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Tort Law - Wrongful Birth and Wrongful Life Actions - Damages

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TORT LAW — WRONGFUL BIRTH AND WRONGFUL LIFE ACTIONS — DAMAGES — The Pennsylvania Supreme Court has held that an infant cannot bring an action for wrongful life, but parents of the infant can maintain a cause of action for wrongful birth and recover damages for mental distress and physical inconvenience incident to the birth.

Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981) (per curiam).

Frank Speck, Jr. suffered from an inherited defect of the genes which caused the disease neurofibromatosis.[1] After having two children who inherited the disease, Frank and Dorothy Speck, his wife, decided for genetic and economic reasons not to have any more children.[2] Although a vasectomy was performed upon Mr. Speck by Dr. Richard A. Finegold,[3] Mrs. Speck was subsequently impregnated by her husband. On December 27, 1974, Dr. Henry J.H. Schwartz operated on Mrs. Speck to terminate her pregnancy.[4] Although Dr. Schwartz represented to Mrs. Speck that the operation had been successful, Mrs. Speck informed him that she thought she was still pregnant. Thereafter, on April 29, 1975, Mrs. Speck gave birth to Francine Speck, who was born with neurofibromatosis.[5]

On April 9, 1976, the Specks[6] brought an action in trespass and assumpsit[7] against Drs. Finegold and Schwartz in the Court of

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1. Speck v. Finegold, 497 Pa. 77, 81, 439 A.2d 110, 112 (1981) (per curiam). Neurofibromatosis, also known as von Recklinghausen's Disease, results from a hereditary defect attributable to an autosomal dominant gene. The disease is characterized by developmental changes in the nervous system, muscles, bones and skin. Skin changes can be trivial to extremely disfiguring. Superficially, the condition is marked by the formation of soft tumors, which can also be found on cranial nerves and nerve roots. It is a congenital and hereditofamilial condition for which there is no known treatment or cure. *Id.* at 81-82 n.2, 439 A.2d 112 n.2.

2. 497 Pa. at 82, 439 A.2d at 113 (Flaherty, J.).

3. Pursuant to an oral agreement entered into on April 28, 1974, Dr. Richard A. Finegold, a urologist, performed a vasectomy or bilateral vas ligation upon Mr. Speck. Dr. Finegold informed Mr. Speck that he was sterile and that no supplemental method of birth control was required. *Id.*

4. *Id.*

5. *Id.*

6. Frank Speck, Jr., Dorothy Speck, his wife, and Francine Speck, a minor, by her parent and natural guardian, Frank Speck, sought recovery from Drs. Richard Finegold and Henry J. H. Schwartz. *Id.* at 81, 439 A.2d at 112.

7. *Id.* The first count of the complaint was brought by Mr. and Mrs. Speck against Dr. Finegold for the birth of their daughter, Francine. In the second count, the parents sought

Common Pleas of Allegheny County, Pennsylvania.[8] Ruling on the demurrers[9] made by the defendants, the court held that Mr. and Mrs. Speck could not assert claims stemming from Francine's birth but were restricted to damages which resulted from the immediate effects of the alleged negligence of the doctors. The court dismissed the claim of their daughter.[10]

A divided Pennsylvania Superior Court affirmed the dismissal of Francine's claim,[11] but allowed that portion of the parents' claim which sounded in tort with compensable damages for the cost of rearing their daughter. However, the superior court denied the parents' claim for damages for mental anguish, emotional distress and physical inconvenience.[12]

The parents petitioned for allowance to appeal the superior court's dismissal of Francine's claim and disallowance of damages on their behalf for emotional distress and physical inconvenience stemming from Francine's birth.[13] The doctors cross-petitioned from the court's allowance of the parents' tort claim. The Supreme Court of Pennsylvania granted allocatur.[14]

The Supreme Court of Pennsylvania in a per curiam opinion, initially affirmed that portion of the superior court's order which allowed the parents a cause of action in tort with the right to recover expenses attributable to the birth and raising of their daugh-

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damages from Dr. Schwartz for the birth. The third count sought damages from both doctors for the birth. In the fourth count, Francine, by her father, sought recovery from both physicians for having been born with an incurable disease. *Id.*

8. *Id.* at 77, 439 A.2d at 111. *See* No. 76-07,752 (C.P.) Allegheny County, Pa. filed Apr. 9, 1976).

9. For a review of the specific demurrers made by these defendants see Speck v. Finegold, 124 Pittsburgh Legal J. 253 (C.P. Allegheny County, Pa. 1976), *aff'd in part, rev'd in part,* 268 Pa. Super. 342, 408 A.2d 496 (1979), *aff'd in part, rev'd in part,* 497 Pa. 77, 439 A.2d 110 (1981) (per curiam).

10. 124 Pittsburgh Legal J. at 265-66.

11. 268 Pa. Super. 342, 365, 408 A.2d 496, 508 (1979), *aff'd in part, rev'd in part,* 497 Pa. 77, 439 A.2d 110 (1981) (per curiam).

12. *Id.* at 365-66, 408 A.2d at 508-09. Judge Price, in a concurring and dissenting opinion, would have disallowed damages for raising Francine, even though he saw the first two counts as containing traditionally cognizable allegations of negligence. However, he agreed with the disallowance of Francine's claim. Judge Spaeth, in a concurring and dissenting opinion, agreed with those portions of the majority opinion which afforded the parents a remedy. However, he disagreed with the denial of the parents' claim for emotional distress and physical inconvenience attributable to Francine's birth. *Id.* at 367-76, 408 A.2d at 509-14.

13. 497 Pa. at 83, 439 A.2d at 113 (Flaherty, J.).

14. *Id.* The Supreme Court of Pennsylvania granted review to consider whether the plaintiffs could recover damages for injuries incurred in the circumstances of this case. *Id.* at 83 n.3, 439 A.2d at 113 n.3.

ter.[15] Thereafter, the court reversed the portion of the superior court's order which denied the parents' right to recover damages for mental distress and physical inconvenience attributable to their daughter's birth.[16] Finally, an evenly divided court affirmed the portion of the superior court's order which held the infant's cause of action was not legally cognizable.[17]

In the lead opinion, Justice Flaherty identified the two substantive issues presented by the appeal: whether the court should approve the parents' cause of action brought in tort for their child's "wrongful birth,"[18] and whether the court should approve the infant's cause of action brought in tort for her "wrongful life."[19] Justice Flaherty answered both questions affirmatively.[20]

Justice Flaherty first addressed the wrongful birth cause of action. He proposed that the action for injuries suffered as the result of negligently performed vasectomy and abortion procedures merely required the extension of existing principles of tort law to new facts, specifically, alleged damages resulting from the birth of an unplanned, genetically defective child.[21] Relying on *Ayala v.*

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15. *Id.* at 79, 439 A.2d at 111. Justice Flaherty filed the lead opinion in which Chief Justice O'Brien, Justice Larsen, and Justice Kauffman joined. Justice Roberts, joined by Chief Justice O'Brien, filed an opinion concurring in the affirmance of this portion of the order of the superior court. Justice Kauffman concurred in the affirmance of this portion of the order in which Justice Larsen and Justice Flaherty joined. Justice Nix filed an opinion which disagreed only with the recovery predicated upon the cause of action based on wrongful birth. *Id.*

16. *Id.* at 80, 439 A.2d at 111-12. Justice Flaherty filed the lead opinion in which Justice Larsen and Justice Kauffman joined. Justice Roberts, joined by Chief Justice O'Brien, filed an opinion which concurred in the reversal of that portion of the superior court's order. Justice Kauffman filed an opinion which concurred in the reversal of this portion of that order, in which Justice Larsen and Justice Flaherty joined. Justice Nix filed an opinion which disagreed only as to the recovery predicated upon a cause of action based upon wrongful birth. *Id.* at 80, 439 A.2d at 112.

17. *Id.* Justice Roberts, joined by Chief Justice O'Brien, filed an opinion in support of the affirmance of the portion of the superior court's order which denied the infant's cause of action. Justice Flaherty filed an opinion in support of a reversal of that portion of the superior court's order in which Justice Larsen and Justice Kauffman joined. Justice Kauffman also filed an opinion in support of the reversal of the superior court's order which denied the infant's cause of action in which Justice Larsen and Justice Flaherty joined. *Id.*

18. *Id.* at 83, 439 A.2d at 113 (Flaherty, J.). The terms "wrongful birth" and "wrongful life" have been used interchangeably. Although Justice Flaherty generally avoided the usage of these terms, for the purposes of this discussion, the term wrongful birth shall refer to those actions brought by parents on their own behalf. The term wrongful life shall refer to actions brought by children or on their behalf.

19. *Id. See supra* note 18.

20. *Id.*

21. *Id.*

Philadelphia Board of Public Education[22] for the proposition that a person may seek redress for every substantial wrong, and a wrongdoer is responsible for the natural and probable consequences of his misconduct,[23] Justice Flaherty reasoned that the parents in the instant case had suffered a substantial wrong.[24] Therefore, the wrongful birth action should be permitted with the usual principles of common law damages applied.[25] Furthermore, since the alleged injury - the mental distress suffered by a parent of a defective child - was foreseeable, damages for mental distress should also be recoverable.[26] By determining that the parents may bring an action under a tort theory in the circumstances of this case, the court recognized that the defendants owed the plaintiffs a duty of care because the plaintiffs had interests entitled to legal protection.[27] Relying on the observation of Justice Nix in *Sinn v. Burd*,[28] Justice Flaherty concluded that the concept of duty is really an aggregate of policy considerations leading to the conclusion that a plaintiff is entitled to protection from the injury he has suffered.[29]

Justice Flaherty then examined the argument that no duty of care should extend from the doctor to the patient in a case which involves alleged damages as a result of the birth of an unplanned child. The argument that parents should not be afforded the right to bring an action because the public policy of the Commonwealth favors birth over abortion[30] was rejected by the court on three

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22. 453 Pa. 584, 305 A.2d 877 (1973) (doctrine of governmental immunity abolished).

23. *See also* Carroll v. County of York, 496 Pa. 363, 437 A.2d 394 (1981) (Kauffman, J., dissenting) (court upheld constitutionality of Political Subdivision Tort Claims Act, Justice Kauffman criticized resurrection of governmental immunity doctrine); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970) (abolished impact rule for tort recovery).

24. 497 Pa. at 84, 439 A.2d at 114 (Flaherty, J.).

25. *Id.* Because the court recognized the wrongful birth action, it did not address the applicability of a theory of relief based on breach of contract. *Id.* at n.4, 439 A.2d at 114 n.4.

26. *Id.* at 84, 439 A.2d at 114 (Flaherty, J.).

27. *Id. See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53 (4th ed. 1971).

28. 486 Pa. 146, 404 A.2d 672 (1979). In *Sinn*, Justice Nix quoted Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974) for the proposition that, "the concept of duty amounts to no more than 'the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection' from the harm suffered." 497 Pa. at 84, 439 A.2d at 114 (Flaherty, J.) (quoting Leong v. Takasaki, 55 Hawaii 398, 407, 520 P.2d 758, 764 (1974)).

29. 497 Pa. at 84, 439 A.2d at 114 (Flaherty, J.).

30. It was argued that the approval of such a cause of action contravenes legislatively declared policy. See PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1982-1983), where it is stated:

> Since it is the public policy of the Commonwealth to favor childbirth over abortion, no Commonwealth funds and no Federal funds which are appropriated by the

grounds. Initially, Justice Flaherty reasoned that because the recognition of this cause of action had no impact on whether abortions are performed in the Commonwealth or not, it could not be in conflict with a public policy which favors childbirth over abortion.[31] Moreover, the court could not rely on the Commonwealth's policy favoring birth over abortion to defeat the cause of action because it conflicts with the constitutional right to seek a termination of pregnancy as recognized by the United States Supreme Court in *Roe v. Wade*.[32] Finally, Justice Flaherty concluded that if no duty of care was imposed on these physicians and no cause of action allowed, fundamental policies of tort law in the Commonwealth would be frustrated.[33] Relying on the importance of the prevention of future harm in the field of torts and the incentive to prevent the occurrence of harm, Justice Flaherty concluded that to deny the plaintiffs the opportunity to bring their cause of action would result in a windfall to the defendants.[34]

Justice Flaherty next addressed the wrongful life cause of action. He rejected the position taken by the New York Court of Appeals in *Becker v. Schwartz*[35] which had denied the cause of action for wrongful life.[36] Justice Flaherty reasoned that the infant exper-

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Commonwealth shall be expended by any State or local government agency for the performance of abortion: Provided, That nothing in this act shall be construed to deny the use of funds where a physician has certified in writing that the life of the mother would be endangered if the fetus were carried to full term or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service. Nothing contained in this section shall be interpreted to restrict or limit in any way, appropriations, made by the Commonwealth or a local governmental agency to hospitals for their maintenance and operation, or, for reimbursement to hospitals for services rendered which are not for the performance of abortions.

Id.

31. 497 Pa. at 84-85, 439 A.2d at 114 (Flaherty, J.).

32. 410 U.S. 113 (1973), Justice Flaherty concluded that the right to terminate a pregnancy would be hollow if the plaintiffs were only able to seek an abortion but unable to obtain a remedy at law for injuries resulting from the negligent performance of the abortion. 497 Pa. 85, 439 A.2d at 114 (Flaherty, J.).

33. 497 Pa. at 85, 439 A.2d at 114 (Flaherty, J.). Justice Flaherty noted these policies were, "to compensate the victim, deter negligence, and encourage due care." *Id. See also* Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. at 599, 305 A.2d at 884, *supra* note 22 and accompanying text.

34. 497 Pa. at 85-86, 439 A.2d at 114-15 (Flaherty, J.).

35. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The companion case of Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub. nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) had recognized a wrongful life cause of action. However, the wrongful life action was denied by the New York State Court of Appeals in *Becker*.

36. Justice Flaherty noted that the New York State Court of Appeals had rejected the

ienced suffering and financial expense as the result of the negligence of a third party; therefore, that suffering and expense should be compensated.[37] Justice Flaherty emphasized that the issue before the court was whether the plaintiffs should be given the opportunity to present their claim to a trier of fact, not whether they should be afforded damages and not whether their claims were true.[38] He rejected the view that the cause of action should be denied because of the inability of the court to calculate the value of existence as compared to nonexistence.[39] Instead, he emphasized that a diseased plaintiff existed and, accepting the allegations of the complaint as true, would not exist but for the negligence of the defendants.[40] Although existence is not generally characterized as an injury, when existence is foreseeably and inextricably coupled with a disease, Justice Flaherty concluded that it may be intolerably burdensome.[41] Justice Flaherty declined to judicially foreclose consideration of whether life may be intolerably burdensome and thus leave a deformed plaintiff without a remedy.[42] Relying on the reasoning of *Flagiello v. Pennsylvania Hospital*[43] Justice Flaherty concluded that where a plaintiff has suffered a "substantial" or "palpable" wrong, a cause of action must be granted. Since both parents and infant had been injured, both should be afforded a cause of action.[44]

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cause of action for two reasons, because the court had declared itself incompetent to decide whether it is better never to have been born than to have been born with gross deficiencies, and because the recognition of the cause of action would force the court to calculate damages based on a comparison between life in an impaired state and nonexistence. 497 Pa. at 86, 439 A.2d at 115 (Flaherty, J.).

37. *Id. See* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (court permitted the wrongful life cause of action).

38. 497 Pa. at 86, 439 A.2d at 115 (Flaherty, J.).

39. *Id.* at 87, 439 A.2d at 115 (Flaherty, J.).

40. *Id.*

41. *Id.*

42. *Id.*

43. 417 Pa. 486, 208 A.2d 193 (1965). In *Flagiello,* plaintiff was injured during a fall caused by the negligence of hospital employees in an episode unrelated to the condition which had brought her to the hospital. The court held hospitals were not immune from tort actions brought by patients. The *Flagiello* reasoning was found by Justice Flaherty to be applicable to the instant case. Specifically, Justice Flaherty relied on the proposition that: "An injury is a wrong; and for the redress of every wrong there is a remedy: a wrong is a violation of one's right; and for the vindication of every right there is a remedy." 497 Pa. at 88, 439 A.2d at 116 (Flaherty, J.) (quoting *Flagiello,* 417 Pa. at 489-90, 208 A.2d at 194-95).

44. 497 Pa. at 88, 439 A.2d at 116 (Flaherty, J.). Justice Flaherty accepted the existence of injuries because he viewed the facts well-pleaded as true as the court must do when a demurrer has been granted below and is the subject of the review. *Id.*

Justice Roberts[45] agreed with the superior court that the parents' claim for medical expenses arising from the allegedly improper operations should be allowed to proceed to trial.[46] Additionally, Justice Roberts agreed that the infant's wrongful life claim was properly dismissed[47] because none of the highest appellate courts of other jurisdictions had recognized such a cause of action.[48] He also justified the dismissal of the wrongful life claim because the California intermediate appellate court's recognition of the claim in *Curlender v. Bio-Science Laboratories*[49] had been called into question by a subsequent panel of the same intermediate appellate court in *Turpin v. Sortini*.[50] Justice Roberts also would have permitted the appellants' claims relating to their own pecuniary losses and emotional distress to proceed to trial.[51] Justice Roberts emphasized that because this child was unhealthy and had inherited a crippling disease, a jury question was presented as to the extent of the net harm.[52]

Justice Kauffman[53] identified the issue presented by the case as merely whether one injured by the negligence of another was able

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45. Chief Justice O'Brien joined in this opinion. *Id.* at 90, 439 A.2d at 117 (Roberts, J.).

46. *Id.* at 89, 439 A.2d at 116 (Roberts, J.).

47. *Id.*

48. *Id. See e.g.*, Elliott v. Brown, 361 So. 2d 546 (Ala. 1978), Coleman v. Garrison, 349 A.2d 8 (Del. 1975), Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), and Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). *But see* Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). (Supreme Court of California recognized the wrongful life cause of action on behalf of a defective child subsequent to the *Speck* decision).

49. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (California intermediate appellate court permitted wrongful life cause of action).

50. 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981) (did not permit wrongful life cause of action), *rev'd*, 31 Cal. App. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (California Supreme Court permitted the wrongful life claim).

51. 497 Pa. at 89, 439 A.2d at 116. (Roberts, J.). Justice Roberts noted the pecuniary losses, including those flowing from the rearing of another child, were within the natural and probable consequences of appellees' allegedly wrongful conduct and emotional distress was also foreseeable. *Id.* at 89-90, 439 A.2d at 117 (Roberts, J.). *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 351, 353 (1979). However, Justice Roberts indicated that the appellees should be allowed to introduce evidence that damages which flowed from the rearing of another child are outweighed by the benefits of joy, companionship, and affection which a child can provide. 497 Pa. at 90, 439 A.2d at 117 (Roberts, J.). *See* RESTATEMENT (SECOND) OF TORTS § 920 (1977).

52. 497 Pa. at 90, 439 A.2d at 117 (Roberts, J.). Thus, Justice Roberts would modify the order of the superior court to permit appellants' counts seeking recovery for emotional distress and pecuniary losses to proceed to trial. *Id.*

53. Justices Larsen and Flaherty joined Justice Kauffman in this opinion. *Id.* at 93, 439 A.2d 118 (Kauffman, J.).

to recover for the harm proximately caused.[54] He identified as "axiomatic" the proposition that a person may seek redress for every substantial wrong and that a wrongdoer is responsible for the natural and probable consequences of his misconduct.[55] Justice Kauffman noted that the medical procedures sought by Mr. and Mrs. Speck were legal in the Commonwealth.[56] Thus, in his opinion, nothing concerning sterilization and abortion procedures required the application of different legal principles from those controlling in other medical malpractice actions.[57] Since each of these doctors entered into a lawful agreement with Mr. and Mrs. Speck, a duty of care arose toward them.[58] Justice Kauffman noted that appellate courts of several states and the majority of the Pennsylvania Supreme Court had adopted the enlightened view that parents should be afforded a cause of action in tort when doctors negligently perform their lawful contractual duties in sterilization[59] and abortion[60] procedures. He considered the fact that the normal remedy afforded a negligently injured party is to be restored to the position

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54. *Id.* at 90, 439 A.2d at 117, (Kauffman, J.). Specifically, the Justice did not view the case as presenting the issue of whether the public policy of Pennsylvania favors birth over abortion. *Id.*

55. *Id. See* Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (permitted bystander recovery of damages for emotional distress); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) (abolished governmental immunity); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970) (abandoned requirement of physical impact as precondition for recovery of damages for fright and shock).

56. 497 Pa. at 91, 439 A.2d at 117 (Kauffman, J.). *See* Roe v. Wade, 410 U.S. 113 (1973) (Texas criminal abortion laws found unconstitutional as they infringed on the right to privacy which encompasses a woman's right to terminate her pregnancy); Doe v. Bolton, 410 U.S. 179 (1973) (Georgia criminal abortion laws found unconstitutional as they infringed on privacy and personal liberty rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (Connecticut statute forbidding the use of contraceptives found unconstitutional as it infringed on right of marital privacy).

57. 497 Pa. at 91, 439 A.2d at 117 (Kauffman, J.).

58. *Id.* Justice Kauffman concluded that since each doctor allegedly performed this duty negligently and allegedly damages directly resulted from this negligence, then the doctors' alleged conduct would be actionable if proven at trial. *Id.*

59. *Id. See e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (permitted award of damages to parents of a healthy child for negligently performed vasectomy); Bushman v. Burns Clinical Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978) (permitted award of damages to parents of healthy child for negligently performed tubal ligation); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (permitted award of damages to parents of healthy child for negligently performed tubal ligation); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (N.J. Super. Ct. 1975) (permitted award of damages to parents of healthy child for negligently performed vasectomy).

60. 497 Pa. at 91, 439 A.2d at 117-18 (Kauffman, J.). *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (permitted wrongful birth action, denied wrongful life action). *Cf.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (New York State Court of Appeals permitted wrongful birth action, denied wrongful life action).

that person would have held but for the negligent conduct, and observed that but for the alleged negligence Francine Speck would not have been born.[61]

Justice Kauffman also conceded that the gift of life was not a compensable injury.[62] However, relying on the fact that this child was incurably diseased and deformed, he concluded that Francine's life of suffering was the natural and probable consequence of the appellees' misconduct.[63] Therefore, Justice Kauffman disagreed with the majority position which denied the infant's wrongful life action.[64]

Justice Nix, in a dissenting opinion, identified the issues on appeal from the superior court.[65] These issues questioned whether Pennsylvania would recognize an action in negligence for a birth that, absent the alleged negligence, would not have occurred.[66] Justice Nix concluded that a review of the pleadings of record indicated that alternative causes of action could provide recovery for some or all of the damages claimed; thus, denial of the negligence claims for wrongful birth or wrongful life would not leave the aggrieved parties without a remedy.[67]

Justice Nix approached the problem from the premise that the court was being asked to judicially legislate two new causes of action which had never before existed in the Commonwealth.[68] He noted that even though a birth had resulted from the negligence of a third party, the jurisdiction had never before held that the birth

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61. 497 Pa. at 92, 439 A.2d at 118 (Kauffman, J.).

62. *Id.*

63. *Id.* Justice Kauffman noted that because the demurrers were sustained by the trial court, all facts well-pleaded in the complaint must be accepted as true. *Id.* at 92 n.4, 439 A.2d at 118 n.4 (Kauffman, J.).

64. *Id.* at 92-93, 439 A.2d. at 118 (Kauffman, J.). Justice Kauffman also noted that to allow this child's wrong to go unredressed would provide no deterrence to professional irresponsibility and would be incompatible with the Commonwealth's principles of tort liability. He stated, "[f]or the majority under these circumstances to turn their backs on this *existing* child and to disregard her *actual* suffering and exceptional need for medical and other assistance is a calloused and unjust act." *Id.* (emphasis in original).

65. *Id.* at 93, 439 A.2d at 118-19, (Nix, J., dissenting). Justice Nix identified the issues as whether the unwanted, unplanned infant had a right to recovery for her wrongful life; whether the parents of the infant could bring an action for that child's wrongful birth; and, if either or both actions were recognized, the question of the damages recoverable. *Id.*

66. *Id.* at 94, 439 A.2d at 119 (Nix, J., dissenting). Justice Nix identified a supplemental issue as the measure of damage question in the event that either parents or infant were afforded a cause of action. *Id.*

67. *Id.*

68. *Id.* Justice Nix specifically rejected the view that the court was merely being asked to extend existing negligence principles to new facts. *Id.*

of any human being, despite being unwanted and unplanned, constituted a legal injury.[69] Thus, this was not a mere extension of existing tort principles.[70] He also refused to limit the applicability of the proposition to a "genetically defective" child.[71] Justice Nix identified the real question presented as whether the negligent failure to prevent the birth of an unwanted child should be compensable.[72] Emphasizing that circumspection and prudence were the qualities most needed in the area of judicial legislation, and also noting that discipline must be exercised to prevent personal views from clouding legal judgment, he concluded that a court can only engage in judicial lawmaking when it is directed to do so by constitutional mandate, by legislative direction, or when the court is articulating public policy.[73] Justice Nix found no constitutional mandate which required the recognition of either cause of action.[74] He indicated that the refusal of the state to recognize the wrongful birth action did not impede the decision of the parents to seek sterilization as a means of contraception.[75] Justice Nix reasoned that the practical effect of the recognition of the wrongful birth action would discourage practitioners from performing the procedures for fear they would be inundated by such claims.[76] Justice Nix found that it was generally the function of the legislature to

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69. *Id.*

70. *Id. See* Comment, Wrongful Life: Birth Control Spawns a Tort, 13 JOHN MARSHALL L.R. 401 (1980); Comment, Wrongful Birth: The Emerging Status of a New Tort, 8 ST. MARY'S L.J. 140 (1977). *See also* Matter of Guardianship of Eberhardy, 102 Wis.2d 539, 576-77, 307 N.W.2d 881, 893 (1981).

71. 497 Pa. at 95, 439 A.2d at 119 (Nix, J., dissenting). Justice Nix refused to do this on the basis that the defective condition of the infant was not attributable to the actions of these doctors and because the term "genetically defective" was undefined and there was no suggestion as to who would decide who fell into the classification. Also, Justice Nix was reluctant to limit the proposition to a genetically defective child because historically there have been societal attempts to control genetics for the extermination of a weaker group by a more powerful group. *Id.*

72. *Id.*

73. *Id.* at 95-96, 439 A.2d 119-20 (Nix, J., dissenting).

74. *Id.* at 96, 439 A.2d at 120 (Nix, J., dissenting). Justice Nix concluded the refusal to create a new tort liability did not constitute government interference with the constitutionally protected access to abortion as recognized in Roe v. Wade, 410 U.S. 113 (1973). The right to seek an abortion is not predicated upon the existence of a negligence action, nor is it deterred by the absence of the action. 497 Pa. at 96-97, 439 A.2d at 120-21 (Nix, J., dissenting). Justice Nix also found no constitutional compulsion to allow the wrongful birth claim in order to protect the preconception decision to avoid giving birth. *Id.* at 97, 439 A.2d at 121 (Nix, J., dissenting).

75. *Id.* at 97, 439 A.2d at 121 (Nix, J., dissenting).

76. *Id.*

decide what was in the public interest.[77] Relying on *Mamlin v. Genoe*[78] he concluded that the area in which the court was free to articulate public policy was a limited one.[79] Because of the absence of unanimity of opinion in regard to sterilization and abortion procedures and because there was a legislatively expressed policy favoring childbirth,[80] Justice Nix concluded there was an absence of unanimity of public opinion to justify the recognition of either cause of action.[81] Because Justice Nix perceived that the function of the court is to implement societal values rather than create them, he concluded that the court was not free to ignore the absence of unanimity of public opinion in this area.[82]

Justice Nix reasoned that the same result would occur even if he accepted the viewpoint that this was merely a new application of traditional principles of negligence.[83] Relying on the court's observations regarding the concept of duty in *Sinn v. Burd*,[84] Justice Nix concluded that ultimately the analytical question presented was whether or not these plaintiffs have interests which are entitled to legal protection.[85] Therefore, even if this were merely an extension of traditional negligence principles, it must be evident that the public policy to be effectuated by the recognition of these

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77. *Id.* at 98, 439 A.2d at 121 (Nix, J., dissenting). The legislature possesses the representative character which provides a reflection of the will of its constituency. *Id.*

78. 340 Pa. 320, 17 A.2d 407 (1941). Justice Nix relied on *Mamlin* for the notion that:

> The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as a result of a study of various factors and conditions. *It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal. . . . Only in the clearest cases, therefore, may a court make an alleged public policy the basis of judicial decision.*

497 Pa. at 98, 439 A.2d at 121 (Nix, J., dissenting) (quoting Mamlin v. Genoe, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941)) (emphasis supplied by *Speck* court).

79. 497 Pa. at 99, 439 A.2d at 121 (Nix, J. dissenting).

80. The Justice noted, it is the public policy of the Commonwealth to favor childbirth over abortion. 497 Pa. at 99 n.8., 439 A.2d at 121 n.8. (Nix, J. dissenting). *See supra* note 30.

81. *Id.* at 99, 439 A.2d at 121 (Nix, J., dissenting).

82. *Id.* at 99, 439 A.2d at 122 (Nix, J., dissenting).

83. *Id.*

84. 486 Pa. 146, 404 A.2d 672 (1979). *See supra* note 28. Justice Nix also observed the *Sinn* court had quoted Professor Prosser for the proposition that, "the problems [sic] of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated." 497 Pa. at 100, 439 A.2d at 122 (Nix, J., dissenting). (quoting W. PROSSER, *supra* note 27, at 325).

85. 497 Pa. at 100, 439 A.2d at 122 (Nix, J., dissenting).

causes of action conforms with the overwhelming weight of public opinion.[86] Because reasonable men disagree about the issues raised by this case, Justice Nix concluded that the court should refrain from making law amid this controversy.[87] Justice Nix declined to recognize either cause of action for wrongful birth or wrongful life because the area would be best left to legislative resolution.[88]

Gleitman v. Cosgrove[89] was one of the first cases to address the issues raised by both wrongful birth and wrongful life causes of action emanating from the birth of a defective child. In *Gleitman,* the plaintiffs alleged that the defendant doctors had negligently failed to inform Mrs. Gleitman of the possible effects German measles could have on her infant during gestation. Thus, Mrs. Gleitman claimed she was deprived of the opportunity to abort and subsequently gave birth to an infant with substantial defects.[90] The New Jersey Supreme Court denied both the wrongful birth and wrongful life claims.[91] Addressing the wrongful life action, the court noted that the defendants' conduct was not a cause of the infant's defects.[92] Thus, the infant was asserting that he should not have been born, rather than asserting he should have been born without defects.[93] Emphasizing that the normal measure of damages in tort actions is compensatory, the *Gleitman* court concluded that it was unable to measure damages because it could not measure the difference between a life with defects and nonexistence.[94] Thus, the court held that the wrongful life action was not actionable because it did not give rise to legally cognizable damages.[95] The *Gleitman* court's reasoning has been described by at least one commentator as the "unascertainable damage" rationale.[96]

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86. *Id.*

87. *Id.*

88. *Id.* Justice Nix emphasized that the pleadings indicated alternative causes of action. Because the Specks were free to file an amended complaint, they were still able to pursue other remedies. Thus, they would not be left without a remedy if the court declined to create these two causes of action. *Id.*

89. 49 N.J. 22, 227 A.2d 689 (1967).

90. *Id.* at 25-26, 227 A.2d at 690-91.

91. *Id.* at 29-31, 227 A.2d at 692-93.

92. *Id.* at 28, 227 A.2d at 692.

93. *Id.*

94. *Id.* at 29, 227 A.2d at 692.

95. *Id.* at 31, 227 A.2d at 693. The *Gleitman* court also denied the wrongful birth action because of the difficulty in measuring damages. The court held that there were no legally cognizable damages and even if there were, public policy considerations which promoted the preciousness of human life would preclude the wrongful birth claim. *Id.* at 30-31, 227 A.2d at 693.

96. *See* Comment, *Wrongful Life and Wrongful Birth Causes of Action - Suggestions*

Thereafter, the New Jersey Supreme Court deemphasized the "unascertainable damage" rationale when it again considered these actions in *Berman v. Allan.*[97] In *Berman,* plaintiffs alleged the defendant obstetricians failed to inform Mrs. Berman of the risk that a woman in her age group could give birth to a child afflicted with Down's Syndrome. They also failed to inform Mrs. Berman of the availability of amniocentisis to determine possible infant defects. Subsequently, Mrs. Berman gave birth to an infant afflicted with Down's Syndrome, or mongolism. The complaint alleged that if Mrs. Berman had been informed of the availability of the amniocentisis procedure, she would have submitted to it and had the fetus aborted.[98] The *Berman* court denied the wrongful life action[99] but permitted the wrongful birth action.[100] Discussing wrongful life, the *Berman* court concluded that the difficulty in measuring damages which had been emphasized in *Gleitman* was not a primary concern.[101] Instead, the *Berman* court denied the wrongful life action because it concluded that the infant had not suffered any legally cognizable damages by being brought into existence.[102] Emphasizing the sanctity of life, the court concluded that life with a handicap was more precious than nonexistence.[103]

Recently, the New Jersey Supreme Court decided *Schroeder v. Perkel.*[104] In *Schroeder,* the plaintiffs alleged negligence because the defendant pediatricians failed to diagnose cystic fibrosis, a hereditary disease, in the first child born to the plaintiff parents, and thus the parents claimed they were deprived of an informed choice to have a second child. Because of the failure to diagnose the hereditary disease in the first child, Mrs. Schroeder subsequently became pregnant and gave birth to a second child afflicted with cys-

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for a Consistent Analysis, 63 MARQ. L. REV. 611, 616 (1980).

97. 80 N.J. 421, 404 A.2d 8 (1979).

98. *Id.* at 424-25, 404 A.2d at 10.

99. *Id.* at 430, 404 A.2d at 13.

100. *Id.* at 434, 404 A.2d at 14.

101. *Id.* at 428, 404 A.2d at 12.

102. *Id.* at 429, 404 A.2d at 12.

103. *Id.* Additionally, the *Berman* court permitted the wrongful birth action and found that in light of the *Roe* decision, public policy supported the proposition that a woman should not be impermissibly denied an opportunity to make the decision to undergo an abortion. *Id.* at 431-32, 404 A.2d at 14. The *Berman* court concluded the physicians were liable for damages proximately caused by their negligence in depriving Mrs. Berman of her opportunity to abort. The court also awarded the Bermans damages for mental and emotional anguish. *Id.* at 432-34, 404 A.2d at 14-15.

104. 87 N.J. 53, 432 A.2d 834 (1981).

tic fibrosis.[105] The sole issue before the court was whether the appellate division had properly entered judgment for the defendants on the portion of the wrongful birth claim which sought damages for incremental medical costs incurred by the parents in caring for their second child afflicted with cystic fibrosis.[106] The *Schroeder* court held that the defendants should be held liable for such expenses if it could be proved at trial that the defendants deprived the parents of a right to choose whether or not to give birth to a defective child.[107] Addressing the issue of whether the pediatricians owed a duty to the parents of their patient, the court emphasized that in a negligence action the scope of duty extends to the reasonably foreseeable consequence of a negligent act, except as limited by policy considerations.[108] Because the court previously had recognized that a wrongdoer who injures one member of a family may indirectly injure another,[109] the *Schroeder* court concluded that harm to the parents was foreseeable from the injury to their child. Therefore, the physicians' duty extended to these parents as members of the immediate family of their patient who might be adversely affected by a breach of their duty.[110] The *Schroeder* court declined to recognize claims for "wrongful life" or "diminished parenthood," a cause of action brought by or on behalf of an infant for the diminution in the capacity of the parents to love and care for their child.[111] The court declined to recognize these claims because the claims were not asserted on the appeal.[112]

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105. *Id.* at 57-58, 432 A.2d at 835-36.

106. *Id.* at 62, 432 A.2d at 838.

107. *Id.* at 70-71, 432 A.2d at 842.

108. *Id.* at 63, 432 A.2d at 838.

109. *Id.* at 64, 432 A.2d at 839. The court emphasized the interconnection of legal interests in a family and stated:

> The foreseeability of injury to members of a family other than one immediately injured by the wrongdoing of another must be viewed in light of the legal relationships among family members. A family is woven of the fibers of life; if one strand is damaged, the whole structure may suffer. The filaments of family life, although individually spun, create a web of interconnected legal interests. This Court has recognized that a wrongdoer who causes a direct injury to one member of the family may indirectly damage another.

Id. at 63-64, 432 A.2d at 839.

110. *Id.* at 64-65, 432 A.2d at 839.

111. *Id.* at 65, 432 A.2d at 840. Although the majority opinion refers to the infant's cause of action as "diminished parenthood," Justice Handler refers to it as the "diminished" or "wrongful" life claim. *Id.* at 78, 432 A.2d at 846 (Handler, J., concurring in part and dissenting in part).

112. *Id.* at 65, 432 A.2d at 840. Justice Handler, in a concurring and dissenting opinion, relied on the fact that the wrongful conduct of these physicians affected the entire family. He proposed that the child alone suffered from the impaired parental capacity

However, dicta in the *Schroeder* opinion regarding family relationships indicates the court may be ready to afford these infants some form of damages.[113]

In *Park v. Chessin*[114] the New York State Appellate Division recognized a wrongful life cause of action brought by a child afflicted with polycystic kidney disease.[115] The *Park* court noted that the right of parents not to have children extends to circumstances in which it can be ascertained that the child would be born deformed.[116] The court found the breach of the parents' right was also tortious to the infant's fundamental right to be born as a whole, functional human being.[117] On this basis, the *Park* court recognized a cause of action for wrongful life.[118] However, the *Park* court's recognition of the wrongful life action was not long lived. The *Park* decision was reviewed by the New York State Court of Appeals in *Becker v. Schwartz*,[119] where the highest court in New York denied the recognition of the wrongful life cause of action.[120] However, the *Becker* court recognized the parents' action brought in negligence and medical malpractice.[121] In denying the wrongful life action, the *Becker* court noted two flaws in the claim. The first

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caused by the physicians' negligence. Thus, the child was also owed a duty by the physicians because he suffered an impaired or diminished childhood or life by being born to parents who were less fit to assume parental responsibility. The infant suffered incremental harm, beyond its natural affliction, which affected the quality of its life. Thus, Justice Handler would have reinstated the diminished or wrongful life claim on behalf of the infant. *Id.* at 72-78, 432 A.2d 843-46 (Handler, J., concurring in part and dissenting in part).

113. *See supra* note 109.

114. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub. nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). In *Park*, after having a child born with polycystic kidney disease, a hereditary malady, the parents sought medical advice from the defendant obstetricians and inquired about the risk of bearing another child with the disease. Defendants told the parents that the chance of having another child with the disease was practically nonexistent. Relying on the inaccurate medical advice, Mrs. Park became pregnant and subsequently gave birth to another child afflicted with the same disease. 60 A.D.2d at 83, 400 N.Y.S.2d at 111.

115. 60 A.D.2d at 88, 400 N.Y.S.2d at 114. Additionally, the *Park* court recognized a cause of action in the parents in medical malpractice. *Id.* at 87, 400 N.Y.S.2d at 114.

116. *Id.* at 88, 400 N.Y.S.2d at 114.

117. *Id.*

118. *Id.*

119. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The *Park* case was the companion case in *Becker*. In *Becker*, plaintiffs alleged Mrs. Becker was never advised by the defendants of the increased risk of Down's Syndrome, or mongolism, in children born to women in her age group, nor was she advised of the availability of amniocentisis to detect such defects. Subsequently, she gave birth to a child afflicted with Down's Syndrome. *Id.* at 405-06, 386 N.E.2d at 808-09, 413 N.Y.S.2d at 896-97. *See supra* note 114.

120. 46 N.Y.2d at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

121. *Id.* at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

was that the infant had not suffered any legally cognizable injury.[122] The court emphasized that there was no precedent for the *Park* court's finding that a child had a fundamental right to be born as a whole, functional human being.[123] The second flaw in the wrongful life claim related to damages. The court emphasized that since the injured party's remedy in negligence is to be placed in the position he would have occupied but for the negligent conduct, in *Becker,* but for the defendants' negligence these infants would never have been born.[124] The *Becker* court concluded that the law was not equipped to calculate damages for wrongful life by making a comparison between life with a handicap and nonexistence.[125]

The California Court of Appeals recognized a wrongful life cause of action brought by a child afflicted with Tay-Sachs disease in *Curlender v. Bio-Science Laboratories.*[126] The *Curlender* court was presented with the wrongful life issue only. The court relied on public policy considerations and recognized the existence of a duty from the medical laboratories which had performed the genetic tests on the parents both to the parents and the unborn child.[127] The *Curlender* court found the real problem to be whether the breach of the duty was the proximate cause of a legally cognizable injury.[128] The court also found that the injury to the child was the birth of the child with a defect[129] and noted that the infant both existed and suffered due to the negligence of others.[130] Addressing the fear that recognition of these infants' rights would inevitably lead to infants bringing suit against their own parents for their

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122. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

123. *Id.*

124. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

125. *Id.* The *Becker* court stated, "a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between Hobson's choice of life in an impaired state and nonexistence." *Id. See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

126. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). In *Curlender,* plaintiffs alleged defendants negligently administered genetic tests to these parents which resulted in the dissemination of inaccurate information to the parents regarding their status as carriers of genes which would result in the conception and birth of a child afflicted with Tay-Sachs disease. Parents relied upon this information either to conceive the infant, forego amniocentesis or forego abortion. Subsequently, an infant was born afflicted with Tay-Sachs disease. *Id.* at 815-16, 165 Cal. Rptr. at 480.

127. *Id.* at 828, 165 Cal. Rptr. at 488. The *Curlender* court also found that the duty was breached. *Id.*

128. *Id.*

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

130. *Id.*

births, the *Curlender* court concluded that this particular cause of action was based upon negligent failure by those under a duty to inform prospective parents of information necessary to make a conscious choice not to conceive.[131] However, if a case arose where parents made a conscious choice to proceed with a pregnancy with full knowledge that an impaired infant would be born, the *Curlender* court found no policy considerations which would protect parents from answering for the misery they may have brought upon their offspring.[132] Noting that there is a remedy for every wrong, the *Curlender* court recognized the wrongful life cause of action.[133]

Subsequently, in *Turpin v. Sortini*[134] another panel of the California Court of Appeals rejected the *Curlender* recognition of a wrongful life action as "unsound under established principles of law."[135] However, the intermediate court decision was reviewed by the California Supreme Court[136] which chose to follow *Curlender* in its recognition of the wrongful life action, thereby reversing the *Turpin* intermediate court decision.[137] Only the wrongful life ac-

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131. *Id.*

132. *Id.* The California Legislature quickly responded to the *Curlender* pronouncement by enacting CAL. CIV. CODE § 43.6 (West 1982) which provides:

> (a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.
>
> (b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.
>
> (c) As used in this section, "conceived" means the fertilization of a human ovum by a human sperm.

Id.

133. 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 489. The *Curlender* court, addressing the issue of the extent of the infant's recovery, rejected the notion that the wrongful life action involved an evaluation of a right not to be born. Instead, the court found the claim as the right of the defective child to recover damages for pain and suffering during its limited life span and any special pecuniary loss resulting from the impaired condition. *Id.* at 830-31, 165 Cal. Rptr. at 489.

134. 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981), *rev'd*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

135. *Id.* at 691, 174 Cal. Rptr. at 129.

136. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). In *Turpin*, the plaintiffs alleged that a speech and hearing specialist and other hospital personnel negligently tested Hope Turpin, a first child, and advised the family pediatrician that Hope's hearing was normal. In fact, Hope suffered from a hereditary ailment which left her completely deaf. Relying on the defendants' inaccurate diagnosis, these parents conceived a second child, who also suffered from total deafness. The parents alleged that they would not have conceived a second child if they had been cognizant of their first child's hereditary defect. *Id.* at 223-24, 643 P.2d at 956, 182 Cal. Rptr. at 339.

137. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

tion brought on behalf of the Turpins' second deaf child was before the court.[138] The court held the child in a wrongful life action could not recover damages for pain and suffering or any other general damages[139] for being born impaired in contrast to not being born at all, but could recover special damages, as could her parents, for extraordinary expenses necessary in order to treat her hereditary defect.[140] The *Turpin* court noted that regardless of the label wrongful life, this action was one form of the traditional medical malpractice action.[141] The court recognized that the defendants' immediate patient was the Turpins' first child, and that the present wrongful life action was brought by the second child. However, the *Turpin* court found that the defendants still owed a duty of care to these parents and their potential offspring because it was reasonably foreseeable that they would be directly affected by the defendants' negligent failure to discover the existence of a hereditary ailment in the Turpins' first child.[142]

The *Turpin* court also addressed the defendants' argument that the Turpins' second child had not suffered any legally cognizable injury or rationally ascertainable damage as a result of the alleged negligence.[143] The court noted a flaw in the *Curlender* analysis because the *Curlender* court had failed to distinguish between an or-

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138. *Id.* at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.

139. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349. The second child, Joy Turpin, sought:

> (1) general damages for being 'deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness' and (2) special damages for the 'extraordinary expenses for specialized teaching, training and hearing equipment' which she will incur during her lifetime as a result of her hearing impairment.

Id. at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.

140. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

141. *Id.* at 229, 643 P.2d at 959, 182 Cal. Rptr. at 342. The court observed that the elements of a cause of action for professional negligence are:

> (1) the duty of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.

Id. at 229-30, 643 P.2d at 960, 182 Cal. Rptr. at 343 (quoting Budd v. Nixen 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971)).

142. 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343. *Cf.* Schroeder v. Perkel, 87 N.J. at 63-65, 432 A.2d at 838-40. *See supra* text accompanying notes 106-08. The *Turpin* court noted that the defendants did not argue that they owed no duty of care to the second child, nor did they challenge the existence of a breach of duty or the fact that the second child's birth was the proximate result of their negligence. 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.

143. 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.

dinary prenatal injury and an injury in a wrongful life case.[144] The *Turpin* court concluded that it would be inconsistent with basic tort principles to view the injury to the second child solely by referring to its present condition without considering the fact that if the defendants had not been negligent, the child would not have been born at all.[145] The court did not disallow the wrongful life action but denied the infant's recovery of general damages,[146] rejecting the *Berman* rationale that the value of impaired life always exceeds the value of nonlife.[147] Instead, the court found it impossible to determine whether the infant had suffered an injury because she was born impaired rather than not having been born at all, and even if it could make this determination, it would be impossible to assess general damages.[148] In contrast to its denial of general damages for wrongful life, the court reasoned that it was illogical to allow the parents to recover medical expenses but to deny them to the infant, and thus the court awarded the child special damages for extraordinary expenses necessary to treat her hereditary ailment.[149]

Today, courts willingly embrace the wrongful birth cause of action.[150] Therefore, the *Speck* decision is clearly consistent with the weight of authority in its recognition of this cause of action. Furthermore, the *Speck* court's allowance of the parents' recovery of damages for mental distress is consistent with the Pennsylvania Supreme Court's granting of such damages in *Sinn v. Burd*.[151]

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144. *Id.* at 231, 643 P.2d at 961, 182 Cal. Rptr. at 344. *See generally* Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1439-57.

145. 31 Cal. 3d at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344.

146. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

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

148. *Id.* at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346. *Cf.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (disallowed wrongful life claim because of absence of legally cognizable injury and inability to assess damages).

149. 31 Cal. 3d at 238-39, 643 P.2d at 965-66, 182 Cal. Rptr. at 348-49.

150. *See e.g.*, Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981) (wrongful birth action permitted parents to recover incremental medical costs associated with raising second child); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (permitted parents wrongful birth action, denied child's wrongful life action); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (permitted parents' wrongful birth action, denied child's wrongful life action); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (wrongful birth action permitted recovery of expenses reasonably necessary for care and treatment of impaired child); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (permitted parents' wrongful birth action, denied child's wrongful life action).

151. 486 Pa. 146, 404 A.2d 672 (1979). In *Sinn*, a mother viewed her child being struck and killed by an automobile. The mother, who was outside the zone of danger, sought damages for emotional distress which she allegedly suffered. The *Sinn* court abolished the zone

However, with the exception of *Turpin*, which was decided subsequent to *Speck*, no final state appellate court has recognized a cause of action for wrongful life.[152] Thus, with respect to this cause of action, the *Speck* decision is also consistent with the current weight of authority.

Although most courts confronted with the issue have denied the wrongful life action, they have struggled for an appropriate rationale to do so.[153] Moreover, a consistent rationale has not been applied among the various courts which have denied these actions.[154] The difficulty in formulating an appropriate rationale for permitting or denying the wrongful life action is also apparent in the *Speck* decision, as evidenced by the conflicting opinions.

In *Speck*, the Justices expressed different policy considerations which precluded the wrongful life action. Justice Roberts and Chief Justice O'Brien relied on the fact that no other final appellate court had recognized the wrongful life claim.[155] However, lack of judicial precedent is no longer as tenable a position in light of the subsequent recognition of the wrongful life action by the California Supreme Court in *Turpin*. In contrast, Justice Nix concluded that both causes of action, wrongful birth and wrongful life, were best left to legislative resolution.[156] Thus, even among the members of the *Speck* court who concluded that the wrongful life action should be denied, there was little agreement as to the appropriate rationale to be utilized by the court to deny the action.

Justices Flaherty, Kauffman, and Larsen would have permitted

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of danger requirement and held that the mother's count for emotional distress stated a cause of action for which relief could be granted because emotional distress incurred by the mother was a reasonably foreseeable injury. *Id.*

In *Speck*, because the parents sought the services of both defendants to prevent the birth of the infant, it is apparent that the parents' emotional distress resulting from the birth of the child was a reasonably foreseeable injury to them. *See also* 18 DUQ. L. REV. 1009 (1980).

152. *See supra* note 48 and accompanying text. However, two intermediate state appellate courts have recognized a wrongful life cause of action. *See* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub. nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

153. *See* Comment, *supra* note 96, at 612-21.

154. *Compare*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (wrongful life action denied due to inability to calculate damages) *with*, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (wrongful life action denied due to nonexistence of legally cognizable injury and inability to assess damages) *[and]* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (wrongful life action denied due to nonexistence of damages).

155. 497 Pa. at 89, 439 A.2d at 116 (Roberts, J.).

156. *Id.* at 100, 439 A.2d at 122 (Nix, J., dissenting).

the wrongful life claim.[157] In contrast to the Justices who denied the claim, these Justices would have applied a traditional negligence analysis to the wrongful life action. As Justice Flaherty concluded, the question before the court was only whether the plaintiffs should be given the opportunity to present their claims to a trier of fact, not whether they should be awarded damages, and not whether their claims were true.[158] Given the procedural posture of the case,[159] and because the infant's pleadings alleged the elements of a negligence action,[160] the court should have viewed the facts well-pleaded as true. If the court had done so, then the wrongful life action should have proceeded to the trier of fact. Despite the fact that Justice Nix specifically declined to analyze this action as a typical negligence action, and Justice Roberts and Chief Justice O'Brien did not commit themselves to any particular analysis, wrongful life claims are brought in negligence and should be analyzed as such, as numerous commentators have suggested.[161] More-

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157. *Id.* at 81-93, 439 A.2d 112-16 (Flaherty, J.).

158. *Id.* at 86, 439 A.2d at 115 (Flaherty, J.).

159. Since a demurrer had been granted below and was the subject of review, the facts well-pleaded were to be viewed as true. *Id.* at 88, 439 A.2d at 116.

160. Generally, the elements of negligence actions are, duty, breach, causation, and damages. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1963-64); W. PROSSER, *supra* note 27, at 143-45.

161. *See* Comment, *"Wrongful Life": Should The Cause of Action Be Recognized?* 70 KY. L.J. 163 (1981-82); Peters & Peters, *Wrongful Life: Recognizing The Defective Child's Right To a Cause of Action*, 18 DUQ. L. REV. 857 (1980); Peters and Peters reasoned,

> [T]he trier of fact and not the court should determine the existence or nonexistence of damages. This is especially true where, as in causes of action such as wrongful life, the finding of damage depends on the resolution of moral, religious and quality of life determinations that can only be made by the jury. Indeed, it increasingly appears that the wrongful life cause of action, and particularly the question of damage, is not a question of law, but rather is a question of fact that should be submitted to the jury. Although, as suggested by the New York Court of Appeals, legislatures are capable of making this determination, legislators have demonstrated an unwillingness to address controversial moral issues (e.g., abortion). Therefore, the only alternative is to have juries proclaim the societal values that should prevail. This would ensure that both the plaintiff's and defendant's interests are protected by an adversarial process in which the evidence and interests of the parties are weighed by the jury. Ironically, whether wrongful life and the issue of damages are legal or factual questions is, in the long term, a moot issue. As the zeitgeist changes, the attitudes of judges will change so that today's judge deciding wrongful life as a question of law on the basis of his values will tomorrow view that question as an issue of fact, appropriate for resolution by the jury. Unfortunately, this approach denies the defective child his day in court today, as a matter of the law.
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> . . . It has been established that duty, breach of duty, proximate cause and damages may exist in any given case and, therefore, the jury should be given the opportunity to make determinations of liability according to each factual setting.

Id. at 869-70 (footnotes omitted). *See also* Comment, *"Wrongful Life": The Right Not To*

over, in recent cases including *Becker, Berman, Curlender,* and *Turpin,* courts have analyzed the wrongful life claim as a negligence action.

The *Becker* court explicitly analyzed the wrongful life actions as negligence actions.[162] Assuming the existence of duty, breach, and proximate causation of the infants' birth, the court concluded that the infants had not suffered any legally cognizable injury[163] and concluded that the law was not equipped to calculate these damages.[164] The *Berman* court also employed a negligence analysis and denied the claim because the infant had not suffered any legally cognizable damage by being brought into existence.[165] Both the *Becker* and *Berman* courts applied negligence concepts to the wrongful life actions and declined to recognize the actions. However, both cases have been criticized because the courts decided issues which would have been more appropriately decided by a trier of fact.[166]

More recently, the *Turpin* court addressed the argument that the infant bringing a wrongful life claim had suffered no legally cognizable injury or rationally ascertainable damages.[167] The *Turpin* court asserted that the wrongful life claim was merely one form of the familiar medical malpractice action.[168] In contrast to *Becker,* which found no injury, the *Turpin* court identified the

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Be Born, 54 TUL. L. REV. 480 (1980); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis],* 55 MINN. L. REV. 58 (1970).

162. 46 N.Y.2d at 410, 386 N.E.2d at 811, 413 N.Y.S.2d at 899.

163. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

164. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. However, the inability to precisely ascertain damages should not deter recognition of a cause of action. The United States Supreme Court has stated:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). *See also* Speck v. Finegold, 497 Pa. at 93 n.5, 439 A.2d at 118 n.5 (Kauffman, J., concurring).

165. 80 N.J. at 429, 404 A.2d at 12.

166. Peters & Peters, *supra* note 161, at 868-70 (wrongful life actions should be analyzed as traditional negligence actions, juries should determine liability). *See also,* Note, *A Reassessment of "Wrongful Life" and "Wrongful Birth",* 1980 WIS. L. REV. 782, 791 (1980).

167. 31 Cal. 3d at 229, 643 P.2d at 960, 182 Cal. Rptr. at 343.

168. *Id.* at 229, 643 P.2d at 959, 182 Cal. Rptr. at 342.

threshold question presented by the wrongful life cause of action to be the determination of whether the infant had been injured by being born with an ailment as opposed to not being born at all.[169] The *Turpin* court examined the difficulty in determining whether injury to the infant existed or not and denied the award of general damages but awarded the infant special damages for extraordinary expenses to treat the hereditary ailment.[170] Both the *Becker* and *Turpin* courts analyzed the wrongful life action as a negligence action. In contrast to other recent wrongful life cases, the members of the *Speck* court could not even agree to employ this form of analysis in reviewing the wrongful life claim. The *Speck* court never focused on the injury aspect of the claim, and thus avoided grappling with the most controversial issue presented by the wrongful life action.

In recent years, the Pennsylvania Supreme Court has generally expanded tort liability in the Commonwealth in a variety of contexts.[171] Thus, the *Speck* court's denial of the wrongful life action is a departure from this course of expansion of tort recovery in the Commonwealth and inconsistent with general principles of tort law as enunciated by the court in other tort decisions.[172] The Commonwealth's policy to compensate, as illustrated by other tort cases, outweighs the policies enunciated by those members of the *Speck* court who denied the wrongful life claim.[173]

The *Speck* court was evenly divided on the wrongful life issue, but more significantly, the justices did not agree on the fundamental characterization of the wrongful life claim. Since wrongful life

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169. *Id.* at 235, 643 P.2d at 961, 182 Cal. Rptr. at 346.

170. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

171. *See e.g.*, Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (permitted bystander recovery of damages for emotional distress, abolished zone of danger requirement); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) (abolished governmental immunity); Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965) (abolished charitable immunity).

172. *See supra* notes 22, 23, 33, 43, 64, and accompanying text. The reasoning of the court in Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979), is applicable to this wrongful life action also. In permitting a mother outside the zone of danger to bring an action to recover damages for negligently inflicted mental trauma, the *Sinn* court stated:

> Regardless of whether Mrs. Sinn will be ultimately successful in recovering the damages she sustained, we believe the gravity of appellant's injury and the inherent humanitarianism of our judicial process and its responsiveness to the current needs of justice dictate that appellant be afforded a *chance* to present [her] case to a jury and perhaps be compensated for the injury [she] has incurred.

Id. at 173-74, 404 A.2d at 686 (quoting Niederman v. Brodsky, 436 Pa. 401, 404, 261 A.2d 84, 85 (1970)) (emphasis in original).

173. *See supra* text accompanying notes 155-56.

cases vary factually,[174] and because recent wrongful life decisions have employed negligence concepts to analyze wrongful life claims, the *Speck* court could have recognized the cause of action on this basis and allowed the suit to proceed to the trier of fact. With the increase in the availability of genetic counseling[175] and performance of sterilization and abortion procedures, litigation emanating from these activities will undoubtedly increase in Pennsylvania and elsewhere. Since subsequent to *Speck* the California Supreme Court in *Turpin* recognized the wrongful life action and because dicta in *Schroeder*[176] indicates that the New Jersey Supreme Court may be on the verge of affording infants at least some form of recovery for claims arising from these activities, the debate regarding this controversial cause of action will not subside in Pennsylvania. If in the future the members of the Pennsylvania Supreme Court can agree to apply a negligence analysis to the wrongful life claim, then ultimately the cause of action will be permitted to proceed to the trier of fact to ascertain whether the claim is true and determine whether damages should be awarded.

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174. *Compare*, Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981) (per curiam) (failed sterilization and abortion procedures) *with*, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (inaccurate genetic testing).

175. *See generally*, Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618 (1979); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978).

176. *See supra* note 109 and accompanying text.