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TORT LAW—WRONGFUL BIRTH—EXPANDING DAMAGES IN WRONGFUL BIRTH TORT ACTIONS—*Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979).

I. INTRODUCTION

Thirty-eight year old Shirley Berman was under the care of Drs. Ronald Allan and Michael Attardi during her pregnancy in 1974.¹ Medical studies show that women have a significantly greater chance of bearing a child with Down's syndrome (mongolism) when they are over thirty-five years old.² Berman's doctors never informed her of this grave risk. They also did not apprise her of amniocentesis which is a procedure that involves the insertion of a long needle into the mother's uterus to withdraw a sample of amniotic fluid. This fluid is then analyzed; and the sex of the fetus, in addition to the existence of any genetic defects such as Down's syndrome, can be determined.³ This procedure is highly reliable in predicting genetic defects with little risk to the mother or fetus.⁴

In 1974, Berman gave birth to a daughter, Sharon, who was afflicted with Down's syndrome.⁵ The Bermans, previously excited about the prospects of raising a normal, healthy child, were prepared neither emotionally nor financially to rear a mongoloid child. They maintained that had they been informed of the high probability of bearing a mongoloid child and the availability of amniocentesis, Mrs. Berman would have undergone such testing.⁶ If the results of the amniocentesis had revealed a fetus afflicted with Down's syndrome, the Bermans contended that they would have aborted the child.⁷

The Bermans sued the doctors for malpractice in connection with the birth of their mongoloid daughter. They brought a wrongful birth action for damages they suffered due to Sharon's birth.⁸ In *Berman v. Allan*,⁹ they alleged that the doctors were negligent for

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

2. Lappé, *Can Eugenic Policy Be Just?*, in *THE PREVENTION OF GENETIC DISEASE AND MENTAL RETARDATION* 456, 462 (A. Milunsky ed. 1975).

3. *Berman v. Allan*, 80 N.J. 421, 424, 404 A.2d 8, 10 (1979).

4. *Id.*

5. *Id.*

6. *Id.* at 425, 404 A.2d at 10.

7. *Id.*

8. *Id.* at 423, 404 A.2d at 10. The Bermans also brought a wrongful life action on behalf of Sharon which will not be discussed in this casenote. The tort of wrongful life is brought by the parents on behalf of the child to recover damages the child has suffered due to being born as opposed to not being born.

9. 80 N.J. 421, 404 A.2d 8 (1979).

not informing Mrs. Berman about the risks of bearing a child with Down's syndrome, and for not informing her about the availability of amniocentesis.¹⁰ They also alleged that the doctors' negligence was the proximate cause of her bearing Sharon since Mrs. Berman was denied her right to decide knowingly whether or not to obtain an abortion. Consequently, she was injured by the birth of a daughter afflicted with mongolism.¹¹ The parents sought damages for raising and educating their child, Sharon, and compensation for present and future mental and emotional anguish as a result of giving birth to a mongoloid child.¹²

The trial court granted summary judgment for the doctors.¹³ Its decision was based on *Gleitman v. Cosgrove*,¹⁴ the only previously decided wrongful birth case before the New Jersey Supreme Court. In *Gleitman*, the supreme court held that wrongful birth was not a legally valid claim for relief. The court stated that no damages cognizable at law resulted if a doctor negligently prevented a mother from obtaining an abortion of a child subsequently born with birth defects. The court also said that even if damages were cognizable, recovery would be precluded because of the public policy against abortion.¹⁵

The Bermans appealed to the New Jersey Superior Court, Appellate Division; but before the appeal was heard, it was directly certified to the New Jersey Supreme Court on the supreme court's own motion.¹⁶ Since the trial court ruled for the doctors on a motion for summary judgment, the supreme court accepted the Bermans' allegations as true for purposes of the appeal.¹⁷

In a unanimous decision in *Berman*, the New Jersey Supreme Court rejected its position in *Gleitman* and recognized wrongful birth as a valid cause of action.¹⁸ The *Berman* court remanded the case with regard to the wrongful birth action with the finding that only mental and emotional anguish damages were recoverable if the Bermans' allegations could be proven.¹⁹

In *Berman*, the court found that if the doctors were negligent

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10. *Id.* at 425, 404 A.2d at 10.
 11. *Id.* at 430-31, 404 A.2d at 13.
 12. *Id.* at 431, 404 A.2d at 13.
 13. *Id.* at 425, 404 A.2d at 11.
 14. 49 N.J. 22, 227 A.2d 689 (1967).
 15. *Id.* at 31, 227 A.2d at 693.
 16. 80 N.J. at 425, 404 A.2d at 11.
 17. *Id.* at 426, 404 A.2d at 11.
 18. *Id.* at 432, 404 A.2d at 14.
 19. *Id.* at 434, 404 A.2d at 15.

in not advising Berman of amniocentesis, then they had to be liable for the consequences. Otherwise, a woman would have been denied her constitutional right to choose an abortion without any recourse against the doctors.²⁰ The court found this result mandated by the United States Supreme Court's decision in *Roe v. Wade*,²¹ which established a woman's constitutional right to obtain an abortion.²²

The *Berman* court stated that if the doctors' negligence had in fact denied the Bermans' right to abort the child, and thereby to reject a parental relationship with Sharon, then the parents had suffered compensable mental and emotional anguish when they learned that Sharon suffered from Down's syndrome.²³ The court did not mention the general rule,²⁴ followed in New Jersey,²⁵ that a physical injury must accompany a claim for mental or emotional distress damages.

The court summarily dispensed with the claim for costs to raise and to educate Sharon. The court contended that it would be unfair to saddle the doctors with the tremendous expenses to raise and to educate Sharon when the parents were going to retain all the benefits of the birth of a child. These benefits, according to the court, were the love and joy the Bermans would experience in raising Sharon.²⁶

This casenote analyzes the damages recoverable in wrongful birth actions. The focus is on the two types of damages sought in *Berman*. First, the alleged damages to raise and to educate Sharon are examined to show that a denial of these damages was improper. Second, the allowance of damages for emotional and mental distress are analyzed as a proper award. Finally, the potential consequences of awarding damages against negligent doctors are evaluated to show that any hardship on the doctors does not outweigh the liberalization of damages in wrongful birth actions.

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

21. 410 U.S. 113 (1973).

22. 80 N.J. at 431, 404 A.2d at 13.

23. *Id.* at 433, 404 A.2d at 14.

24. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 328-29 (4th ed. 1971).

25. See *Lemaldi v. De Tomaso of America, Inc.*, 156 N.J. Super. 441, 383 A.2d 1220 (Super. Ct. Law Div. 1978), wherein plaintiff purchased an expensive sports car that never worked properly. The repairs on the car amounted to \$4,000. Plaintiff brought suit to recover the \$4,000 plus associated mental anguish damages. The court said the mental anguish would be compensable provided an adequate showing of a resulting physical injury was made.

26. 80 N.J. at 432, 404 A.2d at 14.

II. BACKGROUND

The New Jersey Supreme Court first considered wrongful birth twelve years prior to *Berman* in *Gleitman*. In *Gleitman*, a mother contracted German measles during pregnancy, and the treating physician allegedly neglected to tell her that her child could be born with birth defects as a result.²⁷ When the child was born with sight, hearing and speech impairments, the mother sought damages for emotional distress, and the father sought damages for the costs of raising the child.²⁸ The parents alleged that if the doctor had warned them of the possibility of having a child with birth defects, they would have obtained an abortion.²⁹ The court reasoned that the intangible benefits of parenthood had to be weighed against the emotional and monetary damages suffered by the parents to determine a compensatory award. The court ruled that it was nearly impossible to weigh the love and joy of parenthood; and, therefore, no damages were awardable.³⁰ The court then balanced the right of the fetus to be born against the parents' right to obtain an abortion, and thereby to avoid mental distress and monetary damages. Relying on the authority of *Gulliver's Travels and Other Writings* by Jonathan Swift, the court concluded that even if damages could be ascertained, the preciousness of human life outweighed any damages suffered by the parents.³¹ Based on this analysis, *Gleitman* determined that wrongful birth was not a valid cause of action.³²

The New Jersey Supreme Court confronted the issue of wrongful birth a second time in *Berman*. During the intervening years between *Gleitman* and *Berman*, the United States Supreme Court, in *Roe*, decided that a woman had a constitutional right to obtain an abortion.³³ The court held that this right was within the constitutional right of privacy; therefore, any state limitation or regulation of it was unconstitutional absent compelling state interests.³⁴ Relying on *Roe*, the *Berman* court concluded that the arguments of *Gleitman* could no longer block recovery.³⁵

27. 49 N.J. at 24, 227 A.2d at 690.

28. *Id.* at 24, 227 A.2d at 690.

29. *Id.* at 26, 227 A.2d at 691.

30. *Id.* at 29-30, 227 A.2d at 693.

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

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

33. 410 U.S. at 113.

34. *Id.* at 155-56.

35. 80 N.J. at 432, 404 A.2d at 14.

The recognition of wrongful birth in *Berman* brings New Jersey within the majority of decisions that has allowed damages in cases in which the negligence of the doctor has resulted in a denial of the right to obtain an abortion.³⁶ Although the majority of decisions has allowed recovery, there is disagreement as to the proper measure of damages.³⁷ New York state courts have dis-

36. See *Gildner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978) (doctor performed amniocentesis and assured the parents that their child would not be born with Tay-Sachs disease, the child was born with the disease, and the court allowed damages for the medical expenses and the pain and suffering due to the birth of the child); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (consolidation of two cases on appeal). In *Becker* the doctor failed to warn of the possibility that an abnormal child could be born. *Id.* at 406, 386 N.E.2d at 808, 413 N.Y.S.2d at 896-97. He also failed to tell the parents of the existence of amniocentesis. *Id.* at 406, 386 N.E.2d at 808, 413 N.Y.S.2d at 897. As a result, a retarded child was born and the parents sought recovery due to the doctor's negligence. *Id.* at 406, 386 N.E.2d 809, 413 N.Y.S.2d at 897. In *Park v. Chessin* (the case consolidated with *Becker*) the doctor negligently advised the parents to have a child despite the chance of birth defects. *Id.* at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. In both cases the court permitted a cause of action for recovery of the costs of caring for the child. *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902-03; *Karlsons v. Guerinet*, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (N.Y. 1977) (doctor was negligent in not telling the parents of the possibility that their child could be deformed or that amniocentesis could be used, a deformed child was born, a cause of action was allowed to recover for the parents' pain, suffering, and mental anguish subject to an offset for any benefits from raising the child); *Ziamba v. Sterberg*, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (N.Y. 1974) (doctor was negligent in not telling the mother she was pregnant before she could have had an abortion, and consequently a healthy baby was born; the court established a cause of action if the doctor's negligence is established as the proximate cause of the birth, the mother can recover costs of raising the child, the costs of the birth, pain and suffering, and loss of consortium); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. Sup. Ct. 1975) (doctor failed to diagnose the mother's condition as rubella, and therefore, failed to warn that her disease could cause birth defects, the child was born with birth defects, the court established a cause of action if the mother would have obtained an abortion, and recovery could be had for the amount necessary to treat and care for the physical impairment of the child); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (doctor, unaware of the pregnancy, failed to diagnose the mother's condition as rubella, the court permitted a cause of action if the parents could prove the doctor was negligent, they would have aborted the pregnancy and limited damages to the cost difference between raising a normal child and their child who was born with birth defects). *But see* *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (doctor did not take a proper genealogical history and did not inform the parents of the possibility that the child could be born with Tay-Sachs disease or of the availability of tests to detect the disease in the fetus, the child died from Tay-Sachs and the parents sued for negligence seeking damages only for their mental and emotional distress which the court held were not recoverable); *Rieck v. Medical Protective Co.*, 64 Wis.2d 514, 219 N.W.2d 242 (1974) (doctor failed to diagnose pregnancy in time for an abortion, a healthy child was born and the parents sought and were denied damages equal to the costs of raising the child).

37. See note 36 *supra*.

agreed among themselves about what the recovery should be, varying from granting no damages to allowing the costs to raise and to educate the child in addition to compensating for any mental distress suffered by the parents.³⁸ Although the most recent New York Court of Appeals decision³⁹ denied mental distress damages, it did not formally overrule prior cases that allowed these damages. The decision in *Berman* to allow mental distress damages represents a minority view.⁴⁰

The remedy that should be awarded in *Berman* can be analogized to the remedy granted in a line of cases involving the negligent performance of sterilizations and abortions resulting in the birth of unwanted children. The majority of these cases has allowed recovery,⁴¹ but again, there is disagreement over what is the

38. *Becker v. Schwartz*, 46 N.Y.2d 40, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (care and treatment costs allowed); *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (no recovery allowed); *Karlsons v. Guerinot*, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (N.Y. 1977) (pain and suffering and mental anguish compensable); *Ziembra v. Sternberg*, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (N.Y. 1974) (costs to raise healthy child and pain and suffering).

39. *Becker v. Schwartz*, 46 N.Y.2d 40, 386 N.E.2d 807 (1978).

40. See *Karlsons v. Guerinot*, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (N.Y. 1977) (the only other case allowing recovery for mental distress).

41. See *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (doctor performed a negligent abortion which resulted in the birth of a healthy baby, the court held the mother could recover all damages flowing from the negligence under ordinary tort principles and the doctor could prove an offset in accordance with mitigation of damages requirements); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (a negligent sterilization resulted in the birth of an unwanted child, the court held all damages that reasonably flowed from the negligence, including the costs to raise the child, were recoverable); *Anonymous v. Hosp.*, 35 Conn. Supp. 112, 398 A.2d 312 (1979) and *Anonymous v. Hosp.*, 33 Conn. Supp. 112, 366 A.2d 204 (1976) (unsuccessful tubal ligation was performed and birth of an unplanned child resulted, recovery was allowed for the costs of raising each child, but the defendant-doctor could argue the joys of having a child as mitigation of damages); *Coleman v. Garrison*, 349 A.2d 8 (Del. Sup. Ct. 1975) (improperly performed tubal ligation resulted in the birth of a healthy child, the court permitted no damages for raising and educating the child citing the benefits of parenthood and only permitted damages for the cost of the tubal ligation, the cost of the pregnancy and the loss of the husband's consortium during and immediately following the pregnancy, however no recovery was allowed since the parents failed to meet their burden of proof); *Bushman v. Burns Clinic Medical Center*, 83 Mich. App. 453, 268 N.W.2d 683 (1978) (child was born following a negligent vasectomy, damages were allowed for pain and suffering of the mother during pregnancy, the cost of the vasectomy, the loss of consortium and the medical expenses due to the pregnancy); *Green v. Sudakin*, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (doctor failed to perform a tubal ligation and a child was born, recovery was allowed for mental anguish, on a negligence theory, and the costs to raise the child were allowed on a contract theory); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (pharmacist misfilled an oral contraceptive prescription and a healthy child was born, the court allowed damages, as balanced against the

proper measure of damages. The recovery allowed has varied from the costs of the negligent sterilization, the costs of pregnancy and the loss of consortium to the husband,⁴² to the costs of raising the child, plus all other damages that reasonably flowed from the doctor's negligence.⁴³

III. ANALYSIS

A. Damages to Raise and to Educate

Cases such as *Sherlock v. Stillwater Clinic*⁴⁴ and *Troppi v. Scarf*⁴⁵ indicate judicial reluctance to award damages associated with the birth of a child. Utilizing the same reasoning as *Sherlock* and *Troppi*, the *Berman* court limited damages by weighing the love and joy experienced as parents against the unexpected but substantial economic and social burdens of rearing a mongoloid child.⁴⁶ Although *Berman* does not explicitly refer to the source of

benefits of having a child, for the mother's lost wages, medical and hospital expenses, pain and anxiety of pregnancy and childbirth and the costs to raise the child); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (negligent sterilization resulted in a healthy baby, damages were allowed for prenatal and postnatal medical expenses, the mother's pain and suffering, loss of consortium and the costs of rearing the child to the age of majority as offset by the value of the child's comfort and society to the parents during their life expectancy); *Betancourt v. Gaylor*, 136 N.J. Super. 369, 344 A.2d 336 (1975) (negligent sterilization operation resulted in birth of a healthy child, the court allowed recovery for the cost of the operation, emotional distress and for the costs of raising the child, less the benefits of raising the child); *Clegg v. Chase*, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (N.Y. Sup. Ct. 1977) (child was born following a negligent tubal ligation, recovery was allowed only for the cost of the unsuccessful operation and the pain and suffering associated with that operation); *Rivera v. State*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (N.Y. Ct. Cl. 1978) (healthy baby was born as a result of negligent sterilization, the costs to raise the unwanted, but healthy, child were recoverable along with the medical expenses and the pain and suffering incident to the birth); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (an unsuccessful tubal ligation resulted in the birth of twins, the court upheld a \$450,000 award to the mother based on ordinary negligence theory and an award of \$12,500 to the husband for loss of consortium); *Speck v. Finegold*, 408 A.2d 496 (Pa. Super. Ct. 1979) (crippled child was born after an unsuccessful vasectomy and abortion; parents could only recover past and future pecuniary expenses associated with the care and raising of the child). *But see* *Terrel v. Garcia*, 496 S.W.2d 124 (Tex. 1973) (doctor performed unsuccessful tubal ligation, and as a result a healthy baby was born, the parents sued the doctor for negligence seeking only damages to raise and educate the child; the court, relying on public policy, held no recovery as a matter of law because the benefits of a healthy child outweighed any damages).

42. See *Coleman v. Garrison*, 349 A.2d 8 (Del. Sup. Ct. 1975).

43. See *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

44. 260 N.W.2d 169 (Minn. 1977).

45. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

46. 80 N.J. at 432, 404 A.2d at 14.

its weighing formula, the formula derives from the "benefits rule" from the *Restatement of Torts*:⁴⁷ "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where it is equitable."⁴⁸

Although courts have explicitly used the benefits rule to limit recovery,⁴⁹ the California Court of Appeal, in *Custodio v. Bauer*,⁵⁰ was critical of its application. In *Custodio*, a negligently performed sterilization resulted in the birth of a healthy child, and the court allowed recovery of the costs to raise and to educate the child. The court found that the joys of an unwanted child did not outweigh the economic expenses. Consequently, the benefits rule was inapplicable since economic costs to raise the unwanted child could detract from the other family members' share of the total family income.⁵¹

The benefits rule has been improperly applied in wrongful birth cases. A benefit conferred on the plaintiff by the defendant's negligent conduct should only offset the defendant's liability if there is a direct and recognizable benefit to the interest to be protected.⁵² In *Berman*, the constitutional right to choose an abortion without interference was the right that was violated. The joys of raising Sharon do not have any relationship to, nor do they mitigate, the denial of the Bermans' constitutional right. The minimization of damages in *Berman* by weighing the joys and benefits of parenting against the concrete costs of rearing a child directly conflicts with the underlying basis of tort law which is to compensate the victim for damages he or she has suffered.⁵³ If the benefits of

47. *Id.* at 433, 404 A.2d at 14. *Berman* relied on *Coleman v. Garrison*, 349 A.2d 8 (Del. Sup. Ct. 1975), to support its balancing approach. *Coleman* specifically relied on the benefits rule of torts in determining that the value of a newborn child outweighs a claim for the expenses to raise and educate the child, 349 A.2d at 13-14; *See also* *Troppe v. Scarf*, 311 Mich. App. 240, 187 N.W.2d 511 (1971); *Sherlock v. Stillwater*, 260 N.W.2d 169 (Minn. 1977) (benefits rule used to limit recovery).

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

49. *See* *Anonymous v. Hospital*, 33 Conn. Supp. 112, 366 A.2d 204 (1976); *Coleman v. Garrison*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977).

50. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). *See also* *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (benefits rule criticized).

51. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (1967).

52. *Id.*; *Maben v. Rankin*, 55 Cal. 2d 139, 10 Cal. Rptr. 353, 358 P.2d 681 (1961).

53. W. PROSSER, *supra* note 24, at §§ 2 & 7, at 7 & 28.

having a child are allowed to be offset against the parents' monetary damages, then the parents are left with an economic and social burden they did not want; and the doctor whose negligence caused the parents' burden is left in a position of having to pay only a portion of the damages his negligence caused. In some cases, the benefits may be found to equal or to exceed the monetary damages with the result that the doctor incurs no liability. Such a method of determining damages does not compensate the parents for their injuries.

A determination of the reasonable costs to raise Sharon can be based on an estimation of the costs of shelter, food, and clothing required to bring up a child. Costs for a minor child to attend private school⁵⁴ and future expenses for college may also be recoverable in appropriate cases.⁵⁵ Determinations of the costs to raise a child are routinely performed in child support cases, and the same procedure could be utilized in wrongful birth cases. In *Rivera v. State*,⁵⁶ which involved the birth of an unwanted child due to a negligently performed sterilization, the court determined that the economic costs to raise a child were routinely ascertainable. The court said: "Such calculations are made by estate planners, insurance companies, and sometimes by private parties as incident to support proceedings or matrimonial settlements."⁵⁷ Rather than following rigid or mathematical formulations to establish costs, the common practice in child support cases is to allow the trial judge discretion to determine the value of these costs in accordance with the economic level to which the family is accustomed.⁵⁸ This general practice is followed in child support cases in New Jersey where the trial judge is given the discretion to determine what is reasonable and just support on a case by case basis.⁵⁹ This same routine practice could be utilized at the trial level in wrongful birth cases.

54. *Smith v. Smith*, 337 F. Supp. 475 (D. V.I. 1972) (a child support proceeding in which the husband was required to pay the expenses for a minor child to attend a private school).

55. *Thaler v. Klein*, 55 App. Div. 2d 606, 389 N.Y.S.2d 119 (N.Y. 1976) (a child support proceeding in which it was found proper for the husband to pay the full costs of college education for his two daughters).

56. See note 41 *supra*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (N.Y. Ct. Cl. 1978).

57. *Id.* at 161, 404 N.Y.S.2d at 953.

58. *Phillips v. Phillips*, 344 So. 2d 786, (Ala. Civ. App. 1977); *Ducote v. Ducote*, 339 So. 2d 835 (La. 1976); *Mathews v. Mathews*, 42 Ill. App. 3d 1049, 356 N.E.2d 1083 (1976).

59. *Gordon v. Gordon*, 147 N.J. Super. 585, 371 A.2d 791 (Super. Ct. App. Div. 1977).

In *Berman*, however, the cost of raising a normal child should be offset against the costs of raising Sharon, who suffers from Down's syndrome. Since the parents had desired to give birth to and to raise a normal child, only the extra costs associated with raising and caring for for a child born with birth defects should be recoverable. Several courts have followed this reasoning.⁶⁰

B. *Emotional and Mental Distress Damages*

Berman found the emotional and mental distress suffered by the Bermans as a result of giving birth to a mongoloid child to be concrete damages that were compensable.⁶¹ In making this determination, the court never discussed, nor did it require, an accompanying physical injury.

It is axiomatic in tort law that "[w]here the defendants' negligence causes only mental disturbance, without accompanying physical injury or physical consequences, or any other independent basis for tort liability, there is still general agreement that in the ordinary case there can be no recovery."⁶² The purpose of this rule is to insure that the mental injury is real.⁶³ Nevertheless, if it can clearly be established that serious mental distress can result without physical harm, and there is a sufficient guarantee that the alleged mental distress is valid, then the lack of an accompanying physical injury should not bar recovery.⁶⁴ *Berman* falls within the exception to the general rule since the birth of a monogoloid child will cause the parents mental and emotional anguish.⁶⁵

The court did not discuss the significance of its conclusion that damages were being allowed for mental and emotional distress without a requirement of an accompanying physical injury. The authorities cited in *Berman* to support the allowance of mental distress damages all required a physical injury of some sort in addition to the claimed mental or emotional distress.⁶⁶ Although the court

60. *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 66 Wis. 2d 766, 233 N.W.2d 372 (1975). In both *Jacobs* and *Dumer* the doctor's negligence denied the mother an opportunity to obtain an abortion and a child was born with birth defects. The courts found that public policy did not bar recovery of the extra costs to raise these children and to treat their handicaps.

61. 80 N.J. at 433, 404 A.2d at 14.

62. See W. PROSSER, *supra* note 24. *But see* *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968) (the minority trend of allowing recovery of mental distress damages without a showing of an accompanying physical injury).

63. See W. PROSSER, *supra* note 24, at 329-30.

64. *Id.*

65. 80 N.J. at 438-39, 404 A.2d at 17-18 (Handler, J., concurring).

66. *Zahorian v. Russell Pitt Real Estate Agency*, 62 N.J. 399, 309 A.2d 754

deviated from this general rule with regard to recovery of mental distress damages without ever alluding to it, the award was proper; several courts have allowed similar recovery.⁶⁷

C. *The Consequences of a Liberalization of Damages*

It is conceivable that a liberalization of damages recoverable in wrongful birth suits will result in an explosion of litigation.⁶⁸ The jurisdictions that currently allow wrongful birth actions, however, have not had their courts jammed with litigation.⁶⁹ Even if the floodgates were opened by allowing more substantial recovery, that would not be a valid reason to restrict damages. "[T]he fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice."⁷⁰

The Ohio Supreme Court has held that wrongful birth actions should not be singled out for a limitation of recovery.⁷¹ The court

(1973) (single, young woman after being denied an apartment rental due to her age and marital status became extremely upset necessitating several visits to her doctor, the court allowed her damages for her emotional upset in a suit claiming violation of the woman's civil rights); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965) (plaintiff sought damages resulting from fright when a car passed close to plaintiff and made her fearful of being hit, the court allowed recovery in this case for bodily injury or sickness proximately resulting from the fright); *Muniz v. United Hosps. Medical Center Presbyterian Hosp.*, 153 N.J. Super. 79, 370 A.2d 76 (Super. Ct. App. Div. 1977) (parents suffered emotional and mental distress as a consequence of the method used to tell the mother of the death of her baby and the failure to locate the baby or confirm its death for three weeks, although unclear, this case seems to follow the general rule that a physical injury must result from the emotional upset to allow recovery); *Lemaldi v. DeTomaso of America, Inc.*, 156 N.J. Super. 441, 383 A.2d 1220 (Super. Ct. Law Div. 1978). *See also* note 25 *supra* and accompanying text; W. PROSSER, *supra* note 24, § 54, at 327-35. The general rule is that mental distress damages are not recoverable alone. A physical injury must accompany the mental distress so that it is clear that the mental distress claim is not fraudulent.

67. *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (N.J. Super. Law Div. 1975); *Karlsons v. Guerinot*, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (N.Y. 1977). *See also* text accompanying notes 36 & 41 *supra*.

68. *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (court held that if allowance of recovery would open the floodgates, public policy allowed a denial of recovery).

69. Currently, of all the jurisdictions that allow wrongful birth actions, New York has the most reported cases. To date only seven cases have been reported. *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); *Karlsons v. Guerinot*, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (N.Y. 1977); *Ziembra v. Sternberg*, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (N.Y. 1974); *Clegg v. Chase*, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (N.Y. Sup. Ct. 1977); *Rivera v. State*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (N.Y. Ct. Cl. 1978).

70. *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965).

71. *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

said that the right to obtain an abortion has become a constitutionally guaranteed right; therefore, any attempt to limit damages would be an infringement of this right.⁷² This court, along with others,⁷³ has held that damages in a negligence action should not be limited simply because the suit concerns the birth of a child.

Although these damages may result in a substantial burden on a doctor whose negligence causes an unwanted birth, a doctor should not be automatically immunized from the consequences of his negligence. To limit the doctor's liability simply because recovery would be large is unfair since the alternative would be that the innocent victims of the negligence then would have to bear substantial costs. Additionally, if the doctor is held liable for his negligence, he will have an incentive to act in a nonnegligent manner.⁷⁴

The consequences of increased liability may directly affect the expense and availability of certain medical services provided by doctors. Doctors could refuse to perform amniocentesis or to give prenatal advice. Rather than abandon this medical service, however, the medical profession may be willing to pay increased malpractice premiums and then to pass its increased costs to the general public. If this occurred, the *Berman* court's concern for overburdening the doctor⁷⁵ would not be valid since the public at large would, in effect, absorb the liability. Although it might seem unfair for the general public to subsidize medical negligence by an increase in medical bills, it is more unjustifiable to saddle the innocent victims of the negligence with the substantial costs. Such potential consequences are still not adequate reasons to restrict recovery when a woman's constitutional right to obtain an abortion has been infringed.

IV. CONCLUSION

The *Berman* decision brings New Jersey up-to-date by its recognizing wrongful birth as a valid cause of action in tort. The decision followed the pattern of other jurisdictions limiting recoverable damages. *Berman* limited recovery by not recognizing monetary damages for rearing a mongoloid child. Other jurisdictions have limited damages by stating that the joys and benefits of parenthood partially offset or, in some cases, outweigh any recovery.

72. *Id.* at 46, 356 N.E.2d at 499.

73. *Ziamba v. Sternberg*, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974); *Rivera v. State*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (N.Y. Ct. Cl. 1978).

74. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1963); 80 N.J. at 436-37, 404 A.2d at 16 (Handler, J., concurring).

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

The recognition by the United States Supreme Court of a woman's constitutional right to an abortion clearly represents a shift in public policy from prior opposition to abortion. Consequently, courts should not readily reduce compensatory damages in wrongful birth actions simply because the birth of a child is involved. If a doctor negligently performs his job and damages result, he should be fully liable. Otherwise, a doctor may not have an adequate incentive to act in a nonnegligent manner.

The limitation of damages in *Berman* is based on the benefits rule of tort law. The court balanced the joys of parenthood against the monetary costs of raising a mongoloid child. This application of the benefits rule is improper since the interest protected in this case, the right to choose an abortion, is not benefited by the doctors' negligence. Therefore, the extra monetary costs associated with raising a mongoloid child should be recoverable. The costs of raising a child are routinely determined in child support cases, and a similar determination could be made in wrongful birth cases.

The allowance of mental and emotional distress damages in *Berman* was a proper award despite the failure to require an accompanying physical injury. Generally, a physical injury is required to validate the mental and emotional injury. In this case, the alleged mental and emotional injury is recognizable and compensable; and therefore, validation is not required.

Increased damages in wrongful birth actions could result in higher medical malpractice premiums which would be passed on to the general public. Although this would mean higher medical costs for everyone, this is preferable to burdening the innocent victims of the doctor's negligence with the substantial economic costs of raising an unwanted child.

Liberalized damages could potentially open the floodgates to wrongful birth litigation although this has not happened in the jurisdictions that have allowed these actions. Even if the floodgates were opened, that is not a valid reason to deny recovery in meritorious cases. Where a woman's constitutional right to obtain an abortion has been infringed by a doctor's negligence, there is a recognizable injury which should be deterred and remedied.

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