

1979

## Berman v. Allan

Kenneth C. Randall

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

---

### Recommended Citation

Randall, Kenneth C. (1979) "Berman v. Allan," *Hofstra Law Review*: Vol. 8: Iss. 1, Article 10.  
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss1/10>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

## COMMENT

### *BERMAN v. ALLAN*

*TORTS—Wrongful Birth and Wrongful Life—Where negligence of physicians precludes patient's right to abort mongoloid child, parents have limited cause of action for wrongful birth, but child has no cause of action for wrongful life.* 80 N.J. 421, 404 A.2d 8 (1979).

Remembering my birth in infancy, the coughs,  
The swallows, the tear-trees growing  
From your eyeballs of shame; the gray  
Immense morning I was conceived i the womb,  
And the red gory afternoon delivered  
therefrom.<sup>1</sup>

In recent years, courts have been confronted with an increasing number of tort actions<sup>2</sup> claiming that the birth of a child has created compensable injury. Parents have filed "wrongful birth" actions where a physician performed an unsuccessful sterilization operation<sup>3</sup> or abortion,<sup>4</sup> and where a physician failed to inform parents of the increased possibility that the mother would

---

1. J. KEROUAC, *MEXICO CITY BLUES* 89 (1959) (89th Chorus).

2. Such claims have also given rise to actions based on contract. *E.g.* Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. Lycoming County 1957).

3. Most courts now recognize a wrongful birth cause of action in this context. *E.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1st Dist. 1967); Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (1977); Martineau v. Nelson, 311 Minn. 92, 247 N.W.2d 409 (1976); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); *cf.* Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (failure to inform parents that scheduled sterilization operation was never performed). *But see* Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1st Dist. 1973). *See generally* Comment, *Pregnancy After Sterilization: Causes of Action for Parent and Child*, 12 J. FAM. L. 635 (1972-1973). Suits have also been brought against pharmacists for allegedly misfilling a birth control prescription. *E.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1st Div. 1971) (cause of action recognized). The term "wrongful birth" is of recent vintage.

4. It is only in recent years that wrongful birth actions arising in this context have been brought. *E.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1st Dist. 1976) (cause of action recognized).

give birth to a child suffering from birth defects.<sup>5</sup> In the latter case, the parents allege that the physician's negligence deprived them of the opportunity to make an informed decision about whether to have the child.<sup>6</sup> Children have filed claims for "wrongful life" in two basic situations. In one context, an action is brought by an illegitimate child against his or her parents because they caused the child to suffer the consequences of illegitimacy.<sup>7</sup> Actions have also been brought against physicians by children with severe birth defects. They allege that had the defendant informed their parents of the increased possibility of birth defects, the parents would have aborted the fetus and spared the child the pains of impaired life.<sup>8</sup>

*Gleitman v. Cosgrove*,<sup>9</sup> decided by the New Jersey Supreme Court in 1967, was the archetypal decision involving wrongful birth

5. Actions of this variety have recently been recognized. *E.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (37 year old pregnant woman with greater chance of giving birth to deformed child not tested by physician); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977) (negligent genetic counseling regarding hereditary kidney disease), *modified*, 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) (physician failed to diagnose pregnant woman's contraction of rubella); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (physician failed to diagnose pregnant woman's contraction of rubella). *But see* *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (no cause of action where physician fails to inform pregnant woman with rubella of risk to fetus of birth defects); *but cf.* *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (no cause of action where parents uninformed of risk that their child would be born with Tay-Sachs disease) (duty owed only to child, not parents). *See also* *Johnson v. Yeshiva Univ.*, 53 A.D.2d 523, 384 N.Y.S.2d 455 (1st Dep't 1976) (cause of action recognized, but standard of reasonable care not breached by not informing mother about amniocentesis procedure), *aff'd*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977).

6. Additionally, wrongful birth claims have been brought by the older siblings of a child allegedly born due to the defendant's negligence. The basis of such a claim is that the additional child will reduce the older siblings' share of parental income, love, and attention. *E.g.*, *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (cause of action not recognized).

7. *E.g.*, *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1st Dist. 1963) (cause of action dismissed), *cert. denied*, 379 U.S. 945 (1964). *See also* *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965) (cause of action for wrongful life sustained where illegitimate sued state mental hospital alleging that hospital's negligence allowed her mother to be raped), *rev'd*, 25 A.D.2d 907, 269 N.Y.S.2d 786 (3d Dep't), *aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966). Courts have only recently begun to use the term "wrongful life."

8. These actions have been routinely rejected. *E.g.*, *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (4th Dep't 1977).

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

and wrongful life.<sup>10</sup> Ms. Gleitman alleged that her physicians negligently misinformed her that her contraction of rubella during early pregnancy would have no effect on her fetus.<sup>11</sup> Relying on this advice, Ms. Gleitman did not have an abortion<sup>12</sup> and subsequently gave birth to a child whose sight, hearing, and speech were severely impaired.<sup>13</sup> The court ruled that neither the parents' wrongful birth claim nor the infant's wrongful life claim was a legally cognizable cause of action.<sup>14</sup> Twelve years later, the New Jersey Supreme Court in *Berman v. Allan*<sup>15</sup> reassessed the validity of the *Gleitman* holdings.<sup>16</sup> *Berman* overruled *Gleitman* in part by recognizing a limited wrongful birth cause of action for the parents,<sup>17</sup> but it continued to deny the infant's wrongful life claim.<sup>18</sup> While *Berman* represents a necessary step forward, this Comment will show that by limiting the parents' wrongful birth claim and dismissing the infant's action for wrongful life, the *Berman* decision does not advance sufficiently beyond its predecessor.

#### THE FACTS OF *BERMAN V. ALLAN*

Thirty-eight year old Shirley Berman gave birth to a daughter afflicted with Down's Syndrome (mongolism).<sup>19</sup> Suit was subsequently filed against her obstetricians,<sup>20</sup> alleging that since a woman of Ms. Berman's age stands a greater chance of giving birth to a mongoloid,<sup>21</sup> the defendants were negligent in failing to in-

---

10. See *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 772-73, 233 N.W.2d 372, 375-76 (1975); Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127, 156 (1978).

11. 49 N.J. at 26, 227 A.2d at 691. At trial, expert medical testimony on plaintiff's behalf stated that "women who have German measles in the first trimester of their pregnancy will produce infants with birth defects in 20 to 50 per cent of the cases." *Id.* at 25, 227 A.2d at 690. The defendant's medical expert estimated that the likelihood of birth defects in this situation was "some 20 to 25 per cent." *Id.* at 26, 227 A.2d at 691.

12. *Id.*

13. *Id.* at 25, 227 A.2d at 690.

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

15. 80 N.J. 421, 404 A.2d 8 (1979).

16. *Id.* at 423, 404 A.2d at 9-10.

17. *Id.* at 430-34, 404 A.2d at 13-15.

18. *Id.* at 426-30, 404 A.2d at 11-13.

19. *Id.* at 423-24, 404 A.2d at 10.

20. *Berman v. Allan*, No. L1447-75 (N.J. Super. Ct. Nov. 4, 1977), *rev'd in part*, 80 N.J. 421, 404 A.2d 8 (1979). For a discussion of the case's disposition on remand, see note 78 *infra*.

21. 80 N.J. at 425, 404 A.2d at 10. Medical studies indicate that "about 60% of

form Ms. Berman of the existence of a procedure known as amniocentesis.<sup>22</sup> This procedure can detect the presence of such chromosomal defects in the fetus as the genetic anomaly causing mongolism.<sup>23</sup> No allegation was made that the defendants caused the mongolism itself. Rather, the Bermans alleged that the defendants' negligence deprived them of the opportunity to make an informed decision about whether to abort the fetus.

Since the trial court dismissed plaintiffs' suit for failing to state a valid cause of action,<sup>24</sup> the supreme court accepted the facts alleged in the complaint as true and construed all inferences in the plaintiffs' favor.<sup>25</sup> Thus, the court assumed that the defendants failed to inform Ms. Berman about amniocentesis<sup>26</sup> and that this did not conform to accepted medical procedure.<sup>27</sup> It also assumed that had Ms. Berman been informed of the availability of amniocentesis, she would have submitted to the procedure,<sup>28</sup> and upon learning that the child would be afflicted with Down's Syndrome, would have aborted the fetus.<sup>29</sup> The court determined, therefore, that the only question before it was whether damages should be awarded as a matter of law in these circumstances.<sup>30</sup>

#### THE PARENTS' WRONGFUL BIRTH CLAIM

*Gleitman's* dismissal of the parents' wrongful birth claim was premised on two rationales: The impossibility of measuring damages<sup>31</sup> and public policy against abortions.<sup>32</sup> In support of the first

all mongoloid babies are born to mothers above 35 years of age." NAT'L ACAD. OF SCI., GENETIC SCREENING 134 (1975). See generally *id.* at 133-37.

22. 80 N.J. at 424, 404 A.2d at 10.

23. For a description of amniocentesis—which involves inserting a long needle into the mother's uterus and sampling the amniotic fluid—see Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 97-99 (1974); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1493 n.21 (1978). The *Berman* court wrote: "Recent studies indicate that amniocentesis is highly accurate in predicting the presence of chromosomal defects, and that the risk of even minor damage to mother or fetus deriving from the procedure is less than one percent." 80 N.J. at 424, 404 A.2d at 10 (citations omitted).

24. *Berman v. Allan*, No. L1447-75 (N.J. Super. Ct. Nov. 4, 1977), *rev'd in part*, 80 N.J. 421, 404 A.2d 8 (1979).

25. 80 N.J. at 425-26, 404 A.2d at 11.

26. *Id.* at 426, 404 A.2d at 11.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 49 N.J. at 29, 227 A.2d at 693.

32. *Id.* at 30-31, 227 A.2d at 693.

rationale, the *Gleitman* majority explained that to determine the parents' compensatory damages, "a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is . . . impossible to perform."<sup>33</sup> The *Berman* court rejected this reasoning, ruling that "to deny Mr. and Mrs. Berman redress for their injuries merely because damages cannot be measured with precise exactitude would constitute a perversion of fundamental principles of justice."<sup>34</sup> The court cited several cases for the proposition that the impossibility of measuring damages is an insufficient rationale for dismissing a complaint.<sup>35</sup> Since all of these cases predate *Gleitman*, the *Berman* opinion implies that *Gleitman* was unjustified in relying on the impossibility of measuring damages as a basis for rejecting wrongful birth actions. This casts doubt on the validity of decisions that cite and rely on *Gleitman*'s impossibility-of-measuring-damages rationale to reject wrongful birth claims.<sup>36</sup>

The *Gleitman* majority also relied on public policy against abortion.<sup>37</sup> It dismissed as irrelevant the question of the abortion's legality, writing that even if an abortion could have been legally obtained, "substantial policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life."<sup>38</sup> This policy reflects the sanctity of life as expressed by the basic human will to live: "to seek life and hold on to it however heavily burdened."<sup>39</sup> The court therefore assumed that the infant would have chosen life with defects over no life at all. It quoted from Theocritus' *Idyll*: "'For the living there is hope, but for the dead there is none.'"<sup>40</sup> Reasoning from these assumptions, the court concluded that "[t]he right to life is inalienable in our society. A court cannot say what defects should prevent

33. *Id.* at 29, 227 A.2d at 693.

34. 80 N.J. at 433, 404 A.2d at 15 (citation omitted).

35. *Id.* at 428, 433, 404 A.2d at 12, 15 (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Martin v. Bengue, Inc.*, 25 N.J. 359, 136 A.2d 626 (1957); *Jenkins v. Pennsylvania R.R.*, 67 N.J.L. 331, 51 A. 704 (1902)). For a discussion of this rationale as it relates to wrongful life, see text accompanying notes 87 & 88 *infra*.

36. *E.g.*, *Coleman v. Garrison*, 349 A.2d 8, 13 (Del. 1975); *Stewart v. Long Island College Hosp.*, 35 A.D.2d 531, 532, 313 N.Y.S.2d 502, 503-04 (2d Dep't 1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

37. 49 N.J. at 30, 227 A.2d at 693.

38. *Id.*

39. *Id.*

40. *Id.* (quoting Theocritus, *IDYLL* ch. IV, 42). Maybe only the living need it.

an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action."<sup>41</sup> *Berman* rejected this rationale, relying on the Supreme Court's ruling in *Roe v. Wade*<sup>42</sup> that a woman has a constitutional right during the first trimester of pregnancy to decide whether to abort her fetus.<sup>43</sup> *Berman* stated that given *Roe*, public policy now supports the view that a woman cannot be denied a meaningful opportunity to make that decision.<sup>44</sup> Therefore, someone who negligently deprives a woman of her constitutional right to an abortion is liable for the damages proximately caused.<sup>45</sup> The court concluded that "[a]ny other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects."<sup>46</sup>

Despite the court's outright rejection of *Gleitman's* rationales for not recognizing wrongful birth, *Berman* significantly limited the scope of recovery for the tort. The Bermans sought two items of damage: "(1) the medical and other costs that will be incurred in order to properly raise, supervise and educate the child; and (2) compensation for the emotional anguish that has been and will continue to be experienced on account of [the infant's] condition."<sup>47</sup> The court recognized the claim for emotional anguish,<sup>48</sup> but rejected the claim for child rearing costs.<sup>49</sup>

The basis of the parents' claim for child rearing costs was that but for the defendants' malpractice, the Bermans would have aborted the fetus and would not have incurred the expenses of raising a child.<sup>50</sup> The sole explanation given by the *Berman* majority for holding that this item of damage should not be awarded is the following:

In essence, Mr. and Mrs. Berman desire to retain all the benefits inhering in the birth of the child—*i.e.*, the love and joy they will experience as parents—while saddling defendants with the

---

41. *Id.*

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

43. *Id.* at 162-66.

44. 80 N.J. at 431-32, 404 A.2d at 14.

45. *Id.*

46. *Id.* at 432, 404 A.2d at 14 (citations omitted).

47. *Id.* at 431, 404 A.2d at 13.

48. *Id.* at 433-34, 404 A.2d at 14-15.

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

50. *Id.* at 430-31, 404 A.2d at 13.

enormous expenses attendant upon her rearing. Under the facts and circumstances here alleged, we find that such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians.<sup>51</sup>

This reasoning is replicative of the holding in *Shaheen v. Knight*,<sup>52</sup> which for many years was the classic decision rejecting a claim for wrongful birth in the context of an unsuccessful sterilization procedure.<sup>53</sup> In *Shaheen*, the plaintiff fathered a child despite having undergone a vasectomy.<sup>54</sup> In a suit by the father against the physician, the court denied child rearing costs, holding that “[t]o allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and education of this, [plaintiff’s] fifth child.”<sup>55</sup> *Shaheen* rested on the conclusion that as a matter of law the joys of parenthood outweigh the expenses and costs of raising a child.<sup>56</sup> The rationale for this “overriding benefits” theory is that the birth of a healthy child is always considered a joyous event.

*Berman’s* adherence to *Shaheen*-like reasoning—which has been rejected by other jurisdictions<sup>57</sup>—is inappropriate. First, an overriding-benefits theory has less applicability when the parents’ child is deformed. The *Berman* court, however, ruled that even in the case of a mongoloid child, awarding child rearing costs would “constitute a windfall to the parents.”<sup>58</sup> It ignored the possibility that having a child with extreme birth defects might well shift the ratio of parenthood’s burdens and benefits so that the former outweighs the latter. Moreover, irrespective of the infant’s health, it was inappropriate for the court to assume that the Bermans would benefit from being parents. It can no longer be said that the birth

51. *Id.* at 432, 404 A.2d at 14 (citations omitted).

52. 11 Pa. D. & C.2d 41 (C.P. Lycoming County 1957).

53. See *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 173 (Minn. 1977). *Shaheen* and *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934), another widely cited unsuccessful sterilization case, have now both been roundly rejected by more modern reasoning. See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 476-77 (1st Dist. 1967); cf. *Troppi v. Scarf*, 31 Mich. App. 240, 247-49, 187 N.W.2d 511, 518 (1st Div. 1971) (negligent filling of birth control prescription).

54. 11 Pa. D. & C.2d at 41.

55. *Id.* at 45-46.

56. See Robertson, *Civil Liability Arising from “Wrongful Birth” Following an Unsuccessful Sterilization Operation*, 4 AM. J.L. & MED. 131, 149-52 (1978).

57. See cases note 53 *supra*.

58. 80 N.J. at 432, 404 A.2d at 14 (citations omitted).



of a child is always a blessing. Six years ago the dissenting opinion in *Terrell v. Garcia*,<sup>59</sup> a Texas case rejecting a wrongful birth cause of action, argued that

[t]he question is not whether a doctor should be forced "to pay for the satisfaction and joy and affection which normal parents would ordinarily have in the rearing and education of a healthy child." The question is whether a negligent doctor should be held responsible for the consequences of his negligence. There is no basis for the assumption that plaintiffs . . . will derive any joy and satisfaction from the raising of the unwanted child.<sup>60</sup>

Today, in light of the holding in *Roe v. Wade*,<sup>61</sup> the recent repeal of the New Jersey abortion statute,<sup>62</sup> and the Supreme Court's recognition of an individual's right to use contraceptives,<sup>63</sup> people have the right to determine for themselves the relative burdens and benefits of parenthood.<sup>64</sup> Inherent in the right of abortion is the right of would-be parents to decide that they want neither the so-called benefits of parenthood nor the burdensome costs of raising a child.<sup>65</sup> Although the Bermans may have purposefully conceived the infant, the court assumed that but for the defendants' breach of reasonable care, Ms. Berman would have decided to

59. 496 S.W.2d 124 (Tex. Civ. App. 4th Dist. 1973), *cert. denied*, 415 U.S. 927 (1974).

60. *Id.* at 129 (Cadena, J., dissenting) (quoting *Hays v. Hall*, 477 S.W.2d 402, 406 (Tex. Civ. App. 11th Dist. 1972)). The dissenting judge in *Terrell* also wrote: Perhaps these parents, in deciding that they did not want to pay the price for the enjoyment and pleasures which "normal" parents would derive from the birth of an unwanted child, were not acting as "normal" persons. . . . [I]t is hornbook law that a tortfeasor must take his victim as he finds him and has no right to insist on a "normal" victim.

*Id.* at 129-30 (Cadena, J., dissenting).

61. See text accompanying notes 42-44 *supra*.

62. N.J. STAT. ANN. § 2A:87-1 (West 1969) (repealed 1979):

Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.

See generally *Doe v. Bridgeton Hosp. Ass'n*, 71 N.J. 478, 366 A.2d 641 (1976) (woman has federal constitutional right to abort fetus during first trimester of pregnancy), *cert. denied*, 433 U.S. 914 (1978).

63. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

64. "It is no answer to say that a result which claimant specifically sought to avoid, might be regarded as a blessing by someone else." *Rivera v. State*, 94 Misc.2d 157, 162 (Ct. Cl. 1978) (negligent tubal ligation).

65. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

abort the fetus.<sup>66</sup> The *Berman* court's denial of child rearing costs discounts Ms. Berman's constitutional right to terminate a pregnancy and reinflates the *Shaheen* "blessing balloon."<sup>67</sup>

*Berman's* denial of all child rearing costs is not supported by decisions in other jurisdictions that have recognized wrongful birth. While some courts, such as the New York Court of Appeals,<sup>68</sup> have allowed parents to recover all the expenses of raising the child, other courts have utilized approaches that award at least some of these costs. One such approach is to award parents the costs of parenthood's economic burdens, less the value of its benefits.<sup>69</sup> For instance, the Michigan Court of Appeals has held that "the benefits of the unplanned child may be weighed against all the elements of claimed damage."<sup>70</sup> A second approach, utilized by the Texas Supreme Court, awarded the parents the value of the "economic burden related solely to the physical defects of the child."<sup>71</sup> These two

66. 80 N.J. at 426, 404 A.2d at 11.

67. See generally Note, *Busting the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221 (1975). The *Shaheen* "blessing balloon" has been "burst" by other jurisdictions. See cases note 53 *supra*.

68. *Becker v. Schwartz*, 46 N.Y.2d 401, 412-15, 386 N.E.2d 807, 813-14, 413 N.Y.S.2d 895, 901-03 (1978).

69. E.g., *Troppi v. Scarf*, 31 Mich. App. 240, 254-55, 187 N.W.2d 511, 517-19 (1st Div. 1971). The court quoted from the first RESTATEMENT OF TORTS § 920, at 616 (1939):

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 that this is equitable.

Accord, RESTATEMENT (SECOND) OF TORTS § 920, at 520 (1977). The "offsetting benefits rule"—by which the plaintiff's recovery is mitigated by the benefits conferred upon the plaintiff to the interest that was harmed—is not to be confused with the "overriding benefits" theory, see text accompanying notes 51-60 *supra*, by which it is said that the benefits of parenthood as a matter of law outweigh the burdens of parenthood. The former is a rule of damages; the latter, a rule of public policy. Robertson, *supra* note 56, at 150. For a discussion of mitigating damages by putting the infant up for adoption, which the *Berman* court did not discuss, see Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187, 1202-04 (1976). Of course, it would be more difficult for an adoption agency to place an abnormal child, such as infant Berman.

An evaluation of the burdens less the benefits of parenthood is not without its difficulties. However, the *Berman* court rejected *Gleitman's* "impossibility of measuring damages" rationale as a basis for dismissing the parents' complaint. See text accompanying notes 33-35 *supra*. For an indepth discussion of the complexities of such an evaluation, see Note, *supra* note 10, at 145-64.

70. *Troppi v. Scarf*, 31 Mich. App. 240, 255, 187 N.W.2d 511, 518 (1st Div. 1971). In applying the "offsetting benefits rule," the *Troppi* court did not separate the plaintiffs' claims for child rearing costs and the damages suffered as a result of the emotional anguish caused by the pregnancy and childbirth. *Id.*

71. *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975). The *Jacobs* court wrote:

approaches do compromise a woman's right to decide that she wants neither the benefits nor the burdens of parenthood, but they are preferable to a denial of all child rearing costs.

The Bermans also sought to recover for the emotional anguish of having a mongoloid child.<sup>72</sup> The court held that "the monetary equivalent of this distress is an appropriate measure of the harm suffered by the parents deriving from Mrs. Berman's loss of her right to abort the fetus."<sup>73</sup> Just as the court's total denial of child rearing costs is atypical of decisions recognizing wrongful birth, the court's recognition of damages for emotional suffering is unusual. Courts recognizing wrongful birth claims have generally restricted recovery to some child rearing costs, denying damages for emotional suffering on duty and speculativeness grounds.<sup>74</sup> *Berman* met these arguments by referring to the increasing number of situations in which tort law compensates the emotionally injured.<sup>75</sup> The majority explained that "courts have come to recognize that mental and emotional distress is just as 'real' as physical pain, and that its valuation is no more difficult."<sup>76</sup> Moreover, the court stated that to deny redress for emotional anguish "merely because damages cannot be measured with precise exactitude would constitute a perversion of fundamental principles of justice."<sup>77</sup>

Recognizing the parents' claim for emotional damages represents progress in compensating parents for the loss of their right to make an informed decision regarding an abortion. This progress, however, pales in light of the court's denial of all child rearing

It is impossible for us to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with defective body, a policy which in effect requires that the deficient embryo be carried to full gestation until the deficient child is born, and which policy then denies recovery from the tortfeasor of costs of treating and caring for the defects of the child.

*Id. See generally* Kass & Shaw, *The Risk of Birth Defects: Jacobs v. Thetmer and Parents' Right to Know*, 2 AM. J.L. & MED. 213 (1976-1977).

72. 80 N.J. at 431, 404 A.2d at 13.

73. *Id.* at 433, 404 A.2d at 14 (citation omitted).

74. *See, e.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 412-15, 386 N.E.2d 807, 813-14, 413 N.Y.S.2d 895, 901-03 (1978); *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (parents cannot recover for emotional suffering caused by death of their daughter from Tay-Sachs disease) (duty owed only to child, not parents). *But see* *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1st Dist. 1967).

75. 80 N.J. at 433, 404 A.2d at 15. *See* W. PROSSER, *THE LAW OF TORTS* § 54, at 327-35 (4th ed. 1971).

76. 80 N.J. at 433, 404 A.2d at 15 (citations omitted).

77. *Id.* (citation omitted).

costs. The majority never explained why the benefits of parenthood outweigh the "enormous expenses" of raising a mongoloid child, but not the emotional suffering. *Berman's* limitation of wrongful birth recovery represents a cautious first step towards recognizing a cause of action for wrongful birth.<sup>78</sup>

#### THE INFANT'S WRONGFUL LIFE CLAIM

Infant Sharon Berman filed a wrongful life action seeking compensation for the physical and emotional pain and suffering of being a mongoloid.<sup>79</sup> She claimed that but for the defendants' negligence she would not have been born and, thus, would not have been forced to bear the burdens of mongolism.<sup>80</sup> Utilizing a traditional tort formula, the *Berman* court stated that these damages would be computed by comparing the condition the infant would have been in but for the defendants' negligence—nonlife—with the infant's present impaired condition.<sup>81</sup> Consistent with *Gleitman*<sup>82</sup> and the wrongful life decisions of other jurisdictions,<sup>83</sup> the *Berman* court dismissed the infant's claim.<sup>84</sup> *Berman's* rationale, however, differed from *Gleitman's*.

The *Gleitman* court dismissed the infant's wrongful life action because of the impossibility of weighing impaired life against nonlife.<sup>85</sup> Just as *Berman* rejected this rationale when considering

78. On remand to the superior court, plaintiffs were permitted to proceed on the claim for emotional injury. The jury ultimately found for defendants because amniocentesis was not a widely accepted procedure at the time of Ms. Berman's pregnancy. Therefore, the failure to inform Ms. Berman about the procedure did not breach the standard of care owed to her. *Berman v. Allan*, No. L1447-75 (N.J. Super. Ct. Jan. 18, 1980).

79. See 80 N.J. at 427, 404 A.2d at 11-12. Mongolism is "[a] syndrome of mental retardation associated with a variable constellation of abnormalities." *STEDMAN'S MEDICAL DICTIONARY* 791 (22d ed. 1972). For a further description of the mental and physical effects of mongolism, see text accompanying notes 107-112 *infra*.

80. 80 N.J. at 426, 404 A.2d at 11. As in the case of the parents' claim, the infant did not contend that the defendants' negligence caused the defects with which she was born.

81. *Id.* at 427, 404 A.2d at 11-12.

82. 49 N.J. at 29, 227 A.2d at 692.

83. *E.g.*, *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

84. 80 N.J. at 430, 404 A.2d at 13.

85. 49 N.J. at 28-29, 227 A.2d at 692. While the *Gleitman* opinion stated that its rationale for dismissing the wrongful life claim was the "impossibility of measuring damages," *id.*, and the *Berman* court viewed *Gleitman's* wrongful life rationale as such, 80 N.J. at 14, 404 A.2d at 431-32, the anti-abortion attitude expressed in *Gleitman's* wrongful birth section may have pervaded the court's wrongful life thinking as well. In this light, consider the following statement made by the *Gleitman* court in its wrongful birth section:

the parents' claim,<sup>86</sup> the court discarded it as a basis for denying the infant's. The court stated that "where a wrong itself is of such a nature as to preclude the computation of damages with precise exactitude, it would be a 'perversion of fundamental principles of justice to deny all relief to the injured [party].'"<sup>87</sup> *Berman* stated that "were the *measure* of damages our sole concern, it is possible that some judicial remedy could be fashioned which would redress plaintiff, if only in part, for injuries suffered."<sup>88</sup> Instead, the *Berman* court dismissed the wrongful life claim because as a matter of law the plaintiff had not suffered any damage by being born.<sup>89</sup> This is because "[o]ne of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life."<sup>90</sup> *Berman* set forth three "concrete manifestations"<sup>91</sup> of this belief: (1) Documents such as the federal and New Jersey constitutions that set forth the moral principles of our society "are replete with references to the sanctity of life,"<sup>92</sup> and there is no indication in these documents that impaired lives are less valuable.<sup>93</sup> (2) The most severe criminal penalties are reserved for defendants who have deprived others of life, and these defendants are accorded special procedural protections.<sup>94</sup> These "protections and penalties do not vary according to the presence or absence of physical deformities in the victim or defendant."<sup>95</sup> (3) Society holds physicians in high esteem because they are the preservers of life.<sup>96</sup>

---

The sanctity of the single human life is the decisive factor in this suit in tort. . . . We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort.

49 N.J. at 30-31, 227 A.2d at 693 (citations omitted).

86. See notes 33-35 *supra* and accompanying text.

87. 80 N.J. at 428, 404 A.2d at 12 (brackets in original) (citations omitted) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

88. *Id.* (emphasis in original) (citations omitted).

89. *Id.* at 428-29, 404 A.2d at 12 (citations omitted).

90. *Id.* at 429, 404 A.2d at 12 (citations omitted).

91. *Id.*

92. *Id.* (citing U.S. CONST. amends. V, XIV; N.J. CONST. art. I, § 1).

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

94. *Id.* at 429, 404 A.2d at 13.

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

96. *Id.* at 430, 404 A.2d at 13. This particular "concrete manifestation" of the sanctity of life is misplaced in an action for malpractice.

The question before the court was whether the infant's impaired life outweighs nonlife.<sup>97</sup> *Berman's* three examples of the sanctity of life are unresponsive to the infant's claim. The constitutional rights and protections listed by the court go to the individual's right to exist and his or her relationship with the state and other individuals. Therefore, while these rights and protections apply equally to those with and without birth defects, they do not measure the value of life itself when measured against nonlife. It is not the right to exist that is reduced by birth defects, but the value of life to the individual. It is possible to recognize that life's value has been diminished without reducing the individual's right to autonomy and privacy.

*Berman* based its dismissal of the child's cause of action on the sanctity of life. The court held that

[n]otwithstanding her affliction with Down's Syndrome, Sharon, *by virtue of her birth*, will be able to love and be loved and to experience happiness and pleasure—emotions which are truly the essence of life and which are far more valuable than the suffering she may endure. To rule otherwise would require us to disavow the basic assumptions upon which our society is based. This we cannot do.<sup>98</sup>

While the court appears to balance the values of life and nonlife, it uses the fact of birth to decide that life will always be preferable. The court's concluding sentences refer back to its sanctity of life arguments, which are based on the value of life in the abstract. According to the court, birth is sufficient to give that abstraction meaning. The holding, therefore, makes the mere fact of existence dispositive. The court discusses the meaning of existence in terms of the ability to love and be loved. That experience has no meaning, however, if it is possible by birth alone. It is the ability to experience pain, pleasure, and hope that gives those words and life meaning. Thus, mere existence is but a starting point for further analysis.

The abstract value we place on life is not reduced by the argument that nonlife outweighs impaired life. The infant's cause of action only requires a court to recognize that the burdens of impaired life, when weighed against the reduced benefits derived

---

97. *See id.* at 427, 404 A.2d at 11-12.

98. *Id.* at 430, 404 A.2d at 13 (emphasis added).

from it, make nonlife a more rational alternative.<sup>99</sup> The sanctity of life is not diluted; rather, it is strengthened by recognizing that birth defects can so reduce life's pleasures and emphasize its pains, that in certain circumstances nonlife becomes preferable.<sup>100</sup> Similarly, can it be rationally argued that the pain of a terminal cancer patient's existence during the last few weeks before death is better than nonlife?<sup>101</sup> Ending that life does not denigrate life, but elevates it.<sup>102</sup>

The burdens of mongolism may make nonlife preferable.<sup>103</sup>

99. A recent commentary states:

[T]he plaintiff in a wrongful life action, because he must demonstrate that he has been harmed by being born, must establish that nonexistence would have been preferable to life as he must live it. . . . If nonexistence is valueless, then whether the infant-plaintiff has been harmed by being born depends upon whether his existence has a positive or a negative value. To determine this, the court must weigh the benefits and the burdens of that existence. If the burdens outweigh the benefits, then the plaintiff has been harmed by being born.

Note, Park v. Chessin: *The Continuing Judicial Development of the Theory of "Wrongful Life,"* 4 AM. J.L. & MED. 211, 226-27 (1978).

100. A number of commentators on wrongful life have expressed the view that "there should be a point at which life under sufficiently adverse conditions" cannot be assumed to be more desirable than nonlife. *E.g.*, Comment, *Torts—Illegitimate Child Denied Recovery Against Father for "Wrongful Life,"* 49 IOWA L. REV. 1005, 1009 (1964). One such commentator explains that "in certain situations it would be preferable not to exist rather than to endure life incapacitated by severe physical and mental defects." Note, *A Cause of Action For "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58, 66 (1970).

101. See generally O. RUSSELL, FREEDOM TO DIE 35-50 (1975).

102. In this light, consider Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977), where the Massachusetts Supreme Judicial Court upheld a probate court's order that life-prolonging chemotherapy should not be administered to a mentally retarded man, who would not have been able to understand the pain associated with the therapy. See generally *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976). For discussion of the distinction between acts of omission and acts of commission that are responsible for the death of a terminally ill patient, see Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973); Fletcher, *Prolonging Life*, 42 WASH. L. REV. 999, 1006-08 (1967); Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1647-50 (1974).

103. An oft-cited commentary renders the following "relative values" for cases where the infant suffers severe defects:

Life without defects = a plus value (+)

Nonexistence = 0

Life with [severe] defects = a minus value (-).

Note, *supra* note 100, at 66. The commentator explains that his analysis "assumes that life without defects is to be desired most," although life may not be preferable where the infant has severe defects. *Id.* With reference to the "relative values" he has conceived, the commentator writes:

Once the relative plus, minus and zero values have been established, a compensatory figure could be ascertained by the court. This would be no more

Mongoloids are mentally retarded, the majority being imbeciles with I.Q.s of twenty-five to forty-nine.<sup>104</sup> Rarely exceeding a mental age of six years,<sup>105</sup> mongoloids never share in the appreciation normal people have for their world. Brain defects reduce the mongoloid's sensory perception, particularly touch and smell.<sup>106</sup> Many suffer from leukemia,<sup>107</sup> heart disease,<sup>108</sup> impaired respiration and circulation,<sup>109</sup> and reduced life expectancy.<sup>110</sup> An array of physical defects—including abnormal hands,<sup>111</sup> feet,<sup>112</sup> and genitals<sup>113</sup>—plague mongoloids. Therefore, there is none of the hope to which *Gleitman* alluded.<sup>114</sup> Given the benefits and burdens of mongolism, it is not necessarily true that as a matter of law life as a mongoloid outweighs nonlife.

Judge Handler, dissenting from the dismissal of the wrongful life claim, argued that the defendants' negligence prevented the parents from preparing themselves for the burdens of raising a mongoloid child.<sup>115</sup> He explained that the infant's "injury consists of a diminished childhood in being born of parents kept ignorant of her defective state while unborn and who, on that account, were less fit to accept and assume their parental responsibilities."<sup>116</sup> This diminished capacity is aggravated by the child's birth defects, which place demands on the parents beyond those borne by the parents of healthy children.<sup>117</sup> Judge Handler saw no difference between this diminished capacity and the diminished parental ca-

---

difficult than placing a monetary value upon the difference between living with two arms as compared with living with only one—when the other has been severed due to negligence of defendant.

*Id.*

104. See L. PENROSE & G. SMITH, *DOWN'S ANOMALY* 48-53 (1966).

105. C. BENDA, *DOWN'S SYNDROME* 247-49 (rev. ed. 1969).

106. L. PENROSE & G. SMITH, *supra* note 104, at 53-54.

107. *Id.* at 81-83, A. LILIENFELD & C. BENESCH, *EPIDEMIOLOGY OF MONGOLISM* 85-93 (1969).

108. C. BENDA, *supra* note 105, at 38; L. PENROSE & G. SMITH, *supra* note 104, at 26-30; Kirman, *Down's Syndrome*, in 1 *MENTAL RETARDATION* 57, 65 (J. Wortis ed. 1970).

109. R. TREGOLD & K. SODDY, *TEXTBOOK OF MENTAL DEFICIENCY (SUBNORMALITY)* 292 (10th ed. 1963).

110. L. PENROSE & G. SMITH, *supra* note 104, at 26-30.

111. R. TREGOLD & K. SODDY, *supra* note 109, at 291-92.

112. *Id.* at 292.

113. *Id.*; C. BENDA, *supra* note 105, at 33.

114. See 49 N.J. at 30, 227 A.2d at 693; text accompanying notes 39 & 40 *supra*.

115. 80 N.J. at 442, 404 A.2d at 19 (Handler, J., dissenting).

116. *Id.* (Handler, J., dissenting).

117. *Id.* (Handler, J., dissenting).



capacity resulting from injuries sustained in an automobile accident, for which a cause of action has long existed in New Jersey.<sup>118</sup>

Wrongful life claims arise in varied contexts. Where the infant plaintiff is severely deformed, the question of whether his or her life outweighs nonlife should be fact sensitive. Rather than dismiss infant *Berman's* claim, the court should have allowed her complaint to stand and permitted her to prove at trial that nonlife outweighs her impaired life.

Although supported by the decisions of other courts, *Berman's* dismissal of the infant's claim is particularly troublesome. While the majority of courts now award parents at least some child rearing costs in a wrongful birth action, the *Berman* court completely denied the parents' claim for these costs. The net result of *Berman's* wrongful birth and wrongful life holdings is that no provision has been made for the maintenance of the mongoloid child. As Judge Jacobs' dissent in *Gleitman* put it,

[W]hile logical objection may be advanced to the child's standing and injury, logic is not the determinative factor and should not be permitted to obscure that he has to bear the frightful weight of his abnormality throughout life, and that such compensation as is received from the defendants or either of them should be dedicated primarily to his care and the lessening of his difficulties.<sup>119</sup>

### CONCLUSION

The New Jersey Supreme Court in *Berman v. Allan* came to bury *Gleitman*, not to praise it.<sup>120</sup> In the end, however, *Gleitman's* holdings remain with us, uninterred and rejuvenated. While *Berman* held that the parents could recover for their emotional suffering, no provision was made for child rearing costs or the frightful existence that infant *Berman* must now lead. Where a physician negligently precludes parents from making an informed decision about whether to have an abortion, and as a result an infant is born with severe birth defects, it is unresponsive to the needs of the parents and infant to limit recovery to the parents' emotional suffering.

*Kenneth C. Randall*

---

118. *Id.* at 442-43, 404 A.2d at 19-20 (Handler, J., dissenting).

119. 49 N.J. at 50, 227 A.2d at 704 (Jacobs, J., dissenting).

120. W. SHAKESPEARE, *JULIUS CAESAR* act 3, scene 2 (Marc Anthony to populace).