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Wrongful Birth: Judicial Reticence with an Emerging Tort: The Negligent Performance of Genetic Counseling

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NOTES

WRONGFUL BIRTH: JUDICIAL RETICENCE WITH AN EMERGING TORT: THE NEGLIGENT PERFORMANCE OF GENETIC COUNSELING—*Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979).

INTRODUCTION

In *Berman v. Allan*[1] the Supreme court of New Jersey addressed the topics of wrongful birth and wrongful life[2] for the first time since its much quoted decision of *Gleitman v. Cosgrove*.[3] The *Gleitman* decision was the first in what has developed into a series of cases in which a physician's alleged negligent errors in prenatal diagnosis or genetic counseling and testing is claimed to have thwarted the parents' desire not to give birth to a child suffering from severe physical and mental abnormalities.[4] Characteristic of the negligent genetic counsel-

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1. 80 N.J. 421, 404 A.2d 8 (1979).

2. The phrases "wrongful life" and "wrongful birth" have been applied to suits with a variety of fact patterns. "Wrongful life" was first used to describe the child's cause of action when a child sued his father for allowing him to be born a bastard. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963). In *Gleitman v. Cosgrove*, the phrase was applied to a child's action against a physician who had failed to warn the child's mother that he might be born with defects resulting from the Rubella (German Measles) she contracted during pregnancy. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). In both types of suits, the courts have characterized the child's contention as claiming that he should not be alive; that his existence is "wrongful."

"Wrongful birth" is the label attached to the parents' cause of action in cases such as *Gleitman*, in which the parents have received inaccurate and allegedly negligent genetic counseling and/or testing and have subsequently given birth to a child with severe physical and mental abnormalities. *See* Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975). "Wrongful birth" has also been applied to cases in which a negligently performed sterilization operation has resulted in the birth of an unwanted child. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8 (Del. 1975). In both situations, the parents assert that their child should not have been born.

3. 49 N.J. 22, 227 A.2d 689 (1967).

4. Throughout this note "genetic counseling cases" will be the label used to refer to cases involving the allegedly negligent failure of the physician or laboratory to provide accurate preconception and prenatal information and testing to prospective parents. The original genetic counseling cases involved children born with physical and mental abnormalities because the mother had contracted Rubella (German Measles) during the first trimester of pregnancy. *See, e.g.*, Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.2d 502, *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1970) (hospital refused to provide abortion to mother who had had Rubella); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975), *rev'g*, 507 S.W.2d 288 (Civ. App. 1974) (physician negligently failed to diagnose mother's illness as Rubella and to warn her of the risks to her fetus); Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975) (physician negligently failed to diagnose mother's illness as

ing cases[5] is the parents' allegation that either they would not have

Rubella, failed to determine she was pregnant, and failed to warn her of the risks to her fetus).

More recently the courts have heard cases in which the physician failed to detect hereditary or genetic birth defects as opposed to environmentally determined defects (such as those cause by the mother's contracting Rubella). *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D.Pa. 1978) (negligent performance of Tay-Sachs testing and amniocentesis); Curlender v. Bio-Science Laboratories, 2 Civ. No. 58192 (Cal. Ct. App., filed July 11, 1980) (negligent testing of parents and failure to identify them as Tay-Sachs carriers); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (negligent failure to advise mother of risks of Down's Syndrome and availability of amniocentesis); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (negligent failure to warn mother of risks of Down's syndrome and availability of amniocentesis).

Technological advancements concerning genetic abnormalities and an improved ability to detect their presence through a procedure called amniocentesis have made these suits possible. Amniocentesis is an intrauterine testing procedure that can be performed in the sixteenth week of pregnancy to determine the presence of certain genetic abnormalities in the fetus. In Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92 (1974) [hereinafter cited as Friedman], the author describes the procedure, the types of defects capable of detection, the risks of the procedure, and the possible legal consequences stemming from this medical advancement. The most frequent genetic disorders appearing in suits to date are Down's Syndrome and Tay-Sachs disease. Mothers over the age of 35 have a substantially greater risk of bearing a child with Down's Syndrome than do younger mothers. *See* Annas & Coyne, *"Fitness" for Birth and Reproduction: Legal Implications of Genetic Screening*, 9 FAM. L.Q. 463, 469 (1975) [hereinafter cited as Annas & Coyne]. Children born with Down's Syndrome may suffer from fatal heart diseases and, more certainly, will be severely mentally retarded. Friedman, *supra*, at 100 n.34. Through the amniocentesis procedure, the physician can detect whether the fetus will be afflicted with the Syndrome. *See* Annas & Coyne, *supra*, at 469-72. Tay-Sach's disease is characterized by "blindness, severe mental retardation and death, usually before three and four years of age. It is most common in Jews of Northern European origin (Ashkenazy Jews)." Friedman, *supra*, at 101 (quoting Friedman, *Prenatal Diagnosis of Genetic Disease*, 225 SCI. AM., Nov., 1971, at 36). Preconception testing of the parents coupled with amniocentesis can determine whether the fetus will be afflicted.

5. Professor Capron provides the following definition for genetic counseling in Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 621 (1979) [hereinafter cited as Capron], (quoting Ad Hoc Committee on Genetic Counseling, *Genetic Counseling*, 27 AM. J. HUMAN GENETICS 204-41 (1975)):

> Genetic Counseling is a communicative process which deals with the human problems associated with the occurrence or the risk of occurrence, of a genetic disorder in a family. This process involves an attempt by one or more appropriately trained persons to help the individual or family to (1) comprehend the medical facts, including the diagnosis, probable course of the disorder, and the available management; (2) appreciate the way heredity contributes to the disorder, and the risk of recurrence in specified relatives; (3) understand the alternatives for dealing with the risk of recurrence; (4) choose the course of action which seems to them appropriate in view of the risks, their family goals, and their ethical and religious standards, and to act in accordance with that decision; and (5) to make the best possible adjustment to the disorder in an affected family member and/or to the risk of recurrence of that disorder.

Capron points out that the area of genetic counseling provides a number of areas in

conceived[6] or, more frequently, that they would have aborted their afflicted fetus[7] had the physician not been remiss in diagnosing the impairments their child would suffer. Further, the parents usually bring an action on behalf of their child based upon his or her crippling abnormalities.[8]

Such a claim was made by the parents and their physically and mentally impaired child in *Gleitman*.[9] The decision came at a time when abortions were, for the most part, illegal[10] and when the courts were denying parents' causes of action in negligent sterilization cases on the premise that the birth of a child was always a benefit and never a compensable injury.[11] Thus, when the Gleitmans claimed to have

which the professional (usually a physician) may encounter difficulties. For example, it is an area of rapidly expanding knowledge and the requisite standard of care is as yet not certain. To enable correct diagnosis there is considerable information that must be gathered which may involve a number of clinical and laboratory tests that must be properly performed. Further, the physician must make certain that the information is conveyed in a comprehensible manner so that the alternatives are made clear. Capron, *supra*, at 624-29.

6. In *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), the parents had previously given birth to a child with polycystic kidneys who had died from the affliction. The mother's physician had assured them that the disease was not hereditary yet they subsequently gave birth to a second child with the same affliction. The parents contended, *inter alia*, that had they been properly advised that the condition was hereditary and had the proper preconception tests been administered to determine if they would give birth to another afflicted child, they would never have conceived the second child.

7. *See* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

8. *See* Karlsons v. Guerinot, 57 A.D.2d 73, 75, 394 N.Y.S.2d 933, 935 (1977) (child's action sought damages for pain and suffering, for having to live an impaired life, and for lost future earnings).

9. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

10. The New Jersey statute at the time of the decision was not particularly clear on what constituted a legal abortion; the statute merely forbade an abortion "without lawful justification." N.J. STAT. ANN. § 2A:87-1 (West) (statute subsequently declared unconstitutional in *Y.W.C.A. v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972)). Although the majority opinion in *Gleitman* focused less on the possible illegality of abortion and more on the public policy militating against abortion, the concurring opinion of Justice Francis stressed that a eugenic abortion (one performed because of physical or mental abnormalities in the fetus) was against the law. Gleitman v. Cosgrove, 49 N.J. 22, 32, 227 A.2d 689, 698 (1967) (Francis, J., concurring). Justices Jacobs and Weintraub in their separate dissenting opinions reached the opposite conclusion on the legality of eugenic abortions. *Id.* at ____, 227 A.2d at 706, 710. Nonetheless, the *Gleitman* decision predated the Supreme Court's decision of *Roe v. Wade* in which the Court found that the mother's decision to abort during the first trimester of pregnancy fell within her constitutional right to privacy and, as such, was not subject to state interference. Roe v. Wade, 410 U.S. 113 (1973).

11. The belief that the birth of a child was a blessed event and not a compensable injury was first articulated in Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), a case involving a physician's allegedly negligent performance of a vasectomy and the subsequent birth of a healthy child. At the time *Gleitman* was decided, no

been negligently denied the opportunity to abort because of the physician's inaccurate assurance the fetus would be unaffected by Mrs. Gleitman's Rubella, the court found the claim was not actionable.[12] Public policy, the court reasoned, was against abortion. The court found as a second obstacle to recovery the impossibility of measuring the joys and benefits of parenthood against the alleged emotional and pecuniary losses resulting from raising their special child.[13] The court also dismissed the child's cause of action saying the child had made it impossible to assess his damages by claiming he should not have been born or had been wronged by not being aborted.[14] Nonexistence is a state which is incapable of evaluation, the court reasoned, and therefore the comparison between what the child must suffer in his impaired state and what he would endure if consigned to nonexistence cannot be made.[15]

Over a decade has passed since *Gleitman*, and though the decision has had a significant impact on genetic counseling and, to an extent, negligent sterilization cases, much has changed in the interim. Medical technology has greatly improved the ability to predict and detect the existence of severe genetic and chromosomal birth defects, and eugenic abortions have been recognized as a legitimate means for reducing the incidence of these tragic lives.[16] Paralleling these medical advancements has been the Supreme Court's recognition that the decision to procreate and the decision to abort within the first trimester of pregnancy fall within the woman's constitutional right to privacy and

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court had held otherwise and thus parents seeking compensation for the birth of an unwanted child after a negligent sterilization operation were not viewed as having been damaged. *See also* Shaker v. Knight, 11 Pa. D.&C.2d 41 (1957). A few months after the *Gleitman* decision, however, another court allowed the parents compensation recognizing that the birth of an unwanted child could create considerable hardships rather than being a "blessed event." Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

12. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

13. *Id.* at ____ , 277 A.2d at 692. Justice Jacobs in his dissenting opinion argued in favor of allowing the parents to maintain a cause of action because they had been lead to rely on the inaccurate assurances by the physician. The resulting birth of their defective child was, therefore, a wrong that should be redressed. *Id.* at ____ , 227 A.2d at 703. Justice Weintraub, in a separate dissenting opinion, argued that the parents should be allowed to maintain an action for having been denied the opportunity to make the decision to abort or not. *Id.* at ____ , 227 A.2d at 707.

14. *Id.*

15. *Id.*

16. *See generally* Annas & Coyne, *supra* note 4, and Friedman, *supra* note 4, for a discussion of the abilities of medical technology to predict and detect genetic abnormalities and the use of eugenic abortion as a means for reducing the incidence of such hereditary diseases.

are not subject to state interference.[17] There has also been an increasing tendency for courts to find that the birth of a child after a negligently performed sterilization operation is not always a "blessing" but rather can be an injury for which the law will provide compensation.[18] Further, negligent genetic counseling cases have increased in frequency and courts have begun to recognize them as actionable claims for relief.[19]

This note will examine the *Berman* decision within the context of the trends in genetic counseling and negligent sterilization cases that have evolved since the New Jersey Supreme Court decided *Gleitman*. The note will also discuss an alternative approach to addressing both the parents' and child's cause of action.

FACTS AND HOLDING

When Mrs. Berman became pregnant at age 38, she sought the professional services of two gynecology and obstetrics specialists, Drs. Allan and Attardi. Not until Mrs. Berman gave birth to a daughter suffering from the chromosomal disorder of Down's Syndrome[20] did she become aware that her age placed her in a high risk group for bear-

17. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that the couple's decision to procreate or use some method of contraception fell within their constitutionally protected right to privacy. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court extended this constitutional protection to a woman's decision to abort in the first trimester of pregnancy.

18. There is still a split of authority concerning whether the parents of an unwanted child should be compensated because of a physician's negligent performance of a sterilization operation. With increasing frequency courts are allowing compensation for the expenses involved in the birth and raising of the child. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (negligent vasectomy); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (negligent error in filling contraceptive prescription); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Spec. Term 1974) (negligent vasectomy); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (negligent tubal ligation).

Commentators have also tended to support this shift towards compensation. *See, e.g.*, Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries, and Wrongful Life*, 1978 DUKE L.J. 1401 (1978) [hereinafter cited as Robertson].

Some courts, nonetheless, have maintained the posture that the birth of a healthy child is not a compensable injury. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8 (Del. 1975) (unsuccessful tubal ligation); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973) (unsuccessful tubal ligation).

19. *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (allowing medical expenses for treating child); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (allowing special costs to treat child's condition); Dumer v. St. Michael's Hosp., 69 Wis. 2d 76, 233 N.W.2d 372 (1975) (allowing expenses of caring for child's defects).

20. *See* note 4 *supra*.

ing a child with this disorder. Her doctors had not informed her that through a procedure called amniocentesis[21] she could have verified that her fetus had this disorder. The Bermans contended that the physicians had deviated from sound medical practice by not informing them of the risks involved and the availability of tests.[22] They further alleged that had they been properly informed, Mrs. Berman would have undergone the procedure and upon learning of the results, aborted the afflicted fetus. The Bermans sought compensation for the expenses they would encounter in raising, educating, and supervising their child and for the emotional distress they had suffered and would continue to suffer because of the child's condition. The child sought compensation for her physical and emotional pain and suffering.[23]

The trial court, relying upon the holding of *Gleitman v. Cosgrove* as controlling precedent, granted the defendants' motion for summary judgment finding the plaintiffs had failed to state an actionable claim for relief.[24] When the New Jersey Supreme Court certified the case for review on its own motion, the court found that the parents had stated an actionable claim for relief.[25] Damages were limited, however, to compensation for the emotional distress the parents had suffered and would continue to suffer over the birth of their afflicted child.[26] Specifically excluded as a recoverable element of damages were the pecuniary expenses that would arise from providing special care, treatment, and education for their child. The court found that such damages would be disproportionate to the defendants' "culpability" and would unjustly place the entire burden of child rearing on the defendants while the parents reaped all the benefits of parenthood.[27]

Stressing the high value society places on life regardless of the presence or absence of handicaps, the court found the child had not suffered any damages cognizable at law by being brought into existence.[28] The court reasoned that the joys and pleasures the child would experience by virtue of being alive would outweigh any physical or emotional pain and suffering she might endure. The child's action,

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21. Amniocentesis involves the testing of the amniotic fluid drawn from mother by perforating the abdominal wall after the fifteenth week of gestation. The procedure identifies certain genetic and chromosomal problems, as well as the sex and blood type of the fetus. *See* Friedman, *supra* note 4, at 97-99.

22. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

23. *Id.*

24. *Id.*

25. *Id.* at 432, 404 A.2d at 14.

26. *Id.* at 433, 404 A.2d at 15.

27. *Id.* at 432, 404 A.2d at 14.

28. *Id.* at 429-30, 404 A.2d at 12-13.

therefore, was dismissed for failure to state an actionable claim for relief.[29]

ANALYSIS

A. The Parents' Cause of Action

In recognizing the parents' cause of action, the *Berman* court acknowledged that since *Roe v. Wade*,[30] public policy supported rather than militated against the woman's right to make a "meaningful" decision on whether or not to abort. The court, therefore, recognized a duty on the part of the physicians to conform to the professional standard of care in providing genetic counseling and testing and that failure to do so could negligently interfere with the parents' decision to abort. In rather narrowly defining the physician's liability, the court draws from Justice Weintraub's dissenting opinion in *Gleitman*.[31] Weintraub would have awarded the Gleitmans the monetary equivalent of the emotional distress resulting from having lost the opportunity to abort.[32] The majority in *Berman* interpreted this to be the valuation of the emotional distress over the child's condition.[33]

Justice Handler, concurring in part and dissenting in part in *Berman*, attempted to expand upon the nature of this injury by describing the loss of the parents' opportunity to choose to abort or give birth as an irreversible moral and ethical injury.[34] Drawing upon medical and psychological studies of parents with severely handicapped children, Justice Handler felt that a foreseeable and compensable consequence of this lost opportunity was a condition he described as "impaired parenthood." Because the parents had been denied the opportunity to know in advance of the child's condition, they would be less capable of coping emotionally with the child and fulfilling their parental roles.[35]

The difficulty in measuring damages that posed such an obstacle in *Gleitman* was viewed by both the majority and dissent as inadequate grounds for denying the action. They chose to compensate for less concrete elements such as emotional distress and impaired parenthood but were unwilling to allow compensation for medical treatment and rearing costs that were capable of more precise valuation. Yet, without explanation, the *Berman* court declined to note that in four of the six

29. *Id.* at 430, 404 A.2d at 13.
30. 410 U.S. 113 (1973).
31. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).
32. *Id.* at ____ , 227 A.2d at 712.
33. 80 N.J. 421, 404 A.2d 8 (1979).
34. *Id.* at 439-40, 404 A.2d at 18.
35. *Id.* at 440-41, 404 A.2d at 18-19.

most recent genetic counseling cases, though other damages were allowed, emotional distress damages were explicitly denied.[36] Nor did the *Berman* court note that in a fifth genetic counseling case the court was only willing to state that special treatment expenses would be compensable and left the question of whether other damages could be recovered to be resolved on remand.[37]

In reaching this rather contradictory result, the court acknowledged that the medical and pecuniary expenses of raising the child were "caused" by the defendants' breach, but relied upon arguments that appear in negligent sterilization cases to deny all but the emotional distress damages. The two cases relied upon, *Rieck v. Medical Protective Services*[38] and *Coleman v. Garrison*,[39] represent the view that a child is always a benefit and that to allow recovery for rearing expenses would be disproportionate to the defendant physician's culpability.[40]

In *Rieck*, for example, the plaintiff alleged that she would have aborted her healthy fetus had the physician not been negligent in fail-

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36. *See* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Park v. Chessin, 60 App. Div. 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) (denied emotional distress because of uncertainty of measurement and mitigating effects from joys of parenthood); Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (denied emotional distress because injury was to child, impossibility of measuring benefits of parenthood against claimed emotional distress, would place an unreasonable burden on the defendant); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (denied emotional distress damages as too speculative).

The only decision specifically allowing emotional distress damages was *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 966 (1977). Since the consolidated opinion of *Becker v. Schwartz* and *Park v. Chessin*, the controlling precedent in New York would be the denial of emotional distress damages. This position has received criticism from the commentators, particularly since New York has allowed emotional distress damages in situations where a duty was owed to the plaintiff even though there had been no physical impact or physical consequences. *See* Johnson v. State of N.Y., 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (woman allowed to recover for her emotional distress when mental hospital erroneously informed her that her mother had died). For discussions favoring recovery of damages for emotional distress *see generally*, Capron, *supra* note 5; Comment, *Howard v. Lecker: An Unreasonable Limitation on a Physician's Liability in a Wrongful Life Suit*, 12 NEW ENGLAND L. REV. 819 (1977); Comment, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978) [hereinafter cited as *Father and Mother Know Best*]; Note, *Wrongful Birth and Emotional Distress: A Suggested Approach*, 38 U. PITT. L. REV. 550 (1970).

37. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978).

38. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

39. 349 A.2d 8 (Del. 1975).

40. *See, e.g.*, Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957) (stating that the physician should not have to bear all the burden of child rearing while the plaintiff parents derived all the benefits); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (recovery for child rearing expenses would be disproportionate to the defendant's negligence).

ing to diagnose her pregnancy.[41] The Supreme Court felt it would violate public policy to require the physician to bear the economic burden of raising the healthy child while the mother derived all the benefits of parenthood.[42] The court in *Berman* chose to rely upon the reasoning of the Wisconsin court and to overlook that same court's reasoning in *Dumer v. St. Michael's Hospital*,[43] a more factually similar case decided the following year. In *Dumer* the physician had failed to diagnose the woman's illness as Rubella, had failed to determine that she was pregnant, and accordingly had failed to advise her of the risks to her fetus. In allowing compensation for the care and treatment expenses, the *Dumer* court distinguished *Rieck* on the basis that here the parents only sought the special expenses they would encounter in tending to the child's disabilities.[44] The *Berman* court did not explain why it chose to follow *Rieck* instead of *Dumer*, which was more on point.

Futhermore, the court failed to explain why it chose to rely on *Coleman v. Garrison*.[45] Even within the negligent sterilization cases, *Coleman* stands out as an exception to the growing trend that allows the parents to recover child rearing expenses.[46] *Coleman* reverts to the

41. 64 Wis. 2d 514, 219 N.W.2d 242 (1974). *Rieck*, though often treated as a negligent sterilization case, does not fit comfortably in that category, but rather is a case involving the allegedly negligent failure to diagnose a pregnancy in time for the mother to abort her fetus.

42. *Id.* at 518-19, 219 N.W.2d at 244-45. The court was also concerned that a contrary holding would encourage fraudulent claims by mothers seeking a child rearing expenses for their normal children.

43. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

44. *Id.* at 775, 233 N.W.2d 376.

45. 345 A.2d 8 (Del. 1975) (failure of tubal ligation).

46. The first decision in which parents were allowed full recovery for all damages proximately flowing from a negligently performed sterilization operation was Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). *See also* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (allowing medical expenses, pain and suffering relating to childbirth and rearing expenses subject to the offsetting value of the benefits of parenthood); Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169 (1977) (allowing prenatal and postnatal medical expenses, pain and suffering during pregnancy and delivery, costs of raising child subject to offsetting value of child's aid, comfort and society during life of parents); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (allowing, *inter alia*, value of loss of the mother's society, care and protection during and after unwanted pregnancy, expenses due to change in family status, rearing costs of unwanted child); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (allowing all damages that were direct and natural consequence of the defendant's negligence); Rivera v. State of N.Y., 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978) (allowing medical expenses, pain and suffering, rearing expenses subject to defendant's ability to prove offsetting benefits of parenthood). *But see* Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (1977) (allowing recovery only for the costs and pain and suffering resulting from failed sterilization operation); Terrell v. Garcia, 496 S.W.2d (Tex. Civ. App. 1971) (finding that the benefits of parenthood outweigh as a matter of law any monetary injuries).

arguments raised in *Gleitman* that the damages would be too speculative, and further stresses that the benefits of life outweigh, as a matter of law, any damages that might have resulted from this unwanted birth.[47]

The reliance on *Coleman* and *Rieck* is even more tenuous in view of the apparent opposite position of New Jersey on the same issue of compensation for damages resulting from negligently performed sterilization operations. Though the New Jersey Supreme Court has not passed on this issue, the state's Superior Court in *Betancourt v. Gaylor*[48] found that since decisions concerning procreation are within the individual's constitutionally protected right to privacy, when a physician interferes with that right by negligently performing a sterilization operation he should be responsible for any and all damages the plaintiff can establish as flowing from the failed operation, including child rearing expenses.[49] If the parents received benefits from the birth of their healthy, but unwanted child, these could be calculated to offset the damages, but the balancing of benefits and losses would be left to the trier of fact.[50] This handling of the "benefits of parenthood" is in marked contrast to that of the *Berman* court. Rather than allowing the "benefits" to serve as an offset to damages within the jury's calculations, the *Berman* court used them as a total bar to recovery for medical and child rearing expenses. The placement of such emphasis on the benefits of child rearing is particularly odd as the *Berman* child, suffering from severe mental and physical abnormalities, would probably not be able to provide the parents with as many so called benefits as the healthy child in the *Betancourt* decision.

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47. Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975).

48. 136 N.J. Super. 69, 344 A.2d 336 (1975) (failed tubal ligation resulting in birth of healthy child).

49. *Id.*

50. *Id.* at 74-75, 344 A.2d at 340. The issue of weighing the benefit of childrearing as a means of offsetting the pecuniary and emotional losses has been raised in a number of decisions. In so doing, courts have attempted to apply the so called benefit rule of the Restatement of Torts which states:

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

RESTATEMENT (SECOND) OF TORTS § 920 (1979). The courts have varied in their application of the Rule. *Compare* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (joys of parenthood can only be used to offset same interest or emotional distress) *with* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (interests indistinguishable, and joys of parenthood may be used to offset all damages recoverable). The decisions do agree that it is a measurable item. *See also* Kashi, *supra* note 18, for an excellent discussion on the application of the benefit rule.

The court in *Betancourt* went to considerable length to distinguish the facts in *Gleitman*[51] from the facts before it in order to avoid *Gleitman* as controlling precedent. An examination of the reasoning in *Betancourt* coupled with the cursory explanation for limiting damages provided in *Berman* sheds some light on why the *Berman* court may have chosen to draw on cases with distinguishable fact patterns to limit the defendants' liability.

The court in *Betancourt* said that in *Gleitman*, the plaintiffs did not want a child with severe abnormalities, yet the child had already been conceived and the parents could only have avoided the consequences by aborting the fetus.[52] In distinguishing *Betancourt*, the Superior Court explained that the plaintiffs did not want any child, sought to avoid pregnancy through a sterilization operation, and were denied the opportunity to be freed the expense of raising a child because the defendant negligently performed the operation.[53] Yet parents who do not want a child suffering from severe abnormalities are no less deserving of compensation than parents who do not want any child. The real distinction between the two causes of action is that in the former the defendant negligently interfered only with the parents' right to abort.[54] To use the *Berman* court's description, negligent interference with the right to abort is apparently a less culpable form of negligence.[55] Though both the decision to procreate and the decision to abort are within the mother's constitutionally pro-

51. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

52. Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975).

53. *Id.*

54. Arguably, greater proof problems exist in cases where the parents allege that they would have aborted the fetus had they known it would be afflicted with a severe abnormality. When a parent decides to have a sterilization operation, he or she is making it clear in advance of any unfortunate consequences, that it is his or her intent not to bear any children. Should a child subsequently be born, the causal connection between the physician's act of negligence and the child's birth can more surely be drawn. The parent's desire not to have children can be objectively assessed by their submission to the sterilization operation. In the case where an afflicted child is born, the courts may be hesitant to place as much weight on the parents' claim via hindsight, that they would have chosen to abort. In the *Berman* decision, however, the court was reviewing a lower court's granting of summary judgment against the plaintiffs and therefore had to treat all of the plaintiffs' allegations as true for the purposes of its review. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). The question was not could the Berman's prove their allegations, but rather, given that they would be able to establish each allegation, did they have a legally cognizable claim for relief. Even though the court was to accept as true each of the plaintiffs' allegations, the court may still have had reservations about plaintiffs' ability to demonstrate causation in such cases and therefore sought some means of limiting the physician's liability.

55. *Id.* at 432, 404 A.2d at 18.

tected right to privacy,[56] negligent interference with those rights by physicians is receiving comparatively disparate treatment.[57]

Though the *Berman* decision is somewhat exceptional in that it allowed emotional distress damages and not special damages, it represents a tendency in genetic counseling cases to limit damages in some way.[58] The limited damage awards in genetic counseling cases are in marked contrast to the increasingly broad range of damages being allowed in negligent sterilization cases.[59] Arguments against full compensation are now being accepted in genetic counseling cases that have, with increasing regularity, been dismissed as unfounded obstacles to recovery in negligent sterilization cases.[60]

The question then becomes whether an acceptable explanation can be found for these discrepancies and whether it provides a sound basis for the different trends in these two groups of cases. In both types of cases, assuming the mother can prove her allegations, the physician has deviated from the professional standard of care in his treatment of her. In one situation, this breach involves the negligent performance of an operation. In the other situation the physician has negligently failed to advise her of known birth defect risks and of procedures available for verifying the existence of those defects. In the first instance, the defendant's negligence has thwarted the woman's decision not to procreate. In the second instance, his negligence has thwarted her decision not to give birth to a child suffering from severe physical and mental abnormalities. A foreseeable consequence of the physician's breach in both situations is the birth of a child that the woman does not want, a child that she may be both emotionally and financially incapable of

56. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

57. Both Capron, *supra* note 5, and Robertson, *supra* note 18, note the differences in damages recoverable in the two types of cases.

58. *See, e.g.*, Becker v. Schwartz, 49 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (allowing raising expenses but disallowing emotional distress damages); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (allowing only special costs relating to caring for child's abnormalities and disallowing general rearing expenses and parents' emotional distress); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (allowing extra expenses for child's condition but not general rearing expenses).

59. See note 46 *supra*.

60. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (refuting arguments that child is always a benefit and that the defendant should not bear all the burden of child rearing while parents derive all the benefits); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (disagreeing that damages are too speculative); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978) (discounting argument of waiting for legislative enactment).

See also Note, *Theories Upon Which Wrongful Birth Suits Have Been Grounded*, 48 UMKC 1 (1979), for a discussion of the rationale behind denying recovery in genetic counseling cases.

raising. Arguably, cases in which the mother claims that she would have aborted her fetus had she known of its severe abnormalities pose more difficult proof problems because the line of causation is not as direct as in negligent sterilization cases.[61] But whether she would have obtained an abortion is a question of fact that should be left to the trier of fact. Given that the mother can prove her allegations in the genetic counseling cases, the damaging consequences of the defendant's negligence are at least as great and probably greater than when she must suffer the birth of an unwanted healthy child. She will have not only the normal expenses of food and clothing, but also the added expense of the special care and treatment required by the abnormal child. Further, any benefits she receives by virtue of being a parent will probably be less than the mother who must raise an additional healthy child. In view of these consequences, to describe the defendant's negligence in genetic counseling cases as less culpable makes little sense. Though abortion is a sharply disputed right, it enjoys, at least for the time being, the same constitutionally protected status given to the decisions concerning procreation. Courts should not, therefore, denegrate its importance by providing external limits to liability for physicians who fail to keep pace with the professional community's standard of care in genetic counseling. As with the

61. It has been suggested that despite the attendant proof problems, causation must be established through a subjective standard to determine whether *these* parents, not just the objectified "reasonable parents," would have sought an abortion. *Father and Mother Know Best, supra* note 36, at 1509-10.

If prior to conception and/or during the first trimester of pregnancy, the parents actively seek to determine if their child will have severe abnormalities, it may be easier for them to establish that they would have aborted. Absent this overt concern, the parents may have some difficulty in establishing that the physician's failure to properly advise them was the proximate cause of their giving birth to a severely disabled child. They would have to demonstrate that the risks were sufficiently discernible that the doctor should have been alerted to their presence; that he failed to conform to the professional standard of care by not warning them of the risks; that having been warned they either would never have conceived or, if the woman was already pregnant when she saw the doctor, that she would have had the amniocentesis procedure performed; that the procedure would have detected the abnormalities; and that having been informed of the abnormalities the mother would have chosen to abort.

Problems could arise in establishing what constitutes the requisite standard of care with which to compare the defendant's conduct. *See* Capron, *supra* note 5. Further proof problems could arise because amniocentesis is not a perfectly safe or perfectly reliable procedure. *See* Friedman, *supra* note 4. Nonetheless, although the genetic counseling cases pose some challenging proof problems, ever increasing advancements in the area seem to indicate that it is a cause of action that is here to stay. Further, the complexities of genetics and the rapidity with which technological advancements are made, militate in favor of not hinging the parents' cause of action on whether they actively sought to determine if their child would suffer geneteic or chromosomal disorders.

developing trend in negligent sterilization cases, the defendant should be liable for all damages naturally flowing from his breach of duty.[62]

B. The Child's Cause of Action

Though the parents' cause of action has received mixed treatment by the court, the child's cause of action has been disposed of with almost monotonous uniformity. The courts have generally been unwilling to hold, from the child's perspective, that he would have been better off not having been born.[63] The *Gleitman* court based its dismissal on the impossibility of measuring damages.[64] This argument for denying a cause of action was questionable at the time[65] and has lost even

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62. This conclusion has been reached by commentators with a great deal more regularity than by the courts. Karlsons v. Guerinot, 54 A.D.2d 73, 394 N.Y.S.2d 933 (1977) is the only decision in which all damages have been allowed. Commentators have urged recovery under normal tort principles. *See, e.g.*, Capron, *supra* note 5, at 682; Robertson, *supra* note 18, at 1454; Waltz and Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues*, 68 NW. U.L. REV. 696, 754 (1973); Note, *Wrongful Birth in the Abortion Context—Critique of Existing Case Law and Proposal for Future Actions*, 53 DEN. L.J. 501 (1976). *Contra*, Comment, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127 (1978).

63. The child's cause of action has been allowed in only two instances, one of which has been overturned on appeal. In *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 49 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), the contention in part was that the parents would never have conceived if they had received accurate information concerning the hereditary nature of polycystic kidneys. In allowing the child's cause of action, the lower court said that the infant should be allowed to recover for the pain and suffering caused by this preconception tort, stressing that the child has a right to be born as a whole functional human being. The New York Court of Appeals denied that such a right existed and dismissed the child's action on the bases of the impossibility of calculating damages and the lack of a legally cognizable injury.

A more recent decision in California also allowed the child to maintain an action. Curlender v. Bio-Science Laboratories, 2 Civ. No. 58192 (Cal. Ct. App., filed July 11, 1980). Preconception tests had failed to diagnose the parents as Tay-Sachs carriers though they subsequently gave birth to a child suffering from the disease. The court said that public policy and the difficulty in measuring damages were invalid excuses for denying recovery to the child. Describing the child's injury as birth with defects that should have been detected, the court said it was beside the point that the child could not have been born healthy. The court stressed that she exists, has rights, and suffers because of the defendants' negligence. *Id.* It is too soon to know if the decision will stand. Should the California Supreme Court affirm this decision, it will certainly be a breakthrough.

64. Had the defendant not been negligent, the Gleitman child never would have been born. The court found it impossible to calculate the difference between nonexistence and life in an impaired state. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1976).

65. At the time *Gleitman* was decided, the Supreme Court had many years previously decided *Story Parchmant Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). As Justice Jacobs points out in his dissenting opinion in *Gleitman*, *Story Parchment* emphasized that compensation should not be denied merely because the

more favor in the intervening years.[66] The *Berman* court, therefore, emphasized that the defendants' negligence had not "caused" the child's pain and suffering but had only "caused" the child's life.[67] The court reasoned that since our society places a high value on all life, regardless of the presence of physical or mental abnormalities, the child had not been injured by being born.[68]

Popular though this line of reasoning is,[69] it glosses over a meaningful consideration of the nature of the mother's decision to abort or to continue with her pregnancy. If a mother's decision to abort is viewed as only being made on her own behalf, then when a physician negligently interferes with that decision by failing to provide adequate information, arguably, the damage is only to the mother. If, however, the decision is viewed as also being made on behalf of the child, the mother in essence is also saying, "I, the child, would rather not be born," then the negligent interference with that decision damages both the mother and the child. An analysis of the nature of the mother's decision should become a question of fact for the trier of fact.[70]

In some situations, such as *Rieck*,[71] when the mother would have sought an abortion of her fetus regardless of its condition, the trier of

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nature of the tort makes it difficult to determine damages with certainty. Justice Jacobs also noted that the harm to the family included medical expenses capable of fairly precise valuation and emotional distress, no less capable of valuation than frequently awarded pain and suffering damages. Gleitman v. Cosgrove, 49 N.J. 22, 49, 227 A.2d 689, 704 (1967) (Jacobs, J., dissenting). The *Berman* court agreed, thirteen years later, that *Story Parchment* provided precedent for not dismissing an action solely on the basis of not being able to precisely calculate damages. Berman v. Allan, 80 N.J. 421, 428, 404 A.2d 8, 12 (1979).

66. A number of wrongful life cases decided after *Gleitman* specifically stated that difficulty in measuring damages should not bar a legitimate claim for relief. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 261, 189 N.W.2d 511, 520 (1971); Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 176 (1977); Betancourt v. Gaylor, 136 N.J. Super. 69, 76, 344 A.2d 336, 340 (1975); Karlsons v. Guerinot, 57 A.D.2d 73, 79, 394 N.Y.S.2d 933, 937 (1977); Rivera v. State, 94 Misc. 2d 157, 161, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978).

67. 80 N.J. at 426, 404 A.2d at 11.

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

69. *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (child has not suffered damages cognizable at law); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975) (defendant did not cause child's condition and child has not suffered damages congnizable at law); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (law cannot decide if child would be better off never having been born; child has not suffered legally cognizable damages); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (impossible to compare nonexistence with life in an impaired state).

70. *See* Capron, note 5 *supra*, for a discussion that emphasizes that the parents' decision to have a eugenic abortion is similar to other decisions made on behalf of their minor child.

71. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (failure to diagnose mother's pregnancy in time for her to obtain a legal abortion).

fact might find that the decision to abort would have been made by the mother primarily for her own interests. In a case such as *Park v. Chessin*,[72] however, where the affliction of the child is so great, and the pain and suffering and premature death so certain and predictable, the fact finder might conclude that the mother would have made the decision to abort for the sake of both her child and herself.[73] Birth and life in a seriously impaired state then become consequences that both the child and mother would have sought to avoid. The argument the *Berman* court presents, that the physicians' negligence may not have caused the abnormalities since they did not harm an otherwise healthy fetus,[74] fails to recognize the true nature of the injury to the mother and child. When a fetus is destined to be born with severe genetic and chromosomal birth defects, life and crippling physical and mental abnormalities are an inseparable unity. If the physicians' negligence has caused the birth of a tortured child that the mother, speaking on her own behalf and on behalf of her child, would have sought to avoid, then he has also caused the child's pain and suffering that inevitably coincides with that birth. If a jury determines that the mother and the child would have found nonexistence to be a preferable state, the court should be precluded from injecting its own moral evaluation that the child is better off alive.[75]

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72. Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 49 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (child born with hereditary disease of Polycystic kidneys from which she died after 2½ years of life).

73. In *Jacobs v. Theimer*, for example, the physician had failed to diagnose the mother's illness as Rubella. The child was subsequently born with defective major organs. The mother's statement in her deposition is quoted by the court as follows:

> I would have gone to any length to have found out what the chances of my child were, and after having found this out, I would have done the kindest thing that I could have known to have done for her, and that would have been to terminate the pregnancy.

Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975) (quoting from mother's deposition).

74. 80 N.J. at 426, 404 A.2d at 11.

75. Capron, *supra* note 5, at 659, provides an excellent discussion of the method by which damages could be assessed once the jury concluded that nonexistence would be a preferable state as compared to the suffering the child must endure. Capron argues against comparing the child's condition with a "normal" life because the child with the hereditary abnormality could never have been normal. Instead Capron urges that comparing nonexistence to life with impairments requires no more speculation than other damage assessments left to juries. He feels the jury is capable of determining "just how much better" nonexistence would be.

See also Comment, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1971), for a discussion of damage assessments that ascribes plus, minus, and zero values to life, life with severe defects, and nonexistence as a means of determining the child's damages.

The court's discussion on the high value we place on all lives is somewhat beside the point.[76] The contention is not that once a child is born it should be consigned to an existence with diminished rights because of its abnormalities. More to the point is whether we will ever allow a mother to say for her own sake and for that of her child, that she would rather not give birth to a child she knows will be severely disabled. If, as the *Berman* court contends, life is always the preferable alternative, then much of the thrust behind genetic counseling and the benefit gained from amniocentesis and, more certainly, all eugenic abortions would contravene public policy. To hold as a matter of law that life is always preferable denies the mother the right to decide, for whatever reasons, within the first trimester of pregnancy whether her child will come into existence as a separate being.

Though the *Berman* majority provides a rather standard disposal of the child's cause of action, the concurring and dissenting opinion of Justice Handler provides a novel approach to recognition of the child's claim.[76] Referring to his analysis that the parents might suffer from impaired parenthood, Justice Handler urges that the child should have a cause of action for diminished childhood.[77] Justice Handler, however, does not make it clear how one would go about demonstrating that he suffered from diminished childhood and further clouds the issue by indicating that any award of such damages should go to providing care and treatment for the child.[78] Such an element of damages would seem to require an evaluation of the quality of the parenting the child is receiving. By recognizing diminshed childhood as a legitimate cause of action, the court could be inviting suits in which a child proceeded against his parents for not conforming to parental standards. Regardless, two problems with such a claim remain. The first is the need to demonstrate that the child's parents are somehow inadequate and that, as a result, the child suffers. The second problem is that if the parents have borne up well in the face of tragedy and are good parents, they would be penalized by not receiving compensation that, according to Justice Handler, would have gone to the care and treatment of their child.

Perhaps of more significance than Justice Handler's description of the child's cause of action is that for the first time, a justice of a state's highest court has been willing to acknowledge that the child should have any actionable claim. A California Court of Appeals has already

76. Berman v. Allan, 80 N.J. 421, 426, 404 A.2d 8, 11 (1979) (Handler, J., concurring and dissenting opinion).

77. *Id.* at 433, 404 A.2d at 19.

78. *Id.*

seized upon this acknowledgement as authority for recognition of the child's cause of action, even though the description of that cause of action and the damages recoverable were significantly different than what was proposed by Justice Handler.[79] The California court was willing to allow the child to recover medical and treatment expenses, and compensation for pain and suffering, but said nothing of damages for diminished childhood. If this California opinion is allowed to stand, it would appear that Justice Handler may have provided the necessary chink in the thus far impenetrable bar to the child's cause of action.

CONCLUSION

The New Jersey Supreme Court's decision in *Berman v. Allan* was a modest step forward from its opinion seventeen years earlier in *Gleitman v. Cosgrove*. Though the court was willing to recognize the parents' cause of action, it chose to limit the damages to compensation for the emotional distress they had suffered and would continue to suffer over the condition of their impaired child. To limit damages, the court drew upon the reasoning of a line of negligent sterilization cases that had denied rearing costs to parents who have given birth to healthy children. As a result it placed a more conservative limit on the defendants' liability than has been applied in other post *Gleitman* genetic counseling cases. The *Berman* decision, however, is consistent with other genetic counseling cases in placing a limit on the defendants' liability that has not been felt necessary in an increasing number of negligent sterilization cases.

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79. Curlender v. Bio-Science Laboratories, 2 Civ. No. 58192 (Cal. Ct. App., filed July 11, 1980). In *Curlender*, only the child's action was before the court, the parents having filed a separate action on their own behalf. The child was born suffering from Tay-Sachs disease although the parents had been assured by the defendant laboratories that they were not carriers of the disease. The court allowed the child to maintain an action with possible damages including compensation for physical and mental pain and suffering, medical expenses, and punitive damages (if the plaintiff could establish the requisite elements). In finding that the child could maintain an action in her own right, the court went further than necessary, by speculating in dicta that had the parents been properly informed of the risks yet proceeded to conceive and give birth to an afflicted child, then the child could have brought an action against the parents. This conclusion is not compelled by allowing the child's action against the laboratories. The decision to abort is the mother's (or parents') and informing that decision are a number of factual, moral, and religious parameters that may compel a decision one way or the other, depending upon the individual. It is always an option, never an obligation, even when made on behalf of the child. In both situations, the mother decides for the child that he or she would be better off alive or better off not being born. The court should not inject its own evaluation of the alternative she should have selected. See Capron, *supra* note 5, for a more extended analysis of the nature of the mother's (parents') decision.

As long as the rights to procreate and to abort in the first trimester of pregnancy share the same constitutional protection, the right to abort should not be treated as a lesser right by limiting the defendant's liability. If the physician has deviated from the professional standard of care by failing to properly inform and/or test the parents and fetus, and if the parents can prove they would have obtained an abortion, the defendant should be liable for all provable damages proximately flowing from his negligent omission.

If courts continue to be uncomfortable with cases in which the opportunity to abort has been negligently thwarted, the *Berman* decision may prove to be a more conservative and comfortable alternative for handling the parents' cause of action. On the other hand, the decision may serve as a basis for expanding the compensable damages in genetic counseling cases to include damages for the parents' emotional distress in addition to the pecuniary expenses of caring for and raising an afflicted child.

The dismissal of the child's cause of action by the court fails to recognize that in some situations the mother believing the child is better off not being born makes that decision on behalf of her child. The nature of the mother's decision should be determined by the trier of fact. If the child's impairment is determined to be sufficiently certain and severe that the mother would have made the decision for the child's sake as well as her own, then the physician should be responsible for the pain and suffering the child must now endure.

Only Justice Handler in his dissent offers new food for thought on the child's cause of action. His willingness to concede that the child has also been damaged by the defendants' negligence may provide a starting point for a more rational analysis and eventual acceptance of the child's claim.

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