

July 2015

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Recommended Citation

Laufer, Janet A. (1983) "Wrongful Life, Turpin v. Sortini," *Akron Law Review*: Vol. 16 : Iss. 2 , Article 7.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol16/iss2/7>

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WRONGFUL LIFE

Turpin v. Sortini

31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982)

I. INTRODUCTION

IN THE PAST FIFTEEN YEARS, several state appellate courts have considered wrongful birth¹ and wrongful life² causes of action.³ While the modern trend is to allow wrongful birth causes of action,⁴ few courts have permitted wrongful life actions to be maintained.⁵ On May 3, 1982, the California Supreme Court, in *Turpin v. Sortini*⁶ became the first state high court to allow a wrongful life cause of action. This casenote will examine the reasoning of the *Turpin* court in allowing the wrongful life claim. While *Turpin* appears to signal a new trend in this area of tort law, there is little doubt that it will generate much criticism.⁷ Some commentators will suggest that the *Turpin* court went too far;⁸ others that it did not go far enough.⁹ This article will explore the policy considerations surrounding both sides of the issue.

II. *TURPIN V. SORTINI*: THE FACTS, HOLDING AND RATIONALE

On September 24, 1976, James and Donna Turpin took their daughter,

¹Wrongful birth actions are generally brought by parents of a "wrongfully born" deformed or diseased child against a physician who allegedly "wrongfully caused" the child's birth. In such a suit, the parents demand compensation for losses they themselves have sustained as the result of the child's birth. Comment, *Wrongful Life and Wrongful Birth Causes of Action — Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 611 (1980).

²Wrongful life actions are those brought by or on behalf of a child claiming that he was born into a disadvantageous life by reason of another's negligence. *Id.*

³Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967), *overruled in part*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), was the first of the modern-day cases in this area of tort law.

⁴*See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401 (1978), 386 N.E.2d 807, 413 N.Y.S.2d 895; and most recently, Naccash v. Burger, ___ Va. ___, 290 S.E.2d 825 (1982).

⁵Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (Sup. Ct., App. Div. 1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Curlender v. Bio-Science Labs, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980).

⁶31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). Kaus, J. delivered the majority opinion. Newman, Richardson and Broussard, JJ. concurred. Mosk, J. filed a dissenting opinion in which Bird, C.J. concurred.

⁷*Curlender* also sparked much criticism. *See* Brown, *Wrongful Life: A Misconceived Tort — An Introduction*, 15 U.C.D.L. REV. 445, 446 (1981). Also, the Fifth District California Court of Appeal, in rejecting the wrongful life cause of action in *Turpin*, 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." *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128, 129 (5th Dist. 1981).

⁸*See, e.g.*, Comment, *Wrongful Life: A Misconceived Tort*, 15 U.C.D. L. REV. 447 (1981).

⁹Although the California Supreme Court in *Turpin* recognized the child's right to recover for "economic loss, the extraordinary, out-of-pocket expenses that she will have to bear because of her hereditary ailment," it denied her recovery of general damages. 31 Cal. 3d at ___, 643 P.2d at 965-66, 182 Cal. Rptr. at 348-49.

Hope, to the Leon St. Peters Rehabilitation Center at the Fresno Community Hospital for evaluation of a possible hearing defect.¹⁰ Hope was examined and tested by Adam J. Sortini, a hearing specialist, who advised Hope's pediatrician that her hearing was normal.¹¹ In December of 1976, the Turpins conceived a second daughter, Joy, who was born on August 23, 1977.¹² In October 1977, the Turpins learned that Hope was "stone deaf" as the result of an hereditary ailment. Joy was then diagnosed as suffering from the same total deafness as Hope.¹³

The Turpins filed a complaint setting forth four causes of action,¹⁴ including a cause of action brought on behalf of Joy seeking: (1) general damages for being "deprived of the fundamental right of a child to be born as a whole functional human being without total deafness"; and (2) special damages for the "extraordinary expenses for specialized teaching, training and hearing equipment" which she would incur during her lifetime as a result of her hearing impairment.¹⁵ The trial court dismissed the action as to Joy, and the Fifth District California Court of Appeal affirmed the dismissal.¹⁶

While the appeals court relied on the majority of other wrongful life cases in denying the cause of action,¹⁷ the California Supreme Court determined that Joy could recover special damages in her wrongful life suit.¹⁸ At the same time, however, the latter court said Joy could not recover general damages.¹⁹

In denying recovery for general damages, the court acknowledged that the defendants had breached a duty owed to Joy and the Joy's birth was the proximate cause of the breach.²⁰ However, the court emphasized that "the obvious

¹⁰*Id.* at ____, 643, P.2d at 956, 182 Cal. Rptr. at 339.

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴The first cause of action, brought on behalf of Hope, sought damages for the harm Hope allegedly suffered as a result of the delay in diagnosis of her condition. The second cause of action was Joy's wrongful life action, the only matter considered by the California Supreme Court. The third and fourth causes of action, brought on behalf of James and Donna Turpin respectively, sought special damages relating to the support and medical care of Joy until she reached the age of majority, and general damages for emotional distress sustained by James and Donna "attendant to the raising and caring of a totally deaf child." *Id.*

¹⁵*Id.*

¹⁶*Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 129 (5th Dist. 1981), *rev'd*, 31 Cal. 3d ____, 643 P.2d 955-56, 1982 Cal. Rptr. 337 (1982).

¹⁷Wrongful life cases denying the cause of action include: *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1st Dist. 1976); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Speck v. Feingold*, 268 Pa. Super. 342, 408 A.2d 496 (1981), *aff'd*, 439 A.2d 110 (Pa. 1981). The *Stills* case involved a wrongful life action brought by an illegitimate healthy child seeking to recover damages from a doctor who allegedly did not perform a successful abortion on her mother, therefore causing the child to be born.

¹⁸31 Cal. 3d at ____, 643 P.2d at 966, 182 Cal. Rptr. at 349. Joy could recover special damages for the extraordinary expenses necessary to treat her hereditary ailment. *Id.*

¹⁹*Id.*

²⁰*Id.* at ____, 643 P.2d at 960, 182 Cal. Rptr. at 343. The defendants in *Turpin* did not deny that they owed a duty of care to Joy, nor did they deny that Joy's birth was the proximate cause of the breach. The court indicated in dicta that "... it was reasonably foreseeable that Hope's parents and their potential

tragic fact is the plaintiff never had a chance ‘to be born as a whole, functional human being without total deafness’; if defendants had performed their jobs properly, she would not have been born with hearing intact, but — according to the complaint — would not have been born at all.’²¹ The court disagreed with other decisions which have suggested that awarding damages to a severely handicapped, or suffering child would “disavow” the value of life²² and pointed out that other areas of the law have recognized that impaired life is not always preferable to nonlife.²³ Nevertheless, the court concluded:

With respect to general damages, the harmed interest is the child’s general physical, emotional and psychological well-being, and in considering the benefit to this interest which defendant’s negligence has conferred, it must be recognized that as an incident of defendant’s negligence the plaintiff has in fact obtained a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering. Because of the incalculable nature of both elements of this harm-benefit equation, we believe that a reasoned, non-arbitrary award of general damage is simply not obtainable.²⁴

Still, the court upheld Joy’s claim for special damages,²⁵ recognizing that parents’ recovery in a wrongful birth action²⁶ does not extend to expenses the child may incur when parents are no longer responsible for the child’s care.²⁷

offspring would be directly affected by defendant’s negligent failure to discover that Hope suffered from a hereditary ailment . . .’ (and thus the defendants did owe Joy a duty). *Id.* The issue of duty, however, is debatable. One author argues that since *Roe* reserved to the mother the decision of whether to have an abortion (at least in the first trimester of pregnancy), the child has no “right not to be born” to exercise, and thus no duty was owed to it. See Brown, *Wrongful Life: A Misconceived Tort — An Introduction*, 15 U.C.D. L. REV. 445, 446-47 (1981). Another author disagrees with this contention, saying: “the child is merely asserting that the decision of whether the child would have been better off not having been born should be left with . . . its parents.” Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 654 (1979).

²¹31 Cal. 3d at ____, 643 P.2d at 961, 182 Cal. Rptr. at 334.

²²*Id.* at ____, 643 P.2d at 962, 182 Cal. Rptr. at 345. In *Berman v. Allan*, 80 N.J. at 430, 404 A.2d at 13, the New Jersey Supreme Court suggested that awarding damages for wrongful life would “disavow” the value of life.

²³31 Cal. 3d at ____, 643 P.2d at 962, 182 Cal. Rptr. at 345. The court referred to California’s “living will” statute. This statute permits an adult “to make a written directive instructing his physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.” Cal. Health and Safety Code § 7186 (West Supp. 1982).

²⁴31 Cal. 3d at ____, 643 P.2d at 964, 182 Cal. Rptr. at 347. The court followed the “benefit” doctrine in tort damages, which says: “When the defendant’s tortious conduct has caused harm to the plaintiff . . . 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.” *Maben v. Rankin*, 55 Cal. 2d 139, 144, 358 P.2d 681, 686, 10 Cal. Rptr. 353, 358, (1961) quoted in *Turpin*, 31 Cal. 3d at ____, 643 P.2d at 964, 182 Cal. Rptr. at 347.

²⁵31 Cal. 3d at ____, 643 P.2d at 966, 182 Cal. Rptr. at 349.

²⁶In a separate cause of action, Joy’s parents sought to recover for medical expenses which they would incur on Joy’s behalf during her minority. *Id.* at ____, 643 P.2d at 956, 182 Cal. Rptr. at 339. This is the usual scope of damages awarded in wrongful birth actions. See Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 658-60 (1979).

²⁷31 Cal. 3d at ____, 643 P.2d at 965, 182 Cal. Rptr. at 348. The court also noted that allowing the child to recover these expenses “should also help ensure that the available tort remedies in this area provide a comprehensive and consistent deterrent to negligent conduct.” *Id.* at ____, 643 P.2d at 966 n.15, 182 Cal. Rptr. at 349 n.15.

The court explained:

[W]e believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care. If such a distinction were established, the afflicted child's receipt of necessary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when parents remain legally responsible for providing such care.²⁸

In addition, the court said "[w]e believe that it is consistent with the basic liability principles . . . to hold defendants liable for the cost of such care, whether the expenses is to be borne by the parents or by the child."²⁹

A short concurrence in this decision suggested that "basic changes of the kind sought here are better left to the Legislature."³⁰ The dissenting opinion argued that general damages, as well as special damages, should be recoverable in this case.³¹

III. WRONGFUL BIRTH AND WRONGFUL LIFE CAUSES OF ACTION: A BRIEF HISTORY

The first wrongful life action brought before an appellate court was *Zepeda v. Zepeda*.³² This action was brought on behalf of an illegitimate infant against the child's father, alleging that the father wrongfully induced the child's mother to engage in sexual relations, thus causing the child's conception.³³ The Illinois Appellate Court denied the child's claim, stating:

Recognition of the plaintiff's claim means creation of a new tort: a cause of action for wrongful life. The legal implications of such a tort are vast, the social impact could be staggering. . . . Encouragement would extend to all others born into the world under conditions they might regard as adverse.³⁴

²⁸*Id.* at ____, 643 P.2d at 965, 182 Cal. Rptr. at 348.

²⁹*Id.*

³⁰*Id.* at ____, 643 P.2d at 966, 182 Cal. Rptr. at 349. In *Curlender*, the Second District California Court of Appeal suggested that children could maintain an action against their own parents for wrongful life. 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 497. In response to this, the California Legislature enacted CAL. CIV. CODE § 43.6 (West 1982) which exempts parents from liability in such an instance. The court in *Turpin* determined that this statute had no bearing on the case. 31 Cal. 3d at ____, 643 P.2d at 959, 182 Cal. Rptr. at 342.

³¹*Id.* at ____, 643 P.2d at 966, 182 Cal. Rptr. at 349 (1982) (Mosk, J., dissenting). The dissent followed the rationale of the majority opinion in *Curlender*.

³²41 Ill. App. 2d 240, 190 N.E.2d 849 (1st Dist. 1963), *cert. denied*, 379 U.S. 945 (1964).

³³41 Ill. App. 2d at 243, 190 N.E.2d at 851. There is a fundamental difference between this action and the action of a deformed or impaired child. Cases such as the former are now most commonly referred to as "dissatisfied life" cases. Comment, "*Wrongful Life*": *the Right Not to be Born*, 54 TUL. L. REV. 480, 485-86 (1980). There has been some suggestion that had the first wrongful life cases been brought by physically or mentally deformed children, the law in this area would have developed differently. See, e.g., Note, *Medical Malpractice: Wrongful Birth, Preconception Torts, Duty to Inform of Genetic Risks*, 13 AKRON L. REV. 390, 395 (1979).

³⁴41 Ill. App. 2d at 250, 190 N.E.2d at 858.

As noted before, the first wrongful life case involving an impaired child was *Gleitman v. Cosgrove*.³⁵ There, Mrs. Gleitman's physician had advised her that her child, Jeffrey, would be born normal, despite his knowledge that Mrs. Gleitman had had rubella (commonly known as German measles) at an early stage of her pregnancy.³⁶ Jeffrey Gleitman developed impaired sight, hearing, and speech.³⁷ The Gleitmans brought a wrongful life action on Jeffrey's behalf and a wrongful birth suit on their own behalf. Both causes of action were denied by the New Jersey Supreme Court,³⁸ which stated:

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. This Court cannot weigh the value of life with impairments against the non-existence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.³⁹

Twelve years after *Gleitman*, the New Jersey Supreme Court again had a wrongful birth/wrongful life claim before it in *Berman v. Allan*.⁴⁰ Shirley Berman became pregnant with Sharon Berman when she was thirty-eight years old. She was under the care of two obstetrician/gynecologists, Dr. Allan and Dr. Attardi. The physicians failed to perform an amniocentesis⁴¹ on Shirley to determine whether the child she was carrying had Down's syndrome.⁴² Following Sharon's birth with Down's syndrome, the Bermans brought a wrongful life claim on behalf of Sharon and a wrongful birth claim on their own behalf. While the New Jersey Supreme Court once again denied the child's wrongful

³⁵49 N.J. 22, 227 A.2d 689 (1967), *overruled in part*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

³⁶*Id.* at 24, 227 A.2d at 690. "Most congenital defects from rubella occur during the first eight weeks of gestation. The defects include congenital cataracts, heart disease, deafness and central nervous system damage . . .

" . . . Therapeutic abortion is indicated when rubella occurs during the first trimester because of the great probability of irrevocable damage." J. GREENHILL & E. FRIEDMAN, *BIOLOGICAL PRINCIPLES AND MODERN PRACTICE OF OBSTETRICS* 447 (1974).

³⁷49 N.J. at 24, 227 A.2d at 690.

³⁸The aspect of *Gleitman* dealing with wrongful birth was overruled in Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

³⁹49 N.J. at 25, 227 A.2d at 692. By this, the court meant two things. First, it would be difficult to calculate damages, since a trier of fact cannot comprehend nonexistence, thus, it would be impossible to calculate the difference in value between that state and the net burdens the child experiences in life. Secondly, there is an internal contradiction in wrongful life claims: the "wrongful life" complained of is the same one that allows the child to assert his claim. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 648 (1980).

⁴⁰80 N.J. 421, 404 A.2d 8 (1979).

⁴¹Amniocentesis is a "technique of removing fluid from the uterine cavity for the purposes of identification of the phenotype of the fetus." The information derived from this procedure can usually detect Down's syndrome, Tay-Sachs disease, and other disorders of the fetus. G. CHASE & E. MURPHY, *THE PRINCIPLES OF GENETIC COUNSELING* 324-34 (1975).

⁴²Down's syndrome is a genetic defect with a greater risk of Down's syndrome in the child when the mother is thirty-five years old or older. T. KELLEY, *CLINICAL GENETICS & GENETIC COUNSELING* 129 (1980). Therefore, amniocentesis is indicated when the mother is thirty-five years old or older. A. STEVENSON, B. DAVISON & M. OAKES, *GENETIC COUNSELING* 297 (2d ed. 1976).

life claim,⁴³ it reversed its holding in *Gleitman* and allowed the action for wrongful birth.⁴⁴

Eighteen months before the *Berman* decision, in *Park v. Chessin*,⁴⁵ the New York Supreme Court, Appellate Division, became the first appellate court to allow a claim for the wrongful life of a child born with a genetic defect. That decision, however, was reversed in *Becker v. Schwartz*.⁴⁶

Thus, the only wrongful life action in the United States that had ever been completely successful before *Turpin* was *Curlender v. Bio-Science Laboratories*.⁴⁷ In *Curlender*, Phillis and Hyum Curlender retained defendant laboratory to determine if they were carriers of Tay-Sachs disease.⁴⁸ The laboratory performed the test and inaccurately informed the Curlenders that they were not carriers of Tay-Sachs.⁴⁹ Subsequently, Phillis Curlender gave birth⁵⁰ to Shauna Curlender, who had Tay-Sachs.⁵¹ The Curlenders brought a wrongful life action on behalf of Shauna, seeking: (1) damages for the costs of Shauna's care; (2) damages for emotional distress and the deprivation of seventy-two and six-tenths years of her life; and (3) punitive damages of three million dollars.⁵² The California Court of Appeal allowed the wrongful life claims for the costs of Shauna's care,⁵³ and punitive damages.⁵⁴ The court limited damages for emotional distress saying:

We reject as untenable the claim that plaintiff is entitled to damages as

⁴³The court suggested that to rule otherwise would "disavow" the value of life. 404 A.2d at 13.

⁴⁴*Gleitman* was decided before *Roe v. Wade*, 410 U.S. 113 (1973), where the United States Supreme Court held that a state may not restrict a woman's right to abort in the first trimester of pregnancy. 410 U.S. at 163. In *Gleitman*, part of the reason that the court denied the wrongful birth cause of action was that it was not clear that abortion was legal in New Jersey. 49 N.J. at 25, 227 A.2d at 691. In *Berman* the court explained: "The Supreme Court's ruling in *Roe* . . . clearly establishes that a woman possess a constitutional right to decide whether her fetus should be aborted. . . . Public policy now supports, rather than mitigates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision." 80 N.J. at 428, 404 A.2d at 14.

⁴⁵60 A.D.2d 80, 400 N.Y.S.2d 110 (Sup. Ct., App. Div. 1977).

⁴⁶46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). For an excellent discussion of *Park* and *Becker* see Note, *Medical Malpractice: Wrongful Birth, Preconception Torts, Duty to Inform of Genetic Risks*, 13 AKRON L. REV. 390 (1979).

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

⁴⁸*Id.* at 815, 165 Cal. Rptr. at 482.

⁴⁹*Id.* at 816, 165 Cal. Rptr. at 483. Tay-Sachs disease is a "fatal progressive degenerative disease of the nervous system which primarily affects the Eastern European Jewish population and their progeny." Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (Cook, J., dissenting). In Tay-Sachs, "the first symptoms are noticeable at five to six months. Psychomotor deterioration is evident before one year and usually advances rapidly in the second year, resulting in blindness, deafness, seizures and a decerebrate state. . . . Death, usually caused by broncho-pneumonia, intervenes between age three and four years." L. JACKSON & R. SCHIMKE, CLINICAL GENETICS: A SOURCE BOOK FOR PHYSICIANS (1979).

⁵⁰The complaint did not allege the date of plaintiff's birth, so the court did not know whether the parents relied upon the tests in conceiving, or relied upon the results in failing to avail themselves of amniocentesis and abortion. 106 Cal. App. 3d at 816, 165 Cal. Rptr. at 484.

⁵¹*Id.*

⁵²*Id.* at 816-17, 165 Cal. Rptr. at 484.

⁵³106 Cal. App. at 831, 165 Cal. Rptr. at 499. The court suggested that upon remand Shauna's wrongful life claim and her parents' wrongful birth claim should be consolidated to prevent double recovery. *Id.*

if plaintiff had 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 . . . anticipated for one with her impaired condition.⁵⁵

The court went on to say:

[W]e 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 for any special pecuniary loss resulting from the impaired condition.⁵⁶

Thus, the *Curlender* court allowed a greater extent of recovery than the California Supreme Court did in *Turpin*.⁵⁷

Only four months before the California Supreme Court handed down its opinion in *Turpin*, the Supreme Court of Pennsylvania examined the same wrongful life issues in *Speck v. Finegold*.⁵⁸ In *Speck*, Frank Speck Jr. suffered from neurofibromatosis,⁵⁹ a genetic disease. He and his wife had two children, both of whom inherited the disease.⁶⁰ The couple decided not to have anymore children and Mr. Speck went to Dr. Finegold for a vasectomy.⁶¹ After the vasectomy was performed and Mr. Speck was pronounced sterile, Mrs. Speck became pregnant.⁶² Subsequently, the Specks engaged Dr. Schwartz to perform an abortion on Mrs. Speck. Although Dr. Schwartz performed the abortion and told Mrs. Speck that she was no longer pregnant, Mrs. Speck nevertheless gave birth

⁵⁴*Id.*

⁵⁵*Id.* at 830, 165 Cal. Rptr. at 498.

⁵⁶*Id.* at 830-31, 165 Cal. Rptr. at 498.

⁵⁷Perhaps one reason for the differences in the *Turpin* and *Curlender* recoveries is the extent of the child's impairment. The Supreme Court of California suggested as much in *Turpin*:

In this case in which the plaintiffs only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all. Other wrongful life cases, however, have involved children with much more serious, debilitating and painful conditions, and the academic literature refers to still other, extremely severe hereditary diseases.

31 Cal. 3d at ____, 643 P.2d at 966, 182 Cal. Rptr. at 345-46.

⁵⁸439 A.2d 110 & (Pa. Sup. Ct. 1981). This case was decided on December 31, 1981, four months before *Turpin* was decided.

⁵⁹Neurofibromatosis, an extremely disfiguring disease, is "a familial condition characterized by developmental changes in the nervous system muscle, bones and skin and marked superficially by the formation of multiple pendunculated soft tumors with areas of pigmentation." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 886 (26th ed. 1981).

⁶⁰439 A.2d at 113.

⁶¹*Id.* This case is admittedly different from the typical wrongful life action where the parents, had they been accurately advised of the possibility of a deformed birth, would have chosen not to have the child. Comment, "Wrongful Life": *The Right Not To Be Born*, 54 TUL. L. REV. 482, 485 n.34 (1980). Still, the policy issues in this wrongful life action are basically the same.

⁶²439 A.2d at 113.

to Francine Speck, a victim of neurofibromatosis.⁶³

The Specks brought wrongful life and wrongful birth actions against Dr. Finegold and Dr. Schwartz.⁶⁴ The Pennsylvania Supreme Court justices were equally divided as to whether Francine's wrongful life action could be maintained, and hence the intermediate appellate court decision denying the cause of action stood.⁶⁵

The opinion of one of the justices⁶⁶ was strongly critical of courts which have denied recovery for wrongful life. He noted a policy consideration not considered by the *Turpin* court, nor any other court which has considered wrongful life, but one worthy of acknowledgement:

Existence in itself can hardly be characterized as an injury, but when existence is foreseeably and inextricably coupled with a disease, such an existence, depending upon the nature of the disease,⁶⁷ may be intolerably burdensome. To judicially foreclose consideration of whether life in a particular case is such a burden would be to tell the diseased, possibly deformed plaintiff that he can seek no remedy in the Courts and to imply that his alternative remedy, in the extreme event that he finds his life unduly burdensome, is suicide. No court in the land would directly send such a message to these plaintiffs. We deem it unfortunate that some Courts have indeed sent that message by implication.⁶⁸

Justice Flaherty agreed with the *Curlender* court that damages in a wrongful life case should include general damages for suffering as well as special damages for expenses.⁶⁹ A second opinion in this case declared:

Any argument that this life of suffering is not the natural and probable consequence of appellees' misconduct is rank sophistry. . . . To permit such a wrong to go unredressed would provide no deterrent to professional irresponsibility and would be neither just nor compatible with this Commonwealth's principles of tort liability.⁷⁰

Nevertheless, another opinion in *Speck* took the opposing viewpoint, pointing out that "none of the highest appellate courts of other jurisdictions has recognized such a cause of action."⁷¹ A fourth opinion even suggested that

⁶³*Id.* This demonstrates what some parents must go through to avoid having a deformed child despite the *Roe* decision.

⁶⁴*Id.* The trial court dismissed Francine's wrongful life claim, and the Pennsylvania Court of Appeals affirmed the dismissal.

⁶⁵*Id.* at 111.

⁶⁶This opinion was by Justice Flaherty, in which Justice Larsen joined.

⁶⁷Where the plaintiff suffers from neurofibromatosis or Tay-Sachs there is a much stronger case for allowing a wrongful birth claim than where the plaintiff suffers from a hearing defect. 31 Cal. 3d at ____, 643 P.2d at 954, 182 Cal. Rptr. at 345-46.

⁶⁸439 A.2d at 115.

⁶⁹*Id.*

⁷⁰*Id.* at 118. This opinion, written by Justice Kauffman, was joined by Justices Larsen and Flaherty.

⁷¹*Id.* at 116. This opinion, written by Justice Roberts and joined by Chief Justice O'Brien pointed out

to allow wrongful life claims might be a societal attempt to control genetics, "merely plays for the extermination of a weaker group by a stronger and more powerful one."⁷²

Thus there were two completely opposing viewpoints in *Speck*; one seeking to allow recovery for both special and general damages in a wrongful life suit, the other advocating no recovery at all for wrongful life.⁷³ Both sides expressed valid concerns and both views find ample support in the academic community.⁷⁴ Until *Turpin*, there appeared to be no way that a court could reconcile the two views.⁷⁵

IV. *TURPIN V. SORTINI*: A FRESH APPROACH TO WRONGFUL LIFE

In a meritorious decision, the California Supreme Court acknowledged the validity of both views, and combined the best of both in *Turpin*. In wrongful life cases the alleged injury is the life of the child.⁷⁶ This creates a problem for our courts since traditionally our common law has highly valued human life.⁷⁷ Furthermore, basic tort principles do not support recovery for general damages in wrongful life suits. Traditional tort law applies an objective "reasonable man" standard to determine existence of an injury.⁷⁸ Thus, in order to recover under traditional tort law, the child bringing the wrongful life claim would have to prove by a preponderance of the evidence that a reasonable person would conclude that the child is so impaired that he would have been better off never to have been born.⁷⁹ The inherent problem with this is the difficulty in determining what a reasonable person would conclude.⁸⁰ This question really lends itself to a subjective standard,⁸¹ which is an "unwarranted departure from traditional tort law." Such a departure is not one to be made by the courts, but should be left to the legislatures.⁸²

that "[e]ven *Curlender* . . . has recently been called into question by a subsequent panel of that same intermediate Appellate Court in *Turpin*." *Id.*

⁷²*Id.* at 119. This opinion was written by Justice Nix.

⁷³The *Speck* court considered the claims for general and special damages collectively, not independently as the *Turpin* court did.

⁷⁴There is considerable commentary opposing allowance of claims for wrongful life. See, Comment, *supra* note 8. Commentary supporting the cause of action include: Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618 (1979); Comment, "Wrongful Life": *The Right Not To Be Born*, 54 TUL. L. REV. 480 (1980).

⁷⁵It has been suggested that wrongful birth claims should allow for a portion of the parent's compensation to be put into a reversionary trust for the child to "protect the child from his parent's irresponsibility." This, however, would not compensate the child should his parents not bring a wrongful birth action first. See Comment, *supra* note 8.

⁷⁶*Id.* at 459.

⁷⁷*Id.*

⁷⁸See *Id.* at 461; W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 45 (4th ed. 1971).

⁷⁹See W. PROSSER, *supra* note 8.

⁸⁰"An objective standard derived from community values does not rationally inform such an intensely personal evaluation." Comment, *supra* note 75, at 461.

⁸¹*Id.* at 461-62.

⁸²31 Cal. 3d 200, ___, 643 P.2d 954, 966, 182 Cal. Rptr. 337, 349 (1982) (Newman, J., concurring).

Even if there were a basis in tort law for such claims, there is a major problem in establishing damages.⁸³ Again, this determination lends itself to a highly subjective, personal approach which could create a great deal of inconsistency among verdicts.

While the “disavowing the value of life” approach some courts⁸⁴ have taken is unsound, as *Turpin* points out, a monetary award for pain and suffering is not going to significantly improve the plaintiff’s condition.⁸⁵ Likewise, a court does not encourage suicide by denying such damages.⁸⁶ If a wrongful life plaintiff is in such miserable condition that he or she contemplates suicide, it is unlikely that the economic ability to purchase a new television, or take a trip around the world, will convince him or her that life is worthwhile.⁸⁷

Special damages for wrongful life, on the other hand, do have a basis in tort principles.⁸⁸ By breaching a duty owed to the parents, the defendant has caused the parents to bear the extra cost of bringing up the diseased or handicapped child. Should the child live long enough, this damage extends to the child’s own expenses in obtaining medical care, special training, and the like.⁸⁹ The benefit doctrine need not be applied,⁹⁰ so there is no need to balance impaired life against nonlife in assessing damages.

Furthermore, awarding special damages for wrongful life serves a significant policy goal of deterrence.⁹¹ While recovery in wrongful life claims may suffice as such a deterrent against negligent genetic counseling,⁹² it might not hold defendants completely responsible for the wrong because pecuniary losses of the child are not taken into account.⁹³ As one author puts it:

The most obvious consequences [of allowing damages for wrongful life] will be the assessment of damages in an increasing number of cases if physi-

⁸³*Id.* at ____, 643 P.2d at 963, 182 Cal. Rptr. at 346.

⁸⁴*See, e.g.,* *Berman v. Allan*, 80 N.J. at 427, 404 A.2d at 13.

⁸⁵31 Cal. 3d at ____, 643 P.2d at 962, 182 Cal. Rptr. at 345.

⁸⁶One opinion in *Speck* suggested that to disallow wrongful life claims would be to encourage suicide for diseased or handicapped children. 439 A.2d at 115.

⁸⁷However, Capron argues that:

Although a monetary judgment for pain and suffering cannot make them “whole,” any more than it actually does for most injured persons, it may provide some balm for the inner wounds of congenitally defective children if it is spent so as to bring some compensating joy, and the feeling of being “special” in a good sense, into their lives.” Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 655 (1979).

⁸⁸Special damages are the pecuniary damages covering expenses for the impaired child’s care and training, which the court in *Turpin* said could be recovered.

⁸⁹*See* 31 Cal. 3d at ____, 643 P.2d at 965, 182 Cal. Rptr. at 968.

⁹⁰*Id.* at ____, 643 P.2d at 966, 182 Cal. Rptr. at 348-49.

⁹¹*Id.* at ____, 643 P.2d at 966 n.15, Cal. Rptr. at 349 n.15. *See also* Capron, *supra* note 87, at 660.

⁹²*See* Comment, *supra* note 8, at 467. *Contra*, Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 658, 660 (1979).

⁹³“(T)he absence of an entire category of damages — those suffered by the child — can be expected to result in underdeterrence because there is no assurance that the jury in setting the amount to be collected by the parents will take the excluded category of harm into account.” Capron, *supra* note 87, at 658.

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cians and others who provide health care to people planning families fail either to make use of the new information and techniques of clinical genetics or to refer patients to persons who are more knowledgeable in that field. . . . The recognition of a right of recovery does not create the costs but merely shifts the burden of bearing them from the injured parties to the person whose wrong brought them into being.⁹⁴

One consequence of permitting the child-plaintiff in a wrongful life action to recover only special damages is that children who will never be independent of their parents or guardians⁹⁵ have no remedy in the courts. On the surface this might strike one as unfair. The extremely deformed child who dies at an early age cannot recover, while the deaf child who lives a long life can recover. Nevertheless, both children will have their pecuniary losses covered for their entire life span.

V. CONCLUSION

While much disagreement exists in the courts and the academic community as to whether a diseased or handicapped child should be able to collect damages from a genetic counselor, physician, or other person who wrongfully caused his or her birth, the California Supreme Court reconciled both views in *Turpin v. Sortini*. By disallowing general damages for pain and suffering, it recognized that such a claim invites a subjective approach inconsistent with basic tort principles. At the same time, the court recognized that compensating a plaintiff's parents for wrongful birth may not suffice in providing a source of funds for special care that a diseased or handicapped child needs. Additionally, the court recognized the important function of deterrence served by allowing pecuniary damages for wrongful life. No doubt courts will continue to struggle with wrongful life causes of action, but *Turpin* provides a much needed framework for evaluating these cases.

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⁹⁴*Id.* at 660.

⁹⁵For instance, children who die before reaching the age of majority.