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Tort—Parental Immunity—Merrick v. Sutterlin, 93 Wn. 2d 411, 610 P.2d 891 (1980)

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TORTS—WRONGFUL BIRTH—NEW JERSEY RECOGNIZES EMOTIONAL DISTRESS DAMAGES IN A WRONGFUL BIRTH ACTION INVOLVING A DEFORMED CHILD—*Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979).

I. INTRODUCTION

Wrongful birth,¹ a claim once novel and disfavored,² has gradually become accepted as a compensable tort.³ The New Jersey Supreme Court, in *Berman v. Allan*,⁴ recently recognized wrongful birth as a valid cause of action. The Bermans sued their doctors after their daughter, Sharon, was born suffering from Down's syndrome.⁵ At the time of her pregnancy, Mrs. Berman was thirty-eight, an age that carries a high risk of bearing children with chromosomal abnormalities.⁶ The Bermans alleged

1. Wrongful birth is an action brought by parents alleging that the birth of their child caused an injury to them. Wrongful birth actions should be distinguished from wrongful life actions, in which the child brings an action alleging that life itself is an injury. Wrongful life actions have been rejected by the majority of courts, *see, e.g.*, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). *But see* *Curlender v. Bio-Science Laboratories*, ___ Cal. App. 3d ___, 165 Cal. Rptr. 447 (1980). Such actions are beyond the scope of this note. For articles examining wrongful life as a cause of action, *see* generally Note, 54 NOTRE DAME LAW. 696, 709-12, 715 (1979); Note, 20 WM. & MARY L. REV. 125 (1978).

2. For early cases denying wrongful birth claims, *see* *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934); *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957).

3. *See, e.g.*, *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *See also* Annot., 83 A.L.R.3d 15 (1978).

Actions for wrongful birth may be founded on a theory of contract, as in *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), or on a theory of negligence, as in *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Actions in negligence may arise when a sterilization operation performed on one spouse has failed and a child is consequently conceived. Such actions are often referred to as negligent or wrongful conception claims. *See, e.g.*, *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977). Wrongful birth actions may also be brought where the negligence occurs after conception, as in cases where the doctor negligently fails to inform a pregnant mother that her child may be born deformed. *See, e.g.*, *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). For a general discussion of theories upon which wrongful birth claims have been grounded, *see* Moore, *Wrongful Birth—The Problem of Damage Computation*, 48 U.M.K.C. L. REV. 1, 2-3 (1979). For a commentary on damages recoverable in wrongful conception cases, *see* Note, 14 NEW ENGLAND L. REV. 784 (1979).

4. 80 N.J. 421, 404 A.2d 8 (1979).

5. Down's syndrome is a type of mental retardation caused by representation of at least a critical portion of chromosome 21 three times instead of twice in some or all cells. *STEDMAN'S MEDICAL DICTIONARY* 1382 (23d ed. 1976).

Down's syndrome children are often more susceptible to infectious diseases and commonly have vision problems that may require surgery. D. SMITH & A. WILSON, *THE CHILD WITH DOWN'S SYNDROME* 41-42 (1973). Approximately 40% of Down's syndrome babies are born with congenital heart defects often requiring open heart surgery. *Id.* at 41-43.

6. The Nat'l Inst. of Child Health and Human Dev. (NICHD) Nat'l Registry for Amniocentesis

that the defendant doctors negligently failed to inform them of the risk involved in Mrs. Berman's pregnancy. Furthermore, they claimed they were not provided with information about amniocentesis,⁷ the most widely used method of detecting birth defects, even though sound medical practice dictates that amniocentesis be offered to pregnant women over the age of thirty-five.⁸ But for the defendants' negligence, the Bermans alleged, the chromosomal abnormality would have been detected and the pregnancy terminated. The Bermans sought monetary damages for the emotional and pecuniary harm they had suffered and would continue to suffer as a result of the wrongful birth. The trial court granted summary judgment for the defendants and dismissed the case for failure to state a claim.⁹ On appeal,¹⁰ the New Jersey Supreme Court reversed the trial court decision and held that the Bermans' complaint stated a legally cognizable claim for wrongful birth.¹¹

By overruling the landmark precedent of *Gleitman v. Cosgrove*,¹² *Berman's* recognition of wrongful birth settles disagreement over the validity of wrongful birth actions in New Jersey,¹³ and follows the trend of recent authority.¹⁴ And yet, as *Berman* aided settlement of one controversy, it raised the more perplexing problem of damages. The New Jersey Su-

Study Group, *Midtrimester Amniocentesis for Prenatal Diagnosis*, 236 J.A.M.A. 1471, 1476 (1976) [hereinafter cited as NICHD study].

7. Amniocentesis is the process by which a physician removes a sample of the amniotic fluid surrounding the fetus between the fourteenth and sixteenth weeks of the pregnancy. The amniotic fluid contains cells shed by the growing fetus. Once the cells are cultured and tested, approximately sixty serious disorders can be detected, including Down's syndrome. Sammons, *Ethical Issues In Genetic Intervention*, 23 Soc. WORK 237 (1978). See note 24 and accompanying text *infra*.

8. Milunsky, *Current Concepts in Genetics: Prenatal Diagnosis of Genetic Disorders* 295 NEW ENGLAND J. MED. 377 (1976). See also NICHD study, *supra* note 6, at 476.

9. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8, 11 (1979).

10. The plaintiffs filed a notice of appeal to the Appellate Division and while their case was pending before that court, the New Jersey Supreme Court directly certified the case on its own motion. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8, 11 (1979).

11. *Id.* at 14.

12. 49 N.J. 22, 227 A.2d 689 (1967). *Gleitman* also refused to recognize a cause of action for wrongful life. This portion of *Gleitman* remains intact after *Berman*.

13. Even as late as 1978, the status of wrongful birth claims was unclear. New York, New Jersey, and Texas were considered undecided jurisdictions. Annot., 83 A.L.R.3d 15, 55-61 (1978). New York clarified its position in *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *Becker* held that parents of a deformed child could recover pecuniary damages resulting from the child's wrongful birth. Texas decisions indicate that a complaint filed by parents of a deformed child can state a cause of action, *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975), but parents of healthy children will not have a cause of action because they have been blessed, not harmed, *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974). *Berman* now removes New Jersey from the list of undecided jurisdictions; consequently, it can be said that wrongful birth is a compensable tort where damage can be shown. The remaining questions will be centered on the fact and amount of damages.

14. For cases recognizing wrongful birth actions, see note 3 *supra*.

preme Court held that the plaintiffs could recover damages for emotional distress, but denied recovery for pecuniary damages.¹⁵ The result is curious: among jurisdictions recognizing a cause of action in cases involving impaired children, New Jersey alone grants emotional distress damages;¹⁶ at the same time, it is the only jurisdiction to deny pecuniary damages.¹⁷

This note begins by reviewing developments that created the legal and social setting for the *Berman* decision.¹⁸ After analyzing the court's opinion¹⁹ the focus shifts to the issue of damages.²⁰ A valuation scheme is then proposed to effectuate the conclusion that both pecuniary and emotional damages should be awarded in wrongful birth actions involving impaired children.²¹

II. BACKGROUND

In *Gleitman v. Cosgrove*,²² decided in 1967, parents of a child born with sight and hearing defects argued to the New Jersey Supreme Court that the birth of their child was "wrongful." The Gleitmans alleged that the defendant doctor failed to inform them of the harmful effects of rubella upon unborn children.²³ Had they been aware of the risks, the plaintiffs contended they would have obtained a therapeutic abortion. The parents sought relief for the emotional and pecuniary harm resulting from the birth of their child.²⁴ Holding that the complaint did not state a valid cause of action, the court dismissed the case.²⁵

15. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8, 13-15 (1979).

16. For cases denying emotional distress damages, *see, e.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977); *Speck v. Finegold*, 408 A.2d 496 (Pa. Super. Ct. 1979); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

17. For cases granting pecuniary damages, *see, e.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Speck v. Finegold*, 408 A.2d 496 (Pa. Super. Ct. 1979); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

18. *See* notes 22-40 and accompanying text *infra*.

19. *See* notes 41-55 and accompanying text *infra*.

20. *See* notes 55-84 and accompanying text *infra*.

21. *See* notes 85-98 and accompanying text *infra*.

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

23. A fetus carried by a woman who contracts rubella may be born suffering from rubella syndrome, also known as congenital rubella. Congenital rubella is a disease causing a variety of birth defects such as sight and hearing impairments, congenital heart problems, and behavioral anomalies. S. CHESS, S. KORN, & P. FERNANDEZ, *PSYCHIATRIC DISORDERS OF CHILDREN WITH CONGENITAL RUBELLA* 16-18, 145-54 (1971).

24. The Gleitmans' child was partially blind, deaf, and mute. The plaintiffs sought compensation for emotional harm to the mother, for the normal costs of rearing the child, and for any special costs that would arise as a result of the defects. *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

25. *Id.* at 694.

The *Gleitman* decision rested on two premises: first, compensatory damages for emotional harm would be impossible to calculate,²⁶ and second, public policy prohibited granting any compensation for the "denial of the opportunity to terminate the existence of a defective child in embryo."²⁷ *Gleitman v. Cosgrove* was followed by other jurisdictions rejecting wrongful birth actions.²⁸

By the time *Berman* was decided, several developments had eroded the precedential value of *Gleitman*. The primary development was the 1973 Supreme Court decision in *Roe v. Wade*,²⁹ recognizing a woman's constitutional right to have an abortion. Although the women's right is not absolute, the state's interest in regulating abortions is limited.³⁰ The constitutional right recognized in *Roe* has subsequently been reaffirmed by the Supreme Court.³¹

The legal developments surrounding abortion were paralleled by scientific advancements in prenatal detection of birth defects. Although the use of amniocentesis was first reported in 1967, the safety and accuracy of the technique were not conclusively proven until 1976.³² At present, all recognizable chromosomal abnormalities and more than sixty metabolic disorders can be identified *in utero* by amniocentesis.³³

These developments combined to shift the course of wrongful birth litigation. In 1975, Texas, in *Jacobs v. Theimer*,³⁴ and Wisconsin, in *Dumer v. St. Michael's Hospital*,³⁵ granted parents relief for the wrongful birth of their impaired children. Both courts concluded that pecuniary damages were capable of measurement.³⁶ They denied emotional distress damages, however, following the *Gleitman* premise that the amount of such damages would be impossible to ascertain.³⁷

26. *Id.* at 693.

27. *Id.*

28. See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975)(citing *Gleitman*); *Stewart v. Long Island College Hospital*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972)(citing *Gleitman*).

29. 410 U.S. 113 (1973). For a general discussion of the impact of *Roe* on wrongful birth actions, see Comment, 14 *Gonz. L. Rev.* 891 (1979).

30. Only in the final trimester of a pregnancy does the state have a compelling interest in the life of the fetus. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

31. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)(state could not require written spousal or parental consent as a condition precedent to obtaining an abortion).

32. NICHD study, *supra* note 6, at 1471.

33. *Id.*

34. 519 S.W.2d 846 (Tex. 1975).

35. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

36. *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372, 377 (1975).

37. *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372, 376 (1975).

In *Becker v. Schwartz*,³⁸ the New York Court of Appeals recently abandoned its opposition to wrongful birth claims and followed the lead of *Jacobs* and *Dumer*. Factually, *Becker* was nearly identical to *Berman*: parents of a child with Down's syndrome brought an action against a doctor who allegedly failed to inform the middle-aged mother of the use and availability of amniocentesis. The New York court held that the claim was cognizable and that the money needed for the long-term institutional care of the child would be recoverable.³⁹ Again, emotional distress damages were denied.⁴⁰

III. THE DECISION IN *BERMAN V. ALLAN*

The *Berman* court rejected the two premises of *Gleitman*.⁴¹ In light of *Roe v. Wade*,⁴² the New Jersey Supreme Court concluded that public policy now supports a woman's right to make a decision regarding abortion.⁴³ The court further concluded that the *Gleitman* rule would immunize doctors from liability for inadequate genetic counseling.⁴⁴ Consequently, the court held that a cause of action founded upon wrongful birth is a legally cognizable claim.⁴⁵

The court then confronted the more troublesome issue of damages. The plaintiffs first sought to recover the costs of medical care and of raising, educating, and supervising the child.⁴⁶ The court conceded that the defendant caused these damages,⁴⁷ but held that such damages were not recoverable.⁴⁸ The court's denial of pecuniary damages was founded upon two premises: that such an award would be wholly disproportionate to the culpability of the physician,⁴⁹ and that it would allow the parents to realize a windfall gain by burdening the defendants with the expense of raising a child while permitting the parents to retain the joys of parenthood.⁵⁰

The *Berman* court treated emotional damages as an entirely separate issue. The court found that the defendants' negligence deprived the Ber-

38. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

39. *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 903.

40. *Id.* at 413-15, 386 N.E.2d at 813-14, 413 N.Y.S.2d at 901-902.

41. 404 A.2d at 14. For an explanation of *Gleitman's* premises, see notes 26 & 27 and accompanying text *supra*.

42. 410 U.S. 113 (1973).

43. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8, 14 (1979).

44. *Id.*

45. *Id.*

46. *Id.* at 13.

47. *Id.* at 14.

48. *Id.*

49. *Id.*

50. *Id.*

mans of the opportunity to accept or reject a parental relationship with their daughter. As a result, the parents suffered emotional anguish upon discovering that their daughter suffered from Down's syndrome.⁵¹ Furthermore, the emotional trauma could be expected to continue as the parents raised the child.⁵² The *Berman* court rejected the *Gleitman* premise that it would be impossible to place a monetary value on emotional injuries suffered by the parents.⁵³ The court noted that in the twelve years since *Gleitman*, courts and juries have become accustomed to the valuation of emotional distress.⁵⁴ Accordingly, the court held that parents may recover compensatory damages for any past or future emotional anguish resulting from the child's condition.⁵⁵

IV. ANALYSIS OF *BERMAN*

A. *The Cause of Action*

With *Berman*, New Jersey joins the growing majority of jurisdictions recognizing wrongful birth as a valid cause of action.⁵⁶ The decision reaches a sound result and is in accord with the prediction of commentators.⁵⁷

The acceptance of wrongful birth actions is usually noted as a development in the law of torts, but the cause of action has an important constitutional aspect. *Berman's* holding gives meaningful content to the right established by *Roe v. Wade*.⁵⁸ The right to decide whether to continue a pregnancy can be meaningless if a woman is not given all the medical facts necessary to make an informed decision. The health of her fetus may be the most vital fact in that decision. For this information, a woman turns to her physician. If that physician negligently fails to meet the standards of the profession, he should not be insulated from liability. *Berman* correctly acknowledges this principle.

51. *Id.*

52. *Id.* at 15.

53. *Id.* at 12, 14-15.

54. *Id.* at 15; (citing *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A.2d 754 (1973))(plaintiff may recover emotional distress damages from real estate agency that denied her an apartment because of marital status and sex); *Lemaldi v. De Tomaso of America, Inc.*, 156 N.J. Super. Ct. 441, 383 A.2d 1220 (Law Div. 1978)(plaintiff may recover emotional distress damages from auto dealership for distress arising out of a sequence of automobile breakdowns).

55. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8, 14-15 (1979).

56. See cases cited in note 3 *supra*.

57. For articles noting the trend in wrongful birth actions, see Note, 54 NOTRE DAME LAW, 696, 715 (predicting expansion of wrongful conception claims); Note, 20 WM. & MARY L. REV. 125, 134 (1978).

58. 410 U.S. 113 (1973).

Wrongful Birth—Damages

B. Damages

1. Pecuniary Damages

Berman's first premise, that pecuniary damages would be wholly disproportionate to the culpability involved, is based on a misunderstanding of the function of tort law. The function of tort damages is to compensate the victim for harm sustained by reason of the defendant's wrong.⁵⁹ Consequently, the amount of the award should be measured by the loss sustained and not by the culpability of the defendant.⁶⁰

Berman's second premise, that an award of pecuniary damages would allow the parents to realize a windfall gain, unjustifiably assumes that the joys of parenthood outweigh the burdens in all cases. The "overriding benefits" presumption has its root in wrongful conception cases⁶¹ where negligence resulted in the birth of a healthy child.⁶² Even with the birth of a healthy child it is a questionable assumption that, as a matter of law, a birth confers such an overriding benefit.⁶³ But with the birth of an impaired child, the presumption is untenable. At the very least, parents of an impaired child are faced with the special, unexpected, and often immense costs of treating their child's disorder. The Bermans' child suffered from Down's syndrome; children with this chromosomal abnormality have many health problems that can augment medical bills.⁶⁴

The fault in the *Berman* analysis of pecuniary damages is that emotional benefits were offset against the expenses incurred in the care of a child. The Restatement (Second) of Torts provides that "[w]hen the defendant's tortious conduct has caused harm to the plaintiff . . . and in so doing has conferred a special benefit to the interest . . . that was harmed, the value of the benefit conferred is considered in mitigation of damages,

59. W. PROSSER, *THE LAW OF TORTS* 6 (1971).

60. For example, assume X runs a red light and hits pedestrians A and B. A suffers only slight cuts and bruises, and incurs only \$50 of medical expenses. B, however, suffers a broken neck and incurs \$1,000 of medical expenses. The culpability of X is the same with respect to both plaintiffs. According to the *Berman* premise, both plaintiffs would be entitled to the same amount of compensation, a clearly inappropriate result.

61. For an explanation of "wrongful conception," see note 3 *supra*.

62. The notion that a birth is always a blessing first appeared by way of dictum in *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934). The blessing theory was developed later in *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957) (denying recovery for wrongful birth because the award of damages for the birth of a healthy child would be foreign to public sentiments).

63. In *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511, 517-19 (1971), the Michigan court concluded that economic gains conferred upon parents by their children are non-existent. Furthermore, the court recognized that the benefits of parenthood vary widely from case to case, and it would be unfair to say as a matter of law that the benefits always outweigh the burdens. See also Moore, *supra* note 3, at 7-8.

64. See note 5 *supra*.

to the extent that this is equitable.’’⁶⁵ The Restatement rule applies when the defendant confers a benefit on the same interest harmed.⁶⁶ *Berman* lumped together the joys of parenthood and the expenses of child rearing, and concluded the parents came out ahead. However, in wrongful birth actions, the pecuniary and emotional interests are distinct and separable. Even if the two interests could be balanced against each other, the court’s conclusion that the joys of parenthood outweigh the financial burdens is anomalous. The parents were denied pecuniary damages because they gained so much “joy and happiness,” while at the same time were granted damages for emotional anguish.

Berman seems to have been misled into this faulty reasoning by *Rieck v. Medical Protective Co.*,⁶⁷ a 1974 Wisconsin case in which advantages were mistakenly offset against pecuniary burdens. Moreover, the New Jersey court overlooked the fundamental factual distinction between the two cases: the Riecks’ child was born normal and healthy while the Berman’s child was born with Down’s syndrome. The Wisconsin court, in *Dumer v. St. Michael’s Hospital*,⁶⁸ later held *Rieck* not controlling when impaired children are involved.⁶⁹ *Dumer* held that parents may recover the costs reasonably necessary to care for the child’s deformities.⁷⁰ A survey of jurisdictions recognizing wrongful birth actions reveals a consensus that, as in *Dumer*, pecuniary losses are compensable in cases such as *Berman*.⁷¹ If any joy resulted from the birth of Sharon Berman, it is a benefit which should be weighed against the damages for emotional injury; it should not be used to deny compensation for the pecuniary loss.

2. Emotional Damages

Although the *Berman* court deserves criticism for its departure from the majority rule in denying pecuniary damages, its departure in allowing recovery of emotional distress damages is commendable. Upon the birth of a child with Down’s syndrome, parents experience both shock and grief.⁷² Most parents of mentally impaired children continue to suffer

65. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

66. *Id.* at Comment b.

67. 64 Wis. 2d 514, 219 N.W. 2d 242 (1974), cited in *Berman*, 404 A.2d at 14.

68. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

69. *Id.* at 378.

70. *Id.*

71. For jurisdictions granting pecuniary damages, see cases cited in note 17 *supra*.

72. A. GATH, DOWN’S SYNDROME AND THE FAMILY 114 (1978); Wolfensberger & Menolascino, *A Theoretical Framework for the Management of Parents of the Mentally Retarded*, PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 475, 478 (1970).

“chronic sorrow” regardless of whether the child is kept at home or institutionalized.⁷³

Parents’ claims for emotional distress damages have heretofore met with little success.⁷⁴ Judicial responses have ranged from avoidance of the issue,⁷⁵ to denying the damages on odd social theories.⁷⁶ The most typical judicial response has been to deny emotional damages on the *Gleitman* premise that such damages are speculative and would be impossible to ascertain.⁷⁷ *Berman* rejected this premise, correctly noting that it would be a perversion of justice to deny all compensation to the injured party simply because the wrong itself is of such a nature as to preclude a precise measure of damages.⁷⁸ Furthermore, the unascertainable damages argument presumes that a trier of fact is incapable of fairly assessing the harm suffered by an injured party. Yet, as the *Berman* court noted, damages for emotional distress have been awarded in an increasing variety of contexts⁷⁹ and the valuation of such harm has proven no more difficult than the valuation of pain and suffering.⁸⁰

One argument which has been raised in favor of denying emotional distress damages is that such an award unfairly discriminates against fathers. The New York Court of Appeals in two decisions⁸¹ held that if such damages were recoverable, they could be awarded to the mother only;

73. Olshansky, *Chronic Sorrow: A Response to Having a Mentally Defective Child*, 43 Soc. CASEWORK 190 (1962). Olshansky describes the contrast between parents of a healthy child and parents of an impaired child as follows:

The parents of a normal child have to endure many woes, many trials, and many moments of despair. Almost all these parents know, however, that ultimately the child will become a self-sufficient adult. By contrast, the parents of a mentally defective child have little to look forward to; they will always be burdened by the child’s unrelenting demands and unabated dependency. . . . Concern about what will happen to his child after he is dead may be a realistic concern for a parent, or it may be associated with death wishes, either for himself or for his child.

Id. at 191–92.

74. See cases cited in note 16 *supra*.

75. *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978)(deciding that because at least damages for medical treatment were recoverable, it was necessary to decide the issue of “other” damages at the demurrer stage).

76. *Speck v. Finegold*, 408 A.2d 496 (Pa. Super. Ct. 1979)(holding that damages for emotional distress must be denied in order to prevent some parents from having a societal advantage over all parents who suffer at least some degree of stress during child raising).

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

78. 80 N.J. 421, 404 A.2d 8, 12 (1979)(citing *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

79. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8, 15 (1979). See also cases cited in note 54 *supra*.

80. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8, 15 (1979).

81. *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 66, 68, 397 N.Y.S.2d 363, 365 (majority opinion), 368 (dissenting opinion) (1977).

since the mother was the doctor's patient, she alone was owed a duty of care. The Court of Appeals therefore denied emotional damages on the ground that such an award would result in the drawing of artificial boundaries between mother and father.⁸² An arbitrary line would indeed be drawn if the New York court's analysis were correct. However, the duty owed by the physician should not be so narrowly construed. In tort law, a physician's duty may extend well beyond his patients⁸³ and is traditionally governed by foreseeability.⁸⁴ In actions for wrongful birth, a mother and a father are equally foreseeable plaintiffs; their emotional interests are derived from one common source—parenthood. Consequently, there is no need to draw artificial boundaries; a duty should be found to flow to both parents. The *Berman* court summarily concluded that both the father and the mother could recover damages. The *Berman* decision was correct but the opinion would have been more persuasive had the court more thoroughly analyzed this segment of the holding.

V. PROPOSED DAMAGES FORMULA

By allowing recovery of only emotional distress damages and not pecuniary damages, the *Berman* approach would allow doctors to escape liability for much of the harm done. Moreover, society should encourage families to care for special children in the home, and an award of pecuniary damages may make such care possible. The following proposed damages formula is designed to serve as a guideline in reaching a fair and accurate assessment of damages in wrongful birth cases involving impaired children, though it may also be useful in other wrongful birth actions.

The court should first recognize that injuries to both pecuniary and emotional interests are compensable. A court should evaluate the amount of harm to each interest separately in order to effectuate the Restatement's rule that benefits to an interest are balanced against the harm to that same interest.⁸⁵

82. *Becker v. Schwartz*, 46 N.Y.2d 401, 413-14, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 902 (1978); *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 66 (majority opinion), 68 (dissenting opinion), 397 N.Y.S.2d 363, 365 (majority opinion), 368 (dissenting opinion) (1977).

83. A physician may even have a duty to protect unrelated third parties. See *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (holding that a psychotherapist has a duty to warn a third party of a patient's threats). New Jersey recently followed *Tarasoff* in *McIntosh v. Milano*, 168 N.J. Super. Ct. 466, 403 A.2d 500 (1979).

84. See *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928); RESTATEMENT (SECOND) OF TORTS § 281, Comment b (1965).

85. See notes 65 & 66 and accompanying text *supra*.

Wrongful Birth—Damages

Computation of damages should begin with a determination of the amount of gross (or total) loss to each interest. Then, the trier of fact should consider elements which reduce the amount of damages suffered; for conceptual convenience, these elements may be divided into two categories: benefits and offsets. Benefits refer to direct gains conferred on the plaintiffs, while offsets refer to indirect gains realized by the plaintiffs as a result of the defendant's conduct. The valuation process may be expressed as follows:

- (1) damages = pecuniary damages + emotional damages.
- (2) pecuniary damages = (gross pecuniary loss – pecuniary benefits) – pecuniary offsets.
- (3) emotional damages = (gross emotional loss – emotional benefits) – emotional offsets.

A. *Pecuniary Damages*

1. *Gross Pecuniary Loss*

Gross pecuniary loss may be measured in two ways. One method considers only the expenses incurred because of the child's deformities; parents may recover expenses only to the extent that the costs of raising the impaired child exceed the costs of rearing a normal child. This approach has been taken by Texas⁸⁶ and Wisconsin⁸⁷ in cases involving impaired children to avoid conflict with prior holdings that parents of normal children cannot recover child rearing expenses.⁸⁸ These earlier decisions presumed that the probable earnings of a normal child during his minority will offset the expenses of rearing him,⁸⁹ or, alternatively, that the joy of raising the child outweighs the economic burden.⁹⁰ Even if these presumptions were true as to normal children, it makes little sense to extend them to cases involving impaired children.

The better method would recognize all elements of economic loss suffered as a result of the defendant's negligence, thus reflecting a far more accurate application of tort principles. "But for" the defendant's negligence, no child would have been born and no child rearing or additional medical expenses would have been incurred. Furthermore, this method

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

87. *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

88. *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974); *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

89. *Terrell v. Garcia*, 496 S.W.2d 124, 127-28 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

90. *Id.* at 128; *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

avoids the unrealistic assumption that a child's earnings will offset his expenses; this assumption may have been true in an earlier agrarian society, but is unpersuasive today.⁹¹ Recognition of childrearing costs has special significance in cases of impaired children since impaired children may be dependent upon their parents far longer than normal children. The economic drain on the parents is traceable to the defendant's negligence, and that is where the financial responsibility should fall.

In addition to childrearing costs, the costs of pregnancy and delivery, expenses proximately resulting from the defendant's negligence, are properly includible items in the category of gross pecuniary loss.

2. *Pecuniary Benefits*

The amount of gross pecuniary damages should be reduced by the amount of any direct pecuniary benefits to the plaintiffs resulting from the defendant's conduct. For example, a child's earnings would be a direct benefit in theory; in reality, impaired children will rarely contribute to their parent's financial security. On the facts in *Berman*, no pecuniary benefits are discernible.

3. *Pecuniary Offsets*

Finally, to reach a fair and accurate assessment of pecuniary damages, the amount of gross damages should be reduced by the amount of pecuniary offsets, which can be defined as indirect gains conferred upon the plaintiffs as a result of the tortious conduct. More specifically, offsets are the costs that the plaintiffs would have incurred had the defendant fully and properly informed the parents. In *Berman*, the plaintiffs contended that but for the defendants' negligence, the chromosomal defect would have been detected and the pregnancy terminated. Thus, pecuniary offsets would properly have included the costs of amniocentesis and an abortion.

B. *Emotional Damages*

1. *Gross Emotional Damages*

To reach a fair assessment of emotional anguish suffered, the trier of fact should begin by reviewing evidence indicating the degree of harm.

91. *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511, 518 (1971).

Wrongful Birth—Damages

The extent of each parent's emotional anguish may vary; many factors such as ethnic or cultural background, religion, and social class affect the intensity of each parent's anguish.⁹²

2. *Emotional Benefits*

Some parents may derive emotional rewards from caring for impaired children.⁹³ Such rewards are unlikely to outweigh the emotional trauma, but if an emotional benefit exists, it should be considered in reducing the amount of damages awarded.

3. *Emotional Offsets*

Finally, the trier of fact should consider the emotional trauma that would have occurred had the defendant properly informed the parents. Research indicates that women experience anxiety as they await the results of amniocentesis.⁹⁴ Upon learning of the defective fetus, parents experience shock and grief which may be compounded as the parents make the decision to have an abortion.⁹⁵ The abortion itself may cause depression. In fact, parents who obtain a selective abortion because the fetus was defective may experience more trauma than parents who obtain an abortion merely because the entire pregnancy was unwanted.⁹⁶ The emotional trauma that would have occurred even if the defendant had acted properly is a proper offset that should be considered in reducing the damage award.

VI. CONCLUSION

Tort law is a mechanism of social engineering.⁹⁷ As such, it should be utilized to encourage physicians to carry out their duty of disclosing

92. Olshansky, *supra* note 73, at 191; Wolfensberger & Menolascino, *supra* note 72, at 483.

93. Some parents learn to accept their child's abnormalities, and are able to integrate the child into their family. As one mother of a Down's syndrome child reflected, "when the sorrow passes . . . then the happiness sets in. Every moment of every day is a complete revelation of what these children can do and accomplish." D. SMITH & A. WILSON, *supra* note 5, at 97. Some parents may not be able to cope with the Down's syndrome child, and will choose institutionalization. *Id.* at 102-04; A. GATH, *supra* note at 72, at 116. The grief of parents varies so widely that each case and each parent's trauma should be evaluated individually.

94. Sammons, *supra* note 7, at 237.

95. See generally Sammons, *supra* note 7.

96. *Id.* at 239.

97. W. PROSSER, *THE LAW OF TORTS* 14-15 (1971).

genetic information to pregnant women thereby making more meaningful the constitutional right established by *Roe v. Wade*.⁹⁸

Once all the elements of a negligence action have been established, logic and justice require that a defendant be held liable for all damages naturally flowing from the breach of duty. In wrongful birth actions, two distinct interests are subject to the risk of harm, an emotional and a pecuniary interest. Harm to either interest is equally real and deserving of compensation. The goal of tort compensation is to put plaintiffs in the position they would have been in but for the defendant's negligence. This is an impossible goal in wrongful birth actions; yet, the valuation process proposed in this note provides a satisfactory method of compensating the aggrieved parents.

T. Ryan Durkan

98. 410 U.S. 113 (1973).