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Ramey v. Fassoulas, 414 So. 2d 198 (Fla. 3d Dist. Ct. App. 1982)

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Torts—PARENTS IN WRONGFUL BIRTH ACTION ARE ENTITLED TO RECOVER THE EXTRAORDINARY EXPENSES OF RAISING A DEFECTIVE CHILD TO AGE OF MAJORITY BUT ARE NOT ENTITLED TO RECOVER ORDINARY EXPENSES OF REARING A NORMAL OR DEFECTIVE CHILD—*Ramey v. Fassoulas*, 414 So. 2d 198 (Fla. 3d Dist. Ct. App. 1982).

Plaintiffs, John and Edith Fassoulas, were the parents of two children, both of whom were born with congenital defects.[1] Because their children's defects were genetically transmitted, the Fassoulases decided not to have any more children. John Fassoulas sought the services of defendant, Dr. John R. Ramey, for a vasectomy in order that Mrs. Fassoulas could avoid future pregnancies.[2] In November 1974, approximately ten months after Dr. Ramey negligently performed an ineffective vasectomy on John Fassoulas, Edith became pregnant and subsequently gave birth to a daughter, Maria.[3] Maria suffered from a number of congenital deformities such as abnormal shaping of the skull, a short neck, redundant skin, and malformations of the hands with several digits missing from the right hand. Additionally, Maria was mentally retarded and suffered from heart problems and hypertension.[4] Edith Fassoulas became pregnant again in September 1976, and gave birth to a son, Roussi, born with a slight physical deformity which was later corrected.[5] Plaintiffs brought suit in the Circuit Court for Dade County against Dr. Ramey and the members of his professional association alleging medical malpractice and claiming various consequential damages including past and future expenses for the care and upbringing of Maria and Roussi.[6]

The defendants were granted a pretrial motion to strike the claim for rearing expenses but later the court reversed itself and reinstated the claim. The jury returned a special verdict in favor of the plaintiffs and assessed damages at $250,000 for the birth of Maria and $100,000 for the birth of Roussi. Since the jury found defendants fifty percent negligent in the birth of Roussi, plaintiffs' award for his wrongful birth was reduced to $50,000.[7]

On appeal there was no dispute as to defendant's negligent performance of John Fassoulas' vasectomy. The only issue was the

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1. Ramey v. Fassoulas, 414 So. 2d 198 (Fla. 3d Dist. Ct. App. 1982).
2. *Id.* at 199.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

trial court's inclusion of past and future rearing expenses as part of the consequential damages suffered by plaintiffs.

I. The Decision of the District Court of Appeal

The Third District Court of Appeal acknowledged that a cause of action does exist in Florida for the wrongful birth of a child as a result of a physician negligently performing a sterilization or abortion.[8] However, the court determined that consequential damages of a physician's negligence could not include the normal expenses of raising a child to majority because the legal obligation of support is solely the duty of the parents.[9] An exception to this was noted where the child is born with substantial mental or physical defects for which defendant physician was liable for special damages.[10]

Florida case law on the issue of wrongful birth is not only sparse but unsettled. The Florida Supreme Court has yet to hear a wrongful birth or wrongful life case. The district courts which have handed down decisions are not in accord as to what damages may be recoverable in wrongful birth actions. The purpose of this note is to examine the treatment of wrongful birth and wrongful life claims, both nationally and in Florida. Special attention will be given to the problem of damage calculation in these actions.

II. Florida's Treatment of Wrongful Birth Claims

The earliest Florida case to deal with a wrongful birth action was *Jackson v. Anderson* in 1970.[11] There the Second District held that in a suit for malpractice, the jury could assess whatever damages a plaintiff could prove resulted from the defendant physician's negligent performance of a tubal ligation and the ensuing birth of a *healthy* child.

In 1974, the same court rejected a complaint by the three minor children of the victim of yet another failed sterilization. The court refused recovery for the minors' share of parental love and affection and share of worldly wealth being reduced from one-third to one-fourth shares, viewing the action as one "without foundation in law or logic."[12] Although actions for diminished parental capac-

8. *Id.*
9. *Id.* at 489.
10. *Id.*
11. 230 So. 2d 503 (Fla. 2d Dist. Ct. App. 1970).
12. Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. 2d Dist. Ct. App. 1974).

ity have been asserted by some wrongful birth claimants in other jurisdictions, such damage claims have met with only limited acceptance.[13]

The Second District Court of Appeal addressed the issue of contribution in a malpractice suit in which the plaintiff, an unwed mother, sought damages against a clinic for a failed abortion.[14] Plaintiff had sought damages for medical costs of the birth and care of the minor child, and support for the child until age of majority. Additionally, plaintiff sought recovery for her impaired earning capacity during the child's minority and mental and physical pain suffered by her because of apprehension that the fetus had been damaged by the failed abortion and medicine administered by the defendant. The clinic filed a third-party complaint against the biological father, alleging his negligent failure to employ a contraceptive. The trial court granted summary judgment for the third-party defendant, and the second district affirmed, holding that the clinic could not demand contribution from the biological father for damages awarded an unwed mother.[15]

Not until 1980 did another district court decide a wrongful birth case. In *Public Health Trust v. Brown,* the Third District Court of Appeal denied recovery in a malpractice suit for a negligently performed sterilization when the child was born with unimpaired health.[16]

In the recent case of *Moores v. Lucas,*[17] the Fifth District Court of Appeal wrestled with the historically troublesome dichotomy between wrongful birth and wrongful life claims. Although early decisions struggled with the conceptual differences between wrongful birth or wrongful conception actions and wrongful life actions,[18] it is now generally accepted and understood that wrongful birth actions are brought by parents of an unwanted and unexpected child for the pecuniary and emotional damages incurred as a result of

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13. *See* Berman v. Allan, 404 A.2d 8, 15 (N.J. 1979) (Handler, J., concurring); Schroeder v. Perkel, 432 A.2d 834, 844 (N.J. 1981) (Handler, J., concurring). *Cf.*, Custodio v. Bauer, 59 Cal. Rptr. 463, 476 (Cal. 1st Ct. App. 1967) (if diminished capacity can be measured economically, it should be compensated). *Contra*, Coleman v. Garrison, 327 A.2d 757, 761-62 (Del. Super. Ct. 1974), *aff'd* 349 A.2d 8 (Del. 1975).

14. Ladies Center of Clearwater, Inc. v. Reno, 341 So. 2d 543, 544 (Fla. 2d Dist. Ct. App. 1977).

15. *Id.* n.1.

16. 388 So.2d 1084 (Fla. 3d Dist. Ct. App. 1980).

17. 405 So. 2d 1022 (Fla. 5th Dist. Ct. App. 1981).

18. Note, 27 BUFFALO L. REV. 537, 537-38 (1978).

the birth.[19] Wrongful life actions are brought on behalf of the child and seek compensation for being born with certain undesirable physical, mental, or social characteristics.[20] The *Moores* decision is unique in Florida because it is the only case to decide not only a wrongful birth action arising from negligent genetic counseling but also the only claim in Florida for wrongful life resulting from physician negligence.[21]

In *Moores,* Daniel and Linda Moores filed suit against Linda's physician for failure to advise her that Larsen's Syndrome,[22] a disease from which Linda suffered since birth, was inheritable.[23] Daniel and Linda wanted to have a child, but would have avoided a pregnancy if they had been advised that Larsen's Syndrome was inheritable.[24] Linda Moores gave birth to a son, Justin, who also suffered from Larsen's Syndrome. However, the damages for which the court would permit recovery by the parents were quite limited in scope and Justin Moores' wrongful life claim was summarily rejected. The district court upheld the lower court's decision to strike Linda's claim for physical and mental pain and suffering arising from her pregnancy and delivery because she had in fact wanted a child and Justin's delivery had been no more difficult or painful than the delivery of a normal child.[25] In addition, the Moores' claim for past and future emotional pain and suffering because of Justin's being born with Larsen's Syndrome was disallowed on the basis of Florida's "impact doctrine."[26] The Fifth District cited the 1974 Florida Supreme Court case, *Gilliam v. Stewart,*[27] which articulated the accepted application of the doctrine. In *Gilliam,* the court stated:

> There may be circumstances under which one may recover for emotional or mental injuries, as when there has been a physical impact or when they are produced as a result of a deliberate and calculated act performed with the intention of producing such an injury by one knowing that such act would probably—and most

19. Becker v. Schwartz, 46 N.Y.2d 401, 409 (N.Y. 1978).
20. Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967).
21. 405 So. 2d at 1026.
22. Larsen's Syndrome (also known as Larsen-Johanson Syndrome) is a deformity of the patella, a triangular shaped bone located below the kneecap.
23. 405 So. 2d at 1024.
24. *Id.*
25. *Id.* at 1026.
26. *Id.*
27. 291 So. 2d 593 (Fla. 1974).

> likely—produce such an injury, but those are not the facts in this case.[28]

The impact requirement was invoked in *Pazo v. Upjohn Co.*,[29] to deny recovery to parents in a suit against a pharmaceuticals company for their mental pain and suffering related to their child's physical deformities which were caused by a drug manufactured by defendant and prescribed for plaintiff during pregnancy. The court reasoned that the drug only caused physical anomalies to the child and did not "impact" on the parents. Yet it might be argued that the situations in *Moores* and *Pazo* are not the typical causes of action from which the impact doctrine developed and that the policy reasons behind the doctrine are not present in these cases.[30] There would likely never be any "impact" nor any intentional act on the part of physicians, yet the anguish suffered by parents of a physically or mentally handicapped child would likely not be temporary or trivial and the risk of fraud would be non-existent. Oddly enough, the court in *Ramey* specifically acknowledged the emotional drain associated with raising a deformed child when justifying its exception to the bar against rearing expense damages. This concern is puzzling since the *Ramey* opinion ignored the *Moores* court's rejection of a cause of action for mental anguish.[31]

Over the last two decades, a number of other jurisdictions have similarly wrestled with the moral questions and policy considerations attendant upon the emerging recognition of wrongful birth and wrongful life actions. A variety of answers have been produced in response to whether "to be or not to be" is indeed a justiciable issue.

III. THE WRONGFUL BIRTH ACTION

A. *Development of the Cause of Action*

The majority of wrongful birth actions involve the failure of a sterilization procedure on one parent followed by the birth of an

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28. *Id.* at 595.

29. 310 So. 2d 30 (Fla. 2d Dist. Ct. App. 1975).

30. *See,* W. PROSSER, THE LAW OF TORTS § 54 (4th ed. 1971):

> The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking.

31. 414 So. 2d at 201.

unwanted child.[32] The typical situation involves the delivery of a healthy, normal baby, which few courts will recognize as a tortious event.[33] The generally accepted public policy as expressed through judicial sentiment is that the worth of a child always outweighs any economic loss the parents might suffer.[34] As medical science progressed, and methods of identifying parents likely to produce physically or mentally deformed offspring and techniques for detecting fetal abnormalities in *ventre sa mere* were perfected, a number of moral, ethical and legal questions were raised.[35]

In some malpractice cases, the existence of a cause of action turned largely on the ultimate outcome, rather than focusing on the negligent conduct itself.[36] Although this distinction was summarily rejected by the Second District Court of Appeal in *Jackson v. Anderson*,[37] the position of the Third District Court of Appeal in *Public Health Trust v. Brown* that no damages may be awarded for the birth of a healthy child has become the more widely accepted rule. The weight of opinion against recovery for costs of raising a healthy child was probably best expressed by a Pennsylvania court in 1956: "We are of the opinion that to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people . . . . He wants to have the child and wants the doctor to support it."[38]

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32. *E.g.*, Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967), Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1980), Howard v. Lecher, 42 N.Y.2d 109 (N.Y. 1977), Ball v. Mudge, 391 P.2d 201 (Wash. 1964), Rieck v. Medical Protective Co., 219 N.W.2d 242 (Wis. 1974).

33. "Who can place a price tag on a child's smile . . . ?" Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

34. *Id.*

35. *See generally*, Milunsky, *Prenatal Genetic Diagnosis and the Law*, in GENETICS AND THE LAW II 61 (1980); Note, *Liability for Negligent Prenatal Diagnosis: Parents' Right to a "Perfect" Child?*, 42 OHIO ST. L.J. 551 (1981).

36. LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976) (no cause of action for a healthy birth; umbilical hernia not proximately caused by negligent sterilization).

37. 230 So. 2d 503 (Fla. 2d Dist. Ct. App. 1970):

> The physician whose breach and negligence are charged contends that a normal birth of a healthy child precludes recovery, on grounds of public policy. We disagree.
>
> If the appellee's contention is correct it results in an anomalous situation. It is uncontroverted that *prior* to the normal delivery of the child an action would lie. A contract to perform an operation sterilizing the patient is not contrary to public policy. Should plaintiffs in this situation file immediately and push for final hearing before delivery? Could a dilatory defendant defeat recovery? Should we recognize a cause of action defeasible upon the happening of a condition subsequent?

Id. (Citations omitted).

38. Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45-46 (Lycoming County 1957).

Recognition by the United States Supreme Court[39] of a woman's right to an abortion within the first trimester of pregnancy has expanded recognition of actions for wrongful birth. In determining damages, however, considerations other than those of a constitutional nature are paramount. Of major concern is the basic premise of tort law that every wrong deserves a remedy. Society does indeed have a compelling interest in ensuring that genetic testing and evaluation be performed according to the same standards as any other medical procedure.[40]

The standards of care to which a physician should be held were examined in a recent commentary.[41] The author puts forth the premise that in matters of medical malpractice, most particularly those involving genetic and reproductive counseling, the standard of informed consent should be adopted as the measure of the physician's duty.[42] By focusing on the patient in terms familiar to lay persons, this standard was thought to better gauge liability than the more often used standard of accepted practice among physicians of like specialty in the community. The informed consent standard was used to find liability in *Sard v. Hardy*,[43] where a signed hospital consent form was obtained but the physician failed to advise a functionally illiterate patient that a sterilization operation might not succeed. As the *Sard* case demonstrated, the adequacy of informed consent may not turn solely on *whether* the patient is informed, but rather on the extent and manner of information provided.[44]

B. Damages in Wrongful Birth Actions

One state which has wrestled extensively with the damages issue in wrongful birth cases is New Jersey. An early New Jersey case

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39. Roe v. Wade, 410 U.S. 113 (1973).

40. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978):

> Society has an interest in insuring that genetic testing is properly performed and interpreted. The failure to properly perform or interpret an amniocentesis could cause either the abortion of a healthy fetus, or the unwanted birth of a child afflicted with Tay Sachs disease. Either of these occurrences is contrary to the public policy of Pennsylvania.

Id. at 696. For a recent case discussing the issue, see Naccash v. Burger, 50 U.S.L.W. 2655 (Va. April 30, 1982). In *Naccash*, the Virginia Supreme Court allowed a wrongful birth claim in circumstances similar to *Gildiner*.

41. Note, *supra* note 33.

42. *Id.* at 563-66.

43. 379 A.2d 1014 (Md. 1977).

44. Note, *supra* note 35, at 563.

dealing with a wrongful birth claim is *Gleitman v. Cosgrove.*[45] There the plaintiff asserted that the defendant doctor's negligent failure to inform her of the risk of fetal birth defects resulting from German measles contracted during the early stages of her pregnancy deprived her of the option to choose between continuing or aborting the pregnancy. The Gleitmans claimed damages for the cost of raising their child and for the emotional pain and suffering caused them by the child's deformities.[46] The New Jersey Supreme Court affirmed the dismissal of plaintiffs' claim for failure to state a cause of action. The holding was supported on public policy grounds as evidenced by the fact that, at the time, New Jersey law did not provide for eugenic abortions.[47]

A number of years later, after the Supreme Court handed down its decision in *Roe v. Wade,* a lower New Jersey court held that a cause of action for wrongful birth did indeed exist. In a holding quite similar to *Jackson v. Anderson,*[48] the court ruled the trier of fact should be permitted to evaluate plaintiff's damages.[49]

The New Jersey Supreme Court did not again rule on the issues dealt with in *Gleitman* until the 1979 case of *Berman v. Allan.*[50] In *Berman,* the plaintiffs asserted a claim for wrongful birth of their daughter, Sharon, flowing from the defendant's failure to inform Mrs. Berman of the high risk of Down's Syndrome due to her age.[51] Defendant also failed to advise Mrs. Berman of the availability of amniocentesis[52] to detect whether the fetus would indeed

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45. 227 A.2d 689 (N.J. 1967).

46. The possible effects of rubella (German measels) on a fetus when the disease is contracted by the mother during the early stages of pregnancy are cataracts, deafness, heart disease, pneumonia, jaundice, and psycho-motor retardation. The fetus is at risk unless the mother is definitely in the third trimester when the disease is contracted.

THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, 1011 (13th ed. 1977) [hereinafter cited as MERCK].

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

48. *See supra* note 37.

49. Betancourt v. Gaylor, 344 A.2d 336, 339 (N.J. Super. Ct. Law Div. 1975).

50. 404 A.2d 8 (N.J. 1979).

51. Down's Syndrome is characterized by the presence of an extra chromosome and occurs in approximately 1:700 live births. There is a marked increase (45:1,000) in the occurence of this genetic disease in women over the age of 40 who give birth. Fifty per cent of infants born with Down's Syndrome are born to mothers over the age of 35. Symptoms of this genetic deficiency are placid personality (infants cry very little), slanted eyes (hence the popular lay term mongolism), large protruding tongue and congenital heart disease. Life expectancy is decreased by the susceptability to heart disease characterizing the affliction.

MERCK, *supra* note 46 at 1101-03.

52. Withdrawal of 10-20 ml of amniotic fluid during the 14th-16th week of gestation which may be cultured for cytogenic and biochemical studies.

MERCK, *supra* note 46 at 1109.

suffer from Down's Syndrome.[53] The *Berman* court reversed *Gleitman* on the issue of the existence of a cause of action for wrongful birth. Citing *Roe v. Wade* as clearly establishing the right of a woman to decide to abort her pregnancy during the first trimester and criticizing the *Gleitman* majority's retreat on the damages issue, the *Berman* court concluded a cause of action did exist.[54] However, recovery was limited to plaintiffs' mental pain and suffering. The court denied recovery for the cost of raising Sharon Berman as both a windfall to the parents and an unreasonable financial burden on the defendant physician.[55]

In 1981, the New Jersey Supreme Court in *Schroeder v. Perkel*[56] permitted a damage claim for the extraordinary expenses attendant the rearing of a child suffering from cystic fibrosis.[57] Defendant physician incorrectly diagnosed the same illness in the Schroeders' first child. The delayed proper diagnosis prevented the Schroeders from making an informed choice whether to conceive a second child who might be, and in fact was, born with genetically transmitted cystic fibrosis.[58]

Generally, those courts which have allowed recovery for mental pain and suffering alleged by parents of a child "wrongfully conceived" or "wrongfully born" have also allowed recovery for any attendant medical costs.[59] When the child was in some way handicapped, some courts have expressed an eagerness to ease the fam-

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53. 404 A.2d at 10.

54. *Id.* at 15.

55. *Id.* at 14.

56. 432 A.2d 834 (N.J. 1981).

57. Cystic fibrosis is a common fatal genetic disease affecting Caucasians in the United States at a rate of 1:1500. There is no certain method of detecting whether a potential parent is a carrier of the recessive trait. Once the disorder is diagnosed in a child it is determinative that both parents are carriers. The probability that future children by the couple will be carriers is 50% and the probability that their children will be afflicted with the disease is 25%. The disorder commonly affects the digestive and respiratory systems of the body. Mucous clogs the respiratory passages causing chronic pulmonary infection and emphysema. The earlier the disease is diagnosed and proper treatment commenced, the better the prognosis for a longer life expectancy. However, death generally occurs during the late teens. MERCK, *supra* note 46 at 594-97.

58. 432 A.2d at 837. The record showed Mr. Schroeder was so concerned over the risk of subsequent children being afflicted with cystic fibrosis that he underwent a vasectomy after his first child's disease was correctly diagnosed and *before* the birth of their second child. There is no in utero test which will show whether or not the fetus is afflicted with cystic fibrosis. MERCK, *supra* note 46 at 594-97.

59. *See e.g.*, Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1980); Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977). *But see, e.g.*, Berman v. Allan, 404 A.2d 8 (N.J. 1979).

ily's financial burden through the award of damages designed to compensate for the *extraordinary* expenses of raising such a child. As the Texas Supreme Court noted, "The economic burden related solely to the physical defects of the child is a different matter. . . . These expenses lie within the methods of proof by which the courts are accustomed to determine awards in personal injury cases. No public policy obstacle should be interposed to that recovery."[60] Recovery for a variety of other types of tort damages has been granted and denied in numerous jurisdictions.[61]

In response to actions for damages, some traditional defenses to tort claims have been asserted and discussed.[62] One view is that compensation for all reasonably foreseeable economic harm would prevent wrongs from going unredressed[63] and thus would more closely reflect traditional tort principles.[64] The "special benefits rule" has been applied,[65] "[w]hen the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."[66]

A particularly persuasive argument to deny recovery for the expense of raising a child and to refrain from applying the special benefits rule is found in *Public Health Trust v. Brown*:

> We note that, under the contrary view, an unhandsome, colicky or otherwise "undesirable" child would provide fewer offsetting benefits, and would therefore presumably be worth more moneta-

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60. Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975).

61. *Cf.*, Custodio v. Bauer, 59 Cal. Rptr. 463 (Cal. Ct. App. 1967) (other family members could maintain an action for diminished parental capacity); Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974) (husband could sue for damages for loss of consortium); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (mother could sue for pain and suffering during pregnancy and delivery only; husband could also maintain an action for loss of consortium). *Contra*, Aronoff v. Snider, 292 So. 2d 418 (Fla. 2d Dist. Ct. App. 1974) (no cause of action for damages just to replenish family exchequer when healthy child is born).

62. *See generally*, Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CINN. L. REV. 65 (1981).

63. Moore, *Wrongful Birth—The Problem of Damage Computation*, 48 U. MO. KAN. CITY L. REV. 1 (1979).

64. 55 WASH. L. REV. 701, 711 (1980).

65. *E.g.*, Stills v. Gratton, 127 Cal. Rptr. 652 (Cal. Ct. App. 1976); Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971). *But cf.*, Bushman v. Burns Clinical Medical Center, 268 N.W.2d 683 (Mich. Ct. App. 1978) (special benefits rule should not be applied to the gross recovery amount; pain and suffering and medical expenses attendant to pregnancy and delivery should not be subject to mitigation).

66. RESTATEMENT (SECOND) OF TORTS § 920 (1979).

> rily in a "wrongful birth" case. The adoption of that rule would thus engender the unseemly spectacle of parents disparaging the "value" of their children . . . in open court.[67]

The 'impact doctrine' in Florida would, as in *Moores v. Lucas*, obviate the application of the special benefits rule by totally barring recovery for parents' mental pain and suffering.[68]

Additionally, arguments for mitigation of damages have been raised which alleged plaintiff's failure to abort an unwanted pregnancy or failure to place an unwanted child for adoption. Although the right to an abortion is constitutionally protected, it need not be exercised in order to mitigate damages.[69] Not only might adoption not be in the best interest of a child, but "the parents' right to keep their child should not be nullified by a physician's negligence."[70]

IV. THE WRONGFUL LIFE ACTION

Nearly all claims for recovery under a wrongful life action theory have been unsuccessful. New York briefly recognized this tort claim in *Park v. Chessin*[71] and *Becker v. Schwartz*[72] but these decisions were modified to preclude recovery on that basis. The basic difficulty is that the claimant asserts damage caused by existence itself. The conceptual difficulties presented by an attempt to place a pecuniary value on so enigmatic a quality as life itself make it easy to envision a court's reluctance to address such a claim.

The Fifth District in *Moores* held that no cause of action was cognizable at law for wrongful life and adopted the position of a Pennsylvania court[73] that the value of life in an impaired state versus non-existence was a value judgment best left to philosophers rather than to judges.[74] In addition, the purpose of tort damages, to put the plaintiff in the position he would have enjoyed absent defendant's negligence, is at this stage of medical and scientific de-

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67. 388 So. 2d 1084, 1086 n.4 (Fla. 3d Dist. Ct. App. 1980).

68. *See* notes 26-28, *supra*, and accompanying text.

69. Ziemba v. Sternberg, 357 N.Y.S.2d 265 (N.Y. App. Div. 1974).

70. Note, *supra* note 62, at 75.

71. 387 N.Y.S.2d 204 (N.Y. Sup. Ct.), *modified*, 400 N.Y.S.2d 110 (N.Y. App. Div. 1976), *modified*, 413 N.Y.S.2d 895 (N.Y. 1978).

72. 400 N.Y.S.2d 119 (N.Y. App. Div.), *modified*, 413 N.Y.S.2d 895 (N.Y. 1978).

73. Speck v. Finegold, 408 A.2d 496, 508 (Pa. Super. Ct. 1979), *modified*, 439 A.2d 110 (Penn. 1981).

74. 405 So. 2d at 1025.

velopment impossible relative to plaintiff's birth defect.[75]

One of the more recent cases to struggle with the issue was *Curlender v. Bio-Science Laboratories.*[76] The plaintiff's parents submitted to tests conducted by the defendants for the purpose of determining whether either were carriers of a recessive trait which would result in the birth of a child with Tay-Sachs disease.[77] Because incorrect information was given to the parent plaintiffs by the defendants, the infant plaintiff was born afflicted with Tay-Sachs.[78] The court concluded that infant plaintiff did state a cause of action but construed the "wrongful life" action as the right of the child to recover "damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition."[79]

A few courts have touched on the possibility of an action by the child to recover for the diminished capacity of the parents to express love and affection for the afflicted child. Although this question was left unanswered in *Curlender,*[80] Judge Handler's concurrences in *Berman* and *Schroeder* steadfastly maintain such negligence is a tort upon the entire family.[81] The decision in *Aronoff v. Snider,* holding that no cause of action exists merely to replenish the family exchequer, would indicate that Florida law is not in accord with Judge Handler's view.[82]

V. CONCLUSION

The Florida courts in *Ramey* and *Moores* have unequivocally acknowledged a cause of action for wrongful birth of a deformed child flowing from physician malpractice. However, the divergence from earlier cases as to the types of damages recoverable works to the disadvantage of the injured party.

By limiting the award of attendant costs of rearing the deformed child to the time she reaches the age of majority, the *Ramey* court

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75. 408 A.2d at 508.

76. 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).

77. An inherent recessive trait occurring at a rate of 1:30 in Ashkenazi (East European) Jews. The disease is characterized by progressive retardation in development, paralysis and blindness due to a deficiency in the enzyme hexosaminidase A. Prenatal and postnatal diagnosis are both quite reliable. Death usually occurs by age 3-4.

MERCK, *supra* note 46 at 1109, 1235.

78. 165 Cal. Rptr. at 480.

79. *Id.* at 489.

80. Comment, 48 TENN. L. REV. 493, 512 (1981).

81. 432 A.2d at 843 (Handler, J., concurring).

82. 292 So. 2d 418 (Fla. 2d Dist. Ct. App. 1974).

took an unrealistic and myopic approach to the problem of damages. As pointed out by Judge Hendry in his dissent, the child Maria will require special care and attention and support for her entire life.[83] Florida case law provides that support may be ordered for a child past the age of majority when the child is, from physical or mental deficiencies, unable to support himself. The parents' duty to support the child continues as before.[84] Perhaps even more significant is the fact that Florida Statutes expressly authorize courts to require, in their discretion, support for a dependent person over the age of eighteen.[85] Until damage awards are permitted to realistically reflect the emotional, physical, and financial injuries caused by physicians' malpractice, wrongful birth actions will not fully redress the wrongs committed by defendants.

Additionally, the impact doctrine should not be invoked in wrongful birth actions. As the Florida Supreme Court pointed out in *Gilliam v. Stewart,* the doctrine is not alterable exclusively by the legislature. Rather, it is judge-made and may therefore be judicially abolished or limited.[86]

Wrongful life actions were earliest brought in relation to bastardy cases where alleged damages were social stigma and impaired property and inheritance rights.[87] When the court in *Pinkney v. Pinkney*[88] stated, "no one has an inalienable right to be born under one set of circumstances rather than another,"[89] the reference was doubtless to social circumstances. Today, courts are faced with moral dilemmas concerning the quality and essence of life not so much as a result of a raised consciousness but rather because of man's greater technological ability to alter his existence for the better, or for the worse.

It is, however, unlikely that a move toward recognition of a wrongful life cause of action will occur in Florida. The weight of opinion would suggest the position of the Fifth District Court of Appeal in *Moores* will prevail. If the lead of the California courts in *Curlender* were to become a trend, perhaps a more apt defini-

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83. 414 So. 2d at 202 (Hendry, J., dissenting).

84. Perla v. Perla, 58 So. 2d 689, 690 (Fla. 1952), Fincham v. Levin, 155 So. 2d 883, 884 (Fla. 1st Dist. Ct. App. 1963).

85. FLA. STAT. § 743.07 (1981).

86. 291 So. 2d 593, 595.

87. *See,* Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963).

88. 198 So. 2d 52 (Fla. 1st Dist. Ct. App. 1967).

89. *Id.* at 54.

tion of the cause of action would be a life that is not wrong, just not as it should be.[90]

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90. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1432 (1977).