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Wrongful Birth; Preconception Torts; Duty to Inform of Genetic Risks; Becker v. Schwartz

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MEDICAL MALPRACTICE

Wrongful Birth • Preconception Torts •

Duty to Inform of Genetic Risks

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

IN 1977 the Supreme Court of New York, Appellate Division, decided in *Park v. Chessin*¹ that an infant born deformed has a cause of action for its "wrongful life." This was the first time an appellate court in the United States had granted such a cause of action and asserted "the fundamental right of a child to be born as a whole, functional human being."² *Park* was decided fourteen years after the first reported "wrongful life" suit in the United States³ and ninety-three years after Justice Holmes had declared that an infant cannot recover for prenatal injuries.⁴ This decision spawned a number of articles and notes in scholarly journals.⁵ However, late in 1978, under the title *Becker v. Schwartz*,⁶ the New York Court of Appeals reversed the ruling of the Appellate Division in *Park v. Chessin* and brought New York's position on wrongful birth and wrongful life⁷ back into accord with that of most other jurisdictions that have considered the issues.⁸

Similar facts are asserted in *Park v. Chessin* and its companion case *Becker v. Schwartz*. Both cases deal with the physicians' allegedly negligent failure to inform the parents of the risk of the wife bearing a genetically deformed child so that the parents could decide whether to have the child. In *Becker*, Delores Becker, age thirty-seven, learning she was pregnant, consulted the defendants, specialists in obstetrics and gynecology. She re-

¹ 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977).

² *Id.* at 88, 114.

³ *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, N.E.2d 849 (1963).

⁴ *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884). For an excellent history of claims for prenatal injury from *Dietrich* to *Park*, see Robertson, *Toward Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401.

⁵ Note, *Wrongful Life: A Modern Claim which Conforms to the Traditional Tort Framework*, 20 WM. & MARY L. REV. 125 (1978); *Wrongful Life*, 17 J. FAM. L. 199 (1978); Note, *Torts—Wrongful Life*, 44 MO. L. REV. (1979); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978).

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

⁷ Like many other writers but not all justices, I distinguish between the terms "wrongful birth" and "wrongful life." "Wrongful birth" is the broader term, indicating that but for someone's negligence the infant would not have been born. It also refers specifically to the parents' claim that they have been injured as a result of that birth. "Wrongful life" refers to the child's claim, to his legal cry of "I wish I had never been born."

⁸ See Annot., 83 A.L.R.3d 15 (1978). And later cases: *Elliot v. Brown*, 361 So. 2d 546 (Ala. 1978); *Gildiner v. Thomas Jefferson University Hospital*, 451 F. Supp. 692 (E.D. Penn. 1978); *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979).

mained under the defendants' care until after the birth of her daughter. The child was born afflicted with Down's Syndrome⁹ and subsequently was institutionalized. Plaintiffs contended that the defendant physicians informed the parents neither of the increased risk of Down's Syndrome in infants born to women over the age of thirty-five nor of the availability of amniocentesis¹⁰—a medical procedure that could have determined whether the fetus Mrs. Becker was carrying was afflicted with Down's Syndrome. Plaintiff's further contended that but for the negligence of the defendants in failing to inform their patient, Mrs. Becker would have had the amniocentesis test, would have learned that her child would be born mentally retarded and physically deformed, and would have elected to abort the fetus.¹¹

In *Park*, Hetty Park had given birth to a child afflicted with polycystic kidney disease, who died a few hours after birth.¹² Shortly thereafter, she and her husband questioned her obstetricians as to the odds of a second infant being afflicted with the same disorder. The defendants allegedly replied that the disease was not hereditary and the chances of a second child having it were practically nil. As a consequence of these assurances, the plaintiffs intentionally conceived a second child. This baby also was born with polycystic kidney disease, but managed to survive for two and a half years before dying from the progressive effects of the disease. The plaintiffs allege that—contrary to the assurances of the defendants—polycystic kidney disease is hereditary and that, had the defendants correctly informed the Parks of this fact, they would have elected not to conceive another child.¹³

Both pairs of parents sued on their own behalfs for (1) the expenses incurred in the care and treatment of the infants and for (2) the mental distress caused them by the birth of a defective child. They also sought damages on behalf of the children for (3) wrongful life. The Court of Appeals acknowledged the first claim as valid, but dismissed the second and third. It dismissed the claims for damages for emotional distress on the precedent of its 1977 decision in *Howard v. Lecher*¹⁴ and upon the difficulty of ascertaining the value of mitigated damages prescribed by Restatement

⁹ Down's Syndrome is more commonly referred to as mongolism. It is a syndrome of mental retardation associated with a variable constellation of physical abnormalities caused by a chromosomal anomaly.

¹⁰ Amniocentesis is a "transabdominal aspiration of fluid from the amniotic sac." *STEDMAN'S MEDICAL DICTIONARY*, 3d UNABRIDGED LAWYER'S EDITION 1236 (1972). Biochemical tests are performed on the sample of amniotic fluid withdrawn, often times allowing the detection of chromosomal abnormality.

¹¹ 46 N.Y.2d at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 896-98.

¹² Polycystic disease of the kidneys is a condition "characterized by numerous cysts . . . scattered diffusely throughout the kidneys, sometimes resulting in organs that tend to resemble grapelike clusters of cysts." (*Stedman's Medical Dictionary*. 1 3d Unabridged Lawyer's Edition 669, 1972).

¹³ 46 N.Y.2d at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 897.

¹⁴ 42 N.Y.2d 109, 397 N.Y.S.2d 363 N.E.2d 64 (1977).

(Second) of Torts section 920.¹⁵ It dismissed the wrongful life claims of the infants because the infants had suffered no legally cognizable injury and, even if they had, calculations of damages would be impossible.

I. PARENTS' ACTION FOR DAMAGES

Just a year before *Becker*, the Court of Appeals had heard *Howard v. Lecher*¹⁶ — a case based on a very similar set of facts. Mrs. Howard had given birth to a daughter with Tay-Sachs disease.¹⁷ The Howards sued the physician, contending that he should have known of the increased risk that the fetus would suffer from the disease and so should have tested for its presence, and asserting that, had the Howards been informed that the fetus was afflicted with Tay-Sachs, they would have chosen to abort it. The Court of Appeals dismissed the parents' action for damages for mental distress.

The *Howard* majority viewed the parents as mere bystanders to the negligent injury of their child and thus denied them a cause of action under New York's bystander rule.¹⁸ The "[l]aw has repeatedly denied recovery for mental and emotional injuries suffered by a third party as a result of injuries sustained by another."¹⁹ In reaching its decision, the court begged the question of whether or not the physician owed a duty of care directly to the parents to diagnose for Tay-Sachs prenatally.²⁰

Reading the opinion of the Court of Appeals in *Howard*, one suspects that the court is actually concerned about the facts of the case. By denying a cause of action the court is preventing a jury from possibly finding negligence on the part of the physician who fails to screen (or at least to inform of the availability of such screening) Jewish couples automatically for Tay-Sachs genes. This—far more than the awarding of damages to parents for the emotional distress caused by physicians whose failure to inform has been proven negligent—seems to be "the extension of traditional tort concepts beyond manageable bounds"²¹ that the court fears. In

¹⁵ See note 24, *infra*.

¹⁶ 42 N.Y.2d 109, 397 N.Y.S.2d 363, 366 N.E.2d 64 (1977).

¹⁷ Tay-Sachs is a fatal progressive degenerative disease of the nervous system which primarily affects the Eastern European Jewish population and their progeny. Only where both parents are carriers will be their be a great likelihood of the presence of Tay-Sachs in their children. Tay-Sachs victims generally live for 2-5 years.

¹⁸ See *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), and cases cited therein.

¹⁹ 42 N.Y.2d at 112, 366 N.E.2d at 65, 397 N.Y.S.2d at 365.

²⁰ This point is made by Judge Cooke in his dissenting opinion. Cooke argues that the bystander rule is inapplicable because "[I]t was the mother here to whom the defendant's duty was owed"—i.e., she was not a bystander. Cooke asserts that the applicable rule is that enunciated in *Johnson v. State* (37 N.Y.2d 378, 383-384; 334 N.E.2d 590, 593; 372 N.Y.S.2d 638, 642-643); "[T]here may be recovery for the emotional harm, even in the absence of fear of potential physical injury, to one subjected directly to the negligence of another as long as the psychic injury was genuine, substantial, and proximately caused by defendant's conduct." 42 N.Y.2d at 115-116, 366 N.E.2d at 68, 397 N.Y.S.2d at 367.

²¹ 42 N.Y.2d at 111, 366 N.E.2d at 65, 397 N.Y.S.2d at 365.

other words, the court "refused to impose upon all obstetricians the duty of becoming forced genetic counselors."²²

The facts in *Park* presented a much stronger case of negligence. Here the plaintiff parents asked the physician a specific question. He had reason to believe the plaintiffs would rely upon his answer, and he misinformed them. The Court of Appeals granted the parents a cause of action for their pecuniary damages (an issue with which the court did not deal in *Howard*), while the precedent of *Howard* required them to dismiss the claim for emotional distress. However, in granting the parents' claims for medical and support expenses, the court acknowledged that the parents were not mere bystanders to the injury of the child, that the physician owed them (or at least owed the mother)²³ a duty of due care. Thus *Howard* was upheld while its reasoning was undercut.

To bolster its denial of the parents' claim for emotional distress damages, the Court of Appeals asserted that such damages would be "to speculative to permit recovery," since under the "benefits rule" articulated in section 920 of the Restatement (Second) of Torts,²⁴ the parents' anguish at the birth of a deformed child may yet be offset by the parental love "that even an abnormality cannot fully dampen."²⁵

The Court of Appeals had adopted this reasoning in 1972 in *Stewart v. Long Island College Hospital*²⁶ when it affirmed the Appellate Division's dismissal of a similar suit by parents of a child born with rubella syndrome. The Appellate Division had noted: "It would be virtually impossible to evaluate as compensatory damages the anguish to the parents of rearing a malformed child as against the denial to them of the benefits of parenthood."²⁷

In *Berman v. Allan*,²⁸ (decided after *Becker v. Schwartz*) the Supreme

²² 60 A.D.2d at 84; 400 N.Y.S.2d at 112. The textual discussion of the unspoken rationale of *Howard* is that offered by the Appellate Division, 2d Department, in distinguishing *Park* from *Howard*.

²³ See Cooke's dissent in *Howard*, 42 N.Y.2d at 116, 366 N.E.2d at 66, 397 N.Y.S.2d at 368, suggesting the father cannot recover for his mental distress because, since he is not a patient, the physician owes him no duty of care.

²⁴ RESTATEMENT (SECOND) OF TORTS, § 920 (1977), Benefit to Plaintiff resulting from Defendant's Tort: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing 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."

²⁵ 46 N.Y.2d at 414, 386 N.E.2d at 814, 413 N.Y.S.2d at 902.

²⁶ 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

²⁷ 35 A.D.2d 531, 532; 313 N.Y.S.2d 502, 503, (1970); *aff'd* 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972), citing *Gleitman v. Cosgrove*, 49 N.J.2d, 227 A.2d 689 (1967).

For a description of the "benefits" of such parenthood see *Stockton, A Death in the Family*, N.Y. Times, August 12, 1979, (magazine), at 28. *Stockton* tells the story of a young family whose physician neglected to test prenatally for Tay-Sachs disease.

²⁸ 80 N.J. 421, 404 A.2d 8 (1979).

Court of New Jersey recently upheld the wrongful birth claim of parents of a child afflicted with Down's Syndrome. Curiously, the New Jersey court sustained the validity of the parents' claim for damages for emotional distress but—relying on the “benefits rule”—denied the parents' claim for damages for medical and other expenses. The court stated: “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 enormous expenses attendant upon her rearing.”²⁹ Such reasoning apparently ignores the limitation placed on the concept of benefit by section 920 of the Restatement—that the benefit must accrue to the *interest* damaged, that pecuniary damages cannot be offset by emotional benefits.³⁰ The true basis for the court's refusal to find the expenses of rearing a handicapped child recoverable becomes clear as the court continues: “[S]uch an award would be wholly disproportionate to the culpability involved, and the allowance of such a recovery would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians.”³¹ The court is grasping at the “benefits rule” to curtail a damage award it feels will be too harsh on the defendant. Although the damages recoverable for wrongful birth in New Jersey (emotional distress only) are the opposite of those recoverable in New York (expenses only)—the rules in both states reflect an attempt to limit the physician's liability and prevent the possibility of excessive judgments.

II. WRONGFUL LIFE

In *Becker v. Schwartz* the Court of Appeals found “two flaws in plaintiffs' claims on behalf of their infants for wrongful life.” First, the law does not recognize the birth of a defective child as an injury to the child. “Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.”³² Second, even if the law should make such a determination, it would be incapable of assessing damages. For how can one arrive at the difference in value between life in an impaired state and nonexistence, when one has no knowledge of the nature of nonexistence upon which to base an estimate of its value?³³

The Court of Appeals had already used both of these arguments to deny recovery for wrongful life in the leading New York case of *Williams v. State*.³⁴ In *Williams*, the infant plaintiff alleged that the State of New

²⁹ *Id.* at 432, 404 A.2d at 14.

³⁰ Restatement, § 920(b): Limitation to the same interest. “Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited.

³¹ 80 N.J. at 432, 404 A.2d at 14.

³² 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

³³ *Id.*

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

York had been negligent in its care of her mentally defective mother in a state institution and that as a result of the state's neglect her mother was raped and she was conceived. Through the state's negligence, she had been deprived of property rights, a normal childhood and homelife, proper parental care, support and rearing. She was also forced to bear the stigma of illegitimacy. The Court of Appeals denied her claim, holding that: "Being born under one set of circumstances rather than another or to one pair of parents rather than to another is not a suable wrong that is cognizable in court."³⁵ The *Williams* court looked to the earlier Michigan case of *Zepeda v. Zepeda*,³⁶ in which an infant plaintiff was denied a cause of action in a suit against his putative father for the stigma of his bastardy. The court there expressed a fear that allowing the infant Zepeda his claim would open the doors of the courthouse to those protesting such fortuities as their race or their parents' poverty.

Similarly, the second point made by the Court of Appeals in denying infants Becker and Park causes of action for wrongful life — namely, that the calculation of compensatory damages would be impossible—derived from Justice Keating's concurring opinion in *Williams*. And Keating in turn borrowed his analysis from an essay prompted by the *Zepeda* case written by Tedeschi, one of the first scholars to explore the topic of wrongful life.³⁷

It is interesting to note that the first "wrongful life" suits and the ones in which the courts first held that being born into one set of circumstances rather than another is not a suable wrong were suits by illegitimates, not by the physically or mentally deformed. Had the first wrongful life plaintiff been Lara Parks, for example, the court might have asserted with as much logic as it did in *Williams*, but undoubtedly with less confidence, that a court cannot determine whether non-life is preferable to handicapped life. Twelve years later, when Lara Parks did come before the court, the court had precedent as a shield to protect it from the ugly and tragic realities of the baby's existence; they need not scrutinize her life so closely, but need only gently lay over it ready-made phrases.

Becker was not the first case, however, to dismiss a wrongful life claim by a physically and mentally handicapped plaintiff. In 1967 in *Gleitman v. Cosgrove*,³⁸ the New Jersey Supreme Court dismissed the complaint of an infant born with rubella syndrome as a result of the defendant physician's failure to inform its mother of the risks to the fetus of maternal rubella during the early weeks of pregnancy. *Gleitman* became the leading case on a physician's liability for failure to inform parents of the danger of genetic

³⁵ *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.

³⁶ 41 Ill. App. 2d at 240, 190 N.E.2d at 849 (1963).

³⁷ Note, *On Tort Liability for Wrongful Life*, 1 ISRAEL L. REV. 513 (1966).

³⁸ 49 N.J. 22, 227 A.2d 689, 22 A.F.R.3d 1413 (1967).

defect in their child. Essentially, the New Jersey court held, as the New York court did in *Williams*, that one cannot measure life with defects against the "utter void of nonexistence."³⁹ *Gleitman* was specifically followed by New York in *Stewart v. Long Island College Hospital*,⁴⁰ where another infant plaintiff suffering from rubella syndrome filed an unsuccessful claim against a hospital for failing to perform an abortion on her mother and terminate her life. Thus by the time the New York Court of Appeals considered the two cases in *Becker*, the principle that an infant's claim for wrongful life was not recognizable was well established both within the state and without.⁴¹

III. PRECONCEPTION TORTS

The facts in *Becker v. Schwartz* and *Park v. Chessin* were similar enough for the Court of Appeals to decide the two cases together. Both are essentially malpractice cases. Both deal with the alleged negligence of a physician for failing to inform or for misinforming a patient about the risks of a serious genetic or chromosomal defect in a fetus. Neither suit contends that the physician caused the defect in the child, but only that his actions deprived the parents of the opportunity *not* to bear the handicapped child. In both cases, the parents had to allege that, had the physician properly informed them, they would have acted so as to prevent the birth or the conception of the child—either by having an abortion or by using contraception.

On the theoretical level, however, each case presents several issues distinct from the other. *Park* belongs to a small group of cases dealing with "preconception torts." The act that the infant plaintiff alleges injured him (the physician's statement that polycystic kidney disease is not hereditary) was performed before he was even conceived. This raises such questions as: Can a person have a duty of care to one not in existence? And if so, can one breach this duty before the person to whom one owes it exists? In *Renslow v. Mennonite Hospital*,⁴² an Illinois appeals court answered these questions in the affirmative. In this case, the defendant hospital negligently transfused Rh positive blood to the infant plaintiff's Rh negative mother eight years before the plaintiff was conceived. This transfusion resulted in the plaintiff being born with multiple injuries. The *Renslow* court held that one could have a duty to one not yet conceived, and that the infant plaintiff belonged to a foreseeable class of people—future children of the adolescent woman transfused—to whom the hospital owed a duty

³⁹ *Id.*

⁴⁰ 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

⁴¹ For a list of the wrongful life claims that have been dismissed, see Annot., 83 A.L.R.3d 15 (1978). And later causes listed *supra* note 8. *Gleitman* has recently been partially overruled by *Berman v. Allen*. *Berman* creates a cause of action for wrongful birth but still denies one to the infant for his wrongful life.

⁴² 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

of due care. A similar analysis was employed in the Trial Term's favorable decision in *Parks*: the physician who was asked what the chances were of a second child of the Parks having polycystic kidneys reasonably could have foreseen the class of possible future children to which the infant plaintiff belonged.⁴³ The *Renslow* court resolved the problem of how one could injure someone not yet in existence by separating the concept of tortious conduct from that of injury. It held that the tortious conduct occurred before conception, the injury after. The same type of analysis, when applied to the facts of *Park*, does not facilitate recovery, for the tortious act occurred *before* conception and the injury *at* conception. Thus the paradox: plaintiff brings suit because of his conception; but without his conception there would be no plaintiff to bring suit. (This is why the Appellate Division, when it granted the infant plaintiff a cause of action, did so not for her "wrongful life" but for "pain and suffering.")⁴⁴

One can also see that the difficulty of ascertaining damages that troubled the Court of Appeals in *Park* did not exist in *Renslow*. In *Renslow*, but for the defendant's negligence the plaintiff would have been born healthy. Thus the measure of damages is the difference in value between plaintiff's life and the life of a healthy child. There's no need to contemplate the value of the void.

Given a jurisdiction that permits a cause of action for prenatal injuries to a child born alive,⁴⁵ and given strong evidence of causation—the plaintiff in a preconception tort case should often prevail, for preconception tort cases alone do not present the logical and theoretical problems of wrongful life suits.⁴⁶

IV. IMPACT OF THE LEGALIZATION OF ABORTION

Park v. Chessin is in essence a "right-not-to-conceive" (and a "right-not-to-be-conceived") suit. It is almost the only suit for wrongful life brought by a deformed infant and/or his parents that is of this type.⁴⁷ The others—including *Becker v. Schwartz* — are "right-to-abort" (and "right-to-be-aborted") cases.

The first of these right-to-abort cases, *Gleitman v. Cosgrove*,⁴⁸ denied both the infant's and the parents' claims. The parents' claim was dismissed

⁴³ 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Queens Cty., 1976).

⁴⁴ 60 A.D.2d 80, 87; 400 N.Y.S.2d 110, 114, (1977).

⁴⁵ See Robertson, *supra* note 4.

⁴⁶ For further discussion of *Park* and *Renslow* and the concept of the pre-conception tort, see Robertson, *supra* note 4. See also, Comment, *Preconception Torts: Forseeing the Unconceived*, 48 U. COL. L. REV. 621 (1977); Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706 (1977).

⁴⁷ For another such suit see *Elliot v. Brown*, 361 So.2d 546 (Ala. 1978). In *Elliot*, however, the child's deformities were only coincidental to the physician's alleged negligence in performing an unsuccessful vasectomy.

⁴⁸ 49 N.J. 22, 227 A.2d 689 (1967).

in part because the abortion the mother would have sought had the defendant informed her of the danger that the fetus was impaired was criminal in the state of New Jersey.⁴⁹ Anti-abortion sentiment permeates the opinion.⁵⁰ George Annas has observed about the *Gleitman* decision:

What was probably really at stake (although the court seems to deny it) is a belief that life itself is always and under all circumstances a blessing. It is, however, precisely because this premise is not accepted that a couple seeks amniocentesis in the first place, *i.e.*, their desire is to give birth only to a genetically normal child. If amniocentesis followed by abortion of affected fetuses is accepted as an appropriate decision, compensation for birth of an affected fetus due to medical negligence should also be accepted. Nothing in any of the other so-called "wrongful life" cases argues against this conclusion.⁵¹

Certainly the decision in *Roe v. Wade*,⁵² legalizing abortion has undercut the rationale of the *Gleitman* court and those that have followed it. Since 1973, when *Roe v. Wade* granted a woman the absolute right to terminate a pregnancy during the first trimester, courts have begun to grant malpractice claims for the negligent abridgement of that right.⁵³

The first case in which the parents who were denied an opportunity to abort a deformed fetus were granted a cause of action was *Dumer v. St. Michael's Hospital*,⁵⁴ another case in which the infant was born with rubella syndrome. The court held that the physician's duty did not extend beyond advising the woman of the effects of maternal rubella on the fetus. He had no duty to advise the patient of the availability of abortion—that being a legal, not a medical question. Furthermore, the plaintiff had to convince the trier of fact that she would have sought an abortion had she been informed of the possible effects of rubella on the fetus and that an abortion would have been legally available. The *Dumer* court denied the infant a cause of action and limited the parents' damages to the additional medical, hospital, and support expenses occasioned by the child's deformities beyond those of raising a normal child.

Becker is distinguished from *Dumer* in that the New York court did not limit the recovery of the parents so severely but granted to Mr. and Mrs. Becker "the sums expended for the long-term institutional care of their retarded child," and to Mr. and Mrs. Park "the care and treatment of their child until her death."⁵⁵

⁴⁹ This aspect of *Gleitman* has been overruled by *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8.

⁵⁰ Robertson, *supra* note 4.

⁵¹ Note, "Fitness" for Birth & Reproduction: Legal Implications of Genetic Screening, 9 FAM. L.Q. 463, 477 (1975).

⁵² 410 U.S. 113 (1973).

⁵³ For a list, see Annot. 83 A.L.R.3d 15 (1978).

⁵⁴ 60 Wis. 2d 766, 233 N.W. 2d 372, 83 A.L.R.3d 1 (1975).

⁵⁵ 46 N.Y.2d at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902, 903.

In the passage quoted above, Annas does not distinguish between the claims of the parents and those of their infants. He implies, however, that *Roe v. Wade* mandates recovery by the child as well as by the parents. But certainly the right-to-abort does not imply the right-to-be-aborted.

Roe gives the interests of the woman supremacy over those of the fetus during the first trimester. However, to grant the fetus a cause of action for "wrongful life" would, by magnifying its interests during that period, potentially pit them against those of the woman. Although *Roe* would not bar suits by an infant against a physician, such suits could undermine the premises of *Roe*. For example, many commentators who support the legal recognition of claims for wrongful life look forward to the extension of such claims to those naming the parents as defendants.⁵⁶ For another, *Roe* holds that the fetus is not legally a person entitled to fourteenth amendment protection. But each time a court grants a fetus a remedy or a right it is supplying additional arguments to those who would maintain that the *Roe* court was mistaken and that the fetus is indeed a "person" under our laws.

Furthermore, the nature of the question—whether nonexistence is preferable to handicapped existence—potentially conflicts with a woman's right to choose an abortion. To date the courts have held that whether or not a handicapped life is of greater value than non-existence is not a matter capable of legal determination. To acknowledge wrongful life claims, the courts would have to assert that this is indeed a matter for the law to decide. Weighing life against nothingness, they might declare not that a fetus had a right-to-non-existence, but that it had a "right to life," despite handicaps.

To grant a cause of action to a severely deformed infant is superficially appealing, but—in addition to threatening a significant right—it might not be needed. In most cases the family can recover its expenses through a suit by the parents. The infant's pain and suffering may often be rather legalistic, for these children are often so severely retarded or diseased that their consciousness of what they are enduring is sharply limited if not non-existent. Furthermore, the degree of additional deterrence to be achieved by tacking the infant's claim onto that of the parents would appear minimal, since the negligent physician's liability for the parent's expenses in maintaining the diseased child coupled with their emotional distress at its birth seems to be great enough to deter the physician to whatever degree one can be deterred from negligent behavior. Since a cause of action for wrongful life would provide small benefit and little deterrence, the primary interest it would seem to further is that of sentimentality.

V. CONCLUSION

The recent development of genetic screening and amniocentesis and the legalization of abortion have given potential parents new options and physicians new responsibilities. The explosion in genetic knowledge will no doubt lead to many suits seeking to define the extent of the physician's duty to screen his patients for genetic defects. *Becker v. Schwartz* defines the probable extent of the physician's liability in many jurisdictions for negligently failing to inform patients of known risks and available tests and procedures. The parents may recover damages for pecuniary loss—perhaps for the entire expense of maintaining the child.⁵⁷ But they may not recover damages for their pain and suffering.⁵⁸ Neither may the infant recover for his wrongful life. The decision attempts to balance a desire to provide a remedy for a painful wrong and a hesitancy to grant excessive damages in a new cause of action. It may be observed, however, that the argument denying the parents damages for their pain and suffering is somewhat strained. One would expect a court in the near future to grant such damages as well as expense damages. On the other hand, the denial of the infant's claim may be well grounded in logic and public policy.

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⁵⁷ The Court of Appeals left the determination of how to calculate expense damages to the lower court.