Compensating a California Wrongful Life Plaintiff for General Damages and Damages for Lost Earning Capacity

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COMPENSATING A CALIFORNIA WRONGFUL LIFE PLAINTIFF FOR GENERAL DAMAGES AND DAMAGES FOR LOST EARNING CAPACITY

I. INTRODUCTION

Imagine a child is born with a debilitating impairment that could have been discovered through genetic testing. Now envision that genetic testing does discern the potential birth defect, and the parents decide not to conceive the child. These two contrasting scenarios illustrate the “abstract” tort of wrongful life where a child plaintiff “alleges that, due to the negligence of the defendant [doctor], birth occurred.” In essence, the child asserts that his parents would not have conceived had the doctor properly warned them of the potential birth defect, thus sparing him “his impaired existence.”

Although California recognizes the wrongful life cause of action, California courts are unwilling to award general damages—compensation for pain and suffering—or damages for loss of earning capacity. Courts reason that both types of damages are incalculable because it is too difficult for the jury to determine whether the child suffered a legally cognizable injury, and it is

2. Id. at 817, 165 Cal. Rptr. at 481.
5. See Andalon v. Super. Ct., 162 Cal. App. 3d 600, 614, 208 Cal. Rptr. 899, 907–08 (1984); see also infra Part VII. (discussing how damages for loss of earning capacity are comparable to special damages and should be awarded in wrongful life cases).
“impossible” to measure an appropriate damages award. In wrongful life cases, the California Supreme Court has awarded only special damages—compensation for the additional medical expenses required to treat the child for an impairment brought about by the doctor’s negligence. However, because California courts refuse to award either general damages or damages for lost earning capacity in wrongful life cases, the victims of negligent physicians are not afforded a just remedy. Reimbursement for medical expenses is not just compensation for a lifetime of debilitating impairment.

California courts apply an inappropriate analysis to the wrongful life cause of action, which leads them to mistakenly conclude that it is impossible to determine whether a child has suffered a legally cognizable injury. Furthermore, courts incorrectly conclude that general damages and damages for lost earnings are incalculable. This Note proposes an alternative analysis that California courts should use to ascertain whether a child has suffered a legally cognizable injury. In considering wrongful life claims, the court should submit two questions to the jury in the form of a special verdict. The first question considers the severity of the impairment and the second looks at how closely connected the defendant doctor is to the plaintiff's injury. Under the proposed analysis, the jury will be able to clearly determine whether there is a legally cognizable injury and make a “calculable” decision for both general damages and damages for lost earning capacity. Thus, more victims will be compensated for their impaired existence.

Part II of this Note provides a discussion of the history and case law development of the wrongful life causes of action in New Jersey, Washington, and California. Part III discusses the current analysis California courts use to approach a wrongful life claim. Part IV focuses on the 2002 California Court of Appeal ruling in Johnson v.

7. See id. at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.
8. See id.; Andalon, 162 Cal. App. 3d at 614, 208 Cal. Rptr. at 907–08.
10. Cf. Turpin, 31 Cal. 3d at 235–37, 643 P.2d at 964, 182 Cal. Rptr. at 347 (explaining the incalculable nature of the harm-benefit equation in the RESTATEMENT (SECOND) OF TORTS).
Superior Court\textsuperscript{11} to illustrate California's current inappropriate approach to a wrongful life cause of action. Part V discusses general damages and argues that the California Supreme Court’s decision in \textit{Turpin v. Sortini},\textsuperscript{12} which denied general damages to the child plaintiff, was wrongfully decided because the court failed to consider crucial public policy that supports a general damages award. Part VI criticizes the current analytical approach California courts use to decide wrongful life claims and proposes an alternative method of analysis: a special verdict approach that will compensate more plaintiffs for a life of impaired existence. Finally, Part VII explores damages for lost earning capacity and explains that because damages for lost earning capacity are comparable to special damages,\textsuperscript{13} courts should approach these two types of damages similarly. In the alternative, courts should use the proposed special verdict approach in considering lost earning capacity, ensuring that at least some plaintiffs’ injuries are redressed rather than categorically excluding all damages for loss of earning capacity.

II. BACKGROUND OF THE WRONGFUL LIFE CAUSE OF ACTION

The wrongful life cause of action was first recognized in 1964, in the Illinois case \textit{Zepeda v. Zepeda}.\textsuperscript{14} There, the plaintiff was an illegitimate child who brought a damages claim against his father for his out-of-wedlock status.\textsuperscript{15} Although the court recognized the new wrongful life cause of action, the court refused to allow damages because “the doors of litigation would be opened wider . . . [and] encouragement would extend to all others born into the world under conditions they might regard as adverse.”\textsuperscript{16}

The next court to deal with the wrongful life cause of action was the New Jersey Supreme Court in \textit{Gleitman v. Cosgrove}.\textsuperscript{17} There, the plaintiff alleged that doctors “affirmatively misled” her that rubella during her pregnancy would not cause birth defects to her

\begin{thebibliography}{9}
\bibitem{11} 101 Cal. App. 4th 869, 124 Cal. Rptr. 2d 650 (Ct. App. 2002).
\bibitem{12} \textit{Turpin}, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337.
\bibitem{13} Courts generally tend to award special damages to a wrongful life plaintiff. See \textit{infra} Part VII.
\bibitem{14} 190 N.E.2d 849 (Ill. App. Ct. 1963).
\bibitem{15} \textit{See id.} at 851.
\bibitem{16} \textit{Id.} at 858.
\bibitem{17} 227 A.2d 689 (N.J. 1967).
\end{thebibliography}
baby who was “then in gestation.”\textsuperscript{18} The court denied general damages, stating it is impossible to “weigh the value of life with impairments against the nonexistence of life itself.”\textsuperscript{19}

In 1980, however, the wrongful life cause of action gained momentum when the California Court of Appeal awarded both general and special damages to the child plaintiff in \textit{Curlender v. Bio-Science Laboratories}.\textsuperscript{20} In \textit{Curlender}, the parents retained the defendant laboratories to administer tests to discern whether they were carriers of Tay-Sachs disease.\textsuperscript{21} However, “‘incorrect and inaccurate’ information was disseminated to [the] plaintiff’s parents concerning their status as carriers.”\textsuperscript{22} Subsequently, the child plaintiff was born with Tay-Sachs disease.\textsuperscript{23} The court explained that the wrongful life concept is not a notion of metaphysics, stating that “[t]he reality of the ‘wrongful-life’ concept is that such a plaintiff both \textit{exists} and \textit{suffers}, due to the negligence of others.”\textsuperscript{24}

Nevertheless, the \textit{Curlender} court’s “reality” approach was merely transitory. Just two years later, the California Supreme Court in \textit{Turpin} awarded special damages but denied general damages to a wrongful life plaintiff.\textsuperscript{25} In that case, hearing specialists incorrectly advised the plaintiff’s parents that their first-born child was within normal hearing range.\textsuperscript{26} In reality, the child was “stone deaf,” the result of a hereditary hearing impairment.\textsuperscript{27} Because this hereditary affliction was unbeknownst to the parents, they conceived a second child who was born with the same hereditary hearing impairment as their first child.\textsuperscript{28} The California Supreme Court denied general damages because the plaintiff did not suffer a “legally cognizable injury” and there were no “rationally ascertainable damages.”\textsuperscript{29} However, the court did permit the plaintiff to recover special

\begin{itemize}
  \item 18. \textit{Id.} at 691.
  \item 19. \textit{Id.} at 692.
  \item 21. \textit{See id.} at 815, 165 Cal. Rptr. at 480.
  \item 22. \textit{Id.}
  \item 23. \textit{See id.} at 816, 165 Cal. Rptr. at 480.
  \item 24. \textit{Id.} at 829, 165 Cal. Rptr. at 488.
  \item 26. \textit{See id.} at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339.
  \item 27. \textit{See id.}
  \item 28. \textit{See id.} at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.
  \item 29. \textit{Id.} at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
\end{itemize}
Compensation for Wrongful Life

 damages, reasoning that compensation for "the extraordinary, additional medical expenses that are occasioned by the hereditary ailment" was consistent with the "benefit" doctrine in the Restatement (Second) of Torts. The court noted that "[u]nlike the claim for general damages, [the] defendants' negligence ha[d] conferred no incidental, offsetting benefit" to the plaintiff's burden of extraordinary out-of-pocket medical expenses.

Similarly, the Washington Supreme Court allowed recovery for special damages in Harbeson v. Parke-Davis, Inc. In that case, the doctors failed to warn the child plaintiff's mother that use of the drug Dilantin to control seizures could cause serious birth defects. The child plaintiff was born with fetal hydantoin syndrome, a rare disorder that causes "abnormalities of the skull and facial features . . . and/or mild developmental delays." Citing Turpin, the Washington Supreme Court awarded special damages to cover the "extraordinary medical expenses" associated with the child plaintiff's impairment.

Finally, the California Court of Appeal denied damages for lost earning capacity in Andalon v. Superior Court, reasoning that damages for lost earning capacity were comparable to general damages. In Andalon, the child plaintiff alleged that the defendant doctor's negligent prenatal care of his mother caused him to be born with Down Syndrome. The court stated that, like the claim for general damages in Turpin, "[t]here is no loss of earning capacity caused by the doctor in negligently permitting the child to be born

30. Id. at 239, 643 P.2d at 965, 182 Cal. Rptr. at 348.
31. See id. at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347 (citing Restatement (Second) of Torts § 920 (1979)).
32. Id. at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.
33. 656 P.2d 483 (Wash. 1983).
34. See id. at 486.
35. See id.
37. See Harbeson, 656 P.2d at 495.
39. See id. at 614, 208 Cal. Rptr. at 907–08.
40. See id. at 603–04, 208 Cal. Rptr. at 900.
with a genetic defect that precludes earning a living. One cannot lose what one never had."\(^4\)

III. METHOD OF WRONGFUL LIFE JURISPRUDENCE

In California, a wrongful life claim is analyzed within the context of a professional malpractice action.\(^4\)\(^2\) There are five elements in a professional malpractice cause of action: (1) duty; (2) breach of that duty; (3) proximate cause; (4) legally cognizable injury; and (5) damages.\(^4\)\(^3\)

A. Duty

The defendant doctor has the duty to "use such skill, prudence, and diligence as other members of his profession commonly possess and exercise."\(^4\)\(^4\) Duty is not normally a disputed element in a wrongful life case. For instance, in Turpin, the defendant doctors did not "contend that they owed no duty of care... to [the child plaintiff]."\(^4\)\(^5\) Furthermore, in Harbeson, the Washington Supreme Court assumed "that physicians have a duty to the child to prevent birth in an impaired condition by informing the parents of the risks of birth defects."\(^4\)\(^6\)

B. Breach of that Duty

Similar to the duty analysis, breach is generally not a contested issue.\(^4\)\(^7\) In Turpin, although the Turpins’ oldest daughter was the defendants’ immediate patient, the court found that "it was reasonably foreseeable that... parents and their potential offspring

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41. Id. at 614, 208 Cal. Rptr. at 907.
43. See id. at 229–30, 643 P.2d at 960, 182 Cal. Rptr. at 343 (citing Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971)).
45. Turpin, 31 Cal. 3d at 230, 643 P.2d at 940, 182 Cal. Rptr. at 343.
47. See Turpin, 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
would be directly affected by [the] defendants’ negligent failure to
discover that [their daughter] suffered from an hereditary ailment.”

C. Proximate Cause

Proximate cause exists where there is a “causal connection
between the negligent conduct and the resulting injury.” This
element is also generally not disputed, as the court’s analysis is
merely “superficial.” For instance, in Turpin, the defendants never
contended that the plaintiff’s birth was not a “proximate result of the
breach.”

D. Legally Cognizable Injury

Although sometimes the issues of a legally cognizable injury
and damages are considered inseparable, the Turpin court “treated
the two as distinct matters.” Because the Turpin court used a two-
prong analysis—first considering whether there was a legally
cognizable injury, and, if so, then considering damages—this Note
will take the same approach. In order to determine if there is a
legally cognizable injury, a court will analyze whether
“nonexistence—never being born—would have been preferable to
existence in [the] diseased state.”

E. Damages

Damages are the “actual loss . . . resulting from the
professional’s negligence.” In wrongful life suits, plaintiffs have
argued for general damages, special damages, and damages for lost
earning capacity. General damages are “market-measured damages,”
where the court “attempts to make sure the defendant’s tort . . . does
not leave the plaintiff with . . . [a] net worth less than that to which

48. Id.
49. Budd, 6 Cal. 3d at 200, 491 P.2d at 436, 98 Cal. Rptr. at 852.
50. See VanDerhoef, supra note 46, at 672.
51. See Turpin, 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
52. Id.
53. See id.
54. See id. at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344 (quoting Speck v.
(Pa. 1981)).
849, 852 (1971).
she is entitled." In the wrongful life context, general damages are "monetary compensation for the pain and suffering [the plaintiff] will endure because of his or her hereditary affliction." On the other hand, special damages are "damages consequent upon but distinct from harm to the plaintiff's entitlement." In the wrongful life context, special damages include "the extraordinary, additional medical expenses that are occasioned by the hereditary ailment." Lastly, damages for lost earning capacity include "actual [compensation] or the capacity to earn compensation if the injured person is not employed at the time of the tortiously imposed injury . . . ." Although the first three elements of a wrongful life claim are typically uncontested, the last two present problems for California courts. Johnson v. Superior Court illustrates the problems and inequities with the analysis that California courts have traditionally used to determine whether there is a legally cognizable injury and to calculate damages.

IV. JOHNSON V. SUPERIOR COURT

A. Facts

In 1986, Cryobank, a sperm bank, approved an individual designated as Donor No. 276 as a sperm donor, but failed to inspect Donor No. 276 for any potential hereditary kidney problems prior to his approval. In 1988, Diane and Ronald Johnson approached Cryobank about Donor No. 276, and the doctors falsely represented that the sperm had been tested and screened for "reasonably detectable genetically transferred" diseases. Donor No. 276 was a carrier for a kidney disease called Autosomal Dominant Polycystic Kidney Disease (ADPKD), a hereditary disorder that is marked by

56. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 223 (2d ed. 1993).
57. Turpin, 31 Cal. 3d at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347.
58. DOBBS, supra note 56, at 226.
59. Turpin, 31 Cal. 3d at 239, 643 P.2d at 965, 182 Cal. Rptr. at 348.
60. ROBERT S. THOMPSON ET AL., REMEDIES: DAMAGES, EQUITY AND RESTITUTION § 5.03, at 585 (3d ed. 2002).
62. See id. at 874, 124 Cal. Rptr. 2d at 654.
63. See id.
gross enlargement of the kidneys and progressive renal failure.\textsuperscript{64} The Johnsons conceived their daughter with Donor No. 276's sperm, and Brittany Johnson was born with ADPKD.\textsuperscript{65}

In 1999, the Johnsons and Brittany brought a claim against California Cryobank, its officers, directors, and doctors for negligent misrepresentation.\textsuperscript{66} The trial court granted the doctors' motion for summary judgment on the negligent misrepresentation claim and on the issue of damages, finding that Brittany was not entitled to recover general damages or damages for lost earning capacity.\textsuperscript{67} In October 2001, the Johnsons appealed, requesting reconsideration of the 1999 ruling that Brittany was not entitled to general damages or damages for lost earning capacity.\textsuperscript{68}

\textbf{B. Court's Analysis}

The California Court of Appeal agreed with the trial court's assessment that the Johnson claim belonged under the rubric of wrongful life and denied both general damages and damages for lost earning capacity.\textsuperscript{69} In denying general damages, the court exclusively relied on the California Supreme Court's two-prong analysis in \textit{Turpin}, which asks (1) Is there a legally cognizable injury, and (2) are there rationally ascertainable damages?\textsuperscript{70} As to the first prong, the \textit{Turpin} court stated that it is "impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born."\textsuperscript{71} Furthermore, the \textit{Turpin} court agreed with the New Jersey Supreme Court's statement in \textit{Gleitman} that "the choice is between a worldly existence and none at all . . . . To recognize a right

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\textsuperscript{65} See Johnson, 101 Cal. App. 4th at 874, 124 Cal. Rptr. 2d at 654.
\textsuperscript{66} See id. at 873, 124 Cal. Rptr. 2d at 653.
\textsuperscript{67} See id.
\textsuperscript{68} See id.
\textsuperscript{69} See id. at 874, 124 Cal. Rptr. 2d at 654.
\textsuperscript{71} Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
\end{flushleft}
not to be born is to enter an area in which no one could find his way."  

As for rationally ascertainable damages, the Turpin court explained that "even if it were possible to overcome the [legally cognizable injury] hurdle, it would be impossible to assess general damages in any fair, nonspeculative manner." The Turpin court further added that "what the plaintiff has ‘lost’ is not life without pain and suffering but rather the unknowable status of never having been born... [A] rational, nonspeculative determination of a specific monetary award... appears to be outside the realm of human competence." Moreover, like the Turpin court, the Johnson court applied the Restatement’s benefit doctrine. Under this doctrine, “damages must be offset by the benefits incidentally conferred by the defendant’s conduct ‘to the interest of the plaintiff that was harmed.’” Brittany’s harmed interest was her “general physical, emotional and psychological well-being” but the doctor conferred a benefit to Brittany in that she “obtained a physical existence with the capacity both to receive and give love... as well as to experience pain and suffering.” The Johnson court agreed with the Turpin court’s conclusion that the “harm-benefit equation” was “incalculable,” and “a reasoned, nonarbitrary award of general damage is simply not obtainable.” Thus, the Johnson court, like the Turpin court, denied general damages.

In considering whether Brittany was entitled to damages for lost earning capacity, the Johnson court exclusively relied on Andalon v. Superior Court. The Johnson court agreed with the Andalon court’s conclusion that damages for lost earning capacity were like the claim for general damages in Turpin, noting that “if defendants had performed their jobs properly, [the child] would not have been born

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73. Turpin, 31 Cal. 3d at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
74. Id. at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347.
76. Turpin, 31 Cal. 3d at 236–37, 643 P.2d at 964, 182 Cal. Rptr. at 347 (quoting RESTATEMENT (SECOND) OF TORTS § 920 (1979)).
78. Id. at 887, 124 Cal. Rptr. 2d at 665.
[without a genetic defect], but ... would not have been born at all."\textsuperscript{79} Furthermore, the Johnson court stated that Brittany “never had a wage-earning capacity that was taken away by the conduct of the doctor and cannot, therefore, claim compensation.”\textsuperscript{80} The Johnson court went on to “recognize the harshness of the rules” propounded in Turpin and Andalon, but stated that it was “nonetheless bound” by these cases.\textsuperscript{81}

\section{Turpin v. Sortini Was Incorrectly Decided: A Legally Cognizable Injury Should Be Recognized}

Under the test set forth in Turpin, a plaintiff must overcome two hurdles to recover general damages in a wrongful life claim. First, there must be a “legally cognizable injury,” and second, the damages flowing from that injury must be “rationally ascertainable.”\textsuperscript{82} However, the two-prong analysis the court applied in Turpin is inappropriate because it fails to consider vitally important public policy, relevant legislative enactments and case law. As a result, Turpin was incorrectly decided, and the plaintiff was unfairly denied relief.

\subsection{The Turpin Court Failed to Consider Important Public Policy}

Deterrence is an essential consideration in tort cases caused by medical negligence.\textsuperscript{83} Although the law cannot ease the mental anguish the child plaintiff will experience, the law has the ability to alleviate the financial burden.\textsuperscript{84} Allowing financial recovery for general damages will remedy a legally cognizable wrong and will consequently be a deterrent to professional irresponsibility.\textsuperscript{85} This is

\begin{itemize}
\item \textsuperscript{79} Id. at 888, 124 Cal. Rptr. 2d at 665 (alteration in original) (quoting Andalon v. Super. Ct., 162 Cal. App. 3d 600, 614, 208 Cal. Rptr. 899, 907 (1984)).
\item \textsuperscript{80} Id. (quoting Andalon, 162 Cal. App. 3d at 614, 208 Cal. Rptr. at 907–08).
\item \textsuperscript{81} Id. at 889, 124 Cal. Rptr. 2d at 666.
\item \textsuperscript{82} See Turpin, 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
\item \textsuperscript{83} See Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling, 87 YALE L.J. 1488, 1499–1500 (1978) [hereinafter Father and Mother Know Best].
\item \textsuperscript{84} See Gleitman v. Cosgrove, 227 A.2d 689, 703 (N.J. 1967).
\item \textsuperscript{85} Cf. id. (explaining that when a court declines to award compensation for financial burdens, there is no deterrent to professional malpractice).
\end{itemize}
significantly important in the transmission of genetic information because advances in the study of human genetics "permit properly advised prospective parents to learn of some elements of their risk of having genetically defective children in time to include this factor in their childbearing plans." 86 Nevertheless, "[g]enetic defects represent an increasingly large part of the overall national health care burden." 87 Thus, the law needs to ensure that genetic screeners and counselors are doing their jobs properly to provide prospective parents with the correct genetic information to make the most informed childbearing decisions.

Interestingly, the Illinois court in Zepeda explained that "[c]hanging... scientific advancements... produce new problems which are constantly thrust upon the courts. These problems often require the remolding of the law, the extension of old remedies or the creation of new and instant remedies..." 88 Although Zepeda was decided in 1963, even then the court recognized the need for flexibility in the law. Today, the genetic revolution is a "scientific" reality, and "[t]he commercial side of genetic engineering amplifies the need for governmental regulation." 89 Judicial enforcement of general damages in wrongful life causes of action will satisfy the need for governmental regulation, 90 and it will provide a deterrent against negligent genetic engineering.

Dissenters might argue that the risk of rising costs for medical malpractice insurance should be the paramount policy consideration. Insurance companies might increase malpractice premiums if doctors are legally accountable for general damages in the wrongful life context. However, the California legislature has already addressed concerns about the high cost of medical malpractice insurance by passing the Medical Injury Compensation Reform Act of 1975 (MICRA). 91 MICRA caps the amount of noneconomic losses at $250,000 in "any action for injury against a health care provider based on professional negligence." 92 Although MICRA's opponents

86. See Father and Mother Know Best, supra note 83, at 1492–93.
87. Id. at 1496.
90. Id.
91. CAL. CIV. CODE § 3333.2 (West 1997).
92. Id.
suggest otherwise, proponents of the legislation believe it was "enacted to try and stop the kinds of runaway insurance costs caused by unlimited judgments against physicians for malpractice." Although California, like other states, has experienced an increase in jury awards, if it were not for MICRA, "awards would be astronomically higher than they are." California insurance companies then do not have to "pass [astronomical] losses on to their policyholders in the form of double- to triple-digit rate increases." Therefore, MICRA has provided medical malpractice rate stability for California doctors, and will continue to keep insurance costs down at a consistent level even if doctors are held liable for general damages in a wrongful life context.

Furthermore, an evaluation of insurance premium rates in California and other states reveals that California doctors are comparatively not overburdened with exorbitant insurance premiums. California's medical malpractice premiums are one-half or one-third of premiums in other states. For instance, a California

93. Opponents of MICRA maintain that the legislation did not reduce insurance premiums for doctors. For instance, the Foundation for Taxpayer & Consumer Rights stated that "[t]he 1993 study of medical malpractice insurance in California showed that MICRA had done little more than enrich California malpractice insurers with excessive profits, at the expense of malpractice victims." See Foundation for Taxpayer & Consumer Rights, MICRA Did Not Lower Insurance Premiums in California, at http://www.consumerwatchdog.org/insurance/fs/fs002695.php3 (last visited Jan. 15, 2003).


96. Id.

97. See id.

98. For instance, the "total premium in California for physician malpractice increased from $228 million in 1976 to $612 million in 1999 (a 168 percent increase over a 23-year period)." See Jay E. Shankar, President's Message: Compare What MICRA Saves You, SOUTHERN CALIFORNIA PHYSICIAN, May 2002, http://www.sbcm.org/southcalphysician/2002/may/art1.htm. However, the "total premium for the entire United States for physician malpractice increased from $1.2 billion in 1976 to $6.2 billion in 1999. This reflects a 420 percent increase" over the same period. Id.

99. See Doherty, supra note 94.
obstetrician pays between $35,000 and $40,000 per year for malpractice insurance.\(^{100}\) On the other hand, an obstetrician in Pennsylvania pays between $80,000 and $120,000 per year for malpractice insurance.\(^{101}\) California doctors are already paying less for medical malpractice insurance and are in a much better position than most physicians in other states.

Finally, even if premiums were to initially rise in response to wrongful life liability, if holding medical professionals liable effectively deters further medical negligence, the overwhelming benefit to patients would outweigh any increase in premiums for physicians. The court in Park v. Chessin\(^{102}\) correctly explained that “the medical profession is [still] not ‘unreasonably burdened’ if held liable in damages for the injuries caused to those who depend upon it for their very lives.”\(^{103}\) Hence, “where the medical profession is not ‘unreasonably burdened,’” deterring medical negligence and reducing the chance that a child will be born with a lifetime debilitating impairment should outweigh any possibility that malpractice premiums will increase.

**B. The Turpin Court Failed to Consider California Legislation**

Furthermore, the Turpin Court did not adequately consider California statutory law. California Civil Code section 3281 states that “[e]very person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault... compensation...”\(^{104}\) Section 3282 defines detriment as “a loss or harm suffered in person or property.”\(^{105}\) The Civil Code specifically includes the language, “every person,”\(^{106}\) and does not distinguish between persons who suffer detriment in a wrongful life context from others who suffer “loss or harm.”\(^{107}\) Although the child plaintiff in a wrongful life case would not have suffered detriment if he were not born, neither would a plaintiff in any other tort action.

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100. See id.
101. See id.
103. Id. at 211.
104. CAL. CIV. CODE § 3281 (West 1997).
105. Id. § 3282.
106. Id. § 3281
107. Id. § 3282.
The harsh reality is that the child plaintiff in a wrongful life context does suffer detriment and should "recover from the person in fault."108

California Civil Code sections 3281 and 3282 are consistent with the conclusion the court reached in Curlender. The Curlender majority explained that, "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."109 The impaired plaintiff "both exists and suffers, due to the negligence of others,"110 and thus should "recover from the person in fault."111 The court's approach illustrates how the rubric of wrongful life should not run counter to basic legislative initiatives and explains that courts should not deny compensation to a plaintiff who exists and suffers detriment.112 In denying recovery for a wrongful life claim, the Turpin court incorrectly ignored this remedial statutory legislation, which provides compensation for every person who has suffered a detriment.113

C. *The Turpin Court was Shortsighted in its Approach to Nonexistence Versus Existence with Impairment*

Although it is difficult to ascertain whether existence with impairment versus nonexistence constitutes a legally cognizable injury, the Turpin court incorrectly concluded that this task was "impossible to determine in any rational or reasoned fashion."114 The Turpin court stated that, "the value of a healthy existence over an impaired existence is within the experience [or] imagination of most people. The value of nonexistence . . . is not."115 Nevertheless, the court simultaneously recognized that it could not "assert with

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108. *Id.* § 3281.
110. *Id.*
111. *CAL. CIV. CODE* § 3281.
113. *CAL. CIV. CODE* § 3281.
confidence that in every situation there would be a societal consensus
that life is preferable to never having been born at all.\textsuperscript{116} To make
this statement, the court must concede that there is some means to
evaluate existence with impairments versus “never having been born
at all.”\textsuperscript{117} Thus, the court itself was shortsighted in its thinking, and
should have attempted to formulate some “rational or reasoned”\textsuperscript{118}
approach to measure whether life is preferable to never having been
born at all. After \textit{Turpin} was decided, commentators have proposed
various solutions.\textsuperscript{119}

VI. A BETTER APPROACH TO A GENERAL DAMAGES ANALYSIS

A. Utilizing a Special Verdict Approach to Ascertain a Legally
Cognizable Injury

Because deterrence is such an integral factor in a wrongful life
case, it is crucial that courts do not continue to fall back on the
argument that it is impossible to analyze whether existence with an
impairment versus nonexistence constitutes a legally cognizable
injury.\textsuperscript{120} Although it is admittedly difficult for a jury to decide
“whether the plaintiff has in fact suffered an injury in being born
impaired rather than not being born [at all],”\textsuperscript{121} it is not impossible so
long as there is convincing evidence of an injury. Therefore, a better
approach would be for the court to submit a two-factor inquiry to the
jury in a special verdict. The Federal Rules of Civil Procedure
explain that in a special verdict, “the court may submit to the jury
written questions susceptible of categorical or other brief answer.”\textsuperscript{122}
With a special verdict, “the court shall give to the jury such

\textsuperscript{116} Id. at 234, 643 P.2d at 963, 182 Cal. Rptr. at 346.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
\textsuperscript{119} See Alan J. Belsky, \textit{Injury as a Matter of Law: Is This the Answer to the
Wrongful Life Dilemma?}, 22 U. BAL\textit{\textsuperscript{T}}. L. REV. 185, 239 (1993) (applying “a
presumption favoring nonexistence [as it] would equalize the burden of proof
in wrongful life cases and increase the plaintiff’s chance of recovery.”). \textit{Id.};
Dawe, supra note 3, at 496 (suggesting that if nonexistence would be valued at
zero, life with impairments would be assigned a number that hovers near zero,
with the most severe impairments being assigned a negative number, and the
less severe impairments being assigned a positive number).
\textsuperscript{120} See \textit{Turpin}, 31 Cal. 3d at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
\textsuperscript{121} Id.
\textsuperscript{122} FED. R. CIV. P. 49(a).
explanation and instruction . . . as may be necessary to enable the jury to make its findings upon each issue."¹²³ Thus, the jury will be able to differentiate between those injuries that justify an award and those injuries that do not.

Using a special verdict approach, the first question submitted to the jury is whether the impairment is an "extremely severe hereditary disease."¹²⁴ The jury will take into account whether the disease leads to a life-threatening condition and whether it is progressively debilitating. The second question is whether the defendant doctor's causal relationship to the plaintiff's impairment and suffering is sufficient to justify an award. The jury will take into consideration whether the defendant doctor was retained specifically for the purpose of providing genetic information to the child plaintiff. Because this analysis is subjective and the tort of wrongful life does somewhat "retreat into meditation on the mysteries of life,"¹²⁵ the jury must answer both questions affirmatively for the court to find a legally cognizable injury. If only one question is answered affirmatively and the other question is not, the court will not find a legally cognizable injury. This is because "the plaintiff is saddled with the burden of proving that the benefits of nonexistence exceed the burdens of her life" with impairments.¹²⁶

1. What is an "extremely severe hereditary condition?"

In Turpin, the court noted that "it seems quite unlikely that a jury would ever conclude that life with [deafness] is worse than not being born at all. Other wrongful life cases, however, have involved children with . . . extremely severe hereditary diseases."¹²⁷ Thus, to distinguish between extremely severe hereditary conditions and those

¹²³. Id.
¹²⁴. See Turpin, 31 Cal. 3d at 234, 643 P.2d at 963, 182 Cal. Rptr. at 346.
¹²⁵. Curlender v. Bio-Science Labs., 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1980). Justice Weintraub of the New Jersey Supreme Court stated that "the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so." Gleitman v. Cosgrove, 227 A.2d 689, 711 (N.J. 1967) (Weintraub, C.J., dissenting in part).
¹²⁶. Belsky, supra note 119, at 239.
¹²⁷. Turpin, 31 Cal. 3d at 234, 643 P.2d at 962–63, 182 Cal. Rptr. at 345–46.
that are not extremely severe,\textsuperscript{128} it is imperative to first ascertain whether the condition leads to fatality, and secondly, whether it is a progressive and debilitating condition.

One way to differentiate between an extremely severe condition and one that is not is to investigate whether the impairment leads to fatality. In \textit{Turpin}, the child plaintiff was deaf.\textsuperscript{129} Although deafness is a socially, economically, and emotionally straining impairment, there is no indication that it is life threatening.\textsuperscript{130} Furthermore, statistics show that deaf people live longer than those who can hear.\textsuperscript{131} On the other hand, the child plaintiff in \textit{Johnson} suffered from ADPKD,\textsuperscript{132} a hereditary, life-threatening condition “characterized by progressive cyst development and bilaterally enlarged polycystic kidneys.”\textsuperscript{133} Approximately 50% of patients with ADPKD suffer end-stage renal disease by age sixty.\textsuperscript{134} Similarly, in \textit{Curlender}, the child plaintiff suffered from a life-threatening disease.\textsuperscript{135} The plaintiff was diagnosed with Tay-Sachs, a “fatal progressive degenerative disease of the nervous system,”\textsuperscript{136} which leads to “relentless deterioration of mental and physical abilities.”\textsuperscript{137} Furthermore, children with Tay-Sachs disease usually die by age five.\textsuperscript{138}

\textsuperscript{128} See \textit{id.}
\textsuperscript{129} See \textit{id.} at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339.
\textsuperscript{130} See generally Dallas Otolaryngology Cochlear Implant Program, \textit{Facts About Deafness}, at http://www.dallascochlear.com/facts_about_deafness.htm (last visited Dec. 28, 2002) (providing fifteen facts about deafness, none of which points to fatality as a result of deafness) [hereinafter \textit{Facts About Deafness}.]
\textsuperscript{133} \textit{GENE REVIEWS}, supra note 64.
\textsuperscript{134} See \textit{id.}
\textsuperscript{136} \textit{id.} at 815 n.4, 165 Cal. Rptr. at 480 n.4 (quoting Howard v. Lecher, 366 N.E.2d 64, 67 (N.Y. 1977) (Cooke, J., dissenting).
\textsuperscript{138} See \textit{id.}
A second way to differentiate the severity of the plaintiff's condition is to consider the debilitating and progressive nature of the condition. Although those who are deaf have numerous obstacles to overcome, many deaf people lead successful lives. Those who cannot hear have developed their own language, known as American Sign Language, which is a linguistically recognized language as is English or any other language. Furthermore, over time those who are deaf develop keener senses of observation and smell than those who hear to compensate for their loss of hearing. On the other hand, ADPKD is progressively debilitating because the prevalence of cysts "increases from 20% in the third decade to approximately 75% after the sixth decade." Tay-Sachs is even more debilitating and progressive as "muscles begin to atrophy and paralysis sets in" before death.

Thus, Tay-Sachs is the epitome of a condition that a jury should characterize as an extremely severe condition. Not only does Tay-Sachs lead to fatality, it leads to death at an extremely young age. On the other hand, the jury should not characterize deafness as an extremely severe condition, because it does not lead to death and does not have progressively debilitating effects. In the middle of the spectrum is ADPKD, which the jury would have more difficulty characterizing as an extremely severe condition. Although ADPKD is not as medically severe a condition as Tay-Sachs because ADPKD does not lead to fatality at such an early age, both medical conditions could have life-ending ramifications. Therefore, a jury would likely answer affirmatively the first special verdict question when a child plaintiff suffers from ADPKD.

2. How closely connected does the defendant doctor have to be to the plaintiff's injury?

For the jury to find a legally cognizable injury, it will also need to conclude that the defendant doctor was closely connected to the injury. Although this analysis is normally part of the proximate

139. See Facts About Deafness, supra note 130.
140. See DeafNet, supra note 131.
141. See id.
142. See id.
143. GENE REVIEWS, supra note 64.
144. NINDS Tay-Sachs, supra note 137.
cause prong in a negligence cause of action,\textsuperscript{145} it still makes sense to apply it in the wrongful life context to ascertain whether there is an injury. Because a wrongful life injury admittedly involves some notion of metaphysics,\textsuperscript{146} the more closely connected the doctor is to the injury, the less metaphysical it becomes. This is because a wrongful life claim deals with “worldly existence [versus] none at all,”\textsuperscript{147} and thus, the more connected the doctor’s negligence is to the existence, the easier it becomes for the jury to “find [its] way . . . to recognize a right not to be born.”\textsuperscript{148} In essence, the legally cognizable injury becomes more palpable and enhances the “jury’s ability to say that the [plaintiff’s injury] is manifest.”\textsuperscript{149}

To ascertain the defendant doctor’s degree of connection, the jury will consider the purpose of the services rendered by the defendant doctor. The jury will first determine whether the plaintiff employed the doctor to provide genetic counseling. The specific purpose of the employment needs to be for genetic counseling to limit liability on the medical profession. If the plaintiff’s parents consulted the physician for a purpose other than genetic counseling, then the jury should not consider the second question. However, if the services were for genetic counseling, the jury will then consider whether this genetic counseling was for the child plaintiff or for another child, such as a sibling. Once again, to narrow the scope of liability, the jury should only answer affirmatively to the second inquiry in the special verdict if the defendant doctor rendered services specifically in connection with the child plaintiff.

A review of the facts of \textit{Turpin, Curlender}, and \textit{Johnson} illustrate the workings of the second special verdict inquiry. In \textit{Turpin}, the child plaintiff’s parents did not retain the defendant doctor for genetic consultation directly in connection with the child


\textsuperscript{147} Gleitman v. Cosgrove, 227 A.2d 689, 711 (N.J. 1967).

\textsuperscript{148} Id.

\textsuperscript{149} Turpin, 31 Cal. 3d at 236, 643 P.2d at 963, 182 Cal. Rptr. at 346 (quoting Speck v. Finegold, 408 A.2d 496, 512 (Pa. Super. Ct. 1979) (Spaeth, J., concurring and dissenting), aff’d, 439 A.2d 110 (Pa. 1981)).
Instead, a hearing specialist incorrectly advised the plaintiff's parents that their other child's hearing was within normal range. Because the purpose of the defendant doctor's services were not for genetic counseling and not rendered for the child plaintiff, the jury should not answer the second question affirmatively on this set of facts. Although this conclusion might seem unfair considering that the defendant doctor's relationship to the plaintiff's injury would probably meet the traditional proximate cause test, some harshness is necessary because the cause of action is admittedly "metaphysical."

While in Turpin the plaintiff was conceived as an indirect result of the defendant doctor's negligence, the child plaintiff in Johnson was conceived as a direct result of the defendant doctor's negligence. In Johnson, the child's parents relied on the sperm bank's doctors to provide accurate genetic information on the sperm they would use to conceive the child plaintiff. Analogously, in Curlender, the defendant laboratory rendered services to ascertain whether the child plaintiff's parents were carriers of the Tay-Sachs gene. "Relatively simple" blood tests would show whether "both parents [were] carriers" and only then would "there be a great likelihood of the presence of the disease in the offspring."

However, the plaintiff alleged that this "relatively simple" blood test was not accurately completed, and the plaintiff's parents were negligently misinformed that they were not carriers. Thus, in both Johnson and Curlender, the defendants were retained for the purpose of genetic consultation directly in connection with the child plaintiff. Because both considerations under the second inquiry are met, the jury should answer the inquiry affirmatively, and the doctors in Curlender and Johnson would be liable.

150. See id. at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339.
151. See id.
152. See Curlender, 106 Cal. App. 3d at 826, 165 Cal. Rptr. at 486.
154. See id.
155. See Curlender, 106 Cal. App. 3d at 815, 165 Cal. Rptr. at 480.
156. Id. at 816 n.4, 165 Cal. Rptr. at 480 n.4 (quoting Howard v. Lecher, 366 N.E.2d 64, 67 (N.Y. 1977) (Cooke, J., dissenting)).
157. See id. at 815, 165 Cal. Rptr. at 480.
Critics may argue that the special verdict approach would lead to a decrease in genetic counseling, because it would likely hold more doctors liable for their negligence. Arguably "practitioners [might] wonder how far to go in counseling couples," and might advise parents to avoid conception "rather than take the chance of compensating a claimant for lifetime care."\textsuperscript{158} However, even if doctors are more conservative and cautious when advising patients about whether to conceive, doctors still do not "make the ultimate choice."\textsuperscript{159} Although genetic counselors "possess information that deciders often cannot otherwise easily obtain," the "choice among various courses of action" still lies with the parents.\textsuperscript{160} As long as doctors "disclose those risks that would be relevant to a reasonable person," they "preserve parental autonomy in procreative decisionmaking" and are insulated from any liability.\textsuperscript{161} Thus, the special verdict analysis would only hold liable those doctors who negligently fail to disclose ascertainable risks to prospective parents.

Critics may also argue that increased wrongful life liability will "boost medical expenses" by increasing "the number of diagnostic tests ordered for mothers-to-be."\textsuperscript{162} However, more thorough testing can only serve to give "prospective parents . . . [the] reproductive options that a reasonable person would want to know in deciding whether to procreate," and "parents will be given the opportunity to act to avert the birth of children with genetic defects."\textsuperscript{163} Therefore, more cautious genetic counseling and additional testing will allow parents to make better informed choices about whether to conceive, while curtailing professional negligence and wrongful life suits.

Once the jury can more easily ascertain a legally cognizable injury, the next hurdle is to calculate damages. Although computing a "specific monetary award"\textsuperscript{164} is admittedly difficult, it can be done, so this difficulty should not be permitted to justify denying liability.

\textsuperscript{159} See Father and Mother Know Best, \textit{supra} note 83, at 1507.
\textsuperscript{160} Id. at 1507–08.
\textsuperscript{161} Id. at 1509–10.
\textsuperscript{162} See Fain, \textit{supra} note 158, at 628.
\textsuperscript{163} Father and Mother Know Best, \textit{supra} note 83, at 1508.
B. Damages Are Not "Incalculable"

1. The United States Supreme Court's viewpoint on damages

Although the California Supreme Court in Turpin concluded that "it would be impossible to assess general damages in any fair, nonspeculative manner,"\textsuperscript{165} the court overlooked United States Supreme Court jurisprudence on damages. In Story Parchment Co. v. Paterson Parchment Paper Co.,\textsuperscript{166} the United States Supreme Court explained:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.\textsuperscript{167}

The Supreme Court further stated that "damages may not be determined by mere speculation."\textsuperscript{168} The inclusion of the word "mere" implies that some speculation is allowed as long as there is "evidence [to] show the extent of the damages as a matter of just and reasonable inference."\textsuperscript{169} Taken together, these two Supreme Court statements set forth two important principles: (1) Even if damages cannot be determined with "certainty," they are not altogether precluded; and (2) a certain amount of speculation is inherent in reaching a determination of damages.

On the contrary, the California Supreme Court in Turpin reasoned that damages could not be calculated with certainty and thus only compensated the plaintiff for nonspeculative damages.\textsuperscript{170} The Turpin court's approach is antithetical to the Supreme Court's more relaxed approach in Story Parchment. In denying general damages and relief to the injured person, the Turpin court ignores "fundamental principles of justice," and "relieve[s] the wrongdoer from making any amend for his acts."\textsuperscript{171}

\textsuperscript{165} Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
\textsuperscript{166} 282 U.S. 555 (1931).
\textsuperscript{167} Id. at 563. Although Story Parchment dealt with antitrust law, its basic recovery principles are applicable in a wrongful life context.
\textsuperscript{168} Id. at 563.
\textsuperscript{169} Id.
\textsuperscript{170} See Turpin, 31 Cal. 3d at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.
\textsuperscript{171} Story Parchment, 282 U.S. at 563.
Moreover, the California Supreme Court's "nonspeculative" approach in *Turpin* contrasts with its very own approach to damages in *Beagle v. Vasold.*172 There, the court unambiguously stated that in determining compensation for pain and suffering, "the chief reliance for reaching reasonable results... must be the restraint and common sense of the jury."173 Allowing for the common sense of the jury implicitly allows for some speculation. Thus, the *Turpin* court's overly strict approach to damages is not only contrary to the Supreme Court's approach in *Story Parchment,* which allows for some degree of speculation, but is also inconsistent with its own more relaxed approach to computing damages in *Beagle.*

2. The Restatement's benefit doctrine is not applicable in the wrongful life context

Although the *Turpin* court applied the Restatement's benefit doctrine in its attempt to compute damages, the benefit doctrine is not applicable in the wrongful life context. The *Turpin* court semantically differentiates the burdens from the benefits.174 Nonetheless, the burden is the existence with impairments, and the benefit is existence, but with impairments. Because the burdens and benefits seem to be synonymous with one another and would seem to cancel each other out, the approach is not incalculable,175 rather it equals zero.

Although the Restatements are considered persuasive authority created by judges, professors, and lawyers, "Restatements in and of themselves are not primary law."176 Given that the *Turpin* court's reliance on the benefit doctrine to calculate general damages was questionable, the *Johnson* court should have considered the reasoning in *Curlender* and awarded damages "on the basis of the plaintiff's mental and physical condition at birth and her expected

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173. Id. at 172, 417 P.2d at 675, 53 Cal. Rptr. at 131 (quoting CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 88, at 319 (West 1935)).
174. See supra Part IV.B.
175. See *Turpin*, 31 Cal. 3d at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347.
condition during the... life span... anticipated for one with her impaired condition."177

3. Method for calculating general damages

Rather than categorically denying general damages to wrongful life plaintiffs, a better approach would be to incorporate the Curlender court’s reasoning and award damages based on the plaintiff’s mental and physical condition at birth and her expected condition during her anticipated lifespan. Although some may argue that there is “no reliable data or element of certainty”178 from which the amount can be accurately measured, California courts should allow the jury to rely on “‘probable and inferential... [evidentiary] proof”179 and “common sense”180 to ascertain a “reasonable... estimate” of damages.181

The jury will focus on evidentiary proof of the severity of the injury in accordance with the jury’s common sense to guide its damages determination.182 For instance, for those injuries that the jury characterizes as an “extremely severe condition” in the legally cognizable injury analysis,183 the jury should award a higher amount of general damages. On the other hand, for an injury that is not characterized as an “extremely severe condition,” the jury should award a lesser amount of general damages. This approach is consistent with the more relaxed position of both the United States Supreme Court and the California Supreme Court toward a jury’s computation of general damages.

178. Story Parchment, 282 U.S. at 564 (citing Gilbert v. Kennedy, 22 Mich. 117, 129 (1871)).
179. Id. (quoting Allison v. Chandler, 11 Mich. 542, 555 (1863)).
182. See Beagle, 65 Cal. 2d at 172, 417 P.2d at 675, 53 Cal. Rptr. at 131.
183. See supra Part VI.A.
VII. DAMAGES FOR LOST EARNING CAPACITY ANALYSIS

California courts have not awarded child plaintiffs damages for lost earning capacity in wrongful life cases.\(^\text{184}\) For instance, the California Court of Appeal in *Andalon* denied damages for lost earning capacity because it believed that “the plaintiff-child’s claim for loss of earning capacity [was] controlled by the [general damages] reasoning in *Turpin*.\(^\text{185}\) The *Andalon* court stated, “There is no loss of earning capacity caused by the doctor in negligently permitting the child to be born with a genetic defect that precludes earning a living. One cannot lose what one never had.”\(^\text{186}\) In other words, the court mistakenly believed that the plaintiff did not suffer a legally cognizable injury and thus could not recover damages for lost earning capacity.

\(\text{A. Damages for Lost Earning Capacity Are Comparable to Special Damages, Not General Damages}\)

The *Turpin* court limited its treatment of general damages to “pain and suffering [the plaintiff] will endure because of his or her hereditary affliction.”\(^\text{187}\) Moreover, the *Turpin* court differentiated between general damages, which are intangible in nature and are very difficult to measure, and special damages, such as “extraordinary expenses for specialized teaching, training and [medical] equipment,” which are tangible, economically quantifiable costs.\(^\text{188}\) This explicit differentiation was appropriate because “the term special damages is almost always used in contrast to general damages.”\(^\text{189}\)

Furthermore, the *Turpin* court stated that special damages, such as medical expenses, are “the kind of pecuniary losses which are readily ascertainable and regularly awarded as damages in professional malpractice actions.”\(^\text{190}\) Similarly, a claim for lost


\(^{185}\) Id.

\(^{186}\) Id.


\(^{188}\) Id. at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348.

\(^{189}\) DOBBS, *supra* note 56, at 226.

\(^{190}\) *Turpin*, 31 Cal. 3d at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.
income is a "pecuniary loss," which compensates for "actual [earnings losses] or the [loss of] capacity to earn compensation." Thus, both medical expenses and lost earning capacity involve "pecuniary" projection instead of "pain and suffering" projection. Because the special damages portion of the Turpin decision is "far from dictum" and "is a full-fledged holding of [California's] highest court and binding on lower courts," lower California courts could and should differentiate between general damages and damages for lost earning capacity.

Additionally, Professor Dobbs writes that "one common form of [special] damages is the claim . . . to lost income . . . , and in a proper case [that claim] is recoverable as such." Similarly, California courts group damages for medical expenses and lost earning capacity under the auspices of special damages. For instance, in Chitkin v. Lincoln National Insurance Co. the court noted that special damages included "both medical expenses and loss of income." Thus, it makes sense that damages for lost earning capacity should be analyzed under the same umbrella as special damages, not general damages, which consequently avoids complication over whether there is a legally cognizable injury. As long as the defendant's negligence meets the other four elements—duty, breach, proximate cause, and damages—the plaintiff should recover damages for lost earning capacity.

Again, critics may argue that liability for damages for lost earning capacity exposes healthcare providers to an increase in malpractice insurance premiums. MICRA only places a recovery limit on "noneconomic losses," and unlike general damages, damages for lost earning capacity are an economic loss. Thus, in

193. DOBBS, supra note 56, at 226–27.
195. Id. at 847.
197. See CAL. CIV. CODE § 3333.2(b) (West 1997).
198. See THOMPSON ET AL., supra note 191, at 585.
the case of damages for lost earning capacity, MICRA would not prevent a jury from awarding compensation that exceeds $250,000. 199 Critics may argue that because damages are not limited by MICRA, insurance companies will respond by increasing malpractice premiums.

However, as in the case of general damages, the balance between deterrence and rising insurance premiums once again falls heavily on the side of deterrence. If doctors are not held liable for their negligent actions, it will "enable parties to profit by... their own wrongs... and invite depredation."200 Therefore, a fear of rising insurance premiums should not preclude the obvious parallels between damages for lost earning capacity and special damages.

B. Utilizing the Proposed Special Verdict Analysis to Determine the Legally Cognizable Injury Prong in Damages for Lost Earning Capacity

Even if a California court does not agree that damages for lost earning capacity are really a form of special damages and should be analyzed without consideration of legally cognizable injury, a court still should not utilize the *Turpin* categorical general damages rule in considering damages for lost earning capacity. Although the proposed two-inquiry special verdict will not compensate all wrongful life claimants for loss of earning capacity, at least some claimants will be compensated instead of categorically excluding all wrongful life claimants. A court should utilize the two-part special verdict analysis to determine damages for lost earning capacity in the same manner suggested above for general damages. Both the severity of the impairment inquiry and the defendant’s connection to the injury inquiry need to be answered affirmatively to conclude there is a legally cognizable injury before the jury calculates damages for lost earning capacity.

C. Method for Calculating Damages for Lost Earning Capacity

Although "[a]n award for loss of earning capacity is inherently speculative and not always calculable with mathematical

Nevertheless, courts have awarded damages for lost earning capacity to plaintiffs. Damages for child plaintiffs are “especially speculative, because [children] lack an established record of earnings, well-developed skills, and expressed career goals.” Nevertheless, courts have used a combination of objective and subjective factors to determine a child plaintiff’s earning capacity “in allowing at least some damages even where there is no evidence on which to base an award.”

For its objective analysis, the court should consult “gender, age, and race-based tables to predict the number of years that the plaintiff would have remained in the labor force and to determine his or her expected average wages.” Then it should utilize experts to analyze subjective factors such as the plaintiff’s Intelligence Quotient and the socio-economic status of the plaintiff’s family. With this combination of objective and subjective factors, a court could award an amount of damages for lost earning capacity that is just and proportional to the plaintiff’s injury, instead of completely denying recovery under the Andalon reasoning.

D. Damages for Lost Earning Capacity Analysis for the Johnson Facts

The Johnson court was not bound to follow the Andalon reasoning, and it should not have done so. The Andalon case was decided by the California Court of Appeal, which is not the state’s highest court and is not binding on the Johnson case. Furthermore, even the Andalon court itself notes that Turpin’s holding does not foreclose an award for loss of earning capacity.

204. Id. at 441–42.
205. Id. at 443.
206. See id. at 445.
208. See Andalon v. Super. Ct., 162 Cal. App. 3d 600, 613–14, 208 Cal. Rptr. 899, 907–08 (1984). The court stated, “we conclude Turpin’s use of the term general damages is limited to recovery for pain and suffering. Other...
Thus, the Johnson court should have either analyzed damages for lost earning capacity under the special damages rubric or used a special verdict approach to bypass the legally cognizable injury hurdle. Once it is determined that there is a legally cognizable injury, the jury should use a combination of objective and subjective factors to fix an amount. Brittany Johnson deserved to be compensated for her loss of earning capacity.

VIII. CONCLUSION

The wrongful life cause of action is admittedly abstract and metaphysical due to the philosophical nature of existence with impairment versus nonexistence. California courts should not use the philosophical nature of the tort to categorically deny all wrongful life plaintiffs general damages and damages for lost earning capacity; instead, the court should employ the proposed special verdict analysis. The two-part special verdict inquiry facilitates the jury’s role in determining whether there is a legally cognizable injury and ensures that general damages and damages for lost earning capacity are reasonably calculable.

Because the tort does hinge on metaphysics, there concededly should be a limit to the liability imposed on the medical profession. Consequently, in considering the nature of the injury, the special verdict analysis does limit liability to only those plaintiffs suffering particularly impaired existences. If California were to adopt this method of analysis, there may still be children who suffer injuries caused by negligent physicians who would not meet the criteria and unfortunately would not be compensated. However, instead of the Turpin/Andalon categorical rule that no children are compensated for a life of debilitating impairment, under the special verdict analysis, those who most deserve to be compensated will be afforded a remedy. Holding the medical profession responsible for negligence that results in a life of seriously impaired existence will

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elements of damage must be evaluated pursuant to Turpin’s reasoning, but are not controlled by its holding.” Id. at 613–14, 208 Cal. Rptr. at 907–08.
210. See id.
ensure that “a wrong with serious consequential injury [will not] go wholly unredressed.”211

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