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I. INTRODUCTION

Genetic defects and diseases have been recognized for centuries, but recent advances in the field of genetic research now permit health care providers to predict whether two individuals are likely to produce an impaired child.¹ When testing is performed accurately, potential parents are afforded the opportunity to consciously decide whether to conceive a child who might possibly be deformed. But if a physician is negligent, the parents are denied such a choice and the birth of a severely handicapped or diseased infant often results.² Consequently, the courts have increasingly been called upon to adjudicate wrongful life suits.³

There are two different types of wrongful life actions. The first type involves the birth of a healthy, but unplanned, child. These cases usually arise as a result of faulty birth control methods, negligent sterilization, or illegitimacy.⁴ The other wrongful life action involves the birth of a diseased or deformed child. These cases are a result of a health care provider’s failure to warn an infant’s parents


that there is a substantial likelihood that the child will be born with some type of disease or deformity. The scope of this analysis will be limited to wrongful life suits that are brought by impaired children.

The infant plaintiff in such a case claims that if his parents had been accurately informed that they were likely to produce a deformed child, either he would never have been conceived or would have been aborted. The fundamental premise of the child's claim is that he has been harmed by having been born impaired. The infant does not allege that the physician's negligence caused his impairment, rather he argues that the negligence caused his conception and birth. Thus, the plaintiff does not claim that he was denied the right to be born "whole", but that he was denied the right not to have been born at all. He views life itself as a compensable injury and argues that but for the physician's incompetence, he would not have had to experience the pain and suffering of living in a diseased or deformed state.

Recently, the Supreme Court of California considered such a cause of action for the first time. In Turpin v. Sortini, the court found that impaired life is not always more valuable than nonexistence, and became the first court in the nation to specifically recognize that plaintiffs in wrongful life suits may suffer a compensable injury, while at the same time denying recovery simply due to the difficulty of measuring damages.

To fully explain the court's response to this claim, it is necessary to outline the development of the judiciary's response to wrongful life claims. The analysis of the Turpin court will then be compared to the courts' traditional response. Finally, the Turpin court's reasoning will be critiqued and a viable alternative to its treatment of the claim for damages will be suggested.

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5. See supra note 2.
6. When the birth of a child produces harmful consequences, two different causes of action may be brought. A "wrongful life" action may be brought by the child or a "wrongful birth" action may be brought by the parents. Note, "Wrongful Life": The Right Not to be Born, 54 Tul. L. Rev. 480, 483-85 (1980).
7. Id. at 485.
8. Id.
9. Id. at 485, 491.
10. Id. at 497.
11. Id. at 485, 497.
13. Id. at 234, 643 P.2d at 962, 182 Cal. Rptr. at 346.
II. HISTORICAL DEVELOPMENT OF WRONGFUL LIFE

The Supreme Court of California's decision in *Turpin* represents the typical result in wrongful life suits. Although the rationales used to support such decisions vary greatly, consistently every state court of last resort that has considered this issue, has uniformly denied the infant's claim for general damages.\(^{14}\)

Under traditional tort principles, a plaintiff can only recover if he can establish both that he has suffered a legally cognizable injury and that there is an acceptable method of calculating damages.\(^{15}\) Courts have justified their denial of damages in wrongful life controversies by concluding that either one or both of these conditions has not been met.\(^{16}\)

The first case to address a wrongful life claim brought by a physically impaired infant was *Gleitman v. Cosgrove*.\(^ {17}\) In *Gleitman*, the plaintiff's mother contracted German measles while she was pregnant.\(^ {18}\) Because her physician informed her that her unborn child would not be harmed by the virus, she decided not to seek an abortion.\(^ {19}\) As a result of this misinformation, she gave birth to a child who had substantial defects in hearing, sight and speech capabilities.\(^ {20}\) The child brought suit claiming wrongful life, but was denied relief.\(^ {21}\) The court reasoned that life with defects is always more precious than not being born at all,\(^ {22}\) and that it is "logically impossible"\(^ {23}\) to "weigh the value of life with impairments against the nonexistence of life itself"\(^ {24}\) in order to calculate damages.

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16. Berman v. Allan, 80 N.J. at 429, 404 A.2d at 12 (no cognizable injury is primary concern); Gleitman v. Cosgrove, 49 N.J. at 29, 227 A.2d at 692 (no cognizable damages); Becker v. Schwartz, 46 N.Y.2d at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (neither cognizable injury nor measurable damages); Dumer v. St. Michael's Hospital, 69 Wis. 2d at 772-73, 233 N.W.2d at 375-76 (unmeasurable damages).


18. 49 N.J. at 24, 227 A.2d at 690.

19. Id. at 26, 227 A.2d at 691.

20. Id. at 25, 227 A.2d at 690.

21. Id. at 29, 227 A.2d at 692.

22. Id. at 31, 227 A.2d at 693.

23. Id. at 28, 227 A.2d at 692.

24. Id.
Courts today are still following either one or both of these rationales.25

A decade later, Gleitman was partially overruled by Berman v. Allan.26 Mrs. Berman became pregnant at age thirty-eight and Dr. Allan cared for her throughout her pregnancy.27 Although the risk of bearing a child afflicted with Down's Syndrome28 was substantial29 for a woman of her age, Dr. Allan failed to either advise her of the possibility that her child might be born with the affliction, or recommend that she undergo the procedure of amniocentesis,30 which is an accurate way of determining whether there may be chromosomal abnormalities.31 Mrs. Berman subsequently gave birth to a daughter who was afflicted with Down's Syndrome.32

The child sued the doctor on the basis of a wrongful life claim, but her cause of action was rejected.33 The court concluded that the plaintiff had "not suffered any damage cognizable at law by being brought into existence."34 Yet, the court did make one small step toward recognizing a cause of action for wrongful life by rejecting the argument that the difficulty of measuring damages in wrongful

25. See supra notes 14, 16.
27. Id. at 423-24, 404 A.2d at 10.
28. Id. at 424, 404 A.2d at 10. Down's Syndrome, which falls within the group of congenital defects and symptoms seen in mongolism, is "[a] form of idiocy or mental retardation the physical features of which are characterized by obliquely set eyes, open mouth, flabby muscles, soft skin, broad face, etc. . . . In most cases there is a chromosomal abnormality marked by the presence of three number 21 chromosomes (instead of two)." SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER M-129 (17th ed. 1982). Other abnormalities associated with Down's Syndrome "include retarded growth, flat hypoplastic face with short nose, prominent epicanthic skin folds, protruding lower lip, small rounded ears with prominent antihelix, fissured and thickened tongue, laxness of joint ligaments, pelvic dysplasia, broad hands and feet, stubby fingers usually with dysplasia of the middle phalanx of the fifth finger, transverse palmar crease, dermatoglyphic changes including distal displacement of the palmar axial triradius, dry rough skin in older patients and abundant slack neck skin in newborns, and muscle hypotonia and absence of Moro reflex in newborns . . . ." STEDMAN'S MEDICAL DICTIONARY 1386 (24th ed. 1982).
30. Amniocentesis is a "[t]ransabdominal aspiration of fluid from the amniotic sac." STEDMAN'S MEDICAL DICTIONARY 53 (24th ed. 1982). "This procedure is used to remove and study part of the amniotic fluid (the fluid in the 'bag of waters'). . . ." SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER 53 (17th ed. 1982).
31. 80 N.J. at 424, 404 A.2d at 10.
32. Id.
33. Id. at 430, 404 A.2d at 13.
34. Id. at 429, 404 A.2d at 12.
life suits justified the denial of recovery. The court expressly stated that it "would be extremely reluctant . . . to deny the validity of . . . [the] complaint solely because damages are difficult to ascertain." It went on to state that "were the measure of damages . . . [its] sole concern, it is possible that some judicial remedy could be fashioned which would redress [the] plaintiff . . . ."

The first case in which a court recognized a cause of action for wrongful life was Park v. Chessin. Mrs. Park gave birth to a child with a kidney ailment and the child died shortly thereafter. Dr. Chessin negligently assured Mrs. Park that the disease was not hereditary and that there was only a miniscule chance that she would subsequently give birth to another child with the same affliction. In reality, the child was afflicted with polycystic kidney disease, a hereditary and fatal disorder. As a result of Mrs. Park's reliance on the misdiagnosis, she conceived and gave birth to a second child. That child was also born with polycystic disease and died two and a half years later. The Parks sued for wrongful life on behalf of their second child and the court awarded damages for the pain and suffering that the child had endured during his lifetime. Recovery was based upon "the fundamental right of a child to be born as a whole, functional human being."

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35. Id. at 428, 404 A.2d at 12.
36. Id.
37. Id. (emphasis in original).
39. 60 A.D.2d at 83, 400 N.Y.S.2d at 111.
40. Id.
41. Polycystic kidney disease is a condition "characterized by . . . multiple cysts of varying size scattered diffusely throughout both kidneys, resulting in compression and destruction of kidney parenchyma . . . ." Stedman's Medical Dictionary 747 (24th ed. 1982). It is "a progressive disease . . . resulting in compression and destruction of k[idney] parenchyma, usually with hypertension, gross hematuria, and uremia . . . ." Id.
42. 60 A.D.2d at 83, 400 N.Y.S.2d at 111.
43. Id.
44. Id. at 88, 400 N.Y.S.2d at 114.
45. Id. The court based recovery on the right of a child to be born unimpaired. It calculated damages by comparing the plaintiff's condition with that of a normal child. This method penalizes the defendant too heavily. The defendant was negligent in failing to inform the plaintiff's parents of the possibility that the plaintiff would be impaired, not in causing the impairment. The defendant caused the plaintiff to be born, but could not have prevented the deformity. Thus, the proper measure of damages is equivalent to the value of having not been born at all rather than the value of being born healthy, since the plaintiff could not have been born healthy under any circumstances. Id.
however, *Gleitman* was overruled.46

The only other decision to recognize a cause of action for wrongful life was *Curlender v. Bio-Science Laboratories*.47 Mr. and Mrs. Curlender, the plaintiff's parents, retained Bio-Science Laboratories to administer certain tests designed to determine whether either of them was a carrier of genes that would result in the conception and birth of a child with Tay-Sachs disease.48 The laboratory was negligent in performing the tests and incorrectly informed the Curlenders that they were not carriers of the disease. Relying upon this information, they conceived a child who was born with Tay-Sachs disease.50 The infant sued for wrongful life and the court held that the child could recover both general damages for pain and suffering, and special damages for the costs of treating the disease.51 The California court of appeals rejected the argument that a child born with a serious hereditary defect had not suffered a legally cognizable injury.52 The court also refused to adopt the argument that it was impossible to measure damages in such a case.53 It specifically rejected "the notion that a 'wrongful life' cause of action involves any attempted evaluation of a claimed right not to be born."54 Instead, it chose to measure the injury to the child by comparing the pain and suffering that she would endure during her life, with the pain and suffering endured by a normal child with an average

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46. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). In *Becker*, the court denied recovery to a plaintiff who was afflicted with Down's Syndrome. It reasoned that the plaintiff had suffered no legally cognizable injury since a child does not have a "fundamental right . . . to be born as a whole, functional human being." *Id.* at 411, 386 N.E.2 at 812, 413 N.Y.S.2d at 900. Furthermore, it reasoned that even if the child was injured, damages were not ascertainable. *Id.* at 412, 386 N.E.2d at 812, 415 N.Y.S.2d at 900.


48. *Id.* at 815, 165 Cal. Rptr. at 480. Tay-Sachs disease is a "familial disease affecting children of various ages, from four months to twelve years. It is characterized by partial or complete loss of vision, mental underdevelopments, softness of the muscles, convulsions, etc. Known as 'Tay-Sachs disease, cerebromacular degeneration, and Batten-Mayou's disease.' *Schmidt, Attorneys' Dictionary of Medicine and Word Finder* A-141 (17th ed. 1982) (emphasis omitted). Tay-Sachs disease is an infantile type of "cerebral sphingolipidosis." *Stedman's Medical Dictionary* 1314 (24th ed. 1982). Cerebral sphingolipidosis refers to "any one of a group of inherited diseases characterized by failure to thrive, hypertonicity, progressive spastic paralysis . . . occurrence of blindness, usually with macular degeneration and optic atrophy . . . ." *Id.*

49. 106 Cal. App. 3d at 815, 165 Cal. Rptr. at 480.

50. *Id.*

51. *Id.* at 831, 165 Cal. Rptr. at 489-90.

52. *Id.* at 830, 165 Cal. Rptr. at 489.

53. *Id.* at 831, 165 Cal. Rptr. at 489.

54. *Id.* at 830-31, 165 Cal. Rptr. at 489.
lifespan. 

III. THE TURPIN DECISION

The first wrongful life suit to reach the Supreme Court of California was *Turpin v. Sortini*. Mr. and Mrs. Turpin brought their first and only child to Dr. Adam Sortini, a hearing specialist, for diagnosis of a possible hearing defect. Although Sortini concluded that the child's hearing was normal, she was actually totally deaf due to a hereditary ailment. Relying upon the negligent diagnosis, the Turpins conceived a second child, Joy, who was afflicted with the same hereditary deafness. The Turpins brought suit on behalf of Joy alleging that, had they known of their first daughter's true condition, they would never have conceived a second child. Joy sought general damages for the pain and suffering that she experienced as a result of being born deaf, as well as special damages to cover the extraordinary costs of treating the affliction.

The court first evaluated the claim for general damages. It found that the defendant owed a duty of care to Joy because it was reasonably foreseeable that any offspring of the Turpins' would be directly affected by their failure to discover the hereditary condition. In addition, it found "that Joy's birth was a proximate result of the breach" of that duty of care. It failed, however, to find that Joy had suffered any measurable injury as a result of the breach.

In analyzing the element of damages, the court specifically recognized that it "seems doubtful that a child's claim for general damages should properly be denied on the rationale that the value of impaired life, as a matter of law, always exceeds the value of non-life. ..." The court realized that there may be cases in which the child would be better off had he not been born. Thus, it became

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55. *Id.* at 831, 165 Cal. Rptr. at 489. Just like the *Park* court, the *Curlender* court used an incorrect method of calculating damages. See supra note 45.
57. *Id.* at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.
63. *Id.*
64. *Id.* at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347.
65. *Id.* at 234, 643 P.2d at 963, 182 Cal. Rptr. at 346.
66. *Id.*
the first court, using the proper standard for measuring damages,67 to conclude that it is possible for plaintiffs in wrongful life cases to suffer a legally cognizable injury while at the same time denying a remedy.68

The court declined to award general damages because it believed that it would be "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 . . . ."69 Furthermore, the court argued that, even if it were possible to determine if any harm existed, it would be "impossible to assess general damages in any fair, nonspeculative manner."70

In regard to special damages, the court held that a child could recover out-of-pocket expenses for treatment of a hereditary ailment.71 The court reasoned that, unlike the claim for general damages, special damages were easily determined and measured.72

In his dissenting opinion, Justice Mosk suggested that the majority's analysis ignored the established tort principal that every harm deserves a remedy.73 He thought that an innocent plaintiff should not have to suffer simply because the injury was difficult to assess.74

IV. ANALYSIS: ESTABLISHING AND MEASURING THE HARM

Before a plaintiff can be awarded damages, the court must find that he has actually been harmed and the harm must be measurable. The courts have denied recovery in wrongful life suits for three major reasons. Some reason that a plaintiff "has not suffered any damage cognizable at law by being brought into existence."75 Others maintain that even if a harm exists, there is no possible way of measuring it.76 Finally, another group of courts have granted recovery, but have measured damages by employing an improper standard.77

67. See supra note 45.
68. 31 Cal. 3d at 234-35, 643 P.2d at 963, 182 Cal. Rptr. at 346 (1982).
69. Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
70. Id.
71. Id. at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.
72. Id.
73. Id. at 241, 643 P.2d at 967, 182 Cal. Rptr. at 350 (Mosk, J., dissenting).
74. Id. at 240, 643 P.2d at 966, 182 Cal. Rptr. at 349 (Mosk, J., dissenting).
75. Berman, 80 N.J. 421, 429, 404 A.2d 8, 12.
77. Curr/ender, 106 Cal. App. 3d 21 1-13, 165 Cal. Rptr. 477; Park, 60 A.D.2d 80, 400 N.Y.S.2d 110; See supra note 45 and infra note 80.
In reviewing the major cases dealing with wrongful life, it becomes clear that the courts have made some small advances toward recognizing the cause of action. Yet, no court has adopted a satisfactory method of assessing the plaintiffs’ damages. All of the theories that have been employed seem to be flawed in one way or another. Although it is unfair to make the defendant pay damages that would return the plaintiff to a position that he could never have occupied, it is equally unjust to totally preclude a plaintiff from recovering any damages. It is absolutely necessary to formulate a method of determining the existence and extent of damages that is fair to both the plaintiff and the defendant.

A. Establishing the Harm

Many arguments for the denial of damages have rested on the premise that all life, no matter how impaired, is better than no life at all. Thus, it is asserted that the wrongful life plaintiff suffers no legally cognizable injury. The child’s preference for nonexistence is seen as devaluing the sanctity of life.

Decisions in “right to die” cases have rejected the premise that life is always more valuable than nonexistence and have deferred the choice to the impaired individual. Yet, most courts continue to adhere to the argument that public policy supports an assignment of paramount value to the life in all circumstances. Although these

78. The only cases in which the courts have even attempted to formulate a method of assessing damages are Park and Curlender. See supra notes 38-55 and accompanying text.

79. See supra note 77.

80. Turpin, 31 Cal. 3d at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344. It is unfair to force the defendant to pay damages equal to the value of the difference between normal life and impaired life since the defendant caused the plaintiff to be born, but did not cause the impairment. Id.

81. Capron, Tort Liability and Genetic Counseling, 79 COLUM. L. REV. 618, 657 (1979). If it is obvious that the plaintiff has suffered an injury by being born, it is unjust to totally preclude recovery simply because damages are difficult to ascertain. Id.

82. Berman, 80 N.J. at 429, 404 A.2d at 12; Gleitman, 49 N.J. at 30, 227 A.2d at 693.

83. Berman, 80 N.J. at 421, 404 A.2d at 8; Gleitman, 49 N.J. at 22, 227 A.2d at 689.

84. Berman, 80 N.J. at 430, 404 A.2d at 13; Gleitman, 49 N.J. at 30, 227 A.2d at 693.


Courts recognize the fact that "decisional law must keep pace with expanding technological, economic and social change,"\(^87\) they choose to ignore the fact that public policy in this area has changed.\(^88\) Because the main advantage of the common law system is its inherent adaptability to change,\(^89\) courts should cease to rely upon outdated theories of public policy in order to support their decisions.

Although the defendant's negligence sometimes confers a benefit upon the plaintiff by enabling him to be born, this benefit does not always outweigh the burden that the child must bear as a result of his affliction.\(^90\) It is obvious that "[e]xistence in itself can hardly be characterized as an injury, but when existence is foreseeably and inextricably coupled with a disease, such an existence, depending on the nature of the disease, may be intolerably burdensome."\(^91\)

If the plaintiff's parents have alleged that they would either have avoided conception or aborted had the physician given them accurate information regarding the likelihood of deformity, the courts should allow a jury to decide the question of whether the plaintiff has actually been harmed by having been born, rather than denying recovery as a matter of law.\(^92\) The jury would then determine whether a reasonable person, with the plaintiff's impairment, would prefer to never have been born.\(^93\) The trier of fact should be allowed to determine whether the infant actually suffered an injury.\(^94\) The question should be viewed not as a question of law, but as a question of fact. The courts should not be allowed to inject their moral judgments regarding the sanctity of life in order to bar recovery in every case, regardless of the compelling nature of that case.\(^95\) Injury to the child should be determined on a case by case basis.

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87. Park, 60 A.D.2d at 88, 400 N.Y.S.2d at 114.
88. See supra note 85; see also Turpin, 31 Cal. 3d at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345. "[A]t least in some situations—public policy supports the right of each individual to make his or her own determination as to the relative value of life and death." Id.
89. 15A AM. JUR. 2D Common Law §§ 1, 2 (1976).
91. Id. (Opinion in opposition to the result reached in this case).
92. Peters & Peters, supra note 1, at 865-66. Whether the jury or a judge acts as the trier of fact in a particular case, each case should be decided on its merits, rather than judicially foreclosing recovery as a matter of law. Id.
94. Peters & Peters, supra note 1, at 866.
95. Id.
rather than by assuming that life is never an intolerable burden. 96

The court in Turpin rejected the argument that life is always sacred and recognized that, "[a]lthough it is easy to understand and to endorse these decisions' desire to affirm the worth and sanctity of less-than-perfect life, we question whether these considerations alone provide a sound basis for rejecting the child's tort action." 97 They also found that public policy sometimes supports the right of the individual to "make his or her own determination as to the relative values of life and death." 98 They concluded their analysis by stating: "[c]onsidering the short life span of many of these children and their frequently very limited ability to perceive the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all." 99

By concluding that it is possible for a plaintiff in a wrongful life suit to suffer an injury, the Turpin court rejected the notion that impaired life is always more valuable than nonexistence. 100 Yet, it failed to grant a remedy solely due to the difficulty of measuring damages. 101

B. Measuring the Harm

Even if a court accepts the argument that it is possible that a plaintiff in a wrongful life suit could suffer harm in certain cases, there is still another barrier for the plaintiff to overcome. The court must also be convinced that it is possible to ascertain whether the plaintiff has been harmed by being born and to what extent. 102 The court in Turpin, like many other courts, 103 refused to believe that it


97. 31 Cal. 3d at 232-33, 643 P.2d at 961, 182 Cal. Rptr. at 344.

98. Id. at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345; see supra note 85.

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

100. See supra note 75 and accompanying text.

101. Id.

102. Id.

103. See, e.g., Elliot v. Brown, 361 So. 2d 546, 547-48 (Ala. 1978); Gleitman, 49
was possible to assess damages in an accurate manner. It argued 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." The court further stated that even if it were possible to determine when a harm existed, it was "impossible to assess general damages in any fair, nonspeculative manner." Because both issues are resolved by applying the same formula, a comparison between the benefit of living, and the burden of being impaired, they will be considered together.

The Turpin court held that wrongful life damages could not be calculated by juries because the value of nonexistence was not within the experience or imagination of any person. Therefore, the court reasoned that it would be impossible for the jury to balance the benefits of living against the burdens of being impaired, in order to quantify the harm.

This argument can be refuted in three ways. First, it is obvious that in the vast majority of tort cases the jury can only imagine what the plaintiff's life was like both before and after the injury. It would be a very unusual case indeed if one or more members of the jury had experienced a life just like the plaintiff's before he was injured and then suffered an injury which was very similar to the plaintiff's. Thus, in virtually every tort case, the members of the jury must judge whether the plaintiff has been harmed and the extent of the damage solely by listening to various types of testimony and making a determination based upon common sense and an assessment of the witnesses' credibility rather than by relating the plaintiff's injuries to their own past experience.

Secondly, juries regularly assess the amount of damages in wrongful death cases. In these suits, the jury must make the same comparison as is required in a wrongful life suit. The jury must measure damages by comparing the value of either impaired or

N.J. at 26, 227 A.2d at 692; Becker, 46 N.Y.2d at 402, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.
104. 31 Cal. 3d at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346.
105. Id.
106. Id.
108. Id. See also infra notes 115-27 and accompanying text.
109. See infra note 113.
110. See supra note 81, at 658.
healthy life with the value of nonexistence.\footnote{112} If the jury is capable of making this comparison in wrongful death suits, there is no reason to doubt their ability to make the same comparison in wrongful life suits.

Finally, juries are called upon to assess damages in other situations in which the position of the plaintiff is very similar to a state of nonexistence. For example, juries are often called upon to measure the extent of injuries to plaintiffs who are comatose or severely brain damaged.\footnote{113} In such cases, the jury must compare a state of bare existence with that of a healthy existence.\footnote{114} These conditions are very close to nonexistence, yet, juries regularly assess damages for these types of injuries.

In order for a jury to perform its proper function in determining damages, it is necessary to formulate some guidelines for it to follow.\footnote{115} Because juries are able to apply basic tort principles to other intangible injuries, that are equally beyond their powers of comprehension,\footnote{116} there is no reason why these standards cannot be employed to determine the proper recovery in wrongful life suits.\footnote{117}

The traditional tort remedy is compensatory in nature.\footnote{118} Damages are awarded in an attempt to place the plaintiff in the position that he would have occupied but for the tortious act of the defendant.\footnote{119} By this standard, damages for wrongful life would be equivalent to the value of the benefit of never having been born.

\footnote{112}{See supra note 81 at 649; see infra note 142.}
\footnote{113}{In Gainar v. S.S. Longview Victory, 226 F. Supp. 912, 917 (E.D. Va. 1964), the jury was allowed to assess damages to a plaintiff who "exists 'in body' but without the ability to function as a normal man . . . [whose] total reaction makes him little more than flesh and bones which need attention for the balance of his life." In Myers v. Karchmer, 313 S.W.2d 697 (Mo. 1958), the court affirmed a $150,000 jury verdict to a plaintiff with complete mental and physical disability and loss of control of his kidneys. The court in Wolf v. General Mills, Inc., 35 Misc. 2d 996, 231 N.Y.S.2d 918 (1962), affirmed a $500,000 jury verdict to a plaintiff who was brain damaged as a result of a skull injury. The accident caused mental feebleness, impaired memory, loss of taste and smell, difficulty in hearing, total loss of sight in one eye and partial loss of sight in the other, total loss of hearing in one ear and draining of the other, facial paralysis and other injuries. In Seattle-First National Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962), the negligence of a doctor caused a pre-natal injury which resulted in permanent brain damage and cerebral palsy. In assessing damages, the jury compared the plaintiff's degree of intelligence with that of a normal child. Id. at 841, 59 Wash. 2d at 296.}
\footnote{114}{Id.}
\footnote{115}{Note, A Cause of Action for "Wrongful Life": (A Suggested Analysis), 55 Minn. L. Rev. 58, 65-66 (1970).}
\footnote{116}{See infra notes 138-42.}
\footnote{117}{Gleitman, 49 N.J. at 50, 227 A.2d at 704.}
\footnote{118}{W. Prosser, Handbook of the Law of Torts § 55 (4th ed. 1971).}
\footnote{119}{Id.}
The first step in ascertaining the extent of the injury would be to compare the condition that the child would have occupied had the defendant not been negligent, with the impaired condition which he now occupies as a result of the negligent act. This involves balancing the value of nonexistence against the value of an impaired existence. The second step would be to determine whether the defendant had conferred any benefit upon the plaintiff by causing his birth. Tort law requires that the value of any benefit conferred upon the plaintiff be considered in mitigation of damages whenever it is equitable to do so.

Essentially, a jury's task would be to balance the burdens and benefits in each case. The burden of living with an impairment would be balanced against the benefit, if any, that could be attributed to the joy of living. Where a child's impairment is slight, the benefit of having been born would surely outweigh the injury, and no damages would be awarded. Where a child is very severely impaired, however, the benefit of living might be negligible. In such a situation it would be proper to award damages. As the impairment becomes more severe, life becomes less precious and the recovery of a larger award is justified.

The court in Turpin declined to apply such a formula because "a rational, nonspeculative determination of a specific monetary award in accordance with normal tort principles appears to be outside the realm of human competence." By denying a remedy, after acknowledging that an injury may exist, the court violated the basic tort principle that there should be a remedy for every wrong. This principle is so basic to the concept of justice that it has been asserted that it is the very thread of our society. From "the earliest days of organized society it became apparent to man that society could never become a success unless the collectivity of mankind guaranteed to every member of society a remedy for a palpable

120. See supra note 115, at 64.
121. Id.
123. See supra note 115.
124. Id.
125. Id.
126. Id. at 66.
127. Id.
128. 31 Cal. 3d at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347.
wrong inflicted on him by another member of that society.”

The difficulty of measuring damages should not be the basis for a total denial of recovery. If it is determined that “a claim is legally cognizable, mere difficulty in the ascertainment of damages should be insufficient to preclude the action.”

Our legal system does not require that the damages in every case be ascertainable to the extent that it provides an exact figure representing the proper remedy. The United States Supreme Court has stated that “[t]he rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.” In most wrongful life cases, there is no doubt that the physician proximately caused the child to be born. Yet the courts continue to bar recovery even though damages are only uncertain as to their amount. It is extremely unjust to the injured infant to require a degree of precision that the law of torts does not demand. The plaintiff should not be barred from recovery due to the unfortunate circumstances that he was the victim of a tortious act which produces injuries that are difficult to quantify. Indeed, it almost seems illogical to argue that we should grant no remedy at all simply because it is difficult to quantify the proper amount of compensation.

The Turpin court denied the plaintiff a remedy based upon the argument that any award would be speculative. Yet, wrongful life

131. *Id.* at 490, 208 A.2d at 195.
134. *See supra* note 3.
135. *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563 (1931). “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 amends for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result is only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.” *Id.*
136. *Dillon v. Legg*, 68 Cal. 2d 728, 738-39, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968). “[T]he application of tort law can never be a matter of mathematical precision. In terms of characterizing conduct as tortious and matching a money award to the injury suffered as well as in fixing the extent of the injury, the process cannot be perfect . . . . Yet we cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.” *Id.*
137. *See supra* note 128 and accompanying text.
damages are no more speculative or difficult to measure than those awarded for injuries such as loss of earning capacity, \textsuperscript{138} decreased life expectancy, \textsuperscript{139} loss of consortium, \textsuperscript{140} emotional distress, \textsuperscript{141} or wrongful death. \textsuperscript{142} “Surely a judicial system engaged daily in evaluating such matters as pain and suffering, which admittedly have ‘no known dimensions, mathematical or financial’ should be able to evaluate the harm which proximately resulted from the breach of duty [in wrongful life cases].” \textsuperscript{143} It would be no more difficult for a jury to establish a monetary amount representing the difference between defective existence and nonexistence than for it to assess the value of these other intangible injuries. Although the \textit{Turpin} court concluded that wrongful life damages would be too speculative \textsuperscript{144} the fact remains that the necessary computations are similar to other situations in the field of torts in which it is difficult, but certainly not impossible, to ascertain damages. \textsuperscript{145}

\textsuperscript{138} In Wilson v. Northland Greyhound Lines, Inc., 166 F. Supp. 667, 675 (D.C. Mont. 1958), the court held that the plaintiff was entitled to be compensated not only for loss of earning capacity, but also for destruction of the capacity to pursue an established course of life.

\textsuperscript{139} In Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960), the plaintiff was even allowed to recover for premature symptoms of aging.

\textsuperscript{140} In Rodriguez v. Bethlehem Steel, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974) the plaintiff was granted damages for loss of consortium after her husband was severely injured after a steel beam fell on him while he was working.

\textsuperscript{141} In Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), a mother who saw her child struck and killed by a car was allowed to recover for negligent infliction of emotional distress even though she did not have any reason to fear for her own safety.

\textsuperscript{142} Juries have been given great latitude in assessing damages in wrongful death suits. City of Louisville v. Stuckenborg, 438 S.W.2d 94 (Ky. 1968) (granting damages for the wrongful death of a four day old child). In wrongful death suits, the jury calculates damages by comparing the values of existence and nonexistence. To aid in this determination, the parties may submit evidence of the value of the decedent's life.

“A plaintiff undoubtedly has the right in a wrongful death case to produce evidence as to the age, health and activity of the decedent and other facts to show that a decedent would have lived a long time had his death not been accelerated by the wrongful act, and a defendant has the right in mitigation of damages to show the age, weakness, diseased condition, impaired earning power or lack of activity of decedent or any other facts tending to prove that the decedent would have lived only a very short time had his death not been so accelerated.”


\textsuperscript{143} \textit{Gleitman,} 49 N.J. at 50, 227 A.2d at 704 (Jacobs, J., dissenting) (quoting Botta v. Brunner, 26 N.J. 82, 95, 138 A.2d 713, 720 (1958)).

\textsuperscript{144} \textit{See supra} notes 106, 128 and accompanying text.

\textsuperscript{145} \textit{See supra} notes 113, 138-42.
V. CONCLUSION

The Supreme Court of California had a chance to lead the way toward fairness by becoming the first state supreme court to recognize a cause of action for wrongful life. Instead, it only went half way. While it recognized that the infant plaintiffs sometimes do suffer a legally cognizable injury, it declined to endorse a solution to the problem. Rather than attempting to formulate an equitable method of assessing damages, it concluded that it was impossible for juries to assess damages in wrongful life suits. The time has come for the status quo to change, and for the injured plaintiffs' rights to relief to be recognized. The issue of damages should be decided by our juries, as it is in other tort cases. Damages can and should be assessed according to the traditional tort framework by balancing the benefit of living against the burden borne by the impaired plaintiff. The difficulty of ascertaining the existence of and measuring damages should not preclude the granting of a remedy in those cases in which actual injury is established. Justice requires that the defendants in wrongful life suits be required to redress the injuries that they have inflicted and that the impaired plaintiffs be compensated for their suffering.

Dawn E. Currier

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146. 31 Cal. 3d at 234-35, 643 P.2d at 963, 182 Cal. Rptr. at 346.