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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”¹ tort of wrongful life where a child plaintiff “alleg[es] that, due to the negligence of the defendant [doctor], birth occurred.”² 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.”³

Although California recognizes the wrongful life cause of action, California courts are unwilling to award general damages—compensation for pain and suffering⁴—or damages for loss of earning capacity.⁵ 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

1. See *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 828–29, 165 Cal. Rptr. 477, 488 (1980). “The real crux of the [wrongful life] problem is whether the breach of duty [is] the proximate cause of an *injury cognizable at law*. The injury, of course, is not the particular defect with which a plaintiff is afflicted . . . but it is the birth of [the] plaintiff with such defect.” *Id.*

2. *Id.* at 817, 165 Cal. Rptr. at 481.

3. See Timothy J. Dawe, Note, *Wrongful Life: Time for a “Day in Court”*, 51 OHIO ST. L.J. 473, 475 (1990).

4. See *Turpin v. Sortini*, 31 Cal. 3d 220, 236–37, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 347 (1982); see also *infra* Part VI.B. (explaining why courts should award general damages in wrongful life cases and proposing an alternative method of analysis to calculate general damages).

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.⁶ 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.⁷ However, because California courts refuse to award either general damages or damages for lost earning capacity in wrongful life cases,⁸ 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.⁹ 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”¹⁰ 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.*

6. See *Turpin*, 31 Cal. 3d at 234–35, 643 P.2d at 963, 182 Cal. Rptr. at 346.

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.

9. See *Turpin*, 31 Cal. 3d at 235–37, 643 P.2d at 963–64, 182 Cal. Rptr. at 346–47; *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*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 *Turpin v. Sortini*,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,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 *Zepeda v. Zepeda*.¹⁴ There, the plaintiff was an illegitimate child who brought a damages claim against his father for his out-of-wedlock status.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."¹⁶

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

11. 101 Cal. App. 4th 869, 124 Cal. Rptr. 2d 650 (Ct. App. 2002).

12. *Turpin*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337.

13. Courts generally tend to award special damages to a wrongful life plaintiff. See *infra* Part VII.

14. 190 N.E.2d 849 (Ill. App. Ct. 1963).

15. See *id.* at 851.

16. *Id.* at 858.

17. 227 A.2d 689 (N.J. 1967).

baby who was "then in gestation."¹⁸ The court denied general damages, stating it is impossible to "weigh the value of life with impairments against the nonexistence of life itself."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 *Curlender v. Bio-Science Laboratories*.²⁰ In *Curlender*, the parents retained the defendant laboratories to administer tests to discern whether they were carriers of Tay-Sachs disease.²¹ However, "'incorrect and inaccurate' information was disseminated to [the] plaintiff's parents concerning their status as carriers."²² Subsequently, the child plaintiff was born with Tay-Sachs disease.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 *exists* and *suffers*, due to the negligence of others."²⁴

Nevertheless, the *Curlender* court's "reality" approach was merely transitory. Just two years later, the California Supreme Court in *Turpin* awarded special damages but denied general damages to a wrongful life plaintiff.²⁵ In that case, hearing specialists incorrectly advised the plaintiff's parents that their first-born child was within normal hearing range.²⁶ In reality, the child was "stone deaf," the result of a hereditary hearing impairment.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.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."²⁹ However, the court did permit the plaintiff to recover special

18. *Id.* at 691.

19. *Id.* at 692.

20. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

21. *See id.* at 815, 165 Cal. Rptr. at 480.

22. *Id.*

23. *See id.* at 816, 165 Cal. Rptr. at 480.

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

25. *See Turpin v. Sortini*, 31 Cal. 3d 220, 239, 643 P.2d 954, 966, 182 Cal. Rptr. 337, 349 (1982).

26. *See id.* at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339.

27. *See id.*

28. *See id.* at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.

29. *Id.* at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.

damages, reasoning that compensation for “the extraordinary, additional medical expenses that are occasioned by the hereditary ailment”³⁰ was consistent with the “benefit” doctrine in the *Restatement (Second) of Torts*.³¹ 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.³²

Similarly, the Washington Supreme Court allowed recovery for special damages in *Harbeson v. Parke-Davis, Inc.*³³ 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.³⁴ The child plaintiff was born with fetal hydantoin syndrome,³⁵ a rare disorder that causes “abnormalities of the skull and facial features . . . and/or mild developmental delays.”³⁶ Citing *Turpin*, the Washington Supreme Court awarded special damages to cover the “extraordinary medical expenses” associated with the child plaintiff’s impairment.³⁷

Finally, the California Court of Appeal denied damages for lost earning capacity in *Andalon v. Superior Court*,³⁸ reasoning that damages for lost earning capacity were comparable to general damages.³⁹ 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.⁴⁰ 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.*

36. Northwestern Memorial Hospital, Health Library: Illnesses & Conditions—Fetal Hydantoin Syndrome, at http://health_info.nmh.org/Library/HealthGuide/IllnessConditions/topic.asp?hwid=nord948 (last visited Feb. 25, 2003).

37. *See Harbeson*, 656 P.2d at 495.

38. 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984).

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."⁴¹

III. METHOD OF WRONGFUL LIFE JURISPRUDENCE

In California, a wrongful life claim is analyzed within the context of a professional malpractice action.⁴² 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.⁴³

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."⁴⁴ 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]."⁴⁵ 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."⁴⁶

B. Breach of that Duty

Similar to the duty analysis, breach is generally not a contested issue.⁴⁷ 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

41. *Id.* at 614, 208 Cal. Rptr. at 907.

42. *Turpin v. Sortini*, 31 Cal. 3d 220, 229, 643 P.2d 954, 959, 182 Cal. Rptr. 337, 342 (1982).

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)).

44. *Budd v. Nixen*, 6 Cal.3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 at 143 (4th ed. 1971)).

45. *Turpin*, 31 Cal. 3d at 230, 643 P.2d at 940, 182 Cal. Rptr. at 343.

46. Philip J. VanDerhoef, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis—Harbeson v. Parke-Davis, Inc.*, 58 WASH. L. REV. 649, 672-73 (1983).

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."⁴⁸

C. Proximate Cause

Proximate cause exists where there is a "causal connection between the negligent conduct and the resulting injury."⁴⁹ This element is also generally not disputed, as the court's analysis is merely "superficial."⁵⁰ For instance, in *Turpin*, the defendants never contended that the plaintiff's birth was not a "proximate result of the breach."⁵¹

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."⁵² 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.⁵³ 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."⁵⁴

E. Damages

Damages are the "actual loss . . . resulting from the professional's negligence."⁵⁵ 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. Finegold*, 408 A.2d 496, 511–12 (Pa. Super. Ct. 1979), *aff'd*, 439 A.2d 110 (Pa. 1981)).

55. *Budd v. Nixen*, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971).

she is entitled.”⁵⁶ 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.”⁵⁷ On the other hand, special damages are “damages consequent upon but distinct from harm to the plaintiff’s entitlement.”⁵⁸ In the wrongful life context, special damages include “the extraordinary, additional medical expenses that are occasioned by the hereditary ailment.”⁵⁹ 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”⁶⁰

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*⁶¹ 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.⁶² 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.⁶³ 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).

61. 101 Cal. App. 4th 869, 124 Cal. Rptr. 2d 650 (2002).

62. *See id.* at 874, 124 Cal. Rptr. 2d at 654.

63. *See id.*

gross enlargement of the kidneys and progressive renal failure.⁶⁴ The Johnsons conceived their daughter with Donor No. 276's sperm, and Brittany Johnson was born with ADPKD.⁶⁵

In 1999, the Johnsons and Brittany brought a claim against California Cryobank, its officers, directors, and doctors for negligent misrepresentation.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.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.⁶⁸

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.⁶⁹ In denying general damages, the court exclusively relied on the California Supreme Court's two-prong analysis in *Turpin*, which asks (1) Is there a legally cognizable injury, and (2) are there rationally ascertainable damages?⁷⁰ As to the first prong, the *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."⁷¹ Furthermore, the *Turpin* court agreed with the New Jersey Supreme Court's statement in *Gleitman* that "the choice is between a worldly existence and none at all To recognize a right

64. See Peter C. Harris & Vincente Torres, *Autosomal Dominant Polycystic Kidney Disease*, GENE REVIEWS, Jan. 10, 2002, at <http://www.geneclinics.org/profiles/pkd-ad>. (last visited Feb. 20, 2003) [hereinafter GENE REVIEWS].

65. See *Johnson*, 101 Cal. App. 4th at 874, 124 Cal. Rptr. 2d at 654.

66. See *id.* at 873, 124 Cal. Rptr. 2d at 653.

67. See *id.*

68. See *id.*

69. See *id.* at 874, 124 Cal. Rptr. 2d at 654.

70. See *Turpin v. Sortini*, 31 Cal. 3d 220, 230, 643 P.2d 954, 960, 182 Cal. Rptr. 337, 343 (1982).

71. *Id.* at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.

not to be born is to enter an area in which no one could find his way.”⁷²

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.”⁷³ 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.”⁷⁴ Moreover, like the *Turpin* court, the *Johnson* court applied the Restatement’s benefit doctrine.⁷⁵ 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.’”⁷⁶ 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.”⁷⁷ 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.”⁷⁸ 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

72. *Gleitman v. Cosgrove*, 227 A.2d 689, 711 (N.J. 1967).

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.

75. *See Johnson v. Super. Ct.*, 101 Cal. App. 4th 869, 887, 124 Cal. Rptr. 2d 650, 664–65 (2002).

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)).

77. *Johnson*, 101 Cal. App. 4th at 887, 124 Cal. Rptr. 2d at 664–65 (quoting *Turpin*, 31 Cal. 3d at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347).

78. *Id.* at 887, 124 Cal. Rptr. 2d at 665.

[without a genetic defect], but . . . would not have been born at all.”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.”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.⁸¹

V. *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.”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.

A. *The Turpin Court Failed to Consider Important Public Policy*

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

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)).

80. *Id.* (quoting *Andalon*, 162 Cal. App. 3d at 614, 208 Cal. Rptr. at 907–08).

81. *Id.* at 889, 124 Cal. Rptr. 2d at 666.

82. See *Turpin*, 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.

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*].

84. See *Gleitman v. Cosgrove*, 227 A.2d 689, 703 (N.J. 1967).

85. Cf. *id.* (explaining that when a court declines to award compensation for financial burdens, there is no deterrent to professional malpractice).

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.

88. *Zepeda v. Zepeda*, 190 N.E.2d 849, 859 (Ill. App. Ct. 1963).

89. John B. Attanasio, *The Genetic Revolution: What Lawyers Don't Know*, 63 N.Y.U. L. REV. 662, 666 (1988) (review essay).

90. *Id.*

91. CAL. CIV. CODE § 3333.2 (West 1997).

92. *Id.*

suggest otherwise,⁹³ 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.”⁹⁴ 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.”⁹⁵ 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.”⁹⁶ Therefore, MICRA has provided medical malpractice rate stability for California doctors,⁹⁷ 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.⁹⁸ California’s medical malpractice premiums are one-half or one-third of premiums in other states.⁹⁹ 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).

94. Brendan Doherty, *California’s Low Malpractice Rates Are No Medical Error for Docs*, SAN FRANCISCO BUS. TIMES, Oct. 12, 2001, <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2001/10/15/story6.html>.

95. David Ruvalcaba, *Inside the Current Med Mal Market: Understanding Chaos*, SOUTHERN CALIFORNIA PHYSICIAN, Sept. 2002, available at <http://www.sbcms.org/southcalphysician/2002/sep/art3.htm>.

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.sbcms.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.

100. *See id.*

101. *See id.*

102. 387 N.Y.S.2d 204 (Sup. Ct. 1976).

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

108. *Id.* § 3281.

109. *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1980).

110. *Id.*

111. CAL. CIV. CODE § 3281.

112. *See Curlender*, 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.

113. CAL. CIV. CODE § 3281.

114. *Turpin v. Sortini*, 31 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346 (1982).

115. *Id.* at 236, 643 P.2d at 963-64, 182 Cal. Rptr. at 346-47 (alteration in original) (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)).

confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.”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.”¹¹⁷ Thus, the court itself was shortsighted in its thinking, and should have attempted to formulate some “rational or reasoned”¹¹⁸ approach to measure whether life is preferable to never having been born at all. After *Turpin* was decided, commentators have proposed various solutions.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.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],”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.”¹²² With a special verdict, “the court shall give to the jury such

116. *Id.* at 234, 643 P.2d at 963, 182 Cal. Rptr. at 346.

117. *Id.*

118. *Id.* at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.

119. See Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. 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.”). *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).

120. See *Turpin*, 31 Cal. 3d at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.

121. *Id.*

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,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 *Turpin*, the child plaintiff was deaf.¹²⁹ Although deafness is a socially, economically, and emotionally straining impairment, there is no indication that it is life threatening.¹³⁰ Furthermore, statistics show that deaf people live longer than those who can hear.¹³¹ On the other hand, the child plaintiff in *Johnson* suffered from ADPKD,¹³² a hereditary, life-threatening condition "characterized by progressive cyst development and bilaterally enlarged polycystic kidneys."¹³³ Approximately 50% of patients with ADPKD suffer end-stage renal disease by age sixty.¹³⁴ Similarly, in *Curlender*, the child plaintiff suffered from a life-threatening disease.¹³⁵ The plaintiff was diagnosed with Tay-Sachs, a "fatal progressive degenerative disease of the nervous system,"¹³⁶ which leads to "relentless deterioration of mental and physical abilities."¹³⁷ Furthermore, children with Tay-Sachs disease usually die by age five.¹³⁸

128. *Id.*

129. *See id.* at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339.

130. *See generally* Dallas Otolaryngology Cochlear Implant Program, *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 *Facts About Deafness*].

131. *See* DeafNet, *Interesting Facts About the Deaf*, at <http://www.deaf.net/interesting.htm> (last visited Feb. 20, 2003) [hereinafter *DeafNet*].

132. *See Johnson v. Superior Court*, 101 Cal. App. 4th 869, 873, 124 Cal. Rptr. 2d 650, 653 (Ct. App. 2002).

133. GENE REVIEWS, *supra* note 64.

134. *See id.*

135. *See Curlender v. Bio-Science Labs*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477, 481 (1980).

136. *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)).

137. Nat'l. Inst. of Neurological Disorders and Stroke, *NINDS Tay-Sachs Disease Information Page*, at http://www.ninds.nih.gov/health_and_medical/disorders/taysachs_doc.htm (Dec. 5, 2001) [hereinafter *NINDS Tay-Sachs*].

138. *See 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,¹³⁹ many deaf people lead successful lives.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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."¹⁴³ Tay-Sachs is even more debilitating and progressive as "muscles begin to atrophy and paralysis sets in" before death.¹⁴⁴

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,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,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,"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."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."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 *Turpin*, *Curlender*, and *Johnson* illustrate the workings of the second special verdict inquiry. In *Turpin*, the child plaintiff's parents did not retain the defendant doctor for genetic consultation directly in connection with the child

145. See *Turpin v. Sortini*, 31 Cal. 3d 220, 229, 643 P.2d 954, 960, 182 Cal. Rptr. 337, 343 (1982) (quoting *Budd v. Nixen*, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971)).

146. See *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 826, 165 Cal. Rptr. 477, 486 (1980).

147. *Gleitman v. Cosgrove*, 227 A.2d 689, 711 (N.J. 1967).

148. *Id.*

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)).

plaintiff.¹⁵⁰ Instead, a hearing specialist incorrectly advised the plaintiff's parents that their other child's hearing was within normal range.¹⁵¹ 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."¹⁵²

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.¹⁵³ 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.¹⁵⁴ Analogously, in *Curlender*, the defendant laboratory rendered services to ascertain whether the child plaintiff's parents were carriers of the Tay-Sachs gene.¹⁵⁵ "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."¹⁵⁶ 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.¹⁵⁷ 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.

153. See *Johnson v. Superior Court*, 101 Cal. App. 4th 869, 873, 124 Cal. Rptr. 2d 650, 653 (2002).

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."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."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.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.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."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."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"¹⁶⁴ is admittedly difficult, it can be done, so this difficulty should not be permitted to justify denying liability.

158. Constance Frisby Fain, *Wrongful Life: Legal and Medical Aspects*, 75 KY. L.J. 585, 628-29 (1987).

159. See *Father and Mother Know Best*, *supra* note 83, at 1507.

160. *Id.* at 1507-08.

161. *Id.* at 1509-10.

162. See Fain, *supra* note 158, at 628.

163. *Father and Mother Know Best*, *supra* note 83, at 1508.

164. *Turpin v. Sortini*, 31 Cal. 3d 220, 236, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 347 (1982).

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,"¹⁶⁵ the court overlooked United States Supreme Court jurisprudence on damages. In *Story Parchment Co. v. Paterson Parchment Paper Co.*,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.¹⁶⁷

The Supreme Court further stated that "damages may not be determined by mere speculation."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."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.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."¹⁷¹

165. *Id.* at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.

166. 282 U.S. 555 (1931).

167. *Id.* at 563. Although *Story Parchment* dealt with antitrust law, its basic recovery principles are applicable in a wrongful life context.

168. *Id.* at 563.

169. *Id.*

170. See *Turpin*, 31 Cal. 3d at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

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

172. 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129 (1966).

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.

176. Harvard Law School Library, *Restatements of the Law*, at http://www.law.harvard.edu/library/research_guides/restatements.htm (last visited Feb. 20, 2003).

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.

177. *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 830, 165 Cal. Rptr. 477, 489 (1980).

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)).

180. *See Beagle v. Vasold*, 65 Cal. 2d 166, 172, 417 P.2d 673, 675, 53 Cal. Rptr. 129, 131 (1966).

181. *Story Parchment*, 282 U.S. at 565 (quoting *Gilbert*, 22 Mich. at 131).

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.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*."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."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.

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."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.¹⁸⁸ This explicit differentiation was appropriate because "the term special damages is almost always used in contrast to general damages."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."¹⁹⁰ Similarly, a claim for lost

184. See, e.g., *Andalon v. Super. Ct.*, 162 Cal. App. 3d 600, 614, 208 Cal. Rptr. 899, 907-08 (1984).

185. *Id.*

186. *Id.*

187. *Turpin v. Sortini*, 31 Cal. 3d 220, 236, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 347 (1982).

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."¹⁹¹ 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,"¹⁹² 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."¹⁹³ 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.*¹⁹⁴ the court noted that special damages included "both medical expenses and loss of income."¹⁹⁵ 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 damages¹⁹⁶—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,"¹⁹⁷ and unlike general damages, damages for lost earning capacity are an economic loss.¹⁹⁸ Thus, in

191. ROBERT S. THOMPSON ET AL., *REMEDIES: DAMAGES, EQUITY AND RESTITUTION* § 5.03, at 585 (3d ed. 2002).

192. *Hegyes v. Unjian Enters. Inc.*, 234 Cal. App. 3d 1103, 1137, 286 Cal. Rptr. 85, 106 (1991) (Johnson, J., dissenting).

193. DOBBS, *supra* note 56, at 226–27.

194. 879 F. Supp. 841 (S.D. Cal. 1995).

195. *Id.* at 847.

196. *See Budd v. Nixen*, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971) (citing WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30, at 143–44 (4th ed. 1971)).

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

199. See CAL. CIV. CODE § 3333.2(b).

200. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931) (quoting *Gilbert v. Kennedy*, 22 Mich. 117, 130 (1871)).

certainty,”²⁰¹ courts have awarded damages for lost earning capacity to plaintiffs.²⁰² Damages for child plaintiffs are “especially speculative, because [children] lack an established record of earnings, well-developed skills, and expressed career goals.”²⁰³ 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.”²⁰⁴

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.”²⁰⁵ 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.²⁰⁶ 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.²⁰⁷ Furthermore, even the *Andalon* court itself notes that *Turpin*’s holding does not foreclose an award for loss of earning capacity.²⁰⁸

201. *Meshell v. Lovell*, 732 So. 2d 83, 87 (3d Cir. 1999).

202. *See Murray v. Sanford*, 487 S.E.2d 135, 136 (Ga. Ct. App. 1997); *Pipgras v. Hart*, 832 S.W.2d 360, 366 (Tex. Ct. App. 1992).

203. Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 440 (2001).

204. *Id.* at 441–42.

205. *Id.* at 443.

206. *See id.* at 445.

207. *Hegyes v. Unjian Enters., Inc.*, 234 Cal. App. 3d 1103, 1137, 286 Cal. Rptr. 85, 106 (1991) (Johnson, J., dissenting).

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.²⁰⁹ 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.²¹⁰ 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

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.

209. See *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1980).

210. See *id.*

ensure that “a wrong with serious consequential injury [will not] go wholly unredressed.”²¹¹

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211. *Gleitman v. Cosgrove*, 227 A.2d 689, 703 (N.J. 1967) (Jacobs, J., dissenting).

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