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TORT LAW—WRONGFUL BIRTH AND WRONGFUL LIFE ACTIONS—DAMAGES—The Pennsylvania Superior Court has held that although an infant cannot maintain a cause of action for wrongful life, the parents of the child can bring an action for wrongful birth and recover pecuniary expenses incurred in the care and raising of the child, but may not recover for damages for the emotional and mental distress incident to the birth.

Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct.), *allocatur granted*, No. 80-1-16 (Pa. 1979)

Frank Speck, Jr., suffered from neurofibromatosis, a disease which attacks and forms crippling tumors on the fibrous structures of the nerves. This genetic disease had been transmitted by Frank to his first two children.¹ Concerned with the possible recurrence of this disease in future children, and with the effect that a recurrence would have upon the limited economic status of their family, Frank and his wife Dorothy decided that he should undergo a sterilization procedure.² The vasectomy procedure was subsequently performed by Dr. Richard A. Finegold, a licensed urologist. Dr. Finegold allegedly assured Frank that the procedure was successful, and that Frank could engage in sexual relations with his wife without using contraceptive measures.³ Thereafter, Dorothy Speck became pregnant. Because the Specks feared that this child would also be afflicted with neurofibromatosis, Dorothy entered into an agreement to have an abortion performed by Dr. Henry Schwartz, a physician and surgeon in the field of obstetrics and gynecology. Dr. Schwartz performed the abortion and allegedly represented to the Specks that it had been successful.⁴ Sometime after the operation, Mrs. Speck informed Dr. Schwartz that she believed her pregnancy had not been terminated. Despite Dr. Schwartz' reassurance that the fetus had been aborted, Dorothy subsequently gave birth to a premature child, Francine Speck, who was afflicted with the neural disease.⁵

The Specks⁶ then filed suit in the Court of Common Pleas of Alle-

1. *Speck v. Finegold*, 408 A.2d 496, 499 (Pa. Super. Ct.), *allocatur granted*, No. 80-1-16 (Pa. 1979).

2. *Id.* at 499-500.

3. *Id.* at 500.

4. *Id.*

5. *Id.*

6. The plaintiffs included Frank and Dorothy Speck, their first two daughters, Valerie and Lee Ann Speck, and the infant Francine Speck, represented by her parent and guardian Frank Speck, Jr. *Id.*

gheny County⁷ and charged both physicians in a five-count complaint in trespass and assumpsit. They sought damages on behalf of the infant Francine for "wrongful life,"⁸ and on behalf of their two other daughters for economic hardship.⁹ In their own right, the parents sought to recover the pecuniary expenses they had borne and would bear in the future for the care and treatment of Francine. The parents also sought damages for emotional and mental distress suffered as a result of Francine's birth.¹⁰

In response to preliminary objections by the defendant-physicians, the trial court held that no monetary damages could be awarded for any claims relating to the birth of Francine. The trial court reasoned that no relief was cognizable in law; that damages for birth were against public policy; and that such damages were so speculative as to be immeasurable.¹¹ On appeal,¹² the Superior Court of Pennsylvania concluded that the Specks were entitled to claim damages for the economic costs of raising Francine, but were not entitled to damages for the mental anguish, emotional distress, and inconvenience caused by her birth.¹³ The superior court affirmed the lower court's dismissal of Francine's claim for wrongful life.¹⁴

Judge Cercone, speaking for the majority,¹⁵ noted that the question presented was not whether the plaintiffs should recover, nor what damages they were entitled to if they did prevail, but whether the

7. *Speck v. Finegold*, 124 Pitt. Legal J. 253 (1976).

8. "Wrongful life" is a relatively new tort concept in which the child seeks damages for being born. The Speck complaint sought damages from both defendants for the emotional and physical anguish Francine had suffered since birth and would suffer in the future. Plaintiffs' Petition for Allowance of Appeal from the Order of the Superior Court, filed July 25, 1979, at 3 [hereinafter cited as Plaintiffs' Petition].

9. The claim on behalf of the Specks' first two daughters was withdrawn prior to the appeal to the Pennsylvania Superior Court. 408 A.2d at 500 n.6.

10. *Id.* at 500. The parents also claimed damages for the alleged negligence in the vasectomy and abortion procedures. Frank Speck asserted an individual claim for damages due to the loss of his wife's services. *Id.*

11. *Id.* at 501. The claims by Frank and Dorothy Speck for damages related to the vasectomy and abortion procedures were set for trial. *Id.*

12. The appeal was certified by the lower court and accepted by the superior court as a discretionary appeal pursuant to 42 PA. CONS. STAT. ANN. § 702(b) (Purdon Supp. 1979).

13. 408 A.2d at 508-09.

14. *Id.* at 508. Plaintiffs have subsequently appealed to the Pennsylvania Supreme Court. The appeal is based on the superior court's denial of damages for emotional and mental distress incident to Francine's birth, and the refusal to recognize the child's claim in wrongful life. Plaintiffs' Petition at 1-12.

15. Judges Watkins and Hoffman joined in the majority opinion. Judges Price and Spaeth filed separate concurring and dissenting opinions. Judges Jacobs and Van der Voort did not participate in the decision of the case.

plaintiffs' complaint stated a recognizable cause of action in law.¹⁶ After reviewing the case law on wrongful life and wrongful birth actions,¹⁷ Judge Cercone concluded that the weight of precedent dictated recognition of the tort claim for wrongful birth, but disallowance of a cause of action for wrongful life.¹⁸ In addressing the infant's claim for wrongful life, the court admitted that the defendants' acts of negligence were the proximate cause of her birth. However, the infant had failed to state a legally cognizable cause of action for two reasons. First, there is no precedent holding that a child has a fundamental right to be born as a whole, functional human being.¹⁹ Second, the infant's claim for damages did not comport with the traditional remedy afforded to a party injured by the negligence of another; that is, she could not be placed in the position she would have occupied but for the negligence of the defendants. To do so would require that damages be calculated by comparing the value of life in an impaired state to the value of nonexistence.²⁰ The court concluded that because the law was incapable of resolving such an enigmatic issue, the infant's cause of action for wrongful life was not cognizable in law.²¹

Turning to the parent's cause of action for wrongful birth, the court initially noted that the trial court had "miss[ed] the point" by basing its decision on the worth and sanctity of life, as that was not in dispute.²² Rather, the question was whether or not the doctors were negligent in performing the vasectomy and abortion. Judge Cercone found that public policy had long been the reason for denying recovery since abortion was against the law. However, this policy view was largely eliminated by the United States Supreme Court in *Griswold v. Connecticut*²³ and *Roe v. Wade*.²⁴ In *Roe*, the Court held that the constitutional right to privacy protected the woman's qualified right to terminate her pregnancy. Judge Cercone reasoned that if public policy is not violated by termination of the pregnancy, then a fortiori the public policy could

16. 408 A.2d at 508.

17. Wrongful birth is a claim brought by the parents of the unplanned child for economic and emotional damages attributable to the negligent failure to prevent the child's conception and/or birth. *Id.* at 502. See generally Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J. L. & MED. 131 (1978).

18. 408 A.2d at 507.

19. *Id.* at 508.

20. *Id.*

21. *Id.*

22. *Id.* at 503.

23. 381 U.S. 479 (1965) (state statute proscribing use of contraceptives is an unconstitutional intrusion upon right to privacy).

24. 410 U.S. 113 (1973) (state criminal abortion statute prohibiting abortions at any stage of pregnancy except to save the life of the mother is unconstitutional).

not be violated by acts designed to avoid conception.²⁵ As further evidence that sterilization and abortion were not contrary to public policy, the court cited various statutes which regulate the activities.²⁶ Having established that public policy no longer barred the parents' wrongful birth action, the court then examined existing precedent for the controlling legal principles.

Judge Cercone cited *Christenson v. Thornby*²⁷ as the first case to permit a cause of action for wrongful birth resulting from an improperly performed sterilization.²⁸ However, the *Christenson* court did not consider what damages could be recovered. Nevertheless, dicta from the opinion influenced courts in later decisions to deny the parent's claim for the economic costs of raising an unplanned child.²⁹ Judge Cercone was not influenced by this dicta, as he found *Christenson* to be distinguishable from *Speck*. Unlike *Speck*, *Christenson* involved the husband's desire to protect his wife's life from the dangers of another childbirth. Because the wife was not injured by the birth of a healthy child, the wrongful life claim in *Christenson* was remote from the purpose of the husband's sterilization.³⁰ In *Speck*, the plaintiffs did not want the child, and sought the operative procedures solely to prevent a new birth. Judge Cercone noted that after *Christenson*, several courts denied recovery even when the child was unwanted or unplanned, usually because the judiciary did not think itself capable of accurately weighing the intangible benefits of motherhood and fatherhood against the alleged emotional and monetary injuries.³¹ This view prevailed until a California court, in *Custodio v. Bauer*,³² held that parents could recover damages stemming from a negligent sterilization. The *Custodio* court recognized the parents' right to recover not only costs arising out of the negligent medical procedure, but also to recover all costs which reasonably followed the negligent act, including the cost of rearing an unplanned child.³³

25. *Id.* at 504 n.16.

26. *Id.* at 504 n.17.

27. 192 Minn. 123, 255 N.W. 620 (1934).

28. 408 A.2d at 504.

29. The relevant portion of the *Christenson* opinion states:

[T]he plaintiff has been blessed with the fatherhood of another child. *The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation.* As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority.

Id. at 126, 255 N.W. at 622 (emphasis added).

30. 408 A.2d at 505.

31. *Id.*

32. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

33. The *Custodio* court held that damages incident to a failed sterilization include the cost of the unsuccessful operation, expenses incurred for the treatment of physical complications, and pain and suffering. *Id.* at 323-25, 59 Cal. Rptr. at 476-77.

After *Custodio*, several decisions amplified the manner in which damages were to be calculated. In some jurisdictions, the parent's recovery was reduced by any benefits conferred upon them by the child.³⁴ In other jurisdictions, no specific limitations were placed on the amount of recovery allowable for the raising of the child.³⁵ From this, Judge Cercone stated that ample precedent supported the parents' right to maintain a "wrongful birth" claim.³⁶ Judge Cercone concluded that as in all actions sounding in tort, the parents need only demonstrate the existence of a duty, and that the breach of duty proximately caused their damages.³⁷

Applying this tort precept to the pleading, the majority found that but for the defendants' breach of duty to properly treat and advise, the Specks would not have been required to make the alleged expenditures.³⁸ Thus, the parents were entitled to recover the economic expenditures caused by the defendants' negligence. Turning to the parents' claim for damages due to emotional disturbance and mental stress, Judge Cercone concluded that this claim should be denied. The majority was unable to differentiate the emotional and mental distress suffered by the Specks from the suffering of any parent who raises a child, particularly when the child is mentally or physically defective by reason of a natural disease or accident.³⁹ Nor could Francine's status as unwanted alter the sameness in the quality and nature of the stress experienced in the every day work of parenthood. Judge Cercone concluded with the statement that all parents suffer some degree of stress

34. 408 A.2d at 506. See, e.g., *Anonymous v. Hospital*, 33 Conn. Sup. 126, 266 A.2d 204 (1976) (defendant allowed to mitigate damages by arguing benefits of child); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (reasonable costs of rearing child offset by value of child's aid, comfort and society); *Howard v. Lecher*, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976) (benefits of parenthood weighed against alleged injuries).

35. 408 A.2d at 506-07. See, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (economic costs of rearing child recoverable); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (costs of rearing child allowed); *Ziembra v. Sternberg*, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1975) (educational and medical costs of raising child allowed).

36. 408 A.2d at 506.

37. *Id.* at 506-07.

38. *Id.* at 508. It is not clear whether recovery was intended to extend to the future expenses of raising the child. A comprehensive reading of the majority opinion indicates that recovery includes future costs. However, there is language suggesting that only past expenses are recoverable. The relevant language states that "but for the defendants' breach of duty to properly treat and advise plaintiff-parents they would not *have been required* to undergo the expenditures alleged." *Id.* (emphasis added). Judge Price had some difficulty understanding the extent of recovery envisioned by the majority, remarking that "*if the majority opinion is being properly interpreted by this writer,*" he would dissent from allowing the recovery of past, present and future costs. *Id.* at 510 (Price, J., concurring and dissenting) (emphasis added).

39. *Id.* at 509.

and that emotional anguish is a normal, uncompensable price of being a parent. Therefore, to permit recovery for the Specks' emotional anguish would be allowing them a societal advantage not available in other parenthood situations.⁴⁰

In a separate and concurring opinion, Judge Price objected to that portion of the majority opinion allowing recovery of the past, present, and future costs of raising Francine.⁴¹ Judge Price stated that public policy precluded any notion that the birth of a child could be deemed as a compensable wrong to the parents. He also concurred with the majority's denial of the parents' claim for emotional distress and mental anguish and the refusal to recognize the infant's cause of action for wrongful life.⁴²

In his concurring and dissenting opinion, Judge Spaeth agreed with the majority's refusal to recognize the infant's cause of action for wrongful life.⁴³ He reasoned that although the defendants' negligence had allowed Francine to be born, she had suffered no injury that the law treats as compensable. He noted, however, that none of the other claims made by the Specks suffered from the same problem.⁴⁴ The Specks had decided to forego more children because of the prospects of economic hardship and their fear of the hereditary disease. When the child was born, their fears materialized. Since Francine's birth was the direct and foreseeable result of the defendant's negligence, Judge Spaeth concluded that the extent of the damages was also direct and foreseeable. In his view, the jury should be permitted to award all direct and foreseeable damages reduced only by an amount representing the benefit that a child brings to parents.⁴⁵

Judge Spaeth also criticized the majority's reasoning that the Specks' claim for emotional and mental distress should be denied because their anguish was identical to that suffered by all parents.⁴⁶ To

40. *Id.* The court did not elaborate nor explain what it meant by "societal advantage."

41. *Id.* at 509-10 (Price, J., concurring and dissenting).

42. *Id.* at 511 (Price, J., concurring and dissenting).

43. *Id.* (Spaeth, J., concurring and dissenting). However, Judge Spaeth distinguished *Speck* from cases in which a child would have been born healthy but for a doctor's negligent administration of a drug or failure to treat a condition *in utero*. In the latter type of wrongful life case he believed that the infant should be able to assert a claim. Since Francine's disease was hereditary, Judge Spaeth agreed with the majority. *Id.*

44. *Id.* at 513 (Spaeth, J., concurring and dissenting). Judge Spaeth would allow recovery for damages connected with the vasectomy and abortion procedures, the loss of Mrs. Speck's companionship and services, and expenses for the birth and raising of the child. *Id.*

45. *Id.* at 512 (Spaeth, J., concurring and dissenting). Judge Spaeth added that if the plurality opinion was properly understood as not applying the benefits rule to the damages, he would disagree with their position. *Id.*

46. See text accompanying notes 39-40 *supra*.

him, this reasoning was puzzling since a similar argument could be made in any tort case. The more conventional view, according to Judge Spaeth, is that the right to damages cannot be defeated because others may suffer the same injury.⁴⁷ The proper inquiry, he pointed out, is whether negligence caused the damage and not whether the damage can be suffered by others in the absence of negligence.⁴⁸

In cases involving the negligent performance of a sterilization or abortion, it is generally recognized that the tortfeasor is liable for all damages which ordinarily result from the tort.⁴⁹ However, there is considerable conflict surrounding the underlying issues of wrongful life and wrongful birth. Generally, courts have not recognized the wrongful life action because it is judicially impossible to measure the value of life versus nonexistence.⁵⁰ The courts have been more receptive to the parental claim of wrongful birth, treating it as a cognizable claim for damages.⁵¹ From the parents' standpoint, the wrongful birth claim affords the opportunity for a more complete recovery than a simple negligence action, since the economic costs of raising the child and damages for the emotional and mental anguish incident to the birth and rearing of the infant may be recoverable in a wrongful birth action.⁵²

47. 408 A.2d at 513.

48. *Id.* at 514.

49. Damages that are generally granted in negligent sterilization or abortion cases are the expense of the surgical procedure, pain and suffering consequent to the failure of the operation or continuing pregnancy, medical complications during pregnancy, delivery costs, lost wages, and loss of consortium. *See, e.g.*, *Stills v. Gratton*, 55 Cal. App. 3d 698, 707-08, 127 Cal. Rptr. 652, 657-59 (1976); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 475-76 (1967); *Troppi v. Scarf*, 31 Mich. App. 240, 261, 187 N.W.2d 511, 520 (1971); *Ziamba v. Sternberg*, 45 App. Div. 2d 230, 233, 357 N.Y.S.2d 265, 269 (1974); *Bowman v. Davis*, 48 Ohio St. 2d 41, 45, 356 N.E.2d 496, 499 (1976).

50. *See, e.g.*, *Stills v. Gratton*, 55 Cal. App. 2d 698, 706-07, 127 Cal. Rptr. 652, 656-57 (1976); *Coleman v. Garrison*, 349 A.2d 8, 13-14 (Del. Super. 1978); *Gleitman v. Cosgrove*, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967); *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, 435, 296 N.Y.S.2d 41, 44 (1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd* 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972). *But see* *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477, *hearing denied* (1980).

51. *See* *Stills v. Gratton*, 55 Cal. App. 2d 698, 127 Cal. Rptr. 652 (1976) (economic costs of family due to birth of child are compensable); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (economic change in family status due to child's birth is compensable); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (costs of rearing child ascertainable; benefits rule of RESTATEMENT (SECOND) OF TORTS § 920 (1979) applies in making damages determination); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (costs of rearing child allowed). *But see* *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (complex interaction between benefit and loss precludes judicial measurement of damages).

52. *See* *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (damages allowed for any loss or damage proximately resulting from negligent sterilization pro-

The *Speck* court recognized that once a duty and its breach are established, the tortfeasor is liable for those damages which are proven to be the consequence of the breach.⁵³ However, the court refused to apply fully this general tort doctrine by not recognizing the parents' claim for emotional and mental distress.⁵⁴ The Specks sought the sterilization and abortion procedures to avoid the mental anguish and economic hardship that would follow the birth of another defective child into their family. Therefore, the emotional and mental anguish following the birth of the afflicted child was a highly foreseeable result of the doctors' negligence.

The *Speck* court did acknowledge that the defendant physicians owed a duty to the Specks, and that the doctors had breached the duty.⁵⁵ Although the majority accepted the Specks' claim that the doctors' breach of duty resulted in economic damages, the court refused to consider the claim of emotional and mental anguish to be of a nature requiring redress. The sole purpose for which the Specks sought the surgical procedures was to avoid Francine's birth; yet the court did not view this as a fact that distinguished the character of the Specks' anguish from the nature of stress generally experienced by all parents.⁵⁶

In the recent decision of *Sinn v. Burd*,⁵⁷ in which damages for mental and emotional anguish were at issue in another context, the Penn-

cedure, including costs, emotional anguish, and physical inconvenience of rearing the infant). Compare *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) (damages allowed for emotional distress and mental anguish but disallowed for economic costs of rearing the child) with *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (pecuniary damages allowed as a consequence of birth but policy reasons preclude the parents from recovering damages for emotional anguish and mental distress incident to the infant's birth).

53. 408 A.2d at 508. The court referred to the application of the tort doctrine as "axiomatic." *Id.*

54. The *Speck* court stated: "Unlike the measurability of pecuniary loss to which plaintiff-parents are entitled, there is no legal realm of accountability to which they can look for the claimed mental and emotional damages arising out of the birth of their child. . . ." *Id.* at 509.

55. *Id.* at 508.

56. The majority reasoned that "[t]he fact that plaintiffs did not want Francine does not alter the sameness in the quality and nature of pain and suffering experienced in the everyday work of parenthood." *Id.* at 509.

57. 404 A.2d 672 (Pa. 1979). In *Sinn*, the supreme court abolished the zone of danger requirement for bystander recovery that it had previously established in *Neiderman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970). *Neiderman* modified the earlier Pennsylvania impact rule which required a person to be physically harmed before a claim for mental and emotional stress could be successfully asserted. In modifying this rule, the *Neiderman* court developed the zone of danger theory under which a plaintiff could recover for the emotional and mental trauma incident to the negligent act, even if not in immediate danger of physical impact by the negligent force.

sylvania Supreme Court rejected reasoning similar to that put forth by the *Speck* court. In *Sinn*, the court held that due to advances in medical science,⁵⁸ emotional and mental distress was both a demonstrable injury and one capable of measurement.⁵⁹ Furthermore, the court stated that stress incident to a negligent act must be recognized as a compensable injury.⁶⁰ The court concluded that it would be an arbitrary and indefensible position not to recognize that negligence could foreseeably result in emotional anguish.⁶¹

In *Sinn*, the court considered and rejected the argument that recovery for emotional distress depended upon the parents' ability to differentiate their stress from that experienced by all parents.⁶² The differentiation requirement was initially advanced by the New York Court of Appeals in *Tobin v. Grossman*.⁶³ While discussing the possibility of losing a child, the *Tobin* court held that because emotional and mental trauma was an inherent risk of child rearing, recovery should be denied.⁶⁴ The *Sinn* court criticized this rationale as callous and harsh.⁶⁵ Furthermore, the court stated that the *Tobin* court ignored a foreseeable response to tortious conduct.⁶⁶ Hence, not only did the *Speck* court refuse to recognize a foreseeable injury directly flowing from a negligent act, but it did so using the very rationale the Pennsylvania Supreme Court conclusively rejected in *Sinn v. Burd*.

Moreover, the logic used by the *Sinn* court is not limited to bystander situations, as evidenced by the recent decision in *Berman v.*

58. 404 A.2d at 679. See *Tobin v. Grossman*, 24 N.Y.2d 609, 613, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 556 (1969) (mental trauma can now be diagnosed almost as well as physical trauma). See generally Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 50 ST. JOHN'S L. REV. 1 (1976); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1975).

59. 404 A.2d at 679.

60. *Id.* at 683, 686.

61. *Id.* at 683.

62. *Id.* at 686. See note 56 *supra*.

63. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In *Tobin*, a mother was denied her claim for emotional and mental stress suffered when her child was struck by a negligently operated car. The mother did not witness the accident, but heard brakes screech and ran outside in time to see the injured child. The court denied the mother's claim, stating: "This is the risk [of indirect harm] of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed." *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62.

64. *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62.

65. The *Sinn* court stated that "we conclude we cannot accept the callous view of the *Tobin* court that the possibility of a sudden and violent termination of a young life is a risk assumed in child rearing and does not require recovery where mental distress results from the witnessing of such an event." 404 A.2d at 686.

66. *Id.* at 683.

Allan.⁶⁷ In *Berman*, the New Jersey Supreme Court recognized a claim for wrongful birth brought by the parents of a child afflicted with Down's Syndrome.⁶⁸ In part, *Berman* modified an earlier decision by the same court in *Gleitman v. Cosgrove*,⁶⁹ where a cause of action for wrongful birth was not allowed.⁷⁰ The *Berman* court found the defendant-physicians' breach of duty to properly advise and treat the parents to be the cause of the plaintiffs' mental anguish, and allowed a cause of action for this tort.⁷¹ Significantly, the court limited its inquiry to whether the mental anguish was a foreseeable result of the defendant's negligence, and did not find it necessary to further distinguish the nature of the plaintiffs' stress from that experienced by all parents.⁷²

The *Speck* decision represents an unfortunate departure from principles of tort law which, if applied, would dictate that the Specks be compensated for the emotional and mental damage they not only foresaw, but took steps to avoid. Because other parents may experience mental anguish as a normal price for rearing children cannot explain why the Specks, who had valid reasons for not conceiving and giving birth to another child, are forced to bear the abnormally high price, both financially⁷³ and emotionally, of seeing their fears materialize.

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67. 80 N.J. 421, 404 A.2d 8 (1979).

68. The parents in *Berman* sued their physicians for both wrongful life and wrongful birth. They alleged that it was negligent for the doctor to fail to inform them of prenatal tests which could detect a defective fetus, thereby denying them the opportunity to decide if the fetus should be aborted. The mother, being thirty-eight years old, was in an age group with a high incidence of birth defects. *Id.* at 424-25, 404 A.2d at 10.

69. 49 N.J. 22, 227 A.2d 689 (1967).

70. In *Gleitman*, a defective child was born to a mother who had contracted rubella during early pregnancy. Despite this disease, she was assured by the defendants that there was no danger to the fetus. The wrongful life and wrongful birth claims were rejected by the court on the basis of immeasurability of damages. 49 N.J. at 27-31, 227 A.2d at 692-94.

71. 80 N.J. at 433, 404 A.2d at 14. The *Berman* court did not allow recovery for medical and other costs involved in raising the defective child, reasoning that the award would constitute a windfall to the parents and create an unreasonable burden on the physicians' financial resources. *Id.* at 432, 404 A.2d at 14.

72. The defendants' failure in *Berman* to inform plaintiffs of a prenatal test deprived the parents of knowledge that was essential to their decision of whether to continue the pregnancy. The court found the physicians liable for their failure to provide this choice to the parents. By comparison, the parents in *Speck* had already reached a decision, but were precluded from its fulfillment by the physicians' negligence.

73. The majority opinion clearly indicates that the Specks can recover past financial expenditures. Beyond that, the opinion never explicitly holds that future economic costs can be recovered, although the opinion is susceptible of such an interpretation. See note 38 *supra*.