TORTS — MEDICAL MALPRACTICE — DAMAGES FOR EMOTIONAL AND MENTAL ANGUISH ARE AVAILABLE IN AN ACTION FOR WRONGFUL BIRTH — CAUSE OF ACTION FOR WRONGFUL LIFE IS NOT COGNIZABLE AT LAW — *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979).

At age thirty-eight Mrs. Shirley Berman became pregnant with Sharon, her third child.[1] Throughout her pregnancy, Mrs. Berman was under the care and supervision of Doctors Ronald Allan and Michael V. Attardi,[2] specialists in gynecology and obstetrics.[3] On November 3, 1974, Sharon Berman was born afflicted with Down's Syndrome.[4]

On September 11, 1975, Paul and Shirley Berman filed a complaint in the Superior Court of New Jersey, Law Division, naming Doctors Allan and Attardi as defendants, alleging two causes of action for medical malpractice.[5] The first claim was asserted by Mr. Berman on behalf of the infant Sharon, for the physical and emotional pain and suffering which she would endure throughout her life due to her affliction.[6] Such suits have come to be known as claims for "wrongful life."[7] The other claim, based on "wrongful birth,"[8] was for injuries, suffered by the parents themselves, in the nature of emotional anguish, medical, and other costs which they would be forced to endure in order to properly raise, educate, and supervise Sharon.[9]

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[1] Berman v. Allan, 80 N.J. 421, 424, 404 A.2d 8, 10 (1979).

[2] *Id.* at 423–24, 404 A.2d at 8–10.

[3] *Id.*

[4] *Id.* Children born with Down's Syndrome, commonly called mongolism, are mentally retarded, susceptible to infection, and subject to a high frequency of congenital heart disease and acute leukemia. *See* A. EMERY, ELEMENTS OF MEDICAL GENETICS 60 (3d ed. 1974). For an excellent treatment of the subject by the judiciary, see *In re* Grady, 170 N.J. Super. 98, 405 A.2d 851 (Ch. Div. 1979).

[5] Berman v. Allan, 80 N.J. 421, 423, 404 A.2d 8, 10 (1979).

[6] *Id.*

[7] *Id.* at 423, 404 A.2d at 11. The term wrongful life has been used as the general name for all actions in which recovery is sought for someone's birth. *See* Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977). It is used in *Berman v. Allan* to describe the assertion of the infant that absent the defendant's negligence she would never have come into existence. Berman v. Allen, 80 N.J. 421, 423, 404 A.2d 8, 11. Some courts have, however, confused the term with wrongful birth. *See* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

[8] Berman v. Allan, 80 N.J. 421, 423, 404 A.2d 8, 10 (1979). The term wrongful birth, as used in *Berman*, denotes the cause of action of the parents of an unwanted child against those persons whose alleged negligence proximately caused the birth of the child. *Id.*

[9] 80 N.J. at 431, 404 A.2d at 13.

Based on the fact that the risk of having a child with Down's Syndrome is significantly greater for women near forty years of age than for younger women,[10] the plaintiffs alleged that the defendants were negligent[11] in not advising Mrs. Berman of the desirability of amniocentesis as a method of diagnosing the presence of Down's Syndrome.[12] In amniocentesis, a sample of amniotic fluid is taken from the uterus and the fetal cells and fluid are analyzed in order to detect genetic defects in the fetus.[13]

Plaintiffs claimed that, had Mrs. Berman been advised of the "risks and availability of amniocentesis,"[14] she would have submitted to the procedure.[15] Furthermore, they alleged that, had it been determined that the fetus would be born afflicted with Down's Syndrome, she would have aborted it.[16]

On November 4, 1977, the trial court granted the defendants' motion for summary judgment[17] and, on December 22, 1977, the plaintiffs filed an appeal.[18] While the matter was pending before the appellate division, the Supreme Court of New Jersey certified the case on its own motion[19] and, in *Berman v. Allan*,[20] reversed in part the decision of the trial court. Specifically, the supreme court held

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[10] For women under 25 years of age the risk of having a child born with Down's Syndrome is 1 in 2000. The risk among some women over 40 years of age is 1 in 60. A. EMERY, *supra* note 4, at 61–62.

[11] Berman v. Allan, 80 N.J. 421, 424, 430–31, 404 A.2d 8, 10, 13 (1979). In the brief of Defendants-Respondents, it was asserted that amniocentesis is standard practice only for the treatment of pregnant women over the age of 40. Therefore, there was no deviation from accepted medical standards because Mrs. Berman was only 38 at the time of her pregnancy. Brief of Defendants-Respondents at 3, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

In New Jersey, physicians are held to an obligation to exercise that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in a particular field. *See* Walck v. Johns-Manville Products Corp., 56 N.J. 533, 267 A.2d 508 (1970).

It should be noted that this would be a jury issue at trial, but this issue was not the concern of the court in *Berman*. The *Berman* court dealt with whether or not an action could be maintained assuming the negligence of the defendants.

[12] Berman v. Allan, 80 N.J. 421, 425, 404 A.2d 8, 10 (1979).

[13] *See id.* at 424, 404 A.2d at 10; W. FUHRMANN & F. VOGEL, GENETIC COUNSELING 91–94 (2d ed. 1976).

[14] Berman v. Allan, 80 N.J. 421, 425, 404 A.2d 8, 10 (1979). The risk involved in submitting to amniocentesis has been found to be very small. *See* note 120 *infra* and accompanying text.

[15] Berman v. Allan, 80 N.J. 421, 425, 404 A.2d 8, 10 (1979).

[16] *Id.*

[17] *Id.* The trial court considered itself bound by Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). Berman v. Allan, 80 N.J. 421, 425, 404 A.2d 8, 10 (1979). *See* note 45 *infra* and accompanying text.

[18] Berman v. Allan, 80 N.J. 421, 425, 404 A.2d 8, 10 (1979).

[19] *Id.*

[20] 80 N.J. 421, 404 A.2d 8 (1979).

that neither Sharon's action for wrongful life,[21] nor her parent's claim for medical and other costs were cognizable at law.[22] The court did, however, recognize Mr. and Mrs. Berman's claims for emotional and mental anguish as valid grounds for relief.[23]

Actions, such as Sharon Berman's, for wrongful life, have usually been viewed as an assertion that the plaintiff would be better off not to have been born.[24] Since the earliest cases in this area, analytical problems with justifying the award of damages have been a bar to granting relief. The courts have been unwilling to allow a plaintiff to recover damages based on the circumstances of his or her birth.[25]

The first case in which the term wrongful life was used did not involve medical malpractice.[26] *Zepeda v. Zepeda*[27] involved a son, born out of wedlock, who sued his father for causing him to bear the stigma of illegitimacy.[28] He alleged that his father induced his mother to have sexual relations by falsely promising marriage.[29] The son also claimed that, because of his illegitimacy, he would be deprived of his right to inherit.[30] The appellate court upheld the trial court's dismissal.[31] It recognized that a tort had been committed,[32] but found that it had to uphold the dismissal for fear of suits by plaintiffs who did not like the circumstances of their birth.[33]

Three years later, a New York court reached a similar conclusion. In *Williams v. State*,[34] the plaintiff's mother had been raped while she was an inmate of a state mental institution.[35] The infant plaintiff sued the State of New York alleging that, if not for the negligence of state employees, her mother would not have been raped and she would not have been born illegitimate.[36] The Court of Appeals

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[21] *Id.* at 430, 404 A.2d at 13.

[22] *Id.* at 432, 404 A.2d at 14.

[23] *Id.* at 434, 404 A.2d at 15.

[24] *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

[25] *See* notes 33 & 38 *infra* and accompanying text.

[26] *Zepeda v. Zepeda* was the first case to use the term wrongful life. 41 Ill. App.2d 240, 259, 190 N.E.2d 849, 858 (Ill. App. 1963), *cert. denied*, 379 U.S. 945 (1964).

[27] 41 Ill. App. 2d 240, 190 N.E.2d 849 (Ill. App. 1963), *cert. denied*, 379 U.S. 845 (1964).

[28] *Id.* at 245–46, 190 N.E.2d at 851.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 262, 190 N.E.2d at 859.

[32] *Id.*

[33] *Id.*

[34] 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

[35] *Id.* at 482, 223 N.E.2d at 343, 276 N.Y.S.2d at 886.

[36] *Id.*

of New York held that neither the novelty of the claim[37] nor the problems with measuring damages were a bar to relief.[38] But one's circumstances of birth were held not to be a "suable wrong."[39]

A claim for wrongful life, based on medical malpractice, was first brought in the case of *Gleitman v. Cosgrove*,[40] decided by the New Jersey supreme court in 1967. It was the first case in which plaintiffs alleged that it would have been better for a child to have been aborted than to have been born.[41] In *Gleitman*, an expectant mother, who had contracted rubella, was advised by her physician that the disease would have no effect on the fetus.[42] She subsequently gave birth to a child afflicted with severe handicaps.[43] The parents and the child sued, alleging that the doctor's failure to advise the mother of the risk of birth defects prevented the mother from obtaining an abortion.[44] The court refused to recognize either the child's cause of action or his parents' claims for emotional suffering and the costs of raising and caring for him.[45] The child's claim for wrongful life was denied because compensatory damages were not measurable and public policy did not allow the recognition of life itself as an element of damage.[46]

A valid cause of action for wrongful life has not been recognized by any jurisdiction.[47] Claims for wrongful birth have, however, met

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[37] *Id.* at 483, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.

[38] *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.

[39] *Id.*

[40] 49 N.J. 22, 227 A.2d 689 (1967).

[41] *Id.* at 24, 227 A.2d at 690. The complaint had three counts. The first count was on behalf of the infant, Jeffrey Gleitman, for his birth defects. The second count was by the mother, Sandra Gleitman, for the emotional suffering "caused by her son's condition." The third count was by the father, Irwin Gleitman, seeking recovery "for the costs incurred in caring for Jeffrey." *Id.*

[42] *Id.* Sandra Gleitman had consulted the defendants, Robert Cosgrove, Jr. and Jerome Dolan, physicians specializing in obstetrics and gynecology. Dr. Cosgrove examined her and found her to be pregnant. He was advised by her that "she had had an illness diagnosed as German measles" about one month prior to the examination. "Mrs. Gleitman testified that Dr. Cosgrove, on receipt of this information and on inquiry by her, told her that the German measles would have no effect at all on her child." *Id.*

While with her husband at Fort Gordon, Georgia, Mrs. Gleitman was treated by army doctors who instructed her to consult her regular doctor about her contact with German measles. After returning home, she consulted Dr. Dolan. She testified that he had reassured her that the measles would not affect her unborn child. On November 25, 1959, she gave birth to Jeffrey, who was afflicted with substantial birth defects. *Id.* at 24–25, 227 A.2d at 690.

[43] *Id.* at 24, 227 A.2d at 690. The child was born blind and deaf. *Id.*

[44] *Id.* at 26, 227 A.2d at 691.

[45] *Id.* at 31, 227 A.2d at 694.

[46] *Id.* at 28–29, 227 A.2d at 692.

[47] *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 410–11, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899–900 (1978).

with limited success during the last few years.[48] The earliest cases to deal with claims which have come to be known as wrongful birth were actions brought by parents against doctors for unsuccessful sterilization operations.

The Minnesota case of *Christensen v. Thornby*,[49] involved a father who sued his physician for damages suffered as the result of the ineffectiveness of a sterilization operation.[50] The complaint, based on deceit, alleged that the doctor misrepresented the chances for a successful sterilization.[51] Plaintiff sought recovery for the costs to be incurred in caring for and raising his new child.[52] The court found that the complaint was without merit because the plaintiff failed to allege fraudulent intent, which was required in an action for deceit.[53] In dicta, the court found that the plaintiff had suffered no damage, but was blessed with another child.[54]

The validity of wrongful birth as a ground for relief was next considered by a Pennsylvania court in *Shaheen v. Knight*.[55] In *Shaheen*, the plaintiff alleged breach of a contract to make him " 'immediately and permanently sterile.' "[56] The court held that such a breach did exist[57] but public policy precluded the allowance of damages for the birth of a child.[58] The benefits of parenthood were found to outweigh the detriment suffered by the plaintiff. The defendant was not forced to pay for the support of the child where the father wished to retain all of the benefits and joys of parenthood.[59]

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[48] *See* notes 71–90 *infra* and accompanying text.

[49] 192 Minn. 123, 255 N.W. 620 (1934).

[50] *Id.* at 123–24, 255 N.W. at 621. Plaintiff's physician advised him that pregnancy would be harmful to his wife. He submitted to vasectomy and was informed that the operation was a complete success. Subsequently his wife became pregnant and the plaintiff allegedly sustained mental agony and financial expenses. He sued the physician on the theory of deceit. The appellate court upheld the trial court's decision to sustain defendant's demurrer on the ground that the plaintiff failed to allege fraudulent intent. *Id.*

[51] *Id.* at 126, 255 N.W. at 622.

[52] *Id.* at 124, 255 N.W. at 621.

[53] *Id.* at 126, 255 N.W. at 622.

[54] *Id.* The court, in *Christensen*, decided the case on a technicality in the pleadings. Although the decision was considered enlightened because it recognized the propriety of sterilization operations, the court side-stepped the real issue in the case, recovery for wrongful birth.

[55] 11 Pa. D. & C. 2d 41 (C.P. Lycoming, 1957).

[56] *Id.* at 44.

[57] The court recognized the validity of a contract to perform a sterilization operation. The court held that "[a] doctor and his patient . . . are at liberty to contract for a particular result." *Id.* at 44.

[58] *Id.* at 45. The court found "that to allow damages for the normal birth of a normal child [was] foreign to the universal public sentiment of the people." *Id.*

[59] *Id.* at 45–46.

A strong indication that the reasoning of *Christensen* and *Shaheen* was not dispositive on the issue of wrongful birth was found in *Ball v. Mudge*.[60] In *Ball*, the plaintiffs were blessed with the birth of their fourth child after the father had undergone a vasectomy.[61] The plaintiffs sued their physician for malpractice, but at trial the jury determined that the plaintiffs failed to establish negligence on the part of the defendant.[62] On appeal the defendant urged that the reasoning of *Christensen* and *Shaheen* was controlling and that the case should not have been submitted to the jury.[63] The court in *Ball* declined the opportunity to make such a ruling and held that the jury had acted reasonably.[64]

A still greater departure from *Christensen* and *Shaheen* was made by the Appellate Court of Illinois in the case of *Doerr v. Villate*.[65] In *Doerr*, the defendant was charged with breach of an oral contract to make Donald Doerr sterile.[66] After the operation, Mrs. Doerr became pregnant and subsequently gave birth to a retarded and deformed child.[67] More than two years after the birth the plaintiff commenced suit against the physician alleging breach of contract.[68] The defendant claimed that the two year statute of limitations for personal injury suits barred the action.[69] Asserting that such actions could be based on either tort or contract and that the plaintiff had stated a valid cause of action based on contract, the court held that the plaintiff's case was not barred by the statute.[70]

The California court of appeal, in *Custodio v. Bauer*,[71] was the first court to clearly recognize the right of plaintiffs to recover damages arising from pregnancy subsequent to a sterilization operation.[72] Following ligation of her fallopian tubes by the defendants, Mrs. Custodio became pregnant. Suit was instituted alleging negligence in performing the operation, misrepresentation, and breach of

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[60] 64 Wash.2d 247, 391 P.2d 201 (1964).
[61] *Id.* at 247, 391 P.2d at 202.
[62] *Id.* at 249, 391 P.2d at 203.
[63] *Id.* at 248–49, 391 P.2d at 203.
[64] *Id.* at 249–50, 391 P.2d at 203–04.
[65] 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).
[66] *Id.* at 334–35, 220 N.E.2d at 768.
[67] *Id.* at 334, 220 N.E.2d at 768.
[68] *Id.* at 335, 220 N.E.2d at 768.
[69] *Id.*
[70] *Id.* at 338, 220 N.E.2d at 770.
[71] 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).
[72] *Id.* at 307–09, 59 Cal. Rptr. at 465–67.

contract.[73] Finding that the plaintiffs had stated a valid cause of action for both tortious conduct and breach of contract, the court held that the plaintiffs were entitled to "more than nominal damages."[74]

In *Gleitman v. Cosgrove*, however, which was decided in the same year as *Custodio*, the New Jersey supreme court chose not to recognize wrongful birth as a valid basis for recovery.[75] The *Gleitman* decision set a precedent in New Jersey denying an award of damages for wrongful birth where the parents were deprived of the opportunity to abort a fetus.[76] The court held that the "public policy supporting the preciousness of human life" precluded the allowance of damages in such cases.[77] The *Gleitman* decision can be distinguished from prior wrongful birth cases since *Gleitman* involved the right to terminate embryonic life rather than mere sterilization. The reasoning of the *Gleitman* court on wrongful birth, in cases involving abortion, was persuasive in jurisdictions where abortions were considered against public policy. In the New York case of *Stewart v. Long Island College Hospital*,[78] which had a fact pattern similar to *Gleitman*, the abortion issue was also a controlling factor in the court's decision to deny a cause of action for wrongful birth.[79] In

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[73] *Id.* at 308, 59 Cal. Rptr. at 466.

[74] *Id.* at 325–26, 59 Cal. Rptr. at 477–78. The court stated:

> On the present state of the record it cannot be ascertained to what extent plaintiffs, if they establish a breach of duty by defendants, are entitled to damages. It is clear that if successful on the issue of liability, they have established a right to more than nominal damages.

Id. at 325, 59 Cal. Rptr. at 477. Although the above statement appears conservative, a further reading of the opinion indicates it was meant to be taken in its broadest sense. The court recommended a case-by-case approach for the formulation of a measure of damages. *Id.* at 326, 59 Cal. Rptr. at 478.

[75] 49 N.J. at 31, 227 A.2d at 693.

[76] *Id. Cf.* Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (Law Div. 1975).

[77] 49 N.J. at 29–30, 227 A.2d at 693. At the time *Gleitman* was decided, abortion was illegal in New Jersey. *Id.* at 31, 227 A.2d at 693–94. *See* N.J. STAT. ANN. § 2A:87-1 (West 1969) (repealed 1979); N.J. STAT. ANN. § 2A:170-76 (West 1971) (repealed 1979). The court in *Gleitman* held that the plaintiffs were not entitled to recover even if a legal abortion could have been obtained. The public policy against abortions militated against the award of damages for the denial of the opportunity to have an abortion. 49 N.J. at 30, 227 A.2d at 693; *cf.* Berman v. Allan, 80 N.J. at 431, 404 A.2d at 13.

[78] 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968) (*mem.*), *modified on other grounds mem.*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (App. Div. 1970), *aff'd mem.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

[79] In *Stewart*, an expectant mother who had contracted rubella entered the hospital on the advice of her physician. The doctors at the hospital declined to perform an abortion. She gave birth to a child with birth defects. 30 N.Y.2d at 695–96, 283 N.E.2d at 616, 332 N.Y.S.2d at 640–41. The appellate division, later affirmed by the Court of Appeals of New York, held that both the child's and the parents' cause of action must be dismissed "particularly . . . when viewed against a backdrop of public policy which at the time declared the proposed abortion to

cases where the right to abort an embryonic life was not at issue, the courts have not adopted the *Gleitman* rationale on wrongful birth. In *Betancourt v. Gaylor*,[80] the Superior Court of New Jersey was called upon to test the applicability of *Gleitman* to an action for malpractice for an unsuccessful sterilization attempt. The court cited various authorities, including *Custodio*,[81] to support its position that more than nominal damages should be recoverable if a breach of duty can be established.[82]

The United States Supreme Court decision in *Roe v. Wade*,[83] holding that the decision to abort a fetus within the first trimester of pregnancy was not subject to state interference,[84] rendered the public policy argument used in *Gleitman* to deny causes of action based upon wrongful birth inapplicable. *Jacobs v. Theimer*[85] and *Becker v. Schwartz*[86] are two cases recognizing the right of parents to recover damages resulting from the missed opportunity to terminate the pregnancy of a defective and unwanted child. In *Jacobs*, a mother contracted rubella in her first trimester of pregnancy and the child was born with defects in its major organs.[87] The parents brought suit against the doctor for negligently failing to diagnose the problem and to provide the necessary information with which they might have considered terminating the pregnancy.[88] The *Jacobs* court found the *Gleitman* court incorrect in denying the parents a cause of action,[89] and held that the parents had demonstrated a cognizable cause of

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be an illegal one." 35 A.D.2d at 532, 313 N.Y.S.2d at 503, *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

[80] 136 N.J. Super. 69, 344 A.2d 336 (Law Div. 1975).

[81] *Id.* at 76, 344 A.2d at 340.

[82] *Id.* at 77, 344 A.2d at 340.

In *Betancourt*, the court found that the damages suffered by the parents were distinguishable from those claimed in *Gleitman*. *Id.* at 74, 344 A.2d at 339. The elements of loss were separable from the benefit of having another child. The court held that such damages were measurable. *Id.* at 75, 344 A.2d at 339. The loss was the financial expense that the parents had sought to avoid. *Id.*

The court cited West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (Ct. Err. & App. 1944), to show that New Jersey has long recognized the right of plaintiffs to recover damages resulting from faulty sterilization attempts. 136 N.J. Super. at 75, 344 A.2d at 339.

[83] 410 U.S. 113 (1973).

[84] *Id.* at 164.

[85] 519 S.W.2d 846 (Sup. Ct. Tex. 1975).

[86] 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

[87] 519 S.W.2d at 847. Mrs. Jacobs alleged that the defendant doctor had assured her that she had not suffered from the German measles. In fact, she had contracted the disease which had serious effects upon her child. *Id.* at 849.

[88] *Id.* at 847–48.

[89] *Id.* at 849.

action for the "recovery of expenses reasonably necessary for the care and treatment of their child's physical impairment."[90]

In *Becker*, the plaintiff, age 37, gave birth to a child afflicted with Down's Syndrome.[91] The parents sued their physician for not informing them of the increased chances of giving birth to such a child and for not advising them of the availability of amniocentesis.[92] In *Park v. Chessin*, the companion case to *Becker*,[93] the parents sued after giving birth to a child afflicted with polycystic kidney disease, who died two and one-half years after birth.[94] The parents alleged that they made a conscious choice to conceive the child based on their physician's advice that the chances for such a defective birth were "nil."[95] The Court of Appeals of New York held that the plaintiffs stated causes of action "for which compensation may be readily fixed."[96] The recovery was, however, limited to the expenses for the care and treatment of the child's afflictions.[97] The court refused to grant damages for mental anguish and emotional suffering on the part of the parents. The holding, in both *Becker* and *Park*, confined the parents' recovery to the pecuniary loss occasioned by the unwanted birth.[98] This was supported by the argument that the measure of

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[90] *Id.* The court, in *Jacobs*, found the *Gleitman* court's objection to awarding damages based on speculation as to the quality of life understandable. However, the court found that:

> The economic burden related solely to the physical defects of the child is a different matter which is free from the above objection. These expenses lie within the methods of proof by which the courts are accustomed to determine awards in personal injury cases. No public policy obstacle should be interposed to that recovery. It is impossible for us to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with a defective body, a policy which in effect requires that the deficient embryo be carried to full gestation until the deficient child is born, and which policy then denies recovery from the tortfeasor of costs of treating and caring for the defects of the child.

Id.

[91] 46 N.Y.2d at 405–06, 386 N.E.2d at 808, 413 N.Y.S.2d at 896.

[92] *Id.* at 406, 386 N.E.2d at 808–09, 413 N.Y.S.2d at 896–97.

[93] *Id.* at 401, 406, 386 N.E.2d at 807, 809, 413 N.Y.S.2d at 895, 897.

[94] *Id.* at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. This was their second child to succumb to this disease. *Id.*

[95] *Id.* at 406–07, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. In 1967, Hetty Park gave birth to a child afflicted with polycystic kidney disease, who died five hours after birth. *Id.* Hetty and her husband, Steven, were concerned about the possible recurrence of this in future offspring. They consulted their physician before they conceived another child. This physician was "alleged to have informed [the] plaintiffs that inasmuch as polycystic kidney disease was not hereditary, the chances of their conceiving a second child afflicted with this disease were 'practically nil.' " *Id.* at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897.

[96] *Id.* at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

[97] *Id.*

[98] *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902–03.

emotional damages to the parents would be overly speculative and, perhaps, a matter better left to the legislature for resolution.[99]

The first substantive issue considered by the court in *Berman v. Allan* was whether Sharon Berman's claim for wrongful life was a valid ground for relief. The court's decision, written by Justice Pashman, ruled "that Sharon ha[d] not suffered any damage cognizable at law by being brought into existence."[100] Although the *Gleitman* decision, regarding wrongful life, was not overruled, the *Berman* court emphasized that its decision was based upon different reasoning.[101] The court criticized the *Gleitman* decision for placing too much emphasis on the difficulty of measuring damages.[102] Problems with the measure of damages were found not to be a sufficient basis for the denial of relief. The court carefully pointed out that Sharon

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[99] *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902. The *Becker* court relied on the case of Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977), in denying recovery for emotional damages.

In *Howard*, the parents of a child born with Tay-Sachs disease sued their physician for failing to inform them of this possibility and of the availability of testing. *Id.* at 110, 366 N.E.2d at 64–65, 397 N.Y.S.2d at 364. The plaintiffs alleged they would have elected to abort the fetus had tests revealed the presence of the disease. *Id.* The court held that the parents had no right of recovery for the emotional trauma suffered by watching their child succumb to the disease. *Id.* at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 366. To permit recovery would "inevitably lead to the drawing of artificial and arbitrary boundaries." *Id.* at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 365.

The *Becker* court applied the principles of the RESTATEMENT OF TORTS § 920 to the issue of emotional damages. The Restatement supports the argument that if tortious conduct confers a benefit on the injured party then the benefit must be considered in measuring damages.

> Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable.

RESTATEMENT OF TORTS § 920 (1939).

The *Becker* court found that the love that the parents would experience must be considered in mitigation of the damages; the monetary equivalent of love and affection would be hard to determine and would make damages too speculative. The court relegated the matter of awarding emotional damages to the legislature. The court said:

> As in the case of plaintiffs' causes of action for damages on behalf of their infants for wrongful life, the cognizability of their actions for emotional harm is a question best left for legislative address.

46 N.Y.2d at 415, 385 N.E.2d at 814, 413 N.Y.S.2d at 902.

This view was reminiscent of the position taken by the court in *Shaheen v. Knight*. See notes 55–57 *supra* and accompanying text.

[100] 80 N.J. at 428–29, 404 A.2d at 12.

[101] *Id.*

[102] The court stated:

> were the *measure* of damages our sole concern, it is possible that some judicial remedy could be fashioned which would redress plaintiff, if only in part, for injuries

had suffered no damages to be measured.[103] Sharon's potential to experience love, happiness and pleasure, characterized by the court as the essence of life, was found to outweigh the suffering she would endure.[104] Emphasizing the high esteem with which our society views human life, the court could not bring itself to hold that Sharon would have been better off not to have been born.[105]

The *Berman* court chose not to follow *Gleitman's* holding on the issue of wrongful birth. The tortious injury sustained by Mr. and Mrs. Berman, when they were denied the right to make a meaningful decision to abort Sharon, was held to be compensable.[106] The monetary equivalent of the emotional distress was found to be an appropriate measure of the damages incurred by the parents.[107] The *Berman* majority clearly rejected the argument used in *Gleitman* that the benefits of parenthood could not be weighed against the emotional damage caused by the negligence of the defendants.[108] The public policy which precluded the *Gleitman* court from awarding damages for the denial of an opportunity to have an abortion was found to be no longer valid.[109] Despite the court's seemingly pro-

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> suffered. . . . Difficulty in the *measure* of damages is not, however, our sole or even primary concern.

Id. (emphasis in original).

[103] *Id.*

[104] *Id.* at 430, 404 A.2d at 13. In *In re Grady*, the court considered the request of parents of a Down's Syndrome daughter to have her submit to a sterilization operation. 170 N.J. Super. 98, 101, 405 A.2d 851, 852 (Ch. Div. 1979). The court gave a detailed description of Down's Syndrome and discussed the proposition that mentally retarded individuals have the right and ability to enjoy life to the fullest extent possible. *Id.* at 104–05, 405 A.2d at 854–55.

[105] 80 N.J. at 430, 404 A.2d at 13. The court in *Berman* held that to allow damages for life itself "would [be] to disavow the basic assumption upon which our society is based." *Id.*

[106] *Id.* at 432, 404 A.2d at 14.

[107] *Id.* at 433–34, 404 A.2d at 14–15. The *Berman* court recognized that claims for emotional damage in various factual settings have met with great success in recent years. *See, e.g.*, Zahorian v. Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973) (damages awarded for pain and suffering resulting from being denied the right to rent a listed apartment); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965) (damages awarded for injuries resulting from fright without physical contact); Muniz v. United Hospitals Medical Center Presbyterian Hosp., 153 N.J. Super. 79, 379 A.2d 57 (App. Div. 1977) (parents able to recover for pain and suffering caused by hospital's mishandling of their child's corpse).

[108] 80 N.J. at 433, 404 A.2d at 14–15. The court found that to refuse Mr. and Mrs. Berman redress for their injuries because of problems with the measuring of damages "would constitute a perversion of fundamental principles of justice." *Id.*

[109] *Id.* at 431, 404 A.2d at 13. The court stated:

> In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided, the second ground [(public policy against abortion)] relied upon by the *Gleitman* majority [could] no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth.

Id.

gressive holding on the wrongful birth issue, it held that neither the medical expenses nor the projected costs of raising Sharon were compensable elements of the parents' injury.[110] To allow recovery for those items would be a windfall to the parents, "wholly disproportionate to the culpability of the defendants."[111]

Justice Handler's separate opinion, concurring in part and dissenting in part, took a more expansive view of the issues.[112] Like the majority, Justice Handler found emotional damage to be the major compensable injury. He found, however, that Mr. and Mrs. Berman's injury had more than one dimension.[113] In Justice Handler's view, the parents in *Berman* suffered an injury when they were denied the right to decide whether or not to have an abortion. The ultimate decision was irrelevant.[114] The other element of the parents' damages, termed diminished parental capacity by Justice Handler, resulted from the emotional trauma which flowed directly from the defendant's negligence.[115]

Justice Handler went on to develop a basis for a claim by the child. He extended his theory of diminished parental capacity to include a possible action for diminished childhood.[116] While Sharon's claim, under this theory, was causally related to her parents' injury, Justice Handler did not consider the child's damages to be purely derivative.[117] Rather, he reasoned that Sharon was damaged in her own right as the proximate result of the malpractice of the defen-

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[110] *Id.* at 432, 404 A.2d at 14.

[111] *Id.*

[112] *Id.* at 435–36, 404 A.2d at 16 (Handler, J., concurring in part, dissenting in part).

[113] *Id.* at 439, 404 A.2d at 18 (Handler, J., concurring in part, dissenting in part).

[114] *Id.* at 435, 404 A.2d at 16 (Handler, J., concurring in part, dissenting in part). Justice Handler noted the fact that this case went to the supreme court while it was in a very early stage of the litigation process. *Id.* He reasoned that discovery might have revealed an intention to give birth to the child. He did not view this as detrimental to recovery, writing that: "In either event a tortious wrong has occurred and this should not affect the plaintiffs' claim for compensation." *Id.* It was, in Justice Handler's opinion, "[a] serious, irreversible wrong" when the parents in *Berman* were denied the chance "to apply [their] own moral values to the decision of whether or not to bring a handicapped child into the world. *Id.* at 440, 404 A.2d at 18 (Handler, J., concurring in part, dissenting in part).

[115] *Id.* at 438–39, 404 A.2d at 17–18 (Handler, J., concurring in part, dissenting in part).

[116] *Id.* at 436, 404 A.2d at 16 (Handler, J., concurring in part, dissenting in part). Justice Handler wrote:

> [the] plaintiffs should be able to seek to establish that mental and emotional suffering involves moral strife and includes the element of impaired parenthood and, further, that the child has a legitimate injury claim in the nature of a diminished childhood.

Id.

[117] *Id.* at 434–35, 404 A.2d at 15 (Handler, J., concurring in part, dissenting in part).

dants.[118] The child's "handicap has been made more burdensome [because her parents will be] less able to cope with . . . the extra heavy parental obligations" which caring for her will require.[119] In this way, Justice Handler was attempting to resolve the analytical problems which have prevented the success of wrongful life actions.

Under Justice Handler's formulation of Sharon's claim, it is unnecessary to contend that she would have been better off not to have been born. Sharon's damages would depend on the extent to which she could prove her parents' dysfunction. In this way, claims for wrongful birth and wrongful life would be interwoven. The child would, however, be denied the extensive relief that a successful claim for wrongful life, in its present form, would bring. In situations where the parents have proven impairment of their parental function, the child would be protected to the extent of her parents' disability. Perhaps Justice Handler's theory of recovery for Sharon Berman should not be considered a claim for wrongful life, but rather a signal that the court might be more receptive to a more logical basis for such claims.

The *Berman* holding acknowledged that advances in genetic forecasting have given rise to a duty of physicians to inform patients of possible birth defects in their unborn children.[120] The decision to bring a new life into the world is primarily the prerogative of the prospective parents. The *Berman* majority imposed upon physicians a duty to impart to prospective parents any information essential or useful in reaching that decision. The physician's liability was, however, limited to compensation for the parents' emotional anguish.[121] Under *Berman*, physicians in New Jersey will not be liable for medical costs and the projected costs of raising and properly educating children who would not have been born but for the doctor's negligence.[122] This is contrary to the position taken by the courts in *Jacobs* and

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[118] *Id.* He stated that "the infant has come into this world and is here, encumbered by an injury attributable to the malpractice of the doctors." *Id.* at 442, 404 A.2d at 19 (Handler, J., concurring in part, dissenting in part).

[119] *Id.*

[120] The court in *Berman* recognized that liability could arise where a doctor fails to advise patients of amniocentesis. A study conducted by the National Registry for Amniocentesis published in the Journal of the American Medical Association in 1976 concluded that the benefits of amniocentesis far outweighed the risks and that it should be performed as standard procedure for women over thirty-five years of age. Furthermore, incidence of fetal loss was not significantly increased by amniocentesis. The National Institute of Child Health and Development National Registry for Amniocentesis Study Group, *Midtrimester Amniocentesis for Prenatal Diagnosis*, 236 J.A.M.A. 1471, 1473, 1475–76 (1976).

[121] 80 N.J. at 434, 404 A.2d at 15.

[122] *Id.*

Becker.[123] The court has defined the physician's duty while limiting his liability for failure to adequately fulfill that duty.

The failure to recognize wrongful life as a valid cause of action results from analytical problems with the issue of damages. The court was not ready to endorse the proposition that in some instances one would be better off not to have been born. Until society and the court adopt that proposition, it will be logically impossible to allow damages for wrongful life as pleaded in *Berman*.

Vincent James Rubino, Jr.

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[123] *See, e.g.*, Jacobs v. Theimer, 519 S.W.2d 846 (Sup. Ct. Tex. 1975); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).