St. Mary's Law Journal

Volume 16 | Number 3 Article 6

9-1-1985

Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas.

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COMMENTS

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I. Introduction

In the last twenty years, technology in the medical industry has witnessed unprecedented growth in the area of prenatal detection of congenital birth

defects.[1] This includes the genesis of amniocentesis, ultrasonography, and other procedures to detect possible problems with fetal development.[2] Occasionally a physician uses this technology in a negligent manner so that parents are deprived of their limited, but constitutionally protected, option to abort a seriously defective child. Most jurisdictions, including Texas, allow the parents to recover from the negligent physician for special damages, such as medical and educational expenses resulting from the child's birth, in a suit for negligent genetic counseling.[3] Yet, the Texas Supreme Court has held that the child born as a result of this negligence has suffered no compensable injury by being born impaired because, as a matter of law, life is always preferred over nonlife.[4]

If the parents are unable to sue, or if the child has reached majority, Texas and several other jurisdictions leave the child without remedy.[5] Because of this possibility, even if the boundaries of Texas tort law must be expanded, justice requires an assured remedy for all victims of a physician's negligence.[6] This comment will discuss the background and history of the child's

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1. *See* STEADMAN'S ILLUSTRATED MEDICAL DICTIONARY 311 (5th ed. 1982) (congenital defect one that exists at birth); *see also* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 33 S.C.L. REV. 713, 715 n.15 (1982). Some defects may be hereditary, which are transmitted from one or both of the parent's genes to the child, such as Down's Syndrome and Tay-Sachs disease. *See id.* at 715 n.15. Other types of genetic defects are not hereditary, but are caused by exposure of an otherwise healthy fetus to harmful effects, such as radiation, chemicals, or natural infection, such as rubella. *See id.* at 715 n.15.

2. *See* Friedman, *Legal Implications of Amniocentesis,* 123 U. PA. L. REV. 92, 97 (1974) (amniocentesis process consists of extracting anmiotic fluid from mother; serves to identify sex, blood type, chromosomal abnormalities, and many possible genetic defects). Ultrasonography is a process using reflection of sound waves to define and locate internal structures. *See* STEADMAN'S ILLUSTRATED MEDICAL DICTIONARY 1511 (5th ed. 1982). Fetoscopy adds an optical system to the amniocentesis procedure. *See* Comment, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling,* 87 YALE L. REV. 1488, 1493 n.22 (1978).

3. *See, e.g.,* Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981) (recovery by parents for negligence in failing to diagnose possible defects); Boone v. Mullendore, 416 So. 2d 718, 719 (Ala. 1982) (parents awarded damages upon proper proof on remand); Jacobs v. Thermer, 519 S.W.2d 846, 850 (Tex. 1975) (parents can recover for economic burden occasioned by negligent genetic counseling).

4. *See* Nelson v. Krusen, 678 S.W.2d 918, 924-25 (Tex. 1984) (court held no cause of action for wrongful life, supporting holding with assertion of sanctity of human life) (*citing* Becker v. Schwartz, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978)).

5. *See, e.g.,* Phillips v. United States, 508 F. Supp. 537, 544 (D.S.C. 1980) (wrongful birth damages given to parent, but child may not recover); Moores v. Lucas, 405 So. 2d 1022, 1025, 1027 (Fla. Dist. Ct. App. 1981) (parents given damages, but child not allowed recovery); Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984) (parent's wrongful birth action recognized, child denied wrongful life claim).

6. *Cf.* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 1, at 3-4 (5th ed. 1984). The text provides:

cause of action for negligent genetic counseling, which provides such a remedy. Further, it will explore the status of this tort, commonly known as wrongful life, and other prenatal torts in Texas. Finally, this comment will analyze the recent Texas Supreme Court decision not to recognize a wrongful life action and will assert an argument for adoption of the cause of action in Texas.

II. BACKGROUND: THE TORT OF WRONGFUL LIFE IN AMERICAN JURISPRUDENCE

A. *Distinguishing the Child's Cause of Action*

In recent years, there has been a profusion of decisions in the areas denominated wrongful pregnancy, wrongful birth, and wrongful life. Some courts and commentators, however, have never quite differentiated these distinct causes of action, often using the terms interchangeably.[7] These suits involve both different parties and claims and must therefore be distinguished.

An action for wrongful pregnancy is usually brought by the parents alleging that a physician in some way negligently caused the unplanned birth of a child.[8] This cause of action arises in most instances from a negligent failure to diagnose pregnancy when there is still time for abortion,[9] from an unsuc-

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> New and nameless torts are being recognized constantly . . . . The law of torts is anything but static and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

Id. § 1, at 3-4.

7. *See* Comment, *Curlender-Bio Science Laboratories: Recognition of a New Cause of Action for "Wrongful Life"*, 25 ST. LOUIS U.L.J. 455, 455 n.1 (1981) (despite difference between actions, confusion still exists); Becker v. Schwartz, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899 (1978) (reference to child's cause of action as wrongful birth, which is, in fact, parents' cause of action); *see also* Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life,* 1978 DUKE L.J. 1401, 1439-40 (reference to actions brought by parents, as well as children, as "wrongful life" actions); BLACK'S LAW DICTIONARY 1446 (5th ed. 1979) (no differentiation between parents' cause of action and that of child).

8. *See* Hickman v. Myers, 632 S.W.2d 869, 869 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (woman suing physician for failed sterilization attempt); Note, *One More Mouth to Feed: A Look at Physician's Liability for the Negligent Performance of Sterilization Operations,* 25 ARIZ. L. REV. 1069, 1069 (1983) ("wrongful pregnancy" used to describe action by parents seeking compensation for birth of healthy child).

9. *See, e.g.,* Clapman v. Yanga, 300 N.W.2d 727, 729-34 (Mich. 1980) (negligent failure to diagnose pregnancy, court awards all child rearing costs); Anonymous v. Sapega, 392 N.Y.S.2d 79, 79 (App. Div. 1977) (negligent failure to diagnose pregnancy in rape victim);

cessful abortion,[10] or as a result of a negligently performed sterilization operation.[11]

A suit for wrongful birth is similarly brought by the parents of an unplanned child.[12] In a wrongful birth action, the parents claim is that the physician's wrongful genetic counseling deprived them of a choice on whether to bear a defective child or to seek an abortion.[13] This situation usually occurs when genetic tests designed to discover possible fetal defects are not supplied,[14] when tests are given but are negligently performed,[15] or when the

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Ziemba v. Sternberg, 357 N.Y.S.2d 265, 269 (App. Div. 1974) (negligent failure to diagnose pregnancy).

10. *See, e.g.,* Stills v. Gratton, 127 Cal. Rptr. 652, 658-59 (Ct. App. 1976) (plaintiff can recover all costs available under tort law for failed abortion); Wilczynski v. Goodman, 391 N.E.2d 479, 487-88 (Ill. 1979) (plaintiff allowed damages for medical expenses due to failure of therapeutic abortion, but cost of raising unwanted child disallowed); Speck v. Finegold, 408 A.2d 496, 508-09 (Pa. Super. Ct. 1979) (after failure of both sterilization and abortion, court allowed recovery for medical expenses). *But see* Nanke v. Napier, 346 N.W.2d 520, 523 (Iowa 1984) (failed abortion, parents cannot recover for rearing of healthy child). *See generally* Comment, *Wrongful Birth: Fact Patterns Giving Rise to Causes of Action Distinguished and Discussed,* 4 HAMLINE L. REV. 59, 101-03 (1980) (detailed analysis of wrongful pregnancy actions brought after failed abortions).

11. *See, e.g.,* LaPoint v. Shirley, 409 F. Supp. 118, 121 (W.D. Tex. 1976) (in negligently performed sterilization action parents allowed medical costs, but costs of rearing child denied); Fassoulas v. Ramey, 450 So. 2d 822, 823-24 (Fla. 1984) (rearing costs not allowed for healthy child, not even ordinary expenses for impaired child, but parents may recover special upbringing costs after negligent sterilization operation); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 170-71 (Minn. 1977) (failed vasectomy, court allowed pre- and post-natal costs, pain and suffering damages, and reasonable costs of raising child). *See generally* Comment, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation,* 4 AM. J.L. & MED. 131, 135-37 (1978) (list of U.S. and foreign cases on negligently performed sterilizations).

12. *Compare* Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975) (parents sought recovery for being denied chance to make informed decision about birth) *with* Hickman v. Myers, 632 S.W.2d 869, 870 (Tex. Civ. App.—Fort Worth 1982, no writ) (parents sought damages for failed sterilization operation).

13. *See* Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975) (parents brought wrongful birth suit for negligent genetic counseling by physician); Comment, *Wrongful Birth: The Emerging Status of a New Tort,* 8 ST. MARY'S L.J. 140, 145 (1976) (wrongful birth suit parents' cause of action; wrongful life action by harmed child); *see also* Comment, *"Wrongful Life": The Right Not to Be Born,* 54 TUL. L. REV. 480, 484 (1980). When these claims are brought by the parents, the usual allegation is that had the parents been properly advised they would have avoided conception or aborted the child. *See id.* at 484. The parents often seek recovery for expenses incurred in raising the child, as well as for their own mental and physical pain and suffering. *See id.* at 484; *see also* Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis,* 63 MARQ. L. REV. 611, 612-13 (1980) (wrongful birth claim based on failure to provide information, not that doctor could have prevented birth defects).

14. *See, e.g.,* Schroeder v. Perkel, 432 A.2d 834, 835 (N.J. 1981) (physician failed to perform "sweat test" which would have revealed cystic fibrosis in first child); Howard v.

physician fails to warn of possible side effects of maternal disease.[16]

In a wrongful life action, the child seeks damages for the lifetime of pain inflicted by the physician's failure to provide the parents with information necessary to reach an informed decision on whether to abort their fetus.[17] Thus, wrongful life is the cause of action by the child, separate and distinct from any recovery by the parents, but containing virtually the same essential allegations as wrongful birth.[18]

One dissimilarity between wrongful birth and wrongful life is that whereas most courts recognize that wrongful birth fits within the general tort framework of duty, breach, causation, and damages, the courts have not found this so for wrongful life.[19] Recent cases and commentaries, however, support the theory that the child's action for negligent genetic counseling, or "wrongful life," also conforms to traditional tort standards.[20] If these stan-

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Lecher, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 364 (1977) (physician failed to perform amniocentesis to discover possibility of Tay-Sachs disease); Johnson v. Yeshiva Univ., 364 N.E.2d 1340, 1341, 396 N.Y.S.2d 647, 648 (1977) (physican failed to perform amniocentesis). *See generally* Comment, *Wrongful Birth: A Child of Tort Comes to Age,* 50 U. CIN. L. REV. 65, 66 (1981) (wrongful birth cause of action arises when physician fails to perform tests for fetal defects).

15. *See, e.g.,* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 694 (E.D. Pa. 1978) (negligent testing for Tay-Sachs disease); Turpin v. Sortini, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982) (negligently performed hearing test on first child, second child born with identical hereditary deafness); Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 479 (Ct. App. 1980) (physician misdiagnosed parents as noncarriers of Tay-Sachs disease). *See generally* Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis,* 63 MARQ. L. REV. 611, 621-22 (1980) (wrongful birth action can be brought when failure to test for genetic problem occurs through lack of amniocentesis and otherwise).

16. *See, e.g.,* Gleitman v. Cosgrove, 227 A.2d 689, 690 (N.J. 1967) (failure to diagnose and warn of danger of rubella to fetus); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (failure to discern possible adverse result to child caused by drug used to control epilepsy); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 373 (Wis. 1975) (failure to diagnose rubella in pregnant mother). *See generally* Comment, *Wrongful Birth: Fact Patterns Giving rise to Causes of Action Distinguished and Discussed,* 4 HAMLINE L. REV. 59, 62-66 (1980) (detailed discussion of cases where physician failed to warn of side effects of rubella).

17. *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 33 S.C.L. REV. 713, 716 (1982).

18. *See* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695 (E.D. Pa. 1978) (damages sustained by parents separate and distinct from those of child); Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action,* 18 DUQ. L. REV. 857, 857 n.2 (1980) (any suit brought by parents for their injuries separate and distinct from child's suit).

19. *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 33 S.C.L. REV. 713, 749 (1982) (unanimity among courts that wrongful birth within traditional tort requirements).

20. *See, e.g.,* Turpin v. Sortini, 643 P.2d 954, 959-60, 182 Cal. Rptr. 337, 342-43 (1982) (cause of action for wrongful life fits within standard tort framework); Capron, *Tort Liability*

dards can be established, courts could no longer as easily refuse such cases on the ground that they state no cause of action.[21] An analysis of each of the elements of negligent genetic counseling is appropriate in showing the reasons for allowing the child a cause of action.

B. *Negligent Genetic Counseling and Its Place Within the Tort Framework*

1. Duty

Physicians have long had a duty to provide treatment that conforms in quality to that given by similarly situated professionals.[22] Although some cases and commentators have denied that this duty extends to the unborn child,[23] three theories exist that would support this extension of duty. One recognizes a duty based on the foreseeable nature of the injury, another does so as an extension of the duty owed the parents, and the third holds that the physician's duty is owed directly to the fetus.

First, it is foreseeable to a physician that the birth of an impaired child could be the result of improper medical advice and counseling.[24] Obviously,

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in Genetic Counseling, 79 COLUM. L. REV. 618, 683-84 (1979) (recovery by child comports with traditional ideas of tort law); Note, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework,* 20 WM. & MARY L. REV. 125, 155 (1978) (despite denial of cause of action, wrongful life within tort framework).

21. *See, e.g.,* Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967) (no cause of action since damages not ascertainable); Becker v. Schwartz, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (no cognizable damages at law, therefore no cause of action); Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503 (App. Div. 1970) (no cause of action cognizable at law), *aff'd,* 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

22. Jacobs v. Theimer, 519 S.W.2d 846, 848 (Tex. 1975) (physician has duty to disclose results of diagnosis and attendant risks as reasonable practitioner would have); W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 32, at 187 (5th ed. 1984) (doctor must use care and skill as would ordinary member in good standing of his profession).

23. *See, e.g.,* Elliot v. Brown, 361 So. 2d 546, 548 (Ala. 1978) (parental right to abortion does not lead to right not to be born); Comment, *The Trend Towards Wrongful Life: A Dissenting View,* 31 UCLA L. REV. 473, 486 (1983) (incomprehensible to have duty to child to keep it from being born); Note, *Torts—Wrongful Life—No Cause of Action For Failure to Inform Parents of Possible Birth Defects,* 13 WAYNE L. REV. 750, 756 (1967) (duty to parents alone since they are only ones capable of acting on information given). *But see* Phillips v. United States, 508 F. Supp. 537, 542 (D.S.C. 1980) (in suit by child, little doubt that third party may have duty to unborn child); Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 70 (1970) (duty to child not precluded by law merely because fetal state inhibits action on information).

24. *See* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (duty to extend to foreseeable persons; as objects of genetic counseling, future children foreseeable); *see also* Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1255 (Ill. 1977) (child has right to be born without injuries foreseeably caused by breach of duty to child's mother); *cf.* Comment, *Wrongful Life: The Right to Be Born,,* 54 TUL. L. REV. 480, 489 (1980) (several cases allow child recovery for being "foreseeable victim" of negligence by physician).

the physician owes a duty to the parents since they rely on the advice in making their decision.[25] If the physician should have discovered genetic problems, but failed to, this approach suggests the duty is owed to the impaired child since his birth is a direct consequence of the breach.[26]

A second approach presumes the existence of a two-fold decisionmaking process in determining whether to abort an impaired child.[27] One decision concerns the parents and their subjective desire or ability to bear an afflicted child.[28] The second consists of the child's right to determine whether he prefers an impaired condition over life, a decision which has legal support in similar contexts.[29] Since the child is unable to make this choice, the parents are given the power to make a "substituted" decision in their best judgment on his behalf.[30] When negligent genetic counseling has been provided, an informed decision by the parent, and the child through the parent, is therefore precluded.[31]

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25. *See* Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (duty to inform parents; valid cause of action for failure to do so); Comment, *"Wrongful Life": Should the Cause of Action Be Recognized,* 70 KY. L.J. 163, 173 (1981-1982) (recognizes action of parent for failure to disclose relevant genetic information).

26. *See* RESTATEMENT (SECOND) OF TORTS § 311, at 106 (1965). Section 311 provides that a person may be subject to liability if he gives negligent and false information to a person whom he knows will rely on the information. *See id.* § 311, at 106. He will be responsible for injury resulting to the person he tells and also to any third person that the "actor should expect to be put in peril by the actions taken." *See id.* § 311, at 106; Comment, *"Wrongful Life": The Right Not to Be Born,* 54 TUL. L. REV. 480, 490-91 (1980) (foreseeable that when faulty information given, parents will decide to give birth and, further, that child will be impaired); *see also* Comment, *Genetic Counseling and Medical Malpractice; Recognizing a Cause of Action for Wrongful Life,* 8 T. MAR. L. REV. 154, 169 (1983) (impaired birth foreseeable consequence of breach of genetic counseling duty).

27. *See* Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice,* 55 S. CAL. L. REV. 477, 492 (1982) (parent has right to avoid birth of defective child; further, since child incompetent to decide for itself, parents have "substituted" judgment for child).

28. *See id.* at 493.

29. *Cf.* Goldstein & Hirsh, *Wrongful Life,* 1983 MED. TRIAL TECH. Q. 279, 284. The rights of the child in cases of wrongful genetic counseling are very similar to the rights of a comatose or terminally ill patient in the "right to die" cases. *See id.* at 284; *In re* Guardianship of Barry, 445 So. 2d 365, 371 (Fla. Dist. Ct. App. 1984) (family members may decide nonlife prefereable to life); *In re* Quinlan, 355 A.2d 647, 663-64 (N.J. 1976) (denial of parent/guardian right to decide on child's continued existence breach of child's right of self-determination), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

30. *See* Procanik v. Cillo, 478 A.2d 755, 769 (N.J. 1984) (Handler, J., concurring & dissenting) (child's right of personal autonomy in hands of parent); Comment, *Genetic Counseling and Medical Malpractice: Recognizing a Cause of Action for Wrongful Life,* 8 T. MAR. L. REV. 154, 169-70 (1983) (child allowed but unable to choose nonexistence, thus parents should have discretionary power).

31. *See* Capron, *Tort Liability in Genetic Counseling,* 79 COLUM. L. REV. 618, 660 (1979) (failure to provide information on genetic risks breaches duty to parents and child). An im-

Finally, several commentators have proposed that the duty to provide correct information is owed to the parent and the child since each are patients of the physician.[32] This approach is in line with the theory that the unborn child is a "person" from the moment of conception.[33]

2. Breach

Breach, in a negligent genetic counseling action, is the actual failure by the physician to properly inform the parents as to the existence of foreseeable genetic risks, thus depriving both parents and child of an informed decision.[34] Since the child's and the parents' cause of action arise from the same occurrence, the breach of duty is essentially the same in both actions.[35] The fact that a child is born impaired is not necessarily an indicia of negligence, however, since the plaintiffs must still prove that the physician breached his duty of due care, that is, he knew or should have known of a genetic problem.[36]

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paired child has the right to choose death over impaired existence, but the child's parents should have the same right to decide since the child is unable to do so. *See* Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice,* 55 S. CAL. L. REV. 477, 493-94 (1982) (parents have ability to substitute their decision for their child, thus duty to one is duty to both). The essence of the situation is in the nature of an agency relationship, with the parents having power to make decisions for the child. *See* Comment, *Birth-Defective Infants: A Standard for Nontreatment Decisions,* 30 STAN. L. REV. 599, 609-10 (1978) (parents have primary-decision control since child cannot make own decision or determine its best interest).

32. *See* Comment, *"Wrongful Life": The Right Not to Be Born,* 54 TUL. L. REV. 480, 489 (1980) (physician owes separate duty to child); *see also* Comment, *Genetic Counseling and Medical Malpractice; Recognizing a Cause of Action for Wrongful Life,* 8 T. MAR. L. REV. 154, 169 (1983) (physician's duty to use reasonable care extends to both mother and child).

33. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946) (property and criminal law consider child "person" from conception; negligence should not be treated differently).

34. *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 33 S.C.L. REV. 713, 732 (1982) (physicians required to provide counseling and testing only where risks make genetic problems foreseeable; plaintiff must still show breach of standard of care); *see also* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (duty breached by not conforming to standard of care). The question of whether a breach has occurred must include consideration of the actual steps taken by the genetic counselor. *See* Comment, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling,* 87 YALE L.J. 1488, 1504-05 (1978) (sufficiency and accuracy of steps taken determine what constitues breach).

35. *See* Procanik v. Cillo, 478 A.2d 755, 760 (N.J. 1984) (causes of action for negligent genetic counseling same but denominated differently; breach exists as to parent).

36. *See* Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth,* 14 FAM. L.Q. 15, 22 (1980) (plaintiff must prove conduct of physician was below appropriate standard of care). The question of whether a breach of duty has occurred is dependent upon the facts, as the standard of care fluctuates under different circumstances. *See* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 32, at 174 (5th ed. 1984) (uniform rules of conduct not possible in negligence law).

3. Causation

For causation to be present, the plaintiff must show that there is some tangible connection between the injury suffered and the conduct of the defendant.[37] One early case held that causation could not exist in genetic counseling actions because there was no connection between the negligence of the physician and the existence of birth defects, which would have occurred regardless of the negligence.[38] The modern view, however, is that causation in a negligent genetic counseling action is not that the physician caused the birth defects, but that he denied the parents an informed choice.[39] Direct causation is satisfied if the parents prove that they would have obtained an abortion had this choice been given them.[40] Proximate causation is also present if it is determined that denial of the choice makes the birth of an impaired child foreseeable.[41]

4. Damages

Courts have occasionally struggled with the first three elements of negligent genetic counseling actions, but no fiercer debate has occurred than that

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37. *See* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 41, at 263 (5th ed. 1984). There are two elements of causation: one is "but for" or direct causation, which factually determines whether the result complained of would have occurred but for the defendant's acts. *See id.* § 41, at 263. The second is proximate cause, which is a question of law on whether liability should extend to the defendant, or if he had a duty to plaintiff under the circumstances. *See id.* § 42, at 272-73.

38. *See* Gleitman v. Cosgrove, 227 A.2d 689, 691-92 (N.J. 1967) (physician did not produce, nor could he have done anything to prevent, likelihood of disease).

39. *See, e.g.,* Phillips v. United States, 508 F. Supp. 537, 542 (D.S.C. 1980) (in suit by child, gravamen of complaint is deprivation of choice); Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 33 S.C.L. REV. 713, 734 (1982) (wrongful life claim based on birth of child after negligent failure to inform); Comment, *"Wrongful Life": Should the Cause of Action Be Recognized?,* 70 KY. L.J. 163, 177 (1981-1982) (action not for causing *defects,* but for causing *life with defects* by depriving parental choice) (emphasis in original).

40. *See* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695 (E.D. Pa. 1978) (complaint shows sufficient link between negligence and failure to abort); Comment, *"Wrongful Life": The Right Not to Be Born,* 54 TUL. L. REV. 480, 491 (1980) (if "but-for" defendant's negligence parents would have obtained abortion, causation satisfied); *cf.* Comment, *A Cause of Action For "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 73 (1970) (question of whether parents would have availed themselves of knowledge should be fact question for jury).

41. *See* RESTATEMENT (SECOND) OF TORTS § 290, at 47 (1965). To determine whether a counselor's conduct is a risk, he is deemed to know the "qualities and habits of human beings." *See id.* § 290, at 417. When the parents visit a genetic counselor specifically to determine the possibility of genetic problems, and false information is given, foreseeability that a child will be born deformed seems to be present. *See* Park v. Chessin, 400 N.Y.S.2d 110, 113 (App. Div. 1977) (foreseeable that parents would rely on superior knowledge of physicians), *rev'd sub nom.* Becker v. Schwartz, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

over the question of damages.[42] One early decision involving wrongful life supported the idea that a proper measure of damages could not be reached due to the inability to quantify the injury.[43] This rationale is no longer deemed controlling, however, as today the real problem exists in determining whether an injury has occurred at all, that is, whether the birth of a defective child can result in injury cognizable at law.[44] There is universal agreement among courts that the child cannot recover general damages, due to the "impossibility" of making the necessary comparison required by compensatory damage law.[45] It has been held by some courts that such a comparison must necessarily involve weighing life and nonlife, which the law is not prepared to do.[46] Dissension occurs, however, when this identical theory is used to bar claims for special damages.[47] For example, the New Jersey Supreme Court originally adhered to the "comparison" theory to deny any damage recovery to a child, only to reverse itself five years later by allowing a special damage award.[48] The court ruled that special damages were not speculative and, thus, allowed full recovery of medical and educational costs for the child.[49]

In order to avoid the problems caused by the "comparison" theory of damages, two separate means of determining damages have been proposed by several writers. The first operates by assigning a "plus" value to life with-

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42. *See* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (extent of damages and presence of injury most controversial elements); Comment, *Wrongful Life and a Fundamental Right to Be Born Healthy: Park v. Chessin; Becker v. Schwartz,* 27 BUFFALO L. REV. 537, 555 (1978) (damages are major legal obstacle to child's claim for negligent genetic counseling).

43. *See* Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967) (difficulty in measuring damages when child brings action for negligent genetic counseling).

44. *See* Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979) (difficulty in measuring damages no longer overwhelming problem); *see also* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 486 (Ct. App. 1980) (gradual shift away from denying wrongful life damages due to difficulty of measurement).

45. *See* Elliot v. Brown, 361 So. 2d 546, 548 (Ala. 1978) (impossible to measure damages and no infringement of any legal rights); Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979) (no damages possible since no cognizable injury).

46. *See* Becker v. Schwartz, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (damage calculation depends on comparison untenable at law).

47. *Compare id.* at 812, 413 N.Y.S.2d at 900 (impossibility of comparison bars any damage recovery by child) *with* Turpin v. Sortini, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982) (nonexistence-existence argument prevents general damage recovery, but special damages award not prevented).

48. *Compare* Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979) (computation required impossible, child can recover no damages) *with* Procanik v. Cillo, 478 A.2d 755, 762-63 (N.J. 1984) (insurmountable problems only in determining general damages; special damages may be awarded).

49. *See* Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (child allowed special damage recovery since damages readily ascertainable).

out defects, a "zero" value to nonexistence, and a "minus" value to life with defects.[50] The monetary value of the "plus" and "minus" figures are added together, with the resulting sum being the amount of compensatory damages.[51] Under most circumstances, the number obtained will be "positive" and no damages will be awarded.[52] Yet, as the impairment becomes more severe, the "minus" value may preponderate and damages will be ascertainable.[53]

The second theory of recovery proposed by commentators concerns the "benefit" rule of the Restatement (Second) of Torts.[54] The provision states that when both a benefit and an injury result from a defendant's conduct, the monetary value of the benefit will mitigate the damage award.[55] In the negligent genetic counseling situation, this would entail finding what monetary injury has occurred to the child, then subtracting this amount from the determined value of benefit from being born.[56]

Even with the satisfaction of all the elements of a cause of action, there has been reluctance to allow a child recovery.[57] A brief examination of the applicable case law is therefore mandated to discover the reason for this denial and, further, to reveal the existence of a new trend by courts in allowing a cause of action.

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50. *See* Comment, *A Cause of Action for "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 66 (1970) (values assigned depending on child's status); Comment, *"Wrongful Life": The Right Not to Be Born,* 54 TUL. L. REV. 480, 497 (1980) (assigning values to situation makes damages calculable); Comment, *Genetic Counseling and Medical Malpractice: Recognizing a Cause of Action for Wrongful Life,* 8 T. MAR. L. REV. 154, 172 (1983) (once amounts fixed, compensatory damages awardable).

51. *See* Comment, *A Cause of Action for "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 66 (1970).

52. *See id.* at 65 (in cases of minor or single defects, reasoning of *Gleitman* might be correct in that impaired life preferable to nonexistence).

53. *See id.* at 65.

54. *See* Comment, *"Wrongful Life": The Right Not to Be Born,* 54 TUL. L. REV. 480, 497 (1980) (Restatement view basically balancing test); Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice,* 55 S. CAL. L. REV. 477, 502 (1982) (balancing test requires weighing defects against benefits).

55. *See* RESTATEMENT (SECOND) OF TORTS § 920, at 509 (1979).

56. *See* Comment, *"Wrongful Life": The Right Not to Be Born,* 54 TUL. L. REV. 480, 498 (1980) (award amount measures difference between burdens and benefits; the more serious impairment, the less beneficial life can be, thus higher recovery allowed); *see also* Comment, *Genetic Counseling and Medical Malpractice: Recognizing a Cause of Action for Wrongful Life,* 8 T. MAR. L. REV. 154, 174 (1983) (benefits rule also makes general pain and suffering damages possible).

57. *Cf.* Phillips v. United States, 508 F. Supp. 537, 542-43 (D.S.C. 1981) (in suit by child, even though all elements of cause of action met, court denies recovery on public policy grounds).

C. *The Early Search for a Cause of Action*

Historically, wrongful life has been applied in two different situations:[58] (1) in cases of illegitimacy where the child sues the person responsible for his birth, seeking damages caused by the stigma of his condition;[59] and (2) in cases where negligent genetic counseling occurs such that the parent is deprived of a significant choice in future family planning.[60]

Under common law, a child could not recover for any injury received before birth, since the child had no independent existence apart from its mother.[61] In 1946, however, a child was, for the first time, afforded a cause of action stemming from medical negligence inflicted on the parent.[62] Seventeen years later, the term "wrongful life" was first mentioned in *Zepeda v. Zepeda,*[63] where the plaintiff-child sued his alleged father for seducing his mother and wrongfully causing his birth.[64] The child sought a remedy for deprivation of the right to have a legal father and sought damages under the

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58. *But see* Kashi, *The Case of the Unwanted Blessing: Wrongful Life,* 31 U. MIAMI L. REV. 1409, 1409-10 (1977) (three divisions of wrongful life cases). The first division, however, deals with "wrongful conception" cases, which are essentially synonyms for wrongful pregnancy actions, rather than wrongful life, and will be treated as such. *See id.* at 1409.

59. *See, e.g.,* Pinkney v. Pinkney, 198 So. 2d 52, 53 (Fla. Dist. Ct. App. 1967) (daughter sues father for stigma of illegitimacy), *rev'd sub nom.* Brown v. Bray, 300 So. 2d 668, 669 (Fla. 1977); Zepeda v. Zepeda, 190 N.E.2d 849, 851 (Ill. App. Ct. 1963) (child suing alleged father for illegitimate birth); Williams v. State, 223 N.E.2d 343, 343, 269 N.Y.S.2d 786, 786 (1966) (mother raped while inmate at state hospital; child brought suit alleging state's negligence proximately caused her birth).

60. *See, e.g.,* Turpin v. Sortini, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982) (failure to warn parents of potential hereditary deafness); Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 479 (Ct. App. 1980) (physician negligently failed to diagnose Tay-Sachs disease); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (failure to warn mother about possible harmful side effects to child by drug prescribed to control epilepsy); *see also* Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975) (negligent failure to diagnose rubella and advise of attendant risks).

61. *See* Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 17 (1884) (child has no cause of action for prenatal injuries). This decision was followed for 62 years. *See* Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935) (no duty toward fetus who is only unseen, unknown, prospective human being).

62. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 141 (D.D.C. 1946) (if child born alive, can bring action against person causing prenatal injuries); *see also* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 33 S.C.L. REV. 713, 731 (1982) (*Bonbrest* decision eventually adopted by every jurisdiction). *But see* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries,* 110 U. PA. L. REV. 554, 563 (1962) (worst injuries occur during previable stage of development, so viability requirement leaves much injury uncompensated). *See generally* Note, *A Century of Change: Liability for Prenatal Injuries,* 22 WASHBURN L.J. 268, 268 (1983) (discussion of historical background, current law, and theories of recovery for prenatal torts).

63. 190 N.E.2d 849 (Ill. App. Ct. 1963).

64. *See id.* at 858.

theory of wrongful life.[65] The court, in denying relief, held that a decision creating such a new tort would have a staggering social impact and, thus, was a task better suited for the legislature.[66]

The first wrongful life case alleging negligent genetic counseling as a proximate cause of the birth of an imperfect child was the 1967 case of *Gleitman v. Cosgrove.*[67] After the plaintiff's mother had contracted rubella, the plaintiff was born severely deformed, despite the reassurances of her physicians that the illness would have no adverse effect on the baby.[68] The court found that, even though there was negligence, compensatory damages were impossible to award because there is no way to compare a life with defects with the "utter void of nonexistence."[69] This rationale has been used in virtually all cases disallowing a wrongful life claim.[70] The *Gleitman* court further held

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65. *See id.* at 851. The child alleged deprivations of rights, including the right to be legitimately born and to have a normal home. *See id.* at 851.

66. *See id.* at 852-53. The court analogized the cause of action to those decisions allowing a child to recover for injuries received while in the mother's womb. *See id.* at 859.

67. *See* 227 A.2d 689, 692 (N.J. 1967). The first important departure from previous prenatal tort actions occurred in *Gleitman,* in that there was no claim that the physicians could have decreased the possibility that the child would be born with defects. *See id.* at 692. Before *Gleitman,* most tort actions were brought for prenatal injuries resulting in a child's deformity that occurred because of the physician's negligence. *See, e.g.,* Bergstreser v. Mitchell, 577 F.2d 22, 24 (8th Cir. 1978) (negligent caesarean section operation caused rupture of uterus in later pregnancy, which led to birth defects); Larrabee v. United States, 254 F. Supp. 613, 614 (S.D. Cal. 1966) (forceps caused injury to child's eye); Korman v. Hagen, 206 N.W. 650, 650 (Minn. 1925) (force used in delivery damaged nerves in child's arm causing partial paralysis). These actions for prenatal injury are to be distinguished from wrongful life, where the child is not alleging that anything could have been done about his condition, but rather that his parents should have been allowed to make an informed decision. *See* Comment, *Recognition of a New Cause of Action for "Wrongful Life,"* 25 ST. LOUIS U.L.J. 455, 459 (1981) (no contention in *Gleitman* that physician could have decreased likelihood of injury).

68. *See* Gleitman v. Cosgrove, 227 A.2d 689, 690-91 (N.J. 1967). Despite common medical knowledge that severe birth defects were possible, the defendant-physician maintained that there was no cause for alarm. *See id.* at 690-91.

69. *See id.* at 692. The court noted:

> The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in had the defendant not been negligent, with plaintiff's impaired condition as a result of the negligence . . . . This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

Id. at 692; *see also* Malan, *The Wrongful Life Controversy: Curlender v. Bio-Science Laboratories and Turpin v. Sortini,* 18 IDAHO L. REV. 237, 242 (1982) (though defendant-physician affirmatively mislead Gleitman, plaintiff had no cause of action because of inability to compare existence with nonexistence).

70. *See, e.g.,* Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979) (no acceptable measure to determine damages); Becker v. Schwartz, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978)

that, even if damages cognizable at law were suffered, public policy considerations dealing with the importance of human life would deny the child's claim.[71] The dissent argued that the inability to precisely determine damages should not allow a negligent tortfeasor to escape liability for a foreseeable injury.[72] The dissent further found that the normal determination of damages for pain and suffering required the same complex decision as would wrongful life awards, thus concluding that the majority had erred in denying the recovery sought.[73]

D. *Striving for Change: The Effects of Closer Scrutiny on Allowing a Cause of Action*

With the *Roe v. Wade*[74] decision legalizing abortion in 1973, there was renewed hope that a cause of action for wrongful life might be recognized since the public policy against abortion was no longer persuasive reasoning.[75] Fruition came originally in two successful wrongful birth claims by parents in 1975.[76] This advancement led to a plethora of successful actions, so that now the majority of courts have accepted the rationale of the wrongful birth claim.[77] Despite this breakthrough, some courts remained aligned

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(neither measurable damages nor cognizable injury exit); Stewart v. Long Island College Hosp., 283 N.E.2d 616, 616, 332 N.Y.S.2d 640, 641 (1972) (no cognizable injury at law).

71. *See* Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967) (current societal standards cannot tolerate decision that places nonexistence over that of even most impaired existence).

72. *See id.* at 703-704 (Jacobs, J., dissenting) (citing Story Parchment Co. v. Peterson Parchment Paper Co., 282 U.S. 555, 563 (1931)) (if approximate damage figure possible, fundamental fairness dictates relief be given to avoid tortfeasor escaping liability); *see also* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 374 (1982) (*Gleitman* dissent found that allowing negligent defendant to escape liability for foreseeable injury contrary to public policy and fundamental tort law).

73. *See* Gleitman v. Cosgrove, 227 A.2d 689, 704 (N.J. 1967) (Jacobs, J., dissenting).

74. 410 U.S. 113 (1973).

75. *See* Capron, *Tort Liability in Genetic Counseling,* 79 COLUM. L. REV. 618, 635 (1979) (public policy against abortion rationale for denying wrongful life no longer valid); *see also* Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979) (public policy now supports rather than disavows right to abortion).

76. *See* Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (pecuniary losses occasioned by wrongful birth allowed); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 377 (Wis. 1975) (additional medical and hospital bills measure of recovery in wrongful birth suit).

77. *See, e.g.,* Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981) (wrongful life denied, but claim by parents under Federal Tort Claims Act allowed for failure of military hospital to diagnose rubella in pregnant mother); Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982) (parents given damages in wrongful birth claim); Morris v. Frudenfeld, 185 Cal. Rptr. 76, 85 (Ct. App. 1982) (failed sterilization, parents given damages); *see also* Comment, *Wrongful Life: A Legislative Solution to Negligent Genetic Counseling,* 18 U.S.F.L. REV. 77, 97 (1983) (majority of courts denying wrongful life have upheld wrongful birth action).

against wrongful life,[78] so that it was not until 1977, in *Park v. Chessin,*[79] that a recovery for wrongful life was allowed.

In *Park,* parents who had already borne a child afflicted with polycystic kidney disease were negligently informed by doctors that it was not a hereditary disease and that there was no danger of recurrence.[80] In a wrongful life action brought by the second afflicted child, the lower court acknowledged the *Zepeda* and *Gleitman* reasoning, but decided to keep pace with social, economic, and technological change by allowing the child a cause of action.[81] The court explored the effect of *Roe,* reasoning that once the ban on abortion was lifted, constitutionally protected parental choice required accurate information in reference to the child's condition.[82]

The *Park* decision was instrumental in the acceptance of the wrongful life

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78. *See* Karlsons v. Guerinot, 394 N.Y.S.2d 933, 938 (App. Div. 1977). The court showed its unwillingness to agree that plaintiff was in a worse position than if she had never been born. *See id.* at 938. Further, the court dismissed the parents' claim that the new liberalization of abortion laws made older anti-wrongful life holdings obsolete, saying that birth itself could not be considered an injury. *See id.* at 938; *see also* Stills v. Gratton, 127 Cal. Rptr. 652, 656 (Ct. App. 1976). In refusing to award wrongful life damages, the *Stills* court cited to the impossibility of measuring damages. *See id.* at 656. *Stills* can be distinguished, however, because it deals mainly with a wrongful life claim for an illegitimate child rather than a deformed one. *See id.* at 655. *See generally* Comment, *Curlender v. Bio-Science Laboratories: Recognition of a New Cause of Action for "Wrongful Life",* 25 ST. LOUIS U.L.J. 455, 460 (1981) (discussion of *Karlsons v. Guerinot);* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 378 (1982) (short discussion of *Stills v. Gratton).*

79. 400 N.Y.S.2d 110 (App. Div. 1977).

80. *See id.* at 111. Polycystic kidney disease is an ailment marked by the presence of numerous cysts which eventually engulf the kidneys. *See* Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action,* 18 DUQ. L. REV. 857, 867 n.51 (1980) (disease hereditary and uniformly fatal in childhood). The doctors had assured the plaintiffs that chances of having another child with the affliction were "practically nil." *See* Park v. Chessin, 400 N.Y.S.2d 110, 111 (App. Div. 1977), *rev'd sub nom.* Becker v. Schwartz, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The parents relied on this in deciding to have another child. *See id.* at 111.

81. *See* Park v. Chessin, 400 N.Y.S.2d 110, 114 (App. Div. 1977), *rev'd sub nom.* Becker v. Schwartz, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The court said that because of the public policy behind the abolition of the state abortion statute, the parents of a child known to be potentially deformed have the right to seek an abortion. *See id.* at 114. This, the court reasoned, led to "the fundamental right to be born as a whole, functioning human being." *See id.* at 114. The court remarked that the acceptance of wrongful life as a viable cause of action would impose no new duty on any physician, nor would it hold physicians liable to novel or extraordinary consequences. *See id.* at 113. Rather, the cause of action would merely insure physicians' attention to the extra dangers that wrongful genetic counseling might cause. *See id.* at 113.

82. *See id.* at 114; *see also* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 377 (1982) (knowledge of fetal problems invokes parental choice whether to have child).

plea in another New York appellate court.[83] On appeal, however, the New York Court of Appeals reasoned that implicit in determining injury is the decision whether it is better never to be born than to be born with terrible deficiencies.[84] This decision, the court observed, was a "mystery more properly to be left to the philosophers and theologians."[85] Thus, the court overruled both favorable wrongful life cases, concluding that there was neither a cognizable injury at law,[86] nor any logical way to determine damages.[87] The holding has been criticized on the grounds that the infant plaintiff exists and suffers due to the negligence of the defendant, and that this is a proper question for the courts to decide.[88] Furthermore, critics have theorized that denying the child's action, but allowing a cause of action for the mother, seems an anomaly, as the duty owed to the mother should logically apply to the

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83. *See* Becker v. Schwartz, 400 N.Y.S.2d 119 (App. Div. 1977), *modified,* 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). In *Becker,* a woman in her late thirties was not warned by her physicians of the significant danger of Down's Syndrome that accompanies late-life pregnancies. *See* Becker v. Schwartz, 386 N.E.2d 807, 808, 413 N.Y.S.2d 895, 896 (1978). Her child was later born with the disease. *See id.* at 803, 413 N.Y.S.2d at 896. *Park* and *Becker* were joined for appellate review by the New York Court of Appeals. *See id.* at 809, 413 N.Y.S.2d at 897.

84. *See* Becker v. Schwartz, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

85. *See id.* at 812, 413 N.Y.S.2d at 900. Judge Jasen remarked that the law and mankind placed too high a value on human life for a court to resolve this type of issue. *See id.* at 812, 413 N.Y.S.2d at 900.

86. *See id.* at 812, N.Y.S.2d at 900. The court felt there was no precedent at either common law or statutory law for the *Park* finding of a fundamental right to be born as a functioning, whole human being. *See id.* at 812, 413 N.Y.S.2d at 900. Furthermore, the *Becker* court reaffirmed that if this action were recognized, it could lead to claims for "less-than-perfect" births and the concurrent problem as to who would determine perfection. *See id.* at 812, 413 N.Y.S.2d at 900. By this aspect of the decision, the *Becker* court was only reaffirming the fears first announced in *Zepeda* about the flood of litigation that might follow from a recognition of a cause of action for wrongful life. *Cf.* Zepeda v. Zepeda, 190 N.E.2d 849, 858 (Ill. App. Ct. 1963).

87. *See* Becker v. Schwartz, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978). The court held that in a negligence action, the main goal is to put the plaintiff in the position he would have been in had there been no negligent act. *See id.* at 812, 413 N.Y.S.2d at 900. This goal, the court felt, was impossible in a wrongful life action because all that could be restored to the child is the nonexistence that would have occurred had his parents been warned. *See id.* at 812, 413 N.Y.S.2d at 900. The court concluded that this was a "comparison the law is not equipped to make." *See id.* at 812, 413 N.Y.S.2d at 900; *see also* Smith v. United States, 392 F. Supp. 654, 656 (N.D. Ohio 1975) (logical impossibility in comparison of damages) (citing Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967)); Elliot v. Brown, 361 So.2d 546, 548 (Ala. 1978) (determination impossible, no comparison available).

88. *See* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 Sw. L.J. 369, 378 (1982). The author noted that while a "court of law is not the appropriate place to conduct a philosophical battle . . . a court of law is the proper place to compensate injuries directly attributable to the negligence of others." *Id.* at 378.

fetus as well.[89]

In 1979, the New Jersey Supreme Court, in *Berman v. Allan,*[90] refused to allow recovery for wrongful life, but in so doing tacitly modified part of its holding in *Gleitman.*[91] The court ruled that damages were no longer the impenetrable question once imagined and that "it would be a perversion of fundamental principles of justice to deny all relief" in a wrongful life case.[92] Instead, the court denied a recovery for the child on public policy grounds, holding that merely being born is not an actionable injury because of the fundamental right to life supported by our Constitution and societal laws.[93] The court held as a matter of law that the benefits of life, no matter how impaired, always outweigh nonlife in the eyes of society and the law.[94] This

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89. *See* Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice,* 55 S. CAL. L. REV. 477, 495 (1982) (since counseled patients are both parents and unborn children, responsibility also extends to prospective child).

90. 404 A.2d 8 (N.J. 1979). Mrs. Berman was 38 years old at the time of her pregnancy, which markedly increased her chances of giving birth to a child with Down's Syndrome. *See id.* at 10. During her months of care, the defendant-physicians never suggested amniocentesis, which could have uncovered the defect. *See id.* at 10. The Bermans sued for wrongful life on behalf of their daughter and sought recovery for emotional and medical damages to themselves as a result of the doctor's negligence. *See id.* at 10.

91. *Cf. id.* at 11-12. The court affirmed its earlier determination that the basis of tort law was compensatory and that this made it necessary to compare existence with nonexistence. *See id.* at 11-12. Calling such an endeavor impossible, the court quoted Chief Justice Weintraub in his separate opinion in *Gleitman,* saying man " 'who knows nothing of death or nothingness' " cannot make legal judgments on things he can know nothing about. *See id.* at 12 (citing Gleitman v. Cosgrove, 227 A.2d 689, 711 (N.J. 1967) (Weintraub, J., concurring & dissenting)). The *Berman* court repudiated its earlier decision and held that the public policy against abortion could no longer be deemed controlling over the rights of parents to make a choice. *See id.* at 14.

92. *See* Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979). The court reasoned that the complex process that would be needed to determine damages in a wrongful life case should not be used as the sole reason for denying recovery. *See id.* at 12. The court noted its reluctance "to deny the validity of . . . [the] complaint solely because damages are difficult to ascertain," since this would be against the weight of authority in all jurisdictions. *See id.* at 12. If the measure of damages was the only problem, the court admitted, a remedy of some sort could be given to the plaintiff to compensate for the injuries suffered. *See id.* at 12; *see also* Comment, *Wrongful Birth and Wrongful Life: Questions of Public Policy,* 28 LOY. L. REV. 77, 85 n.63 (1982) (court briefly noted damages could be found, but failed to specify how computations might be made).

93. *See* Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979). The court explained its reasoning by pointing out the commitment to the sanctity of human life as illustrated by the due process clause of the fifth amendment, the Declaration of Independence, and the procedural safeguards given to those facing the death penalty. *See id.* at 13; *see also* Comment, *Genetic Counseling and Medical Malpractice: Recognizing a Cause of Action for Wrongful Life,* 8 T. MAR. L. REV. 154, 163 (1982) (*Berman* court bound to uphold societal-placed value on human life).

94. *See* Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979). Even with knowledge that the child's life would be extremely limited due to both physical and mental pain, the court held that no recovery could be fashioned. *See id.* at 13. The pleasure and happiness she would

argument has been declared specious by commentators and courts primarily because it treats all genetic problems equally, while some afflictions make nonexistence preferable in comparison.[95] The "benefits of life" argument, however, was used by later courts to deny subsequent wrongful life claims,[96] until the first wrongful life recoveries were upheld in the 1980's.

E. *The New Trend in Wrongful Life*

In *Curlender v. Bio-Science Laboratories,*[97] a court's wrongful life award withstood appellate review for the first time. Due to alleged negligent genetic counseling by physicians, an infant was born with Tay-Sachs disease[98] and thereafter brought suit seeking pecuniary and non-pecuniary damages.[99] The court, in allowing a wrongful life claim, rejected the theory of other courts that metaphysical decisions had to be reached.[100] Further, it summa-

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experience merely by being alive, the court concluded, more than made her life worth living for her. *See id.* at 13.

95. *See, e.g.,* Turpin v. Sortini, 643 P.2d 954, 962, 182 Cal. Rptr. 337, 345 (1982) (under some circumstances nonexistence may be preferable to life); Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law,* WASH. U.L.Q. 919, 937 (1979) (denying recovery in wrongful life suit based on unsupportable contention that sorrows of life always outweighed by joys); Note, *A Cause of Action For "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 65-66 (1970) (severity of some deformities make it unclear whether life with these defects preferred over nonexistence).

96. *See* Phillips v. United States, 508 F. Supp. 537, 543 (D.S.C. 1980) (in suit by child, policy considerations other than theory that life is more precious than nonlife are merely cumulative); *see also* Turpin v. Sortini, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 347 (1982) (refusal to allow general damages on "sanctity of life" argument, although wrongful life recognized).

97. 165 Cal. Rptr. 477 (Ct. App. 1980).

98. *See id.* at 480. Tay-Sachs is a fatal, progressive disease of the nervous system that primarily affects Eastern Europeans of Jewish extraction and their children. *See id.* at 480 n.4. A simple test was developed that reveals possible carriers of the disease and would have allowed the parents to arrive at an informed decision on whether to continue the pregnancy. *See id.* at 480 n.4 (citing Howard v. Lecher, 366 N.E.2d 64, 67, 397 N.Y.S.2d 363, 366 (1977) (Cooke, J., dissenting) (further discussion of Tay-Sachs disease)).

99. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 490 (Ct. App. 1980). The child alleged that because of the disease, she suffered from mental retardation, convulsions, loss of motor reactions, muscular atrophy, gross physical deformity, as well as other disabilities. *See id.* at 480-81; *see also* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 372 n.14 (1982) (other disabilities alleged included susceptibility to other diseases, pseudobulper palsy, and inability to feed by mouth). The plaintiff sought damages for medical costs, emotional distress, the deprivation of "72.6 years of her life," a number based on actuarial tables for a normal lifespan, and punitive damages of $3 million, for the "reckless disregard" or "knowing" character of the tort. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 481 (Ct. App. 1980).

100. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 486-87 (Ct. App. 1980). "[T]here is not [sic] universal acceptance of the notion that 'metaphysics' or 'religious beliefs,' rather than law, should govern the situation." *Id.* at 486. This is especially true today

rily dismissed any public policy argument, reasoning that public policy should be concerned with compensating injuries, not with dismissing claims.[101] The court ruled that the only necessary determination is based on the basic principles of tort law, those being duty, breach, causation, and damages.[102]

The doctor's duty was viewed as a responsibility to use ordinary care in providing genetic counseling to the mother.[103] The court in *Curlender* had no difficulty in declaring that this duty had been breached by the physician.[104] The problem, the court remarked, was in the determination of the "proximate cause of an injury cognizable at law."[105] The proximate cause was found in that "[t]he reality of the 'wrongful life' concept is that such a plaintiff both *exists* and *suffers,* due to the negligence of others."[106] While emotionally appealing, this determination has been criticized for its avoidance of the problems of comparing nonexistence and existence, a comparison other courts have seen as crucial.[107] The *Curlender* court viewed damages

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when technological breakthroughs have provided the ways and means of avoiding "genetic disaster." *See id.* at 487. The reasoning of the *Curlender* court is not revolutionary, as the echos of its analysis can be seen in dissenting opinions of previous wrongful life cases. *See* Berman v. Allan, 404 A.2d 8, 21 (N.J. 1979) (Handler, J., concurring & dissenting). Justice Handler noted that the injury of the child "might be hard to sense, difficult to define and puzzling to evaluate," but it constitutes a valid tort claim and should be remedied. *See id.* at 21.

101. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 486 (Ct. App. 1980). The court remarked that public policy should include social welfare considerations as affected by competent genetic counseling. *See id.* at 486-87.

102. *See id.* at 487. Other jurisdictional law also supports these elements as necessary for a cause of action in negligence. *See, e.g.,* Knight v. United States, 498 F. Supp. 316, 323 (E.D. Mich. 1980) (elements of negligence are duty, breach, causation, and damages); Lawyer's Sur. v. Snell, 617 S.W.2d 750, 752 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (Texas law requires that legal duty, breach of that duty, and proximately caused injuries occur); Rodriguez v. Carson, 519 S.W.2d 214, 216 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (plaintiff must prove legal duty, breach, and damages proximately caused in order to recover).

103. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 488 (Ct. App. 1980); *see also* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 381 (1982) (duty owed by genetic counselor to give accurate information based wholly on accurate genetic tests).

104. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 488 (Ct. App. 1980).

105. *See id.* at 488.

106. *See id.* at 488 (emphasis in original); *see also* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695 (E.D. Pa. 1978) (causation present if parents state they would have obtained abortion had true situation been disclosed); Comment, *Wrongful Life: The Right Not to Be Born,* 54 TUL. L. REV. 480, 491 (1980) (causation satisfied if parent shows lack of information and corresponding failure to obtain abortion).

107. *See* Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View,* 31 UCLA L. REV. 473, 492 (1983). In failing to answer the existence-nonexistence questions, the commentator noted, the court weakened its opinion because it never dealt with the problems raised in *Gleitman* and its progeny. *See id.* at 492-93; *see also* Comment, *Wrong-*

as the amount that would compensate the infant for the injuries proximately caused by the negligence; namely, a general recovery for pain and suffering, special awards for medical expenses, and finally, the possibility of punitive damages.[108]

The court noted emphatically that it was not recognizing damages or a cause of action for the right not to be born, but was answering the question posed solely on the normal recovery of damage for pain and suffering.[109] The court, however, offered no reasoning for its conclusions regarding damages, thus leaving its motivational factors an enigma.[110] The decision is important because it placed the cause of action for wrongful life within the traditional tort framework and allowed recovery without ever having to deal with the metaphysical question which stymied earlier courts.[111]

The *Curlender* decision created a storm of opposition so strong in California that two major attempts to nullify its effects were mounted. The first was an unsuccessful attempt by the California Legislature to pass an "anti-wrongful life" bill to limit such decisions.[112] The second was the case of

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ful Life: A Legislative Solution to Negligent Genetic Counseling, 18 U.S.F.L. REV. 77, 85 (1983) (courts have avoided *Curlender* reasoning because of failure to deal with nexus question of comparing existence and nonexistence).

108. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 489 (Ct. App. 1980). The court based the decision on fundamental elements of jurisprudence which provide that "for every wrong there is a remedy." *See id.* at 489. This reasoning has been criticized for its failure to determine whether birth can be the proximate cause of a legally cognizable injury and for its avoidance of deciding whether birth is a detriment which calls for a remedy. *See* Comment, *Curlender v. Bio-Science Laboratories: Recognition of a New Cause of Action for "Wrongful Life",* 25 ST. LOUIS U.L.J. 455, 467 (1981). The *Curlender* court determined that there was no legal or public policy reasons to exempt a physician from liability for punitive damages in a wrongful life case where the necessary facts are proven. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 490 (Ct. App. 1980).

109. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 490 (Ct. App. 1980). One author has noted that by this "pain and suffering only" mode of recovery, the California court has removed the core element that had been asserted in the past, i.e., that the recovery sought was for the "right not to be born." *See* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 384 (1982).

110. *See* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 384 (1982) (suggesting two possible motivations for *Curlender* court's ruling). The author stated that it was likely that the court was trying to avoid any problems of appellate review by confining the "parameters of wrongful life." *See id.* at 384. The author further hypothesized that the court was trying to solve the wrongful life question solely on firm legal grounds, rather than relying on theological or philosophical arguments. *See id.* at 384.

111. *See id.* at 386 (*Curlender* revamped cause of action to fit within traditional legal principles; wrongful life became "hybrid" negligence or malpractice action).

112. *See id.* at 387. The bill as originally drafted would have totally abolished any future cause of action for wrongful life. *See id.* at 388. The bill was rejected, however, and was redrafted and passed in a form that only banned infants from bringing wrongful life suits

Turpin v. Sortini,[113] decided by the California Supreme Court almost two years later.

In *Turpin,* a girl born with congenital deafness was not allowed recovery for general pain and suffering damages for being denied the right to be born as a "whole human being," but was awarded special damages for extraordinary teaching and equipment expenses.[114] Unlike *Curlender,* the court found the problem was not whether a legally cognizable injury occurred, but rather if any damages could be fashioned by the court.[115] In an unprecedented opinion, the court determined that in some cases nonexistence might be preferable to an impaired existence.[116] The court was concerned, however, with the difficulty that a wrongful life action would present to the average jury.[117] First, the court feared that the average juror was not qualified to compare existence and nonexistence, as required by the law of compensatory damages.[118] Second, in valuating the injury, the jury would have no "frame

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against their parents. *See id.* at 388. This could be considered as a tacit approval by the California Legislature of the normal cause of action against the physician, even though *Turpin* refused to consider it as such. *See id.* at 389.

113. 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

114. *See id.* at 956, 182 Cal. Rptr. at 339. In *Turpin,* the parents of a small child, suspecting a hearing deficiency, took her to a hearing specialist for a diagnosis. *See id.* at 956, 182 Cal. Rptr. at 339. The defendant-doctor pronounced her hearing to be normal even though she was really totally deaf as the result of a hereditary disease. *See id.* at 956, 182 Cal. Rptr. at 339. In reliance on this diagnosis, and before discovering her true condition, the Turpins conceived another girl who was born with the same disease. *See id.* at 956, 182 Cal. Rptr. at 339. The second child alleged negligence in failure to diagnose the deafness in her older sister, and that it was this negligence that caused her injury. *See id.* at 956, 182 Cal. Rptr. at 339.

115. *See id.* at 965, 182 Cal. Rptr. at 346. The Supreme Court of California addressed the issue as the *Curlender* court did, by considering the action as a standard tort or malpractice case. *See id.* at 959, 182 Cal. Rptr. at 342. The court remarked that the defendants had not disputed that they had breached a duty to the plaintiff's sister, and since the risks of injury to later children were reasonably foreseeable, this duty, breach, and proximate causation existed as to the plaintiff also. *See id.* at 960, 182 Cal. Rptr. at 343.

116. *See id.* at 962, 182 Cal. Rptr. at 345. While endorsing prior courts' efforts to uphold the sanctity and importance of impaired life, the *Turpin* court questioned how awarding damages to a handicapped child in any way disfavored the sanctity of life. *See id.* at 961-62, 182 Cal. Rptr. 344-45. The court concluded by saying:

> In this case, in which the plaintiff's only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all. Other wrongful life cases, however, have involved children with much more serious, debilitating and painful conditions . . . . Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consenus that life is preferable to never having been born at all.

Id. at 962-63, 182 Cal. Rptr. at 345-46.

117. *See id.* at 963-64, 182 Cal. Rptr. at 346-47.

118. *See id.* at 963-64, 182 Cal. Rptr. at 346-47. The court felt there was a great difference between assessing damages in a personal injury or wrongful death case and trying to do

of reference in their own general experience to appreciate what the plaintiff has lost—normal life without pain and suffering."[119] Thus, the court concluded that general damages for pain and suffering were not recoverable in a wrongful life action.[120] The court then recognized, however, that the special damages claimed by the child would be recoverable even in the absence of general damages.[121] Thus, California became the first state to recognize wrongful life, both as a cause of action and as a valid way to recover damages.

Two other state courts have followed the *Turpin* rationale in allowing a limited wrongful life recovery. First, in *Harbeson v. Parke-Davis, Inc.*,[122] the

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the same in a wrongful life action. *See id.* at 963, 182 Cal. Rptr. at 346. The problem occurs not in determining damages for an admitted injury, but in actually determining whether an injury has occurred at all, a decision the average juror is not experienced to make since he has no knowledge of nonexistence. *See id.* at 963-64, 182 Cal. Rptr. at 346-47; *see also* Speck v. Finegold, 408 A.2d 496, 512 (Pa. Super. Ct. 1979), *rev'd in part,* 439 A.2d 110 (Pa. 1981) (Spaeth, J., concurring & dissenting) (monetary value of health over impaired existence within experience of average juror; value of nonexistence not). *But see* Note, *The Judicial System's Wrongful Conception of "Wrongful Life",* 6 W. NEW ENG. L. REV. 493, 504 (1983) (not a valid reason to deny recovery since juries in most tort cases cannot imagine quality of plaintiff's life before and after injury) (citing Bryan v. Ross, 114 S.E.2d 97, 99 (S.C. 1960)); *cf.* Capron, *Tort Liability in Genetic Counseling,* 79 COLUM. L. REV. 618, 649 (1979) (existence and nonexistence necessary comparison in wrongful death actions; wrongful life should not be denied on this ground).

119. *See* Turpin v. Sortini, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 347 (1982). The court reasoned that while fixing general damages for pain and suffering in a personal injury case is difficult, at least the average juror will have an idea of what was lost by the wrong inflicted. *See id.* at 964, 182 Cal. Rptr. at 347. The court felt that this was not the case in a wrongful life action because "what the plaintiff has 'lost' is not life without pain and suffering but rather the unknowable status of never having been born." *See id.* at 964, 182 Cal. Rptr. at 347.

120. *See id.* at 964, 182 Cal. Rptr. at 347. The court held that general pain and suffering damages in this particular case were too difficult to measure and that they would not "in any meaningful sense compensate the plaintiff for the loss of the opportunity not to be born." *See id.* at 964, 182 Cal. Rptr. at 347.

121. *See id.* at 965, 182 Cal. Rptr. at 348. The court thought it illogical to only allow the parents to recover for the cost of any special medical or educational expenses caused by the negligence. *See id.* at 965, 182 Cal. Rptr. at 348. Holding that these damages were measurable and certain, the court limited damages only to the extent of not allowing a double recovery should the parents bring a wrongful birth suit. *See id.* at 965, 182 Cal. Rptr. at 348; *see also* Comment, *Curlender v. Bio-Science Laboratories and Turpin v. Sortini: The Rise and Fall of Wrongful Life in California,* 13 SW. L.J. 369, 393 (1982) (*Curlender* was important decision for wrongful life supporters, but *Turpin* changed wrongful life into secondary source of recovery in wrongful birth suit).

122. 656 P.2d 483 (Wash. 1983). Mrs. Harbeson had been diagnosed as having epilepsy and had been prescribed an anti-convulsant drug by the defendant-physician. *See id.* at 486. She and her husband asked three doctors on different occasions whether the drug would have an effect on any future children. *See id.* at 486. All three doctors responded that there could be some minor correctable effects, such as temporary hirsuitism or cleft palate, but that no major problems would occur. *See id.* at 486. The Harbesons' next two children were affected

Washington Supreme Court cited *Turpin* to show inconsistency in granting damages to the parents alone for costs of medical care stemming from the handicapped nature of the child.[123] Reaffirming that wrongful life did not abandon the sanctity of human life, and that general pain and suffering damages were not available,[124] the court followed *Turpin* and allowed recovery of medical costs by the child.[125] Second, in *Procanik v. Cillo,*[126] the New Jersey Supreme Court vitiated its earlier landmark holdings and allowed recovery for the child's special medical expenses.[127] The court found it illogical to allow the parents a reimbursement of special damages for wrongful birth while disallowing the same recovery for the child,[128] particularly when the parents' claim was barred by the statute of limitations.[129] The court refused to allow damages for pain and suffering, holding that the theoretical

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with a variety of mental and physical abnormalities that would have been revealed had a proper inquiry been made by the doctors. *See id.* at 486. *But see* Note, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis,* 58 WASH. L. REV. 649, 652 n.26 (1983) (discussion of whether even if proper search had been made, literature discussing potential problem could have been found).

123. *See* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 495 (Wash. 1983). The court agreed with the *Turpin* opinion by remarking that medical costs do not disappear upon attaining majority and by expressing fear that this burden will thereafter fall either on the parents or possibly the state. *See id.* at 495. The *Harbeson* court determined that it was better to place these costs on the person whose negligent act proximately caused the situation. *See id.* at 495.

124. *See id.* at 496 (court agreed with long line of cases, including *Turpin,* holding that existence cannot be compared with nonexistence to determine general damages).

125. *See id.* at 496. The court concluded that foreseeable extraordinary medical and training expenses resulting as a consequence of a defective child are easily and readily calculable and, as such, recoverable. *See id.* at 496. *But see* Note, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis,* 58 WASH. L. REV. 649, 668 (1983) (decision failed to adequately confront issue of whether birth is an "injury" cognizable at law).

126. 478 A.2d 755 (N.J. 1984). Much as in *Gleitman, Procanik* involved the negligent failure to diagnose rubella in a pregnant woman, resulting in a baby born with serious birth defects. *See id.* at 757.

127. *See id.* at 764. The court noted the slow evolution in the law from a denial of both parents' and child's causes of action, to an acceptance of the parents' suit, to a limited recognition of the child's ability to sue. *See id.* at 758-60.

128. *See id.* at 762. The court noted that only injustice could result from making the parents' recovery exclusive. *See id.* at 762. Further, the court remarked that "law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice." *Id.* at 762.

129. *See id.* at 762. Justice Pollock ruled that:

> Here, the parent's claim is barred by the statute of limitations. Does this mean that Peter must forego medical treatment for his blindness, deafness, and retardation? We think not. His claim for the medical expenses attributable to his birth defects is reasonably certain, readily calculable, and of a kind daily determined by judges and juries.

Id. at 762. The court based much of its reasoning, in allowing the child to recover damages, on the tremendous effect medical disabilities can have on an interdependent family unit. The recovery of compensatory damages from the negligent physician was seen by the court to be a necessary conclusion of an act that so affects the family unit as a whole. The court felt that

justice of allowing these damages is predominated by the "essentially irrational and unpredictable nature of that claim."[130]

III. PRENATAL TORTS IN TEXAS

A. *Actions for Wrongful Pregnancy and Wrongful Birth*

Texas courts have encountered numerous actions alleging some type of prenatal negligence on the part of a physician.[131] The confusion in denominating suits as wrongful pregnancy, wrongful birth, or wrongful life has not been as dramatic in Texas as in other jurisdictions, but is nevertheless present.[132]

Early in the national evolution of wrongful pregnancy suits, a Texas court ruled that public policy precluded awarding any damages to the parents of a healthy child for his birth.[133] Texas has steadfastly clung to that decision,[134] despite contrary holdings in other jurisdictions.[135] The most recent Texas case on point denied any recovery by the parents for the birth of a child after

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brothers and sisters of the injured child must be considered, so that medical costs will not drain away funds for their food, clothes, or college education. *See id.* at 762.

130. *See id.* at 763. The ultimate problem was once again seen by the court to be the lack of a natural way to compare the pain and suffering of impaired existence with nonexistence, or to measure nonexistence at all. *See id.* at 763.

131. *See, e.g.,* Nelson v. Krusen, 678 S.W.2d 918, 920 (Tex. 1984) (wrongful life action brought by child); Jacobs v. Theimer, 519 S.W.2d 845, 847 (Tex. 1975) (parents brought wrongful birth action); Hickman v. Myers, 632 S.W.2d 869, 870 (Tex. App.—Fort Worth 1982, no writ) (wrongful pregnancy action brought by parents).

132. *Cf.* Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975) (court referred to wrongful life and wrongful birth as part of same action).

133. *See* Hays v. Hall, 477 S.W.2d 402, 406 (Tex. Civ. App.—Eastland 1972), *rev'd on other grounds,* 488 S.W.2d 412 (Tex. 1973). The case involved a child who was born after a negligently performed vasectomy. *See id.* at 403. In refusing to overturn the trial court's dismissal, the court of appeals noted that a doctor should not have to pay for satisfaction and affection which parents receive from a healthy child. *See id.* at 406.

134. *See* Hickman v. Myers, 632 S.W.2d 869, 870 (Tex. App.—Fort Worth 1982, no writ) (parents cannot be damaged by birth of normal child); Sutkin v. Beck, 629 S.W.2d 131, 131-32 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (intangible benefits to plaintiffs outweigh economic loss; no recovery); Silva v. Howe, 608 S.W.2d 840, 842 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (statute of limitations ran on claim; no recovery even if had not); Terrell v. Garcia, 496 S.W.2d 124, 127-28 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (even if no public policy argument, benefits still outweigh loss), *cert. denied,* 415 U.S. 927 (1974).

135. *See, e.g.,* Custodio v. Bauer, 59 Cal. Rptr. 463, 476-77 (Ct. App. 1967) (plaintiff entitled to total costs of raising unplanned child so that family resources not depleted); Troppi v. Scarf, 187 N.W.2d 511, 518-19 (Mich. 1971) (court allows recovery under "benefits rule," which balances benefits and costs of having a child); Kingsbury v. Smith, 442 A.2d 1003, 1006 (N.H. 1982) (traditional tort damages of medical expenses, pain and suffering, and wife's lost earnings).

a negligently attempted sterilization.[136] The court held as a matter of law that public policy in Texas recognizes that the benefits of having a healthy child outweigh any economic loss incurred in rearing such a child.[137]

In contrast to the decisions involving wrongful pregnancy, the Texas Supreme Court, in *Jacobs v. Theimer,*[138] became the first court in the United States to allow a recovery for wrongful birth.[139] In granting recovery for all pecuniary expenses necessary for care of a child, the court held that there were no public policy arguments that should keep parents from being compensated.[140] The court qualified its decision by holding that relief of the economic burden placed on the family had none of the speculative qualities which would accompany pain and suffering damages.[141] The wrongful birth

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136. *See* Hickman v. Myers, 632 S.W.2d 869, 872 (Tex. App.—Fort Worth 1982, no writ). The Hickmans were already the parents of two children and opted for sterilization as a means of birth control. *See id.* at 870. The operation on Mrs. Hickman was unsuccessful because the defendant-surgeon failed to completely seal off the right fallopian tube, allowing pregnancy to occur. *See id.* at 870.

137. *See id.* at 872 (no injury in birth of healthy child as intangible benefits of parenthood outweigh monetary burdens). The Texas public policy has been derived from many sources. *See, e.g.,* Wilczynski v. Goodman, 391 N.E.2d 479, 487 (Ill. 1979) (normal healthy life not compensable wrong, but esteemed right); Christensen v. Thornby, 255 N.W. 620, 622 (Minn. 1934) (father blessed with another child has not suffered any injury); Ball v. Mudge, 391 P.2d 201, 204 (Wash. 1964) (costs associated with pregnancy and birth far outweighed by gift of healthy child). *But cf.* Troppi v. Scarf, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971) (state law funding contraceptives shows public policy no longer supports denial of wrongful pregnancy damages); Note, *Confusion of Actions in Wrongful Life, Wrongful Birth, and Wrongful Pregnancy,* 35 ALA. L. REV. 179, 185 (1984) (difficult to call birth blessing when parents have tried to avoid it). One court recently held that rights of contraception and family planning are being impaired by failure to recognize a wrongful pregnancy action. *See* Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982); *see also* Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (Cadena, J., dissenting) (regardless of any moral argument, parents have right to prevent conception and even abort child; any frustration of this right should be actionable), *cert. denied,* 415 U.S. 927 (1974).

138. 519 S.W.2d 845 (Tex. 1975). Mrs. Jacobs contracted rubella early in her pregnancy and later gave birth to a child with "rubella syndrome" birth defects. *See id.* at 847. She alleged that Dr. Theimer was negligent in his failure to diagnose the rubella and asked for special damages consisting of medical expenses and general damages for mental pain and suffering. *See id.* at 847. The trial court entered summary judgment for the defendant, but the supreme court reversed. *See id.* at 850.

139. *Cf. id.* at 849-50; *see* Comment, *The Risk of Birth Defects: Jacobs v. Theimer and Parents' Right to Know,* 2 AM. J.L. & MED. 213, 216 (1976-1977) (*Jacobs* first case to allow cause of action on claim of negligent genetic counseling).

140. *See* Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975). The court found that Dr. Theimer had a duty to make a disclosure of any risks discovered by his testing. *See id.* at 848. The court admitted that damages were the true difficulty in the case, but held that public policy could not justify depriving parents of information necessary for an informed decision and at the same time insulate the wrongdoer from liability. *See id.* at 848.

141. *See id.* at 849. *But see* Comment, *The Risk of Birth Defects: Jacobs v. Theimer and Parents' Right to Know,* 2 AM. J.L. & MED. 213, 238 (1976-1977) (*Jacobs* court should have

holding was affirmed in *Nelson v. Krusen,*[142] decided in October 1984, but the Texas Supreme Court simultaneously denied recovery for the attendant wrongful life suit in a case of first impression in Texas.[143]

B. *Actions for Wrongful Life: Nelson v. Krusen*

Tom and Gloria Nelson were the parents of a child who was afflicted with Duchenne muscular dystrophy,[144] when, in 1976, Mrs. Nelson became pregnant again and numerous tests were performed to determine whether an abortion should be considered.[145] Relying on Dr. Krusen's report, the Nelsons assumed everything was normal until long after the birth of their son, Mark.[146] While still an infant, yet after the medical malpractice statute of limitations had passed, Mark was diagnosed as having Duchenne muscular dystrophy.[147] The Nelsons brought a wrongful birth suit for themselves and a wrongful life suit for Mark, but the district court found that both actions were barred by limitations and granted summary judgment for the defendants.[148] The Dallas court of appeals upheld the statute of limitations bar against the parents and decided that Mark's claim was not tenable under Texas law.[149]

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awarded pain and suffering damages as they are no more difficult to comprehend than in personal injury cases).

142. 678 S.W.2d 918 (Tex. 1984).

143. *See id.* at 925. *Jacobs* dealt with an action arising from negligent genetic counseling, but only the parents brought suit and no wrongful life suit was brought on the child's behalf. *See* Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975). Thus, *Nelson* provided the Texas court with the first chance to act on the wrongful life claim. *See* Nelson v. Krusen, 678 S.W.2d 918, 924-25 (Tex. 1984).

144. *See* Nelson v. Krusen, 678 S.W.2d 918, 920 (Tex. 1984).

145. *See id.* at 920. Mrs. Nelson specifically consulted with Dr. Krusen to determine if she was a genetic carrier of Duchenne muscular dystrophy. *See id.* at 920.

146. *See id.* at 920. The Nelsons alleged that the choice not to terminate the pregnancy was due to the assertions by the defendant that Mrs. Nelson was not a genetic carrier of the disease. *See id.* at 920.

147. *See id.* at 920. Mark Nelson was born on November 24, 1976, but it was not until November 12, 1979, that a nursery school examination revealed that he had "tight heel cords bilaterally" which were a symptom of his disease. *See id.* at 920.

148. *See id.* at 919.

149. *See* Nelson v. Krusen, 635 S.W.2d 582, 584-85 (Tex. App.—Dallas 1982), *rev'd in part,* 678 S.W.2d 918 (Tex. 1984). The court of appeals felt the "discovery" rule, which prevents the running of the statute of limitations until the injury is or should be discovered, was not applicable to the Nelson's malpractice claim since prenatal malpractice did not fall into the three exclusive categories provided by the Texas Supreme Court in Robinson v. Weaver, 550 S.W.2d 18, 19-20 (Tex. 1977) (foreign objects, negligent vasectomy, excessive x-ray exposure). *See id.* at 584. The court of appeals ruled that Mark's claim could not be supported by Texas law and refused to allow his claim until endorsed by the Texas Supreme Court. *See id.* at 585-86.

The supreme court, on a motion for rehearing,[150] affirmed in part and reversed in part the determination of the court of appeals.[151] Speaking for the majority, Justice Spears ruled that the two year statute of limitations under article 5.82, section 4, of the Texas Insurance Code,[152] as applied to bar the parents' suit, was unconstitutional as violating the "open courts" provision of the Texas Constitution.[153] In implementing the "discovery rule" to wrongful birth actions,[154] the court held that the Nelsons had to sue

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150. *See* Nelson v. Krusen, 27 Tex. Sup. Ct. J. 82, 84-86 (Nov. 19, 1983) (withdrawn opinion denied both wrongful life and wrongful birth claims), *withdrawn,* 678 S.W.2d 918 (Tex. 1984).

151. *See* Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984).

152. TEX. INS. CODE ANN. art. 5.82, § 4 (Vernon 1981), *repealed by* Medical Liability and Insurance Improvement Act, ch. 817, § 41.03, 1977 Tex. Gen. Laws 2039, 2064. For essentially the same provisions, see TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1985). The statute, in part, provides:

> Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim . . . is completed.

Id.

153. *See* Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984); TEX. CONST. art. I, § 13 (1876, amended 1984). "All courts shall be open, and every person for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* The *Nelson* court reasoned that Texas case law was in conformity with the principle that the legislature cannot "make a remedy by due course of law contingent on an impossible condition." *See* Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984); *see also* Sax v. Vottler, 648 S.W.2d 661, 665-66 (Tex. 1983) (right to enter Texas courts only abrogated by legislature when legislative basis for statute outweighs denial of constitutional right); McCrary v. City of Odessa, 482 S.W.2d 151, 153 (Tex. 1972) (children and those incompetent to comply with notice requirement excused from performance). The *Nelson* court concluded that the statute barring the Nelsons' claim would require suit to be brought before there could be any reason to believe that they should sue. *See* Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984). In holding the statute unconstitutional, the court noted that it could not defer to such an unreasonable condition, as it would be a blatant abdication of the judicial duty to secure rights granted by the Texas Constitution. *See id.* at 923.

154. *See id.* at 923; Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967) (statute of limitations does not run until injury is or should be discovered). The discovery rule has also been applied to negligent vasectomy cases. *See* Christ v. Lipsitz, 160 Cal. Rptr. 498, 501 (Ct. App. 1979) (statute of limitations begins to run only when reasonable person would be put on inquiry); Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1973) (in failed vasectomy cases, statute of limitations begins when plaintiff discovers operation's failure). Not all jurisdictions, however, have adopted the discovery rule. *See* Clark v. Randall, 272 S.E. 2d 769, 770 (Ga. 1980) (statute of limitations for improper sterilization two years); McKnight v. New York City Health & Hosp. Corp., 416 N.Y.S.2d 63, 64 (App. Div. 1979) (statute of limitation begins running day of operation). *See generally* Note, *Medical Malpractice: "Discovery Rule" Rejected in Wrongful Birth or Wrongful Life Actions Arising from Negligent Sterilization Operations,* 6 AM. J. TRIAL AD. 511, 511-12 (1983) (case law approving or disapproving of application of discovery rule in medical malpractice cases).

on their own behalf within two years of the discovery of the negligent act.[155] Since the Nelsons had met this criterion, the court reversed the wrongful birth portion of the judgment.[156]

Turning its attenion to the issue of Mark's wrongful life claim, the court found that prior case law had provided two reasons for denying wrongful life claims.[157] The first consideration that the court noted was the public policy supporting the sanctity of human life.[158] The second factor was the impossibility of determining damages due to the necessity of comparing life and nonlife.[159] The court discussed and attempted to distinguish *Turpin, Harbeson,* and *Procanik,* concluding that the impossibility of determining if injury had indeed occurred necessarily barred any wrongful life claim.[160]

Both the wrongful birth and the wrongful life aspects of this holding were in dispute by the members of the court, as evidenced by the separate opinions filed by Justices Robertson,[161] Kilgarlin,[162] Gonzales,[163] and Wal-

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155. *See* Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984). The statute of limitations in *Nelson* could only begin to run when the parents knew or should have known of Mark's disability. *See id.* at 923. The earliest this could have been was in February 1980, so the statute of limitations began to run then, rather than at Mark's birth. *Cf. id.* at 920.

156. *See id.* at 925.

157. *See id.* at 924.

158. *See id.* at 924. The court cited Becker v. Schwartz, 386 N.E. 2d 807, 812, 413 N.Y.S.2d 895, 902 (1978), saying that there is an unwillingness to allow a plaintiff damages merely for being alive, this being due to the high value that society has placed on human life. *See* Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984).

159. *See* Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984). The court felt that the "benefit rule" would preclude any chance of recovery. *See id.* at 924. The benefit rule provides that when a tortfeasor's act causes harm to a plaintiff, but at the same time confers a benefit to him, the value of this benefit mitigates the damage award. *See* RESTATEMENT (SECOND) OF TORTS § 920, at 509 (1979). This rule was believed by the court to require the comparison between life and nonlife that had often been condemned. *See* Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984).

160. *See* Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984). The court insisted that the holding was not based on a "mere difficulty in assessing a dollar amount of damages," since damages need not be precise in order to recover. *See id.* at 925.

161. *See id.* at 925 (Robertson, J., concurring). Justice Robertson felt that the majority was wrong in labeling the parents' cause of action as "wrongful birth," as it was more properly included under simple medical negligence actions because it fit within the standard tort framework. *See id.* at 925-26. On the wrongful birth claim, he felt Sax v. Vottler, 648 S.W.2d 661, 665 (Tex. 1983) was controlling and found no need to decide whether "art. 5.82, sec. 4 has legislatively abolished the 'discovery rule.' " *See* Nelson v. Krusen, 678 S.W.2d 918, 928 (Tex. 1984) (Robertson, J., concurring). As to the wrongful life claim, Justice Robertson argued that neither public policy nor difficulty of determining damages should bar recovery. *See id.* at 928. Rather, wrongful life was denied because, under standard rules of negligence, no injury could be shown. *See id.* at 928. Justice Robertson noted that "[i]t is not fatal to a cause of action in negligence that a plaintiff cannot prove the *quantum* of injury; but a plaintiff must always establish the *existence* of injury. This is an impossible burden for a wrongful life plaintiff to meet." *Id.* at 929; *cf.* Becker v. Schwartz, 386 N.E. 2d 807, 812, 413 N.Y.S.2d 895, 900

lace.[164] But the sum of the decision, while supporting a recovery for the parents, failed to allow an independent recovery for the child as well, which has been seen as necessary by courts and commentators alike.

1. Possible Injustices in Failure to Allow Recovery for Wrongful Life

Failing to allow a wrongful life recovery can lead to substantial injustice in many ways. First, there is the possibility that the parents will fail to recover.[165] For example, the statute of limitations may bar action even after adoption of the discovery rule, such as in *Procanik.*[166] In *Nelson,* had it not been for application of the discovery rule, Mark would have been left totally without monetary support for his condition since his parents would have been barred from filing suit.[167] If damages had been awarded to Mark, the

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(1978) (child has suffered no injury cognizable at law); Alquijay v. St. Luke's-Roosevelt Hosp. Center, 471 N.Y.S.2d 2, 3 (App. Div. 1984) (birth with defect does not constitute injury to infant).

162. *See* Nelson v. Krusen, 678 S.W.2d 918, 931 (Tex. 1984) (Kilgarlin, J., concurring & dissenting). Justice Kilgarlin agreed with the majority on the issue of wrongful birth, but felt that the court erred in failing to allow Mark special damages in the wrongful life suit. *See id.* at 931-32. Recognizing wrongful life, noted Justice Kilgarlin, would be in line with public policy objectives of deterring negligent conduct and insuring proper genetic counseling. *See id.* at 935. Wrongful life, he concluded, would ensure that the difficult, yet constitutionally protected, decision whether to seek abortion would remain in the parents' hands. *See id.* at 935.

163. *See id.* at 935 (Gonzales, J., concurring & dissenting). Justice Gonzales felt that the majority was correct in declaring the statute of limitations unconstitutional and also in denying the wrongful life action. *See id.* at 935. Justice Gonzales urged that questions on the rights of the unborn should be rethought in a more pro-life manner. *See id.* at 935. Thus, he called for overruling of the *Jacobs* decision and insisted that there be no "legal entitlement to a perfect child." *See id.* at 935.

164. *See id.* at 935. (Wallace, J., joined by McGee, J., dissenting). The major thrust of Justice Wallace's opinion attacked the inconsistency of the majority's decision to allow wrongful birth damages, but at the same time disallow wrongful life damages for essentially the same injury. *See id.* at 935-36. Thus, Justice Wallace was of the opinion that *Jacobs* should be overruled in order to avoid the discrepancy between the two causes of action. *See id.* at 936.

165. *See* Turpin v. Sortini, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982). The court noted it would be illogical to allow only the parents to recovery medical expenses, saying:

> [I]f such a distinction were established, the afflicted child's receipt of necessary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care.

Id. at 965, 182 Cal. Rptr. at 348.

166. *See* Procanick v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (parents' suit barred by statute of limitations); *see also* Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983) (parents failed to assert cause of action within statute of limitations); Silva v. Howe, 608 S.W.2d 840, 842 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (wrongful pregnancy action, statute of limitations barred parents' claim).

167. *See* Nelson v. Krusen, 635 S.W.2d 582, 584-86 (Tex. App.—Dallas 1982), *rev'd in part,* 678 S.W.2d 918, 925 (Tex. 1984). If the appellate court and original supreme court

court would have prospectively eliminated a need for future action by insuring a child recovery even if his parents are denied one.[168]

Additionally, injustice can result by not allowing the child to recover since any sum gained by the parents will not necessarily be used towards alleviating the child's difficulties.[169] In most situations, when the parents bring suit in the name of their child, the child is the party who recovers the damages.[170] The court can then place the proceeds in trust to ensure the child receives the benefits due.[171] Thus, a situation is envisioned where the parents have no trust in favor of the child to limit expenditures, and they exhaust the money, leaving the child with no support.[172] Furthermore, if the parents of an afflicted child die without creating a provision for the child from the award, the child could be denied the funds for proper care by the

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decisions had been allowed to stand, neither Mark nor his parents would have recovered any expenses necessary for his care. *See id.* at 585-86.

168. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 440 (2d ed. 1977). Posner suggests that it is inefficient to make a ruling that will require more judicial time and litigation to define, when a different ruling can be made that solves the problem altogether. *See id.* at 440. One of the major criticisms that can be levelled against the *Nelson* decision is that it is inefficiently narrow in scope and will require further suits to test the breadth of its holding, thereby placing an otherwise avoidable burden on the Texas court system. *See* Nelson v. Krusen, 678 S.W.2d 918, 933 (Tex. 1984) (Kilgarlin, J., concurring & dissenting) (necessity of deciding issues postponed by court's ruling in *Nelson).*

169. *See* Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action,* 18 DUQ. L. REV. 857, 868 n.56 (1980). "No probate court and no guardian can insure that the money provided for the care and maintenance of the child will enure to the child's benefit. Arguably, nothing prevents the parents from using that money for their own purposes." *Id.* 868 n.56.

170. *See, e.g.,* Safeway Stores, Inc. v. Rutherford, 130 Tex. 465, 468, 111 S.W.2d 688, 689 (1938) (in suit brought on behalf of minor by parents as next friends, minor true party plaintiff); Allen v. Roark, 625 S.W.2d 411, 416 (Tex. App.—Fort Worth 1981) (if next friends institute suit on behalf of minor, minor and not next friend true plaintiff), *rev'd in part,* 633 S.W.2d 804 (1982); *Ex Parte* Taylor, 322 S.W.2d 309, 311 (Tex. Civ. App.—El Paso 1959, no writ) (child real party plaintiff in suit by next friend).

171. *See* Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980) (parents received reversionary trust for child, payments to parent not made in lump sum, but rather disbursed from trust account as necessary to meet expenses); Note, *Robak v. United States: A Precedent-Setting Damage Formula for Wrongful Birth,* 58 CHI-KENT L. REV. 725, 755-60 (1982). The reversionary trust created by the court solves two problems: (1) it ensures that the child will always be provided for, and (2) it ensures that no windfall will occur, as the trust will revert back to government upon the child's death. *See id.* at 755-60.

172. *Cf.* Berman v. Allan, 404 A.2d 8, 18 (N.J. 1979) (Handler, J., concurring & dissenting). Justice Handler remarked that many parents might have serious problems in accepting the burden that is placed on them by having a handicapped child. *See id.* at 18. "While some individuals confronted by tragedy respond magnificently and become exemplary parents, others do not." *Id.* at 18. Justice Handler specifically pointed out the *Becker* case, where the parents were allowed to recover damages, but subsequently put their handicapped child up for adoption. *See id.* at 18.

workings of intestate succession.[173] If intestate succession takes place, the recovery could be so divided that it would not adequately defray the medical expenses incurred.[174] Further, even if a will exists, the child is not an assured beneficiary of the portion of the estate that represents the recovery, as the testator may disburse his estate in any way he wishes.[175] This situation could also lead to a child's becoming a ward of the state, forcing the taxpayers to subsidize the negligence of the physician.[176] By allowing the child compensation independent of parental recovery, the court can appoint a trustee, and the child need not fear the actions of spendthrift or myopic parents.[177]

2. Grounds of Criticism of the *Nelson* Decision

The *Nelson* court found that similar cases relied primarily on two postulates in denying all recovery in a wrongful life claim.[178] The first axiom is the public policy of protecting the "sanctity of human life," which, in essence, is a decision that life, no matter how impaired, is always better than nonlife.[179] This reasoning can be attacked in three ways.

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173. *Cf.* TEX. PROB. CODE ANN. § 38 (Vernon 1980).

174. *Cf. id.*. The code provides that if a parent dies without a spouse and without a will, the property in the estate will go to the children. *See id.*. If there are children other than the afflicted child, the estate will be divided, each child receiving an equal share, with a corresponding division of any money originally destined to go to the handicapped child. *See id.* § 43. In addition, there is the danger of high estate taxes or improper estate management substantially depleting any recovery meant for the child's adulthood. *See* A. CASNER, I ESTATE PLANNING 19-21 (4th ed. 1980). Both federal and state governments place a tax on the estate left by a decedent, and in extreme situations the amount claimed can be more than the total value of the estate. *See id.* at 20-21; W. CASEY, THE TRUTH ABOUT PROBATE AND FAMILY FINANCIAL PLANNING: HOW TO BUILD AND PRESERVE YOUR WEALTH 13-14 (1967) (independent support of incompetent child essential to assure child's security and to remove financial burden from siblings).

175. *See* 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 171, at 800 (3d ed. 1960) (as part of estate of testator, proceeds of recovery may be distributed to anyone chosen by testator because child has no "natural or inalienable right" to take under will).

176. *See* Nelson v. Krusen, 678 S.W.2d 918, 934 (Tex. 1984) (Kilgarlin, J., concurring & dissenting) (if something happens to parents, state might have to shoulder support costs); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 495 (Wash. 1983) (burden of care of defective child in danger of shifting to state); *cf.* Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action,* 18 DUQ. L. REV. 857, 868 n.56 (1980) (no way to prevent parents from obtaining windfall by delegating care of child to state and taxpayers).

177. *See* Capron, *Tort Liability in Genetic Counseling,* 79 COLUM L. REV. 618, 639 (1979) (because afflicted child will be actual, if not formal, recipient of any wrongful birth recovery, no difficulty in allowing direct claims by child).

178. *See* Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984).

179. *See, e.g.,* Elliot v. Brown, 361 So. 2d 546, 548 (Ala. 1978) (right to abortion does not mean right not to be born, since latter alien to public policy and state interest); Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979) (society's deepest belief that life, in any form, better than

The first method is by examination and analysis of *Roe v. Wade* and companion cases, which provide that parental choice, within certain limits, supersedes any state or public policy interest.[180] Regardless of contrary arguments on moralistic grounds, the United States Supreme Court has intimated that the sanctity of human life will not always be the primary concern.[181] Thus, it would be contradictory to argue that public policy unswervingly supports the "high value of human life."[182]

Further, the recent support of "right to die" cases are further evidence of a situation where the sanctity of life is not of primary importance.[183] The holdings of these cases consistently pay tribute to the significance of human life, much as do the courts in the wrongful life context.[184] Yet, the cases are in accord in saying that the state interest in keeping a person alive, in some instances, does not outweigh the rights of that person to choose death over

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nonlife); Becker v. Schwartz, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (law cannot resolve issue against uniform high value of human life).

180. *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (state may not abrogate rights of woman to terminate pregnancy during first trimester). The privacy right seen in *Roe* also extends to the decision whether or not to procreate. *See* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (government may not infringe upon individual decision whether or not to procreate); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (right to privacy assures that decision to have children solely in parents' hands).

181. *See* Roe v. Wade, 410 U.S. 113, 163 (1973). The Supreme Court stated, in its landmark opinion, that while the state may have an important interest in protecting "the potentiality of human life," this interest is not sufficient to overcome the privacy right of a pregnant woman. *See id.* at 162. Only when the fetus is "viable" does any possibility of a "compelling state interest" come into play to limit the mother's decision. *See* id. at 163.

182. *See* Turpin v. Sortini, 643 P.2d 954, 962, 182 Cal. Rptr. 337, 345 (1982) (not accurate to say that public policy, as matter of law, always prefers life); Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (rejected prior case law decided on policy grounds; familial financial interdependence and justice require remedy for child); *cf.* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (award of damages in no way disavows human life).

183. *See* Rutherford v. United States, 438 F. Supp. 1287, 1290 (W.D. Okla. 1977) (plaintiff sought permission to use controversial drug Laetrile to fight cancer), *rev'd and remanded,* 582 F.2d 1234 (1978), *rev'd,* 442 U.S. 544 (1979), *cert. denied,* 449 U.S. 937 (1980); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 419 (Mass. 1977) (guardians of mental incompetent with leukemia sought to avoid chemotherapy treatment, which was only chance to fight disease); *In re* Quinlan, 355 A.2d 647, 651 (N.J. 1976) (guardian sought permission to discontinue extraordinary procedures sustaining daughter's life), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976). *See generally* Note, *Park v. Chessin: The Continuing Judicial Development of the Theory of "Wrongful Life",* 4 AM. J.L. & MED. 211, 222-23 (1978) (right to die cases example of circumstances where public policy can choose nonlife over life).

184. *Compare In re* Quinlan, 355 A.2d 647, 667 (N.J. 1976) (even under traditional Judeo-Christian beliefs on importance of human life, death sometimes blessing when compared with impaired existence) *with* Turpin v. Sortini, 643 P.2d 954, 962, 182 Cal. Rptr. 337, 345 (1982) (even though society and law place highest value on human life, nonlife may sometimes be considered better than impaired life).

impaired existence.[185] Here again, any argument that a suit by the child disavows human life is subsumed by the fact that in other cases public policy dictates that nonlife may be preferable.[186]

Finally, it would seem to be presumptuous to rule as a matter of law that under all circumstances life is better than nonlife.[187] The *Turpin* court ruled that public policy does not demand that impaired life always be considered better than nonlife.[188] Yet, no bright line can be drawn dividing what type of disability or severity will make life absolutely intolerable.[189] Therefore, to

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185. *See* Rutherford v. United States, 438 F. Supp. 1287, 1299 (W.D. Okla. 1977) (citizen has right to use controversial cancer fighting drug and could refuse treatment altogether, despite state interest in sanctity of human life), *rev'd and remanded,* 582 F.2d 1234 (1978), *rev'd,* 442 U.S. 544 (1979), *cert. denied,* 449 U.S. 937 (1980); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977) (most significant state interest in preservation of human life, but guardian may decide to discontinue medical treatment of ward even though death results); Eichner v. Dillon, 426 N.Y.S. 2d 517, 540 (App. Div. 1980) (both common-law right of self-determination and constitutional right to privacy protect choice of certain death over continued impaired existence).

186. *See* Note, *Park v. Chessin: The Continuing Judicial Development of the Theory of "Wrongful Life",* 4 AM. J.L. & MED. 211, 224 (1978) (analogy to right-to-die cases supports idea that in certain circumstances wrongful life plaintiff might establish nonexistence preferable to existence). There are other situations where society places the choice of individuals over the sanctity of human life, for example, "living wills," which as of 1983 were recognized by 11 states. *See* Comment, *Genetic Counseling and Medical Malpractice: Recognizing a Cause of Action for Wrongful Life,* 8 T. MAR. L. REV. 154, 175 n.173 (1983) (recognition of "living wills" weakens validity of "sanctity of life" arguments). For an example of such a document, see Note, *Statutory Recognition of the Right to Die: The California Natural Death Act,* 57 B.U.L. REV. 148, 158 (1977) (living will document, which allows adult to authorize doctors to withhold extraordinary medical treatment if terminal illness occurs). *But see* Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View,* 31 UCLA L. REV. 473, 495 (1983) (right-to-die cases do not support decision in wrongful life cases that nonexistence preferable to existence).

187. *See, e.g.,* Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law,* 1979 WASH. U.L.Q. 919, 937 (common sense provides that certain defects make nonlife preferable); Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 33 S.C.L. REV. 713, 737 (1982) (not invariably or necessarily true that benefits of life will always outweigh suffering); Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 65-66 (1970) (whether life preferable to nonlife dependent upon severity of defects). It has been noted that to conclude as a matter of law that life is always preferable debases purpose of genetic counseling, amniocentesis, therapeutic abortions and, further, denies maternal right to terminate pregnancy during the first trimester. *See* Note, *Wrongful Birth: Judicial Reticence With an Emerging Tort: The Negligent Performance of Genetic Counseling,* 6 U. DAYTON L. REV. 115, 131 (1981).

188. *See* Turpin v. Sortini, 643 P.2d 954, 962, 182 Cal. Rptr. 337, 345 (1982) (court found California "Living Will" statute ample support for determination that public policy did not blindly follow pro-life standard).

189. *See* Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View,* 31 UCLA L. REV. 473, 498-99 (1983). One problem with "line drawing" is that the trier of fact will be forced to define the amount of impairment "that renders a child's nonexis-

rule that no injury could ever reach this threshold would seem to be error since it is not difficult to imagine a state of existence where the pain is so great that even nonexistence is preferable.[190]

The second argument used in *Nelson* and similar courts to deny wrongful life is based on the problem of comparing existence and nonexistence to determine a compensatory damage figure.[191] This rationale can also be logically and legally refuted. First, several commentators have argued that this reasoning is faulty because the exact type of comparison is made by judges and juries every day in wrongful death cases.[192] In a wrongful death action, the decedent's condition before the accident is compared with the nonexistence at the time of the trial in order to determine damages.[193] A sum, while admittedly arbitrary, will be arrived at in an effort to compensate the injured party in some way.[194] If a jury can decide this type of question, there is no

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tence preferable to existence." *See id.* at 499. This decision is difficult and must necessarily be a personal judgment based on the facts of the situation. *See id.* at 499; *see also* Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice,* 55 S. CAL. L. REV. 477, 507-08 (1982) (problem with decisions as to which genetic disorders are debilitating enough to be genetically screened or to support negligent genetic counseling actions).

190. *See* Capron, *Tort Liability in Genetic Counseling,* 79 COLUM. L. REV. 618, 650-51 (1979) Professor Capron noted:

> There is nothing illogical in a plaintiff saying "I'd rather not be here suffering as I am, but since your wrongful conduct preserved my life, I am going to take advantage of my regretable existence to sue you." It may seem improbable that life with burdens is ever worse than nonlife, but the jury might so find on the facts of particular cases.

Id. at 650-51. Professor Capron then pointed out at length how some genetic diseases such as Lesch-Nyhan Syndrome make the slogan "life is always preferable" totally untenable and even absurd. *See id.* at 651 n.151.

191. *See* Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984).

192. *See, e.g.,* Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation,* 4 AM. J.L. & MED. 131, 149 (1978) (wrongful death damages involve same intangible considerations as wrongful life); Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice,* 55 S. CAL. L. REV. 477, 501 (1982) (establishing monetary sum for wrongful life no more onerous than arriving at damages for wrongful death); Note, *The Judicial System's Wrongful Conception of "Wrongful Life",* 6 W. NEW ENG. L. REV. 493, 504-05 (1983) (juries must make same comparisons necessary in wrongful life cases as in numerous wrongful death actions).

193. *See* Comment, *Wrongful Life: A Legislative Solution to Negligent Genetic Counseling,* 18 U.S.F.L. REV. 77, 99 (1983) (juries asked to ascertain what loss deceased has incurred and what deprivation worth to dependents in wrongful death action); *see also* Capron, *Tort Liability in Genetic Counseling,* 79 COLUM. L. REV. 618, 649 (1979) (in cases involving wrongful death, nonexistence compared to "normal" condition before accident).

194. *See* Landreth v. Reed, 570 S.W.2d 486, 492 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (survival action damages have no fixed standard, thus left to discretion based on specific fact situation); *see also* RESTATEMENT (SECOND) OF TORTS § 903 comment a (1979) (detriment in cases of bodily injury cannot truly be measured, so damage award necessarily only rough approximation of suffering endured).

reason to deny a similar inquiry in a wrongful life action.[195]

The logical strength of the court's argument is further weakened when the court denies wrongful life but affirms a recovery for wrongful birth.[196] Wrongful life and wrongful birth are essentially the same actions, requiring the same consideration and elements; they merely have different plaintiffs.[197] Texas law after *Jacobs* allows a court to decide between existence and nonexistence in a wrongful birth action by granting damages to care for a child who would be nonexistent had there been no negligence.[198] This decision necessarily calls for a value judgment on the part of the jury as to the relative worth of life and nonlife, just as the claim in wrongful life would.[199] Thus, because the court allows recovery in certain circumstances, but not under virtually identical others, the *Nelson* ruling seems to be inconsistent.[200]

In addition, *Nelson* and other courts appear to have placed reliance on a mistaken interpretation of compensatory damages.[201] The courts have reit-

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195. *See* Capron, *Tort Liability in Genetic Counseling,* 79 COLUM. L. REV. 618, 649 (1977) (should not consider problems in comparing existence to nonexistence in wrongful life as insurmountable when they can be overcome in other contexts).

196. *See* Nelson v. Krusen, 678 S.W.2d 918, 934 (Tex. 1984) (Kilgarlin, J., concurring & dissenting) (inconsistent to distinguish between wrongful birth and wrongful life in allowing damages); *id.* at 935 (Wallace, J., joined by McGee, J., dissenting) (inconsistency in allowing cause of action for wrongful birth but not allowing wrongful life).

197. *Compare* Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979) (parents claim based on deprivation of constitutional right to seek abortion) *with* Park v. Chessin, 400 N.Y.S.2d 110, 114 (App. Div. 1977) (child's claim based on deprivation of parental right of choice which essentially caused child to be born in impaired condition), *rev'd sub nom.* Becker v. Schwartz, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *Cf.* Nelson v. Krusen, 678 S.W.2d 918, 935 (Tex. 1984) (Wallace, J., dissenting). Justice Wallace argued that the majority opinion was "merely using the labels of 'wrongful life' and 'wrongful birth,' the meaning of which is the same, in an attempt to differentiate truly identical causes of action; one which is brought by the parent, and the other which is brought by the child." *Id* at 935 (Wallace, J., dissenting).

198. *See* Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975) (parents allowed recovery for economic burden originating from handicapped child).

199. *See* Nelson v. Krusen, 678 S.W.2d 918, 934 (Tex. 1984) (Kilgarlin, J., concurring & dissenting). Justice Kilgarlin observed that both wrongful birth and wrongful life required an election betwen discordant values. *See id.* at 934. This occurs because the jury in both actions must compare the imponderable blessings of bearing even a defective child with the unknown quality of nonexistence to arrive at a damage figure. *See id.* at 934.

200. *See* Turpin v. Sortini, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982) (illogical to disallow child recovery for its own medical care); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 495 (Wash. 1983) (no logic in refusing to allow child recovery but allowing same recovery for parent). *But see* Comment, *Wrongful Birth: The Emerging Status of a New Tort,* 8 ST. MARY'S L.J. 140, 145 (1976). The author felt there was no illogic in differentiating between the two causes of action since in a wrongful birth action "parents are not placed in the anomalous position of trying to sue themselves into oblivion, as are the children." *See id.* at 145.

201. *See* Comment, *The Wrongful Life Controversy: Curlender v. Bio-Science Laboratories and Turpin v. Sortini,* 18 IDAHO L. REV. 237, 248 (1982) (no need to restore plaintiff to his original position after personal injury under compensatory tort law). The *Nelson* court

erated that tort law is compensatory, requiring that the conditions of the plaintiff before and after the injury be discerned to arrive at a figure approximating the injury.[202] The Restatement (Second) of Torts, however, provides, in an official comment, that damages in personal injury suits are not necessarily compensatory because a court cannot, strictly speaking, put the plaintiff back in his original position.[203] Therefore, the recovery referred to as compensatory damages is given for humiliation, and pain and is designed as a "pecuniary return for what [one] has suffered or is likely to suffer."[204] The child claiming wrongful life cannot be placed back in his original position, but pain and suffering undoubtedly exist and therefore should be compensable.[205]

3. Refusal to Follow Recent Trends in Case Law and Public Policy

There are at least two basic tort policies that would be best served if a wrongful life award were allowed for the child. First, there is the theory that damages should be shifted to the party that is in the best position to spread

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avoided discussion of compensatory damages by merely stating that the "benefit rule" made the balancing of life and nonlife necessary and that this was impossible. *See* Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984). Other courts, however, have considered the nature of compensatory damages and their effect on the outcome of wrongful life actions. *See* Gleitman v. Cosgrove, 227 A.2d, 689, 692 (N.J. 1967) (condition plaintiff would have been in had there been no negligence compared to injured condition as consequence of that negligence). Any court that bases its decision on the *Gleitman* refusal to compare the value of life with impairments against the value of nonexistence is necessarily relying on principles of compensatory damages. The Restatement (Second) of Torts defines compensatory damages as "the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." *See* RESTATEMENT (SECOND) OF TORTS § 903 (1979).

202. *See, e.g.,* Elliot v. Brown, 361 So. 2d 546, 547-48 (Ala. 1978) (agreed that in order to determine damages, plaintiff's condition before and after must be examined; impossible in wrongful life); Turpin v. Sortini, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346 (1982) (in denying general damages, one rationale was impossibility of arriving at fair sum); Berman v. Allan, 404 A.2d 8, 11-12 (N.J. 1979) (court cannot make necessary comparison between plaintiff's position before and after negligence). *But see* Phillips v. United States, 508 F. Supp. 537, 542 (D.S.C. 1980) (in suit by child mere difficulty in arriving at damages should not bar recovery).

203. *See* RESTATEMENT (SECOND) OF TORTS § 903 comment a (1979). The comment provides that there is a difference between damages for pecuniary loss and those for personal injury. *See id.* § 903 comment a. Yet, it is acknowledged that the law cannot restore the injured person to his prior position because "money is not equivalent of peace of mind." *See id.* § 903 comment a.

204. *See id.* § 903 comment a. The comment further provides that there need only be a very rough equivalence between the amount awarded as damages and the quantum of suffering. *See id.* § 903 comment a.

205. *See* Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 488 (Ct. App. 1980) (essence of wrongful life is that infant exists and suffers due to negligence, thus should be compensated).

the costs involved.[206] In the wrongful life situation, the physician can carry liability insurance that would spread this loss over a large portion of society, thus satisfying this goal.[207]

Further, there is the policy goal of deterrence of socially harmful conduct.[208] In cases where the parents' suit is barred, and no wrongful life recovery is allowed, the physician will never be required to make amends for his negligent acts.[209] But, if a wrongful life recovery is allowed, the goal of deterrence is satisfied by requiring the tortfeasor-physician to make all amends necessary for the full compensation of all the parties involved.[210]

More importantly than refusal to support esoteric policy goals, the Texas Supreme Court failed to adequately deal with the precedential trend set by *Turpin, Harbeson,* and *Procanik.*[211] The facts in *Nelson* are nearly identical to these cases,[212] and while the Texas Supreme Court obviously need not consider these cases as binding precedent, the trend they represent should

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206. *See* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 39 (1970) (losses due to accidents least burdensome when spread among population and over time); Keeton, *Conditional Fault in the Law of Torts,* 72 HARV. L. REV. 401, 405 (1959) (loss should be shifted to more efficient loss distributor).

207. *Cf.* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 4, at 24 (1984) (doctors among those best able to avoid and distribute losses through use of rates, prices, and insurance); Prosser, *Proximate Cause in California,* 38 CALIF. L. REV. 369, 397 (1950) (insurance has removed fears of overburdening groups best able to distribute costs).

208. *See* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 4, at 25 (1984) (one reason for imposing liability to provide incentive to avoid committing act again).

209. *See* Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967) (even if physican found negligent, neither parent nor child may recover any damages from him).

210. *See* Turpin v. Sortini, 643 P.2d 954, 956 n.15, 182 Cal. Rptr. 337, 349 n.15 (1982) (permitting child's recovery promotes "comprehensive and consistent deterrent" to negligence); *see also* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (imposition of duty to child discourages malpractice).

211. *See* Turpin v. Sortini, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982) (recovery of expenses for extraordinary medical, teaching, training, and equipment costs); Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (recovery of expenses for extraordinary medical care); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 497 (Wash. 1983) (recovery of medical and special training expenses).

212. *Compare* Nelson v. Krusen, 678 S.W.2d 918, 919-20 (Tex. 1984) (negligence in testing first child with resulting inaccurate genetic information being given to parents) *with* Turpin v. Sortini, 643 P.2d 954, 956, 182 Cal. Rptr. 337, 339 (1982) (negligent testing of first child provides faulty information as to existence of harmful genetic trait); *compare* Nelson v. Krusen, 678 S.W.2d 918, 919-20 (Tex. 1984) (parents chose not to end pregnancy after inaccurate genetic counseling given) *with* Procanik v. Cillo, 478 A.2d 755, 758 (N.J. 1984) (parents ignorant of child's true condition failed to seek abortion); *compare* Nelson v. Krusen, 678 S.W.2d 918, 919-20 (Tex. 1984) (parents sought genetic counseling information three separate times and on all three occasions were misinformed) *with* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (parents sought information as to possible birth defects on three occasions and were misinformed each time).

not be ignored.[213] The sum of the holdings of these cases is that fundamental fairness dictates at least special damages be given to the child, without the necessity of comparing life and nonlife to arrive at that figure.[214] Regardless of the alleged weaknesses in their arguments,[215] more credence should have been given to the fact that the highest courts of three states have chosen to award special damages in situations markedly similar to those in *Nelson.*[216] Thus, Texas makes its stand on case law contrary to the most recent trends as the chance to advance Texas tort law to meet changing technology action has momentarily passed.

IV. CONCLUSION

The concepts of "wrongful life" and "negligent genetic counseling" have only begun to plague the nation's courts within the last twenty years. During this brief time, wrongful life has evolved from an isolated occurrence to a nationwide debate among courts and commentators alike. The daily progression of medical technology has forced upon the legal system the task of resolving the attendant problems of this knowledge, and as of yet there is no philosophical consensus. As it can logically be foreseen that negligent genetic counseling will occur in the future, now is the time to deal intelligently and effectively with the issues set forth by the wrongful life claim.

The decision in *Nelson v. Krusen* fails to answer these issues by choosing not to follow the progressive trends of other jurisdictions. Further, the deci-

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213. *Cf.* Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984). The court noted the effect of *Turpin, Harbeson,* and *Procanik* by saying "we do not believe that the measure of damages can be circumscribed as the California, Washington and New Jersey courts have attempted." *See id.* at 925. The court cited Strohmaier v. Associates in Obstetrics & Gynecology, 332 N.W. 2d 432, 435 (Mich. App. 1982), stating that damages cannot be considered separately from the reality that plaintiff would not exist had there been no negligence. *See Nelson* v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984).

214. *See* Turpin v. Sortini, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982) (logic, fairness, statute, and established principles of tort law allow recovery of special damages); Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (logic, justice, and prior case law support recovery of special damages); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496-97 (Wash. 1983) (special damages not susceptible to impossibility of determination as are general damages).

215. *See* Comment, *Wrongful Life: A Legislative Solution to Negligent Genetic Counseling,* 18 U.S.F.L. REV. 77, 98-100 (1983). The *Turpin* decision, upon which *Harbeson* and *Procanik* are based, has several weaknesses in its allowance of special, and not general, damages. *See id.* at 98. One of the most important is that if general damages are impossible to determine, then it would seem the same impossibility would bar recovery of any damages. *See id.* at 98.

216. *See* Turpin v. Sortini, 643 P.2d 954, 966, 182 Cal. Rptr. 337, 349 (1982) (child allowed recovery of damages); Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (child recovers special damages); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 497, 499 (Wash. 1983) (special damage recovery awarded to child).

sion provides an environment in which injustice could flourish by its refusal to allow the injured child a cause of action. Persuasively reasoned precedent from prominent courts was available for the Texas court to emulate in permitting a cause of action for special damages to the child, yet the majority of the court rejected that reasoning. Public policy, as evidenced by decisions of some of the highest courts in the land in myriad forms, shows that the arguments against wrongful life may be overcome under traditional tort principles and should be discarded. In following this policy, wrongful life should be recognized in Texas to the extent necessary to protect a child's rights from the infringement of negligent physicians.

The wide difference of opinion on the Texas Supreme Court shows that any change of membership might topple the reasoning and holding of the *Nelson* decision. With other wrongful life cases sure to soon appear, it is up to the Texas judiciary to insure that the physically burdened victim of negligent genetic counseling will not also bear the financial brunt of the negligence.