit where the injuries were birth defects with pain and suffering and the negligence alleged was medical malpractice.[24] Sandra Gleitman entered the care of defendant Dr. Cosgrove when she was two months pregnant. A month earlier she had had German measles. Mrs. Gleitman testified that Dr. Cosgrove advised her that the measles would have no effect on her child. Allegedly, this opinion was repeated to Ms. Gleitman at a later date by the other defendant, also a doctor.[25] Subsequently, she gave birth to a baby boy, plaintiff Jeffrey Gleitman, born deaf, mute, almost blind and mentally retarded.[26] The parents alleged that had they been informed of the possibility of the defective birth, Mrs. Gleitman would have undergone an abortion.[27]

The court stated that in tort law, compensatory damages are measured by the difference between the plaintiff's impaired state and the state the plaintiff would have been in absent the defendant's negligence.[28] Here, the infant plaintiff never would have existed since, absent the negligence, the parents would have aborted the fetus.[29]

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22. *Id.* at 484-85, 276 N.Y.S.2d at 888 (emphasis added).

23. 49 N.J. 22, 227 A.2d 689 (1967).

24. Besides the child plaintiff's action for wrongful life, his parents brought "wrongful birth" actions on their own behalf for the injuries to themselves arising from the birth and life of their son. *Id.* at 23, 227 A.2d at 690.

25. *Id.* at 24, 227 A.2d at 690.

26. *Id.* at 29, 227 A.2d at 703.

27. *Id.* at 26, 227 A.2d at 691. In rebuttal, Dr. Cosgrove testified that he did inform Mrs. Gleitman of the possible effects of her measles on the fetus. *Id.* at 25, 227 A.2d at 690. The parents sought damages for their own mental and emotional suffering and for the expense of raising the child; the child sought to recover for his own pain and suffering due to the birth defects. *Id.* at 24, 227 A.2d at 690.

28. *Id.* at 28, 227 A.2d at 692. The court stated, "the infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination." *Id.*

29. "[T]he conduct complained of, even if true, does not give rise to damages cogni-

In the years following *Gleitman*, other state courts began to recognize the parents' cause of action for wrongful birth while at the same time continuing to deny the child's wrongful life cause of action.[30] Recognition of the parents' cause of action was sometimes facilitated by the U.S. Supreme Court's abortion decision of *Roe v. Wade*,[31] since a woman's constitutional right to an abortion during the first trimester supports the parents' right to choose to abort a genetically defective fetus. Abortion is not al-

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zable at law." *Id.* at 29, 227 A.2d at 692. In also denying the parent's cause of action, the court found that it was impossible to weigh the benefit of the child against the parent's emotional and monetary damages. "Such a proposed weighing is similar to what which we have found impossible to perform for the infant plaintiff." *Id.* at 29, 227 A.2d at 693.

30. *See* Gidner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (N.Y. Sup. Ct. 1968), *modified* 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd as modified*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). For commentaries on the wrongful life subject see Capron, *Informed Decisionmaking In Genetic Counseling: A Dissent To the "Wrongful Life" Debate*, 48 IND. L.J. 581 (1972-73); Friedman, *Legal Implications of Amniocentesis*, 123 UNIV. OF PA. L. REV. 92 (1974); Kashi, *The Case of The Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 WASH. U.L.Q. 919 (1979); Ploscowe, *An Action for "Wrongful Life"*, 38 N.Y.U. L. REV. 1078 (1963); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401; Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513 (1966); Note, *Wrongful Life and a Fundamental Right To Be Healthy:* Park v. Chessin; Becker v. Schwartz, 27 BUFFALO L. REV. 537 (1978); Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions For a Consistent Analysis*, 63 MARQ. L. REV. 611 (1980); Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis*, 55 MINN. L. REV. 58 (1970); Note, *Preconception Tort—The Need for a Limitation*, 44 MO. L. REV. 143 (1979); Note, *Torts—Wrongful Birth and Wrongful Life*, 44 MO. L. REV. 167 (1979); Note, *Torts Prior To Conception: A New Theory of Liability*, 56 NEB. L. REV. 706 (1977); Comment, Howard v. Lecher: *An Unreasonable Limitation on a Physician's Liability in a Wrongful Life Suit*, 12 NEW ENG. L. REV. 819 (1977); Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140 (1976); Note, Curlender v. Bio-Science Laboratories: *Filling The Wrongful Life Vacuum*, 9 SAN FERNANDO VALLEY L. REV. 113 (1981); Note, *New Jersey Recognizes Parents Cause of Action for Emotional Damages for Wrongful Birth But Denies Infant's Cause of Action for Wrongful Life*, 53 TEMPLE L.Q. 176 (1980); Note, *Torts—Wrongful Life—Infant's Right To Sue For Negligent Genetic Counseling*, 48 TENN. L. REV. 493 (1981); Comment, *Preconception Torts: A New Look at Our Newest Class of Litigants*, 10 TEX. TECH. L. REV. 97 (1978); Comment, *Liability For Wrongfully Causing One To Be Born: Development of a Tort For "Wrongful Life"*, 10 U.W.L.A. L. REV. 53 (1978); Note, *Torts—An Action for Wrongful Life Brought on Behalf of the Wrongfully Conceived Infant*, 13 WAKE FOREST L. REV. 712 (1977); Note, *Torts—Wrongful Life—No Cause of Action for Failure to Inform Of Possible Birth Defects*, 13 WAYNE L. REV. 750 (1967); Note *Wrongful Life: A Modern Claim which Conforms to the Traditional Tort Framework*, 20 WM. & MARY L. REV. 125 (1978).

31. 410 U.S. 113 (1973).

ways an issue in a wrongful life or wrongful birth case, however. As later cases reveal, developments in genetic testing provide a method of determining the possibility of genetic defects even prior to conception.[32] Coupled with modern methods of contraception, this affords parents the choice not to conceive a child who would face life with severe physical or mental defects.

In a case of first impression in New York, the appeals court in *Park v. Chessin*[33] rejected the arguments from other jurisdictions and took the unprecedented step of recognizing the child's cause of action for wrongful life.[34] It found that New York's abolition of its abortion ban gave parents the right not to have a child.[35] Then, without citing authority or providing much analysis, the court stated that, "[T]he breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole, functional human being."[36]

The court held that the infant plaintiff stated a cause of action for wrongful life and allowed recovery for the child's injuries and conscious pain and suffering.[37] Though the *Park* court's holding was to be short-lived, it was the initial judicial attempt to provide a framework for recognition of a wrongful life cause of action.

In a companion case, *Becker v. Swartz*,[38] the New York Court of Appeals reversed the *Park* decision,[39] holding that the

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32. *See* Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618 (1979).

33. 60 A.D.2d 30, 400 N.Y.S.2d 110 (1977).

34. Steven and Hetty Park sued on behalf of themselves and their child, Sara Park. Hetty had previously given birth to a child with fatal polycystic kidney disease who survived only five hours. Because this disease is hereditary, there was a substantial probability that any subsequent child would likewise be afflicted. The parents alleged that prior to conceiving a second child they consulted the defendant doctors who allegedly stated that the disease was not hereditary and the the chances of these parents producing another child with the diseases were "practically nil." The parents then conceived their second child, plaintiff Sara Park, who was also born with polycystic kidney disease and died from it at the age of two-and-a-half. *Id.* at 83, 400 N.Y.S.2d at 111.

35. *Id.* at 88, 400 N.Y.S.2d at 114.

36. *Id.*

37. *Id.* A concurring justice noted that "the action on behalf of the deceased infant is not for 'wrongful life', but rather for conscious pain and suffering allegedly caused by the negligence of the defendant doctors." *Id.* at 88, 400 N.Y.S.2d at 115.

38. 46 N.Y.2d 401, 413 N.Y.S.2d 895 (1978).

39. Park v. Chessin, 60 A.D.2d 30, 400 N.Y.S.2d 110 (1977).

child, Sara Park, failed to state a cause of action. The court based its holding on two closely related concepts. First, the plaintiff had not suffered a legally cognizable injury. Philosophers and theologians, the court reasoned, not judges, are equipped to decide "[w]hether it is better never to have been born at all than to have been born with even gross deficiencies."[40] The court found "no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child."[41] Second, assessing compensatory damages requires a measurement of nonexistence (the state the child would have been in absent the negligence), against life with defects (the state the child is in due to the defendant's negligence). The court found it impossible to make this measurement.[42] Both these concepts are founded on the court's refusal to assess, or allow a jury to assess, the value of nonexistence or of life.[43] In the end, the court decided that legislative, rather than judicial, action was required for recognition of this novel cause of action.[44]

The theoretical problems that courts have faced in dealing with plaintiffs who claim injury due to birth with physical ab-

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40. 46 N.Y.2d at 411, 413 N.Y.S.2d at 900.

41. *Id.*

42. "Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependant upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison, the law is not equipped to make." *Id.* at 442, 413 N.Y.S.2d at 900.

43. The court also rejected the appellate court's new found right to be born whole: "There is no precedent for recognition at the Appellate Division of 'the fundamental right of a child to be born as a whole, functional human being.' " *Id.* at 411, 413 N.Y.S.2d at 900 (citations omitted).

44. *Id.*, at 412, 413 N.Y.S.2d at 901. The court then allowed the parents' cause of action for wrongful birth, but limited the recoverable damages to the monetary expenses of care and treatment until the child's death. *Id.* at 415, 413 N.Y.S.2d at 903. For policy reasons, the court declined to allow damages for the parents' mental and emotional suffering. The court cited RESTATEMENT (SECOND) OF TORTS § 920 which states:

> 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.

Noting that the parents' damages for mental and emotional suffering would be mitigated by the emotional rewards of parenthood, the court found the calculation of these damages too speculative. The court again deferred allowance of these damages to the legislature. *Id.* at 415, 413 N.Y.S.2d at 902.

normalities are shown in *Elliott v. Brown*,[45] an Alabama Supreme Court case decided four months prior to *Becker*. The *Elliott* case depicts a claim which, unlike *Gleitman* or *Park*, aptly deserves the label "wrongful life." In *Elliott*, the husband underwent a vasectomy because of fears for the wife's health if she had to go through a pregnancy. Thereafter, Rachael Elliott was conceived and later born with serious deformities.[46]

The infant plaintiff alleged that the vasectomy had been performed negligently.[47] The court reviewed earlier cases, including *Gleitman* and *Park*, and found that the denial of a cause of action for wrongful life is based on the impossibility of calculating damages.[48] Raising and disposing of this claim,[49] the court held there is no legal right to be born as a whole, functional human being.[50] On these bases the court denied the child's cause of action.

However, *Elliott* is distinguishable from wrongful life cases faced by other courts. In *Elliott*, the plaintiff did not allege that the "defendant knew or should have known that, if born, she would have a deformity."[51] Thus, the defendant could not have been negligent toward the child plaintiff with respect to her pain and suffering from the defects. In *Elliott*, unlike other wrongful life cases reviewed here, the plaintiff truly claimed that the defendant's negligence simply consisted of allowing her to be conceived and born. Even if a wrongful life cause of action were recognized, the child plaintiff in *Elliott* would not be allowed to recover damages for the defects, since these were an unforseeable consequence of the defendant's negligence.

In *Berman v. Allan*[52] the New Jersey Supreme Court was called upon to reassess *Gleitman*, decided twelve years earlier. Sharon, the child plaintiff, sought damages for the physical and emotional pain and suffering due to her mongloid condition.[53] As

45. 361 So. 2d 546 (Ala. S. Ct. 1978).
46. *Id.* at 547.
47. *Id.*
48. *Id.*
49. *Id.* at 548.
50. *Id.*
51. *Id.* at 547.
52. 80 N.J. 421, 404 A.2d 8 (1979).
53. Shirley Berman, 38 years old and pregnant, entered into the care of the defen-

in *Gleitman*, the *Berman* court denied the child's cause of action, albeit for a different reason.

The *Berman* court acknowledged that Sharon would suffer greatly.[54] Comparing her to normal, healthy children, the court stated "she, unlike them, will experience a great deal of physical and emotional pain and anguish."[55] Then the court did explicitly what prior courts had only done implicitly: it weighed the value of life with defects against nonexistence and came down on the side of life in any form.[56]

In *Speck v. Finegold*[57] an intermediate Pennsylvania court denied the child's wrongful life cause of action, but allowed the parents' cause of action for wrongful birth by relying on the California case of *Custodio v. Bauer*.[58] In denying the child-plaintiff

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dant doctors. She later gave birth to the child plaintiff, Sharon, who was born with Down's Syndrome—a genetic defect commonly known as mongolism. The plaintiffs, Sharon and her parents, alleged that the defendant doctors failed to follow standard medical practice. They alleged that because of Shirley's age and the statistically high possibility that a child born of a woman who is over 35 years old will have Down's Syndrome, the defendants should have informed her about amniocentosis, a method of detecting genetic defects in a fetus. The plaintiffs further alleged that had they been so informed and if the defects were detected, the fetus would have been aborted. *Id.* at 424-25, 404 A.2d at 10.

54. After cataloging the instances where society shows how precious life is, the court noted that society also has a high regard for members of the medical profession. *Id.* at 429-30, 404 A.2d at 12-13.

55. *Id.* at 430, 404 A.2d at 13.

56. "Notwithstanding her affliction with Down's Syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure — emotions which are truly the essence of life and which are far more valuable than the suffering she may endure." *Id.* Reversing part of *Gleitman*'s holding, the *Berman* court recognized the parents' claim for emotional and mental suffering. The parents' claim for actual expenses of raising the child was denied because the court found this burden to be more than offset by the benefit they received — the joy and love of raising the child. *Id.* at 432, 404 A.2d at 14.

57. 408 A.2d 496 (Pa. Super.) (1979).

58. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). The court also made an interesting observation. The trial court had denied the parents' cause of action because the worth and sanctity of life was so great a societal interest that allowing damages in any form would be against public policy. The appellate court stated that "the lower court misses the point when it bases its opinion on this premise. The question is not the worth and sanctity of life, but whether the doctors were negligent in their surgical attempts at vasectomy and abortion." 408 A.2d at 503. No reason is given in the opinion for why this idea did not apply with equal force to the child's cause of action. For this court, as for prior courts, the "worth and sanctity of life" was the main consideration for denial of the child's cause of action.

Francine's cause of action,[59] the court enunciated several theories, all of which had been dealt with by earlier courts. First, there is no fundamental right to be born as a whole functional human being. The value of nonexistence over that of life with defects is a question for philosophers and theologians, not tort law.[60] Second, in tort law, damages are compensatory; measuring damages requires a comparison of non-existence with life in an impaired state—a comparison the law cannot make.[61] Third, this was not an action cognizable at law.[62] While the court failed to explain the third point, it apparently concluded that the child has suffered no injury recognized by law because the court cannot and will not measure damages under traditional tort principles.

B. California Case Law

Two California cases, decided prior to *Curlender*, shed light on the issues that arise in wrongful life causes and provide conceptual tools for dealing with them. These cases also show the state of California law on the subject when *Curlender* arose.

In 1967, just two months after *Gleitman* refused to recognize either the parents' or child's causes of action, a California appellate court in *Custodio v. Bauer*[63] recognized the parents' cause of action for wrongful birth and allowed a broad range of damages. The parents, seeking to limit the size of their family and to protect the wife's health, employed the defendant doctors to perform a sterilization operation upon the wife. When the wife later became pregnant and gave birth to a healthy child,

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59. 408 A.2d at 509. Frank and Dorothy Speck decided they did not want any more children. They were concerned that another child would be afflicted with neurofibromatosis, a crippling and disfiguring disease of the fibrous structures of the nerves. Their fear was well founded. Frank and their daughters, Valerie and Lee Ann, were already victims of the disease. For this reason, Mr. Speck had Dr. Finegold, one defendant, perform a vasectomy. Thereafter, Mrs. Speck became pregnant. Dr. Swartz, another defendant, was then engaged to perform an abortion, after which he allegedly proclaimed successful termination of the pregnancy. About four months later Francine Speck was born prematurely and afflicted with neurofibromatosis. 408 A.2d at 499-500.

60. 408 A.2d at 508.

61. *Id.* In Speck v. Finegold, 439 A.2d 110 (1981) (Pa. Super.), the Supreme Court split 3-3 on the question of whether Francine could bring a wrongful life cause of action. This evenly divided vote operated to automatically affirm the intermediate court's determination that Francine did not have a cause of action against the defendant doctors.

62. *Id.*

63. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

their tenth, the parent plaintiffs alleged that the operation was performed negligently. No cause of action was brought by the child, presumably because the child was born healthy.

The *Custodio* court rejected arguments similar to those raised by the defendants in *Gleitman* and held that the parents stated a cause of action. Upon proof of negligence, damages were allowable for the cost of the sterilization operation, mental and physical pain, loss of the wife's society and comfort, cost of the pregancy and delivery, and any further damages developed at trial, including the costs of raising the child.[64]

The court then addressed the applicability of the benefit rule of the Restatement (Second) of Torts, section 920.[65] The *Custodio* court noted that the rule contemplates a benefit to the interest to be protected.[66] Thus, when the defendant's negligence confers a benefit as well as a burden on the plantiff, the defendant can offset the measure of damages with the value of the benefit. However, this can only be done when the benefit accrues to the plaintiff's interest that would have been protected, absent the defendant's negligence.

In this case, the sterilization had been sought to protect the wife's health. The court then narrowly construed this interest and stated that "[i]f the failure of the sterilization operation and the ensuing pregnancy benefitted the wife's emotional and nervous makeup, and any infirmities in her kidney and bladder organs, the defendants should be able to offset it."[67] By narrowly construing the scope of the interest to be protected, *Custodio* swiftly disposed of the defendants' benefit argument. The court did not construe the wife's general physical and mental health as the interest to be protected, which in certain respects may have benefitted from the joy, love, and affection of another child. Instead, the court narrowed the scope of this interest to the particular mental and physical areas that the defendants' negligence had endangered, namely, the wife's nervous makeup, her kidney and bladder.

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64. *Id.* at 322-23, 59 Cal. Rptr. at 475-76.
65. For text of § 920, see note 44 *supra*.
66. 251 Cal. App. 2d at 323, 59 Cal. Rptr. at 476.
67. *Id.*

In *Stills v. Gratton,*[68] the second California case, the court faced a plaintiff who claimed injury by reason of his illegitimacy. His mother, unmarried and pregnant, had employed the defendant to perform an abortion. Though the operation was performed, the child plaintiff was later born healthy.[69] Both mother and child brought actions for damages alleging negligence by the defendant. In upholding the mother's cause of action, the court reiterated the *Custodio* analysis concerning a wrongful birth cause of action, including the applicability of Restatement section 920.[70]

The court denied the child's cause of action, cited both *Zepeda v. Zepeda* and *Williams v. State* and noted that the child "is a healthy, happy youngster who is a joy to his mother. His only damage, if any, caused by the respondents' conduct is in being born."[71]

III. REASONING IN THE PRINCIPLE TWO CASES: *CURLENDER* and *TURPIN*

Recently, two districts of the California Court of Appeal faced child plaintiff's alleging that had their parents known they would give birth to a child with defects they would have chosen not to conceive, and, had they conceived, would have aborted. The question in both cases was whether a child living with physical defects could recover in damages for the pain and suffering incurred when the only alternative to the child was never to have been born at all.

The court in *Curlender v. Bio-Science Laboratories*[72] held that an infant born with Tay-Sachs disease stated a cause of action for wrongful life against the defendant laboratories which, it was alleged, had negligently misinformed the child's parents that they would not produce a child afflicted with Tay-Sachs.[73]

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68. 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

69. *Id.* at 701-03, 127 Cal. Rptr. at 653-54.

70. *Id.* at 708-09, 127 Cal. Rptr. at 658-59 (citing RESTATEMENT (SECOND) OF TORTS, § 920 (1979)).

71. 55 Cal. App. 3d at 705, 127 Cal. Rptr. at 656. The court also cited *Gleitman* for the proposition that in wrongful life cases it is impossible to measure damages. *Id.* at 706, 127 Cal. Rptr. at 656.

72. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

73. In *Curlender* the complaint alleged as follows: Phillis and Hyam Curlender, plaintiff's parents, on January 15, 1977, retained defendant medical laboratories to ad-

One year later, the court in *Turpin v. Sortini*[74] reviewed all prior case law, rejected the *Curlender* holding, and instead held that the deaf child plaintiff, Joy Turpin, had not stated a cause of action.

A. Judicial Authority to Develop Tort Law

Since all prior authority had denied the wrongful life cause of action, the *Turpin* court's first volley at the *Curlender* decision was aimed at *Curlender*'s right to establish such a cause of action. An analysis of this part of both the *Curlender* and *Turpin* decisions requires an understanding of the California Supreme Court's decision in *Rodriguez v. Bethlehem Steel Corp.*[75] In *Rodriguez* the Supreme Court faced a situation where sixteen years earlier the California Supreme Court, in *Deshotel v. Atchison, Topeka, and Santa Fe Railway Co.*,[76] had flatly denied a cause of action for spousal loss of consortium.[77] The *Rodriguez* Court stressed that the impediment it faced to recognition of such a cause of action was the precedential force of *Deshotel*.[78]

In response, the *Rodriguez* court found that subsequent to

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minister certain tests. These tests were designed to reveal whether either of the parents were carriers of genes which would result in the conception and birth of a child with Tay-Sachs disease, medically termed "amaurotic familial idiocy." The tests were given on January 21, 1977 and the results allegedly showed that a child conceived of these parents would not be afflicted with Tay-Sachs disease. Sometime later Phillis Curlender gave birth to a baby girl, plaintiff Shauna Tamar Curlender, and on May 10, 1978, Shauna's parents were told that Shauna had Tay-Sachs disease. *Id.* at 815-16, 165 Cal. Rptr. at 480.

74. 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981), *rev'd* (May 3, 1982) (SF 24319). *See* editor's note at the end of this Note. In *Turpin* the plaintiff, Joy Turpin, alleged that the defendants had diagnosed her elder sister, Hope Turpin, as having normal hearing. In fact, Hope was totally deaf due to a hereditary hearing defect. Plaintiff's parents, James and Joy Turpin, allegedly relied upon these diagnoses and conceived plaintiff. Born on August 23, 1977, Joy like her sister Hope, was totally deaf from a hereditary abnormality. *Id.* at 692, 174 Cal. Rptr. at 129.

75. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974). In *Rodriguez* the California Supreme Court was "called upon to decide whether California should continue to adhere to the rule that a married person whose spouse has been injured by the negligence of a third party has no cause of action for loss of 'consortium', *i.e.* for loss of conjugal fellowship and sexual relations." *Id.* at 385, 525 P.2d at 670, 115 Cal. Rptr. at 766.

76. 50 Cal. 2d 664, 328 P.2d 449 (1958).

77. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d at 387, 525 P.2d at 671, 115 Cal. Rptr. at 767.

78. Referring to the trial court, the Supreme Court stated, "Addressing Mary Anne's counsel, the court made it clear that it would have ruled in his client's favor but for the precedent of *Deshotel* . . . . " *Id.*

the *Deshotel* decision there had been a dramatic shift in the weight of authority. Many state courts and commentators had reversed their earlier positions and had recognized the spouse's cause of action for loss of consortium.[79] On this basis *Rodriguez* held that *Deshotel* was no longer sound authority and overruled it.[80]

Against this background, the *Turpin* court criticized *Curlender* for recognizing the child's cause of action since there had been no such shift in the weight of authority.[81] The question arises, however, whether the need for a shift in authority, called for in *Rodriguez,* applies to *Curlender.* The *Rodriguez* court faced, as its impediment, California Supreme Court precedent which had stood for sixteen years. To test the continued validity of its own precedent, the court looked to other jurisdictions and to the works of legal commentators. The *Rodriguez* holding accomplished a change in California common law and a concomitant overruling of California precedent. For this reason, the Court sought support for its holding in the previous shift of attitude in legal circles.

However, the *Curlender* court distinguished the facts in its case from *Stills v. Gratton,*[82] the only previous wrongful life decision in California, and, therefore, did not face any longstanding California precedent. Since the child in *Stills* was born healthy, the only possible injury was his illegitimacy, merely a difference in status, and not a physical injury as in *Curlender* and later in *Turpin.*[83] *Turpin,* though, rejected any distinguish-

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79. *Id.* at 388-93, 525 P.2d at 672-75, 115 Cal. Rptr. at 768-71.

80. *Id.* at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782.

81. 119 Cal. App. 3d at 693, 174 Cal. Rptr. at 129. "The reasons for changing these principles do not comport with the criteria for changing long-standing rules of law under the standards of *Rodriguez v. Bethlehem Steel Corp.* . . . ; specifically, as will be pointed out, there has been no dramatic shift, indeed no shift, in the weight of authority against allowing recovery . . . . " *Id.*

82. 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

83. The *Curlender* court stated:

> "[I]llegitimacy is a status which may or may not prove to be a hinderance to one so born, depending on a multitude of other facts; it cannot be disputed that in present society such a circumstance, both socially and legally, no longer need present an overwhelming obstacle. The same is true for the simply unwanted child. We agree with the reasoning of *Zepeda* and *Stills* that a cause of action based upon impairment of status — illegitimacy contrasted with legitimacy — should not be

ing of *Stills:*

> *Curlender* concludes that illegitimacy is not an injury. It is, however, not a reality that despite social gains the disadvantage and stigma of being a bastard have far from disappeared? [Citation]. It is not specious to argue that the burden of illegitimacy is a less compensable injury than many physical impairments or defects? Though not justified, may it not in fact be true that an unwanted illegitimate child, even more than the cared-for although physically handicapped child, is doomed to a life of hardship and social stigma?[84]

One might wonder whether these are truly the rhetorical questions the *Turpin* court believed them to be. Furthermore, while the California Supreme Court in *Rodriguez* faced its own precedent, which had stood for sixteen years, *Curlender,* decided by an appellate court from the Second District, faced *Stills,* an appellate decision from the First District, which had stood for only four years.[85] Thus, the *Rodriguez* factors do not stand as an impediment to the *Curlender* decision. Rather, the *Curlender* court was correct when, in framing the question before it, it stated, "The appeal presents an issue of first impression in California . . . . "[86]

Turpin also implied that the mere existence of adverse precedent in other states stood as a barrier to the *Curlender* decision.[87] However, *Rodriguez* had rejected any such idea. It ap-

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> recognizable at law because a necessary element for the establishment of any cause of action in tort is missing, *injury* and damages consequential to that injury. A child born with severe impairment, however, presents an entirely different situation because the necessary element of injury is present."

106 Cal. App. 3d at 825, 165 Cal. Rptr. 486 (emphasis in original). The dissent in *Turpin* also distinguished *Stills:* "[T]he case is dissimilar from the instant case. In *Stills* the child 'was and is a healthy, happy youngster who is a joy to his mother.' His only disability was illegitimacy. In view of social mores as they existed in the 1970's, any damages would be highly speculative." 119 Cal. App. 3d at 697, 174 Cal. Rptr. at 134 (citation omitted).

84. 119 Cal. App. 3d at 697, 174 Cal. Rptr. at 132.

85. The independence of the appellate districts was illustrated when the *Turpin* court, from the Fifth District, refused to follow the Second District's *Curlender* decision.

86. 106 Cal. App. 3d at 814, 165 Cal. Rptr. at 479.

87. 119 Cal. App. 3d at 692, 174 Cal. Rptr. at 129. The *Turpin* court stated that until *Curlender,* "a long and unbroken line of authority, both in and outside of California, has held that a cause of action for 'wrongful life' could not be stated." *Id.*

provingly quoted a Massachusetts court that had observed, "We should be mindful of the trend although our decision is not reached by a process of following the crowd."[88] In this case the *Curlender* court sought to lead the crowd, to show the way to a more just tort system; one that other courts had not reached due to mixed or muddled reasoning.

B. Deference to the Legislature

The role of the legislature was the second major area where *Turpin* and *Curlender* clashed. The *Turpin* court rejected "*Curlender* as unsound under established principles of law and as a sortie into areas of public policy clearly within the competence of the Legislature."[89] But *Rodriguez* had shown that the deference-to-the-legislature argument had not been persuasive when the question involved judicial development of judicially-created common law:

> The second principal rationale of the *Deshotel* opinion . . . was that any departure from the then-settled rule denying the wife recovery for the loss of consortium "should be left to the legislative action," and defendants in the case at bar echo that plea. But in the years since *Deshotel* the argument has fared badly in our decisions. 'In effect the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case demonstrates.'[90]

In this regard, *Curlender* cited *Rodriguez* for the proposition that California courts have power to develop flexible, judicially created tort common law:

> It is to the credit of this state that our highest court has, when expansion of tort liability is indi-

88. 12 Cal. 3d at 392, 525 P.2d at 675, 115 Cal. Rptr. at 771. *See* Diaz v. Lilly & Co., 364 Mass. 153, 302 N.E.2d 555, 561 (1973). The dissent in *Turpin* stated, "Although deference should be accorded decisions of other jurisdictions, they should be followed only if consonant with California law." 119 Cal. App. 3d at 698, 174 Cal. Rptr. 133.

89. 119 Cal. App. 3d at 692-93, 174 Cal. Rptr. at 129. The *Turpin* court argued that, "[i]f any decision requires the wise deliberation and painstaking investigation that only the Legislature can give, the determination that impaired, but living children should be enabled to sue for the injury of birth is such a decision. Accordingly, the issue here could better be left to legislative determination." *Id.* at 698, 174 Cal. Rptr. at 133.

90. 12 Cal. 3d at 393, 525 P.2d at 675-76, 115 Cal. Rptr. at 771-72 (quoting People v. Pierce, 61 Cal. 2d 879, 882, 395 P.2d 893, 895, 40 Cal. Rptr. 845, 847 (1964)).

> cated, emphasized the flexible nature of judicially created common law and the assistance provided by analysis of previous decisions whether of California courts or courts in other jurisdictions in defining the issues, identifying trends and, on occasion, detecting the winds of change.[91]

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91. 106 Cal. App. 3d at 827, 165 Cal. Rptr. at 487 (citation omitted). At one point the *Curlender* court suggested that, in an appropriate case, the child may have a cause of action against her parents for wrongful life:

> The "wrongful life" cause of action with which we are concerned is based upon negligently caused failure by someone under a duty to do so to inform the prospective parents of facts needed by them to make a conscious choice *not* to become parents. If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.

Id. at 829, 165 Cal. Rptr. at 488 (emphasis in original). The *Turpin* Court recoiled from this vision of a child suing her parents for the pain and suffering of her genetic defects. "The right of parents to make a decision to take the risk of having offspring with a defective rather than live childless, for example, should not be tampered with by judicial intermeddeling." 119 Cal. App. 3d at 697, 174 Cal. Rptr. at 132.

The Legislature agreed that a child's cause of action for wrongful life should not extend to suits against the parents. As originally introduced by Assemblyman McAlister, A.B. 267 would have totally rejected the *Curlender* holding:

> A court of appeals has recently held that a child afflicted with a genetic disorder has a cause of action for damages based on her birth with such defects proximately caused by the negligent failure by a laboratory that conducted genetic tests on the child's parents to inform the parents that they were carriers of the genetic disorder. This bill would provide that no cause of action arises (1) on behalf of any person based upon the claim that the person should not have been conceived or, if conceived, should not have been born alive, or (2) on behalf of a person based on the claim that another person, once conceived, should not have been allowed to have beem born alive. It also would provide that the failure or refusal of a person to prevent the live birth of another person once conceived shall not be a defense in any action against a third party, and would prohibit such failure or refusal from being considered in awarding damages.
>
> . . . .
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> . . . Section 43.6 is added to the Civil Code, to read: 43.6. (a) No cause of action arises on behalf of any person based upon the claim that the person should not have been conceived, or if conceived, should not have been born alive.

In sum, *Rodriguez* sets forth two guidelines for a court when developing a new tort rule. First, if there is California precedent, look for a dramatic shift of opinion in other jurisdictions. Second, if there is no California precedent, look to other jurisdictions to detect the winds of change.

The *Curlender* court found no California precedent contrary to its holding, but instead detected shifting winds in the dissents in cases from other jurisdictions, the views of commentators, the intermediate appellate decisions of *Park v. Chessin,* the implications of *Roe v. Wade,* the continuing recognition by other courts of the parents' cause of action, the retreat from accepting the "impossibility of measuring damages" as a ground for denying the child's cause of action, and the "dramatic increase in the last few decades, of the medical knowledge and skill needed to avoid genetic disaster."[92]

(b) No cause of action arises on behalf of a person based on the claim that another person, once conceived, should not have been allowed to have been born alive.

(c) The failure or refusal of a person to prevent the live birth of another person once conceived shall not be a defense in any action against a third party, nor shall such failure or refusal be considered in awarding damages in any such action.

(d) As used in this section "conception" means the fertilization of a human ovum by a human sperm."

A.B. 267, 1981-82 Sess. (Cal. 1981).

This language in the bill ran into opposition in the Assembly Judiciary Committee. The amended bill, ultimately passed by both the Assembly and Senate and signed by the Governor three months after the *Turpin* decision, only rejected any cause of action for wrongful life by a child against her parents. Significantly, subsection (b) strengthens the child's cause of action against medical personnel. When medical personnel are negligent in testing and a child is conceived, but it is discovered prior to birth that the child has the feared genetic defects, the medical personnel cannot argue that the parents' refusal to obtain an abortion is an intervening act that relieves them of liability.

A.B. 267, as amended, added § 43.6 to the Civil Code. That section reads:

(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.

(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.

(c) As used in this section "conceived" means the fertilization of a human ovum by a human sperm.

1981 Cal. Stat. ch. 331, § 1 (codified at CAL. CIV. CODE § 43.6 (West Supp. 1981)).

92. 106 Cal. App. 3d at 826, 165 Cal. Rptr. at 486-87.

C. VALUATION OF LIFE

Though the *Curlender* court found that it was neither bound by decisions from other jurisdictions, nor restrained by legislative inaction, it did seek to develop a theory of recovery that addressed the main concerns expressed by other courts: that a value would have to be assigned to life itself, and that a consequent denigration of life would be necessary to find that the child was suffering legal damages. Prior courts believed that the wrongful life cause of action was tantamount to the idea that a genetically-defective child was better off dead, or at least never born.

In response to this concern the *Curlender* court stated:

> The circumstance that the birth and injury have come in hand in hand has caused other courts to deal with the problem by barring recovery. 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.[93]

The *Turpin* court replied that, "[b]y such a narrow, humanistic approach to an issue laden, as it is, with questions and considerations beyond the judicial ken, *Curlender* represents at least an unwise jurisprudential example which we decline to follow."[94] On this point, the *Turpin* court misperceived *Curlender*. In the above quoted section, the *Curlender* court recognized that the defendant's negligence had produced two distinct elements: (1) the child is given life and (2) the child lives with pain and suffering.[95] Prior decisions had not made this theoretical distinc-

93. *Id.* at 829, 165 Cal. Rptr. at 488.

94. 119 Cal. App. 3d at 697, 174 Cal. Rptr. at 132.

95. 106 Cal. App. 3d at 821, 165 Cal. Rptr. at 483. The *Curlender* court noted that:

> The dissenting opinion in *Berman* expressed the cogent observation that, as for the child, "[a]n adequate comprehension of

tion between life, and pain and suffering, and neither did *Turpin*. The significance of this distinction will be shown later.

The *Turpin* court, misreading *Curlender*, searched for the basis of *Curlender*'s holding in prior case law and in the *Turpin* child's complaint. In doing so, *Turpin* interpreted the *Curlender* holding as grounded upon the fundamental right of a child to be born as a whole, functional human being.[96] However, *Curlender* explicitly noted both that this fundamental right argument had been advanced in the intermediate appellate decision of *Park v. Chessin*[97] and that the New York Court of Appeals had rejected it.[98] *Curlender* did not thereafter mention any such right in developing its analysis, and none was necessary to its holding. *Turpin*, nonetheless resurrected the old arguments on the rejection of any such right, the preciousness of life in any form, and the refusal to attach a value to either life or to nonexistence. Again, the *Turpin* court attacked *Curlender* for not addressing the problem that all previous courts had faced—attaching a value to life: "*Curlender* avoids resolving this fundamental problem of measuring damages, that is, comparing the value of impaired life against no life."[99]

> the infant's claims under these circumstances *starts with the realization that the infant has come into this world and is here*, encumbered by an injury attributable to the malpractice of the doctors."

Id. (quoting Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 19 (1979) (emphasis in original). For a discussion of *Berman*, see notes 52-56 *supra* and accompanying text.

96. 119 Cal. App. 3d at 695, 174 Cal. Rptr. at 131. The *Turpin* court stated:

> Turning to the issue of public policy, it is explicit that the minor plaintiff herein predicated her right to recover upon an alleged right to be born as a whole, functional human being without defect, alleging specifically she was "deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness, all to her general damages." *Curlender* is implicitly grounded upon the same concept.

Id.

97. For a discussion of *Park v. Chessin*, see notes 33-37 *supra* and accompanying text.

98. 106 Cal. App. 3d at 822, 165 Cal. Rptr. at 484. Referring to the New York Court of Appeals, the *Curlender* court stated, "The court particularly rejected the idea that a child may expect life without deformity: 'There is no precedent for recognition at the Appellate Division of the fundamental right of a child to be born as a whole, functional human being.' " *Id.* (quoting Becker v. Schwartz, 413 N.Y.S.2d 895, 900, 386 N.E.2d 807, 812 (1978)).

99. 119 Cal. App. 3d at 695, 174 Cal. Rptr. at 131.

While *Curlender,* did avoid valuing life, it did not shrink from measuring damages. As noted earlier, *Curlender* made the unique distinction between the two simultaneously occuring, but theoretically distinct, elements the defendant's negligence had produced: the child is given life and the child experiences pain and suffering. Therefrom, *Curlender* held that the child could recover for the detriment received—the pain and suffering—but that this injury was only to be measured by the actual life span of the child plaintiff, not by any theoretical life span of a child without the physical defects.[100] In this way, the court again negated the idea that it based its decision on a fundamental right to be born whole. If such a right were being recognized, the correct measure of damages would have reflected the normal life span of a whole child.

By narrowing the recoverable damages to the pain and suffering of the actual child, the court did not have to value either life or nonexistence. What *Curlender* did not explain was what happened to the benefit of life received by the child. If damages are assessable for the burden of pain and suffering, for example, why shouldn't the benefit of the life received be a component in the calculation? After all, this benefit also resulted from the defendant's negligence. In this respect *Curlender* provides little assistance. It may be that the *Curlender* court realized that valuing life is a volatile issue, found it unnecessary to its holding,

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100. The *Curlender* court stated:

> The complaint seeks damages based upon an acturial life expectancy of plaintiff of more than 70 years—the life expectancy if plaintiff had been born without the Tay-Sachs disease. The complaint sets forth that plaintiff's actual life expectancy, because of the disease, is only four years. We reject as untenable the claim that plaintiff is entitled to damages as if plaintiff has been born without defects and would have had a normal life expectancy. Plaintiff's right to damages must be considered on the basis of plaintiff's mental and physical condition at birth and her expected condition during the short life span (four years according to the complaint) anticipated for one with her impaired condition. In similar fashion, we reject the notion that a "wrongful-life" cause of action involves any attempted evaluation of a claimed right *not* to be born. In essence, we construe the "wrongful-life" cause of action by the defective child as the right of such child to recover damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition.

106 Cal. App. 3d at 830-31, 165 Cal. Rptr. at 489 (emphasis in original).

and therefore refused to discuss either the value of life or the relation of that benefit to the question of damages. Neither wanting nor required to make any valuation of life, the court ignored the benefit received.

IV. ANALYSIS

As shown earlier, *Turpin* misperceived the *Curlender* analysis and thereby failed to address *Curlender*'s unique approach. Curlender's theoretical distinction between the life received and the pain and suffering endured by the child, along with the court's assessment of damages, goes far to justify a cause of action for the child. However, this analysis was not fully developed. Since the child is suing only for pain and suffering, not life, the question arises whether the defendant can raise the value of the benefit received (life) in mitigation of damages. Case law provides three ways to deal with the benefit of life in wrongful life cases.

A. Infringement On the Parents' Right To Choose

As noted earlier,[101] Restatement section 920 applies in California. According to section 920:

> 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.[102]

Thus, section 920 allows the benefit to be raised in mitigation of damages where it is equitable. In a wrongful life case, it would not be equitable to allow the defendant to raise the benefit in mitigation of damages. The defendant never had the intention of conferring his benefit on the child-plaintiff, but, more importantly, the defendant had no right to make such a decision.

In *Bushman v. Burns Medical Center*,[103] the plaintiff un-

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101. The applicability of the *Restatement*'s benefit rule is discussed at notes 65-67 *supra* and accompanying text.

102. Restatement (Second) of Torts § 90 (1979).

103. 83 Mich. App. 453, 268 N.W.2d 683 (1978).

derwent a vasectomy at the defendant hospital. His wife later became pregnant and delivered their fifth child. The parents sued the medical center for malpractice, claiming mental and emotional suffering and the cost of pregnancy. The trial court accepted the defense theory that "any damages incurred by the plaintiffs should be offset by the benefits received from having the blessing of a healthy child."[104] A verdict for the defense was returned. On appeal it was reversed and remanded due to this erroneous jury instruction.

Referring to Restatement section 920, the *Bushman* court stated:

> We believe the last phrase of the quote from the Restatement is applicable here. To allow the defense to shield itself behind the love and affection of the plaintiffs for their healthy and lovable fifth child is less than equitable if indeed the plaintiffs' claims are in fact true. That is, that the physician was negligent, that the plaintiff mother, a polio victim as a child, had considerable and extreme difficulty with four previous deliveries, that she had a crippling condition of the spine, a significant difference in leg length, a distorted pelvis and had been subjected to extensive labor anywhere from 45 to 50 hours during delivery. Testimony indicates that plaintiff mother was placed under psychiatric care, threatening suicide shortly after her pregnancy was confirmed. Under these circumstances the damages claimed seem reasonably and equitably severable.[105]

In a wrongful life case, a jury could not be expected to value a child's life at less than the pain and suffering of some genetic defects. Furthermore, it is not equitable to allow the benefits rule in wrongful life cases because the defendants have infringed on the parents' right to choose whether this child should be conceived, or, if conceived, born. An early commentator stated, "[i]f the infant is to endure a life with defects, it must be because that was the moral choice made by his parents and not because they were given no alternative choice due to the negligence or

104. *Id.* at 457, 268 N.W.2d at 685.
105. *Id.* at 463-64, 268 N.W.2d at 687-88.

private morality of a physician."[106]

B. Absence of Benefit to the Burdened Interest

As discussed previously,[107] the *Custodio* court, in applying section 920 in California, noted that it applies only when the defendant benefits the interest to be protected. In a wrongful life case the parents have sought to protect the infant from enduring the pain and suffering caused by genetic defects. The life given to the infant brings all the benefits noted by the courts and the child is able to experience many rewards of this earthly existence. However, none of these benefits reduces the pain and suffering of the infant, although it may receive other benefits. The joy and affection lavished on a child by family and friends is a rewarding experience. But these benefits cannot reduce Shauna Curlender's partial or complete loss of vision, her mental underdevelopment, the softness of her muscles, the convulsions, or all the pain and suffering attendant thereto. Neither can they bring hearing to Joy Turpin. The life given, far from being a benefit to these interests to be protected, is the foundation on which they rest. The life given supports and nurtures, but does not mitigate or reduce, the physical defects, the very things that the parents, in soliciting medical advice from the defendants, sought to avoid for their child.

C. Balancing of Life Against Nonlife

Courts could allow the jury to balance the benefit against the burden, rather than making the irrebuttable presumption that life is always superior to nonlife. In *Sherlock v. Stillwater Clinic*[108] the Minnesota Supreme Court recognized the parents' cause of action for "wrongful conception" due to a negligently performed sterilization operation, and allowed damages for medical expenses, pain and suffering during delivery, and loss of consortium. Also, parents could recover the costs of rearing the child, offset by the value of the child's aid, comfort, and society during the parent's life expectancy.[109] *Sherlock* allowed the value of the child's life in relation to the parents to be used in

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106. Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis*, 55 Minn. L. Rev. 58, 81 (1980).

107. *Custodio v. Bauer* is discussed at notes 66-67 *supra* and accompanying text.

108. 260 N.W.2d 169 (Minn. S. Ct. 1977).

109. *Id.* at 170-71.

mitigation of damages. Likewise, the courts could allow the value of the child's life to be applied in mitigation of her own damages in a wrongful life case. However, this would entail a valuation of life, the very thing that most courts have refused to do.

V. CONCLUSION

Courts in other jurisdictions have found various reasons to deny the child's wrongful life action. Central to all their holdings, however, was the belief that a valuation of life itself was necessary to identify the plaintiff's injury and to assess the damages. This was not the case in *Curlender*. *Curlender* recognized the child's cause of action without undergoing a valuation of life. *Turpin* misperceived the *Curlender* court's analysis and thus failed to adequately refute its arguments. The *Curlender* court's analysis, including its discussion of damage assessment, coupled with the equitable considerations of Restatement section 920, provides a solid theoretical foundation for the recognition of a child's cause of action for wrongful life when the pain and suffering from genetic defects are made manifest by medical malpractice.*

Daniel Linchey

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* Editor's Note. During publication, the California Supreme Court reversed *Tupin v. Sortini* (May 3, 1982) (No. S.F. 24319). In a 4-2 decision, the court recognized the child-plaintiff's cause of action for wrongful life, but limited recovery to special damages such as medical expenses and specialized training. General damages were denied because of the inability of comparing the value of an impaired life to nonlife in any fair, nonspeculative manner. The benefit rule of section 920 of the *Restatement (Second) of Torts* was likewise rejected because it would directly require the weighing of life vs. nonlife. Special damages were allowed since they are certain and readily measurable and in many instances the expenses would be vital "not only to the child's well-being but to his or her very survival." *Id.* at 19.

The dissent found the majority's opinion internally inconsistent in allowing special damages but not general damages for the same tort, and would have adopted *Curlender*'s approach to awarding general damages.