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## By What Measure?: The Issue of Damages For Wrongful Pregnancy

### I. INTRODUCTION

Recent years have seen a significant number of American couples deliberately attempting to avoid parenthood through various methods of birth control.<sup>1</sup> As part of this trend, sterilization operations have become a common and accepted means of preventing birth of unwanted children. This increase in voluntary sterilization<sup>2</sup> inevitably has been accompanied by situations in which the effort to prevent conception has been unsuccessful, frustrated through another's negligence.

The courts have responded to this new reality by recognizing a cause of action of wrongful pregnancy (or wrongful conception).<sup>3</sup> Consequently, in the last decade, an extensive body of case law has developed concerning the tort of wrongful pregnancy.<sup>4</sup> Although courts are recognizing this cause of action, they are sharply divided over the issue of

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1. See N.Y. Times, Dec. 9 1984, at 29, col. 1. The National Center for Health Statistics reported that in 1982 18% of couples with one partner of child bearing age used sterilization to avoid conception, 16% used birth control pills, 7% used condoms, 5% used diaphragms, and 4% used intrauterine devices.

2. Among couples who wanted no more children, as opposed to those couples who merely wanted to delay child rearing, the use of sterilization more than tripled between 1965 and 1982, from 18% to 62%. *Id.*, col. 4.

3. Wrongful pregnancy is an action brought by the parents of a healthy but unplanned child against a physician alleging that the physician negligently performed the sterilization procedure which proximately caused a postoperative unwanted pregnancy.

4. Of the twenty-eight states and the District of Columbia having considered the question, all but two of these jurisdictions have recognized a wrongful pregnancy cause of action: *Boone v. Mulendore*, 416 So. 2d 718 (Ala. 1982); *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 667 P.2d 1294 (1983) (en banc); *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W.2d 568 (1982); *Morris v. Frudenberg*, 135 Cal. App. 3d 23, 185 Cal. Rptr. 76 (1982); *Ochs v. Borrelli*, 187 Conn. 253, 445 A.2d 883 (1982); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984); *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984) (per curiam); *Fulton-Dekalb Hosp. Auth. v. Graves*, 252 Ga. 441, 314 S.E.2d 653 (1984); *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied*, 464 U.S. 846 (1983); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984); *Byrd v. Wesley Medical Center*, 237 Kan. 215, 699 P.2d 459 (1985); *Schork v. Huber*, 648 S.W.2d 861 (Ky. 1983); *Jones v. Malinowski*, 299 Md. 257, 473 A.2d 429 (1984); *Clapham v. Yanga*, 102 Mich. App. 47, 300 N.W.2d 727 (per curiam), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1981); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Hershey v. Brown*, 655 S.W.2d 671 (Mo. Ct. App. 1983); *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d 1003 (1982); *P. v. Portadin*, 179 N.J. Super. 465, 432 A.2d 556 (App. Div. 1981); *Weintraub v. Brown*, 98 A.D.2d 339, 410 N.Y.S.2d 634 (1983); *Pierce v. Piver*, 45 N.C. App. 111, 262 S.E.2d 320, *appeal dismissed*, 300 N.C. 375, 282 S.E.2d 228 (1980); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (per curiam); *Mason v. Western Pa. Hosp.*, 499 Pa. 484, 453 A.2d 974 (1982); *Hickman v. Myers*, 632 S.W.2d 869 (Tex. Ct. App. 1982); *McKernan v. Aasheim*, 102 Wash. 2d 411, 687 P.2d 850 (1984); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

The Fourth Circuit and Wisconsin have refused to recognize a wrongful pregnancy cause of ac-

damages. A particularly troublesome issue has been awarding costs for rearing a healthy child. Courts have adopted positions that range from no recovery to the full recovery of all consequential damages including the costs of raising a healthy child to adulthood.<sup>5</sup> Courts differ in both their awards and their reasoning, causing one commentator to note that "this area of law now seems to contain more rules for limiting wrongful [pregnancy] damages than it contains wrongful [pregnancy] cases."<sup>6</sup>

This Comment argues that awarding damages that include the total harm resulting from the interference with the parents' rights is proper and suggests that public policy considerations articulated by some courts do not justify a denial of full parental compensation. Part II of this Comment describes the various factual situations that give rise to the cause of action of wrongful pregnancy. Part III analyzes the various judicial approaches used to measure damages for the tort. Included in this section are discussions of the doctrine of mitigation, the benefits rule, public policy, and motivational analysis. This Comment concludes that courts facing a wrongful pregnancy plaintiff should extend their full consideration to the costs and benefits of raising a healthy, yet unwanted child, and award damages for all economic losses, including financial expenses for rearing the child and for pain and suffering.

## II. THE CAUSE OF ACTION

An action for wrongful pregnancy is generally a negligence action<sup>7</sup> brought by parents of a healthy<sup>8</sup> but unwanted and unplanned child

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tion. *McNeal v. United States*, 689 F.2d 1200 (4th Cir. 1982) (per curiam) (construing Virginia law); *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

5. See *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242, 244 (1974) (no recovery allowed; cause of action not recognized); *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982) (recovery limited to expenses up to and including the time a healthy child is born and denied child rearing costs); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977) (proof of all damages including child-rearing costs permitted, but offset equal to the benefit derived by parents from raising a child is required); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 318-25, 59 Cal. Rptr. 463, 473-78 (1967) (recovery of all costs associated with an unplanned pregnancy and birth of a child including costs of child rearing).

6. Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1312 (1982) (the commentator refers to wrongful pregnancy as wrongful birth).

7. Negligence may be pleaded in the alternative to a claim of breach of contract or warranty, or misrepresentation. See, e.g., *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982) (misrepresentation); *Mason v. Western Pa. Hosp.*, 499 Pa. 484, 453 A.2d 974 (1984) (breach of warranty); *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (breach of contract).

Sometimes only breach of contract is alleged. See, e.g., *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934).

8. Occasionally the child is physically or mentally impaired. Such an impairment may have been anticipated. See *infra* note 11. The impairment also could have been unanticipated. See *La Point v. Shirley*, 409 F. Supp. 118, 119 (W.D. Tex. 1976) (child born with umbilical hernia following failed tubal ligation); *Fulton-Dekalb Hosp. Auth. v. Graves*, 252 Ga. 441, 442, 314 S.E.2d 653, 654 (1984) (child born with club foot following failed tubal ligation).

against a health care worker, usually a physician.<sup>9</sup> Typically, the prevention of conception is sought to (1) protect the mother from potential health problems associated with pregnancy and childbirth;<sup>10</sup> (2) avoid the birth of a potentially defective child;<sup>11</sup> and (3) avoid the financial strain an additional child would place on the family.<sup>12</sup> The physician is engaged to provide a service designed to prevent conception or birth. When this medical assistance is performed negligently, conception is not prevented, and the pregnancy and birth of an unexpected, unwanted, and healthy child results.

In the majority of wrongful pregnancy claims, the negligence occurs before conception. Typical examples include misprescribed or misfilled birth control pill prescriptions,<sup>13</sup> failed contraceptive devices,<sup>14</sup> and unsuccessful sterilization operations.<sup>15</sup> However, the negligence may occur

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9. Although the defendant in most wrongful pregnancy claims is a physician, others such as a pharmacist and a manufacturer of condoms also have been made defendants.

10. See *Bishop v. Byrne*, 265 F. Supp. 460, 463 (S.D. W. Va. 1967) (sterilization undertaken to safeguard plaintiff's health); *Stills v. Gratton*, 55 Cal. App. 3d 689, 701, 127 Cal. Rptr. 652, 653 (1976) (obstetrician advised plaintiff that abortion was in her best interest due to her emotional state); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 307, 59 Cal. Rptr. 463, 466 (1967) (having more children would have aggravated plaintiff's existing bladder and kidney conditions); *Wilczynski v. Goodman*, 73 Ill. App. 2d 51, 53, 391 N.E.2d 479, 484 (1979) (plaintiff sought abortion when pregnancy constituted a serious threat to her life); *Christensen v. Thornby*, 192 Minn. 123, 123-24, 255 N.W. 620, 621 (1934) (plaintiff experienced great difficulty with the birth of her first child and was advised that another pregnancy would endanger her life); *Bowman v. Davis*, 48 Ohio St. 2d 41, 41, 356 N.E.2d 496, 497 (1976) (per curiam) (plaintiff with history of diabetes, obesity, and miscarriages was advised to undergo sterilization to avoid the hazards of another pregnancy).

11. See *Ochs v. Borrelli*, 187 Conn. 253, 254-55, 445 A.2d 883, 883-84 (1982) (after giving birth to two children with orthopedic defects, plaintiff decided to undergo sterilization to avoid the birth of another child with the same defect); *Fassoulas v. Ramey*, 450 So. 2d 822, 822 (Fla. 1984) (plaintiff bore two children with severe abnormalities and decided not to have another because of fear of birthing another deformed child); *Speck v. Finegold*, 497 Pa. 77, 82, 439 A.2d 110, 113 (1981) (after the birth of two children who inherited neurofibromatosis, the father decided to undergo a vasectomy to avoid the possible birth of another child with the same defect).

12. See *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 581, 667 P.2d 1294, 1296 (1983) (en banc); *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. 1984); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 171 (Minn. 1977); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 74, 344 A.2d 336, 339 (Law Div. 1975); *Terrell v. Garcia*, 496 S.W.2d 124, 125 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 972 (1974).

13. *Troppi v. Scarf*, 31 Mich. App. 240, 244, 187 N.W.2d 511 (1971) (pharmacist negligently substituted tranquilizers for birth control pills).

14. See, e.g., *J.P.M. v. Schmid Laboratories*, 178 N.J. Super. 122, 428 A.2d 515 (App. Div. 1981) (per curiam) (condom failed to prevent pregnancy); *Jackson v. Baumgardner*, 71 N.C. App. 107, 321 S.E.2d 541 (1984), *disc. rev. granted*, 312 N.C. 797, 325 S.E.2d 486 (1985) (intrauterine device negligently not maintained in place).

15. In the majority of cases, the female was negligently sterilized by a tubal ligation or tubal cauterization. See *McNeal v. United States*, 689 F.2d 1200 (4th Cir. 1982) (per curiam); *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *White v. United States*, 510 F. Supp. 146 (D. Kan. 1981) (construing Georgia law); *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Morris v. Frudenberg*, 135 Cal. App. 3d 23, 185 Cal. Rptr. 76 (1982); *Ochs v. Borrelli*, 187 Conn. 253, 445 A.2d 883 (1982); *Anonymous v. Hospital*, 33 Conn. Supp. 125, 366 A.2d 204 (1976); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984); *Public Health Trust v.*

after conception and preclude termination of the pregnancy, such as when pregnancy is not diagnosed in the first trimester<sup>16</sup> or an abortion is unsuccessful.<sup>17</sup>

Most wrongful pregnancy claims are brought by victims of an unsuccessful sterilization procedure, a tubal ligation in females or a vasectomy in males.<sup>18</sup> When parents are able to prove that the doctor's negligence was responsible for the unsuccessful operation and ensuing conception of an unwanted child, the courts confront the difficult task of determining the damages required to redress the injury suffered by the parents. Accepting that creation, "particularly the creation of a normal healthy human, can in any way be wrongful has been a strain on the [courts]."<sup>19</sup> A divergence of opinion in the case law has resulted, reflecting a basic disagreement on the hierarchy of certain fundamental rights and the difficulty of identifying the nature of the injury in a wrongful pregnancy claim.

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Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980), *petition denied*, 399 So. 2d 1140 (Fla. 1981); Fulton-Dekalb Hosp. Auth. v. Graves, 252 Ga. 441, 314 S.E.2d 653 (1984); Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (tubal ligation and vasectomy cases consolidated), *cert. denied*, 464 U.S. 846 (1983); Byrd v. Wesley Medical Center, 237 Kan. 215, 699 P.2d 459 (1985); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984); Hershley v. Brown, 655 S.W.2d 671 (Mo. Ct. App. 1983) (defendant substituted another procedure for the tubal ligation to which plaintiff consented); Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App. 1982); Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (App. Div. 1981) (defendant substituted another procedure for the tubal ligation to which plaintiff consented); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (Law Div. 1975); Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320, *appeal dismissed*, 300 N.C. 375, 282 S.E.2d 228 (1980); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (per curiam); Mason v. Western Pa. Hosp., 499 Pa. 484, 453 A.2d 974 (1982); Stribling v. DeQuevedo, 288 Pa. Super. 436, 432 A.2d 239 (1980); Terrel v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 972 (1974); Hickman v. Myers, 632 S.W.2d 869 (Tex. Ct. App. 1982); McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

In a number of cases the male was negligently sterilized by a vasectomy. See *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 667 P.2d 1294 (1983) (en banc); *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W.2d 568 (1982); *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984); *Maggard v. McKelvey*, 627 S.W.2d 44 (Ky. Ct. App. 1981); *Bushman v. Burns Clinic Medical Center*, 83 Mich. App. 453, 268 N.W.2d 683 (1978); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 621 (1934); *Weintraub v. Brown*, 98 A.D.2d 339, 470 N.Y.S.2d 634 (1983); *Sorkin v. Lee*, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981) (per curiam) (unsuccessful vasectomy in husband and subsequent unsuccessful abortion); *Baldwin v. Sanders*, 266 S.C. 394, 223 S.E.2d 602 (1976); *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964).

16. See *Clapham v. Yanga*, 102 Mich. App. 47, 300 N.W.2d 727 (per curiam), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1981); *Ziemba v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974); *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

17. See *Stills v. Grattoon*, 55 Cal. App. 3d 689, 127 Cal. Rptr. 652 (1976); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984).

18. See cases cited *supra* note 15.

19. *Holt, Wrongful Pregnancy*, 33 S.C.L. REV. 759, 761 (1982).

### III. DAMAGES

The underlying principle behind any award of damages is that the person who causes an injury should make the victim whole to the extent possible. The injured plaintiff is returned to the position he would have occupied had the injury not occurred.<sup>20</sup> Therefore, the tortfeasor is liable and must compensate his victim for any and all damages that are the natural and probable consequences of his negligence.<sup>21</sup> However, courts may limit recovery on the basis of either certain rules of law<sup>22</sup> or public policy considerations.<sup>23</sup>

In wrongful pregnancy claims the courts have awarded damages based on a broad range of measures: the cost of the failed surgical procedure;<sup>24</sup> the physical and mental pain and suffering of the mother during pregnancy and delivery;<sup>25</sup> the medical expenses associated with pregnancy and delivery;<sup>26</sup> the lost wages of the mother during pregnancy and the immediate period after delivery;<sup>27</sup> the husband's loss of consortium dur-

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20. RESTATEMENT (SECOND) OF TORTS § 901 comment a, § 903 comment a (1979).

21. W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 282 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

22. RESTATEMENT (SECOND) OF TORTS §§ 918-923 (1979).

23. PROSSER & KEETON, *supra* note 21, § 3.

24. See *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. 1984); *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 443, 314 S.E.2d 653, 654 (1984); *Kingsbury v. Smith*, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); *McKernan v. Aasheim*, 102 Wash. 2d 411, 421, 687 P.2d 850, 856 (1984); *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

Some courts also award the costs of an additional sterilization. See *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. 1984); *Miller v. Duhart*, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982); *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1985).

25. See *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982); *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. App. 1984); *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 443, 314 S.E.2d 653, 654 (1984); *Maggard v. McKelvey*, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981); *Kingsbury v. Smith*, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); *P. v. Portadin*, 179 N.J. Super. 465, 472, 432 A.2d 556, 559 (App. Div. 1981); *Mason v. Western Pa. Hosp.*, 499 Pa. 484, 486, 453 A.2d 974, 976 (1982); *Weintraub v. Brown*, 98 A.D.2d 339, 349, 470 N.Y.S.2d 634, 641 (1983); *McKernan v. Aasheim*, 102 Wash. 2d 411, 421, 687 P.2d 850, 856 (1984); *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

26. See *White v. United States*, 510 F. Supp. 146, 150 (D. Kan. 1981); *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. 1984); *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 443, 314 S.E.2d 653, 654; *Maggard v. McKelvey*, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981); *Miller v. Duhart*, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982); *Kingsbury v. Smith*, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); *P. v. Portadin*, 179 N.J. Super. 465, 472, 432 A.2d 556, 560 (App. Div. 1980); *Weintraub v. Brown*, 98 A.D.2d 339, 349, 470 N.Y.S.2d 634, 641 (1983); *Mason v. Western Pa. Hosp.*, 499 Pa. 484, 486, 453 A.2d 974, 976 (1982); *McKernan v. Aasheim*, 102 Wash. 2d 411, 421, 687 P.2d 850, 856 (1984); *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1985).

27. See *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. 1984); *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 443, 314 S.E.2d 653, 654 (1984); *Maggard v. McKelvey*, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981); *Kingsbury v. Smith*, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); *P. v. Portadin*, 179 N.J. Super. 465, 472, 432 A.2d 556, 559 (App. Div. 1981); *Mason v. Western Pa. Hosp.*, 499 Pa. 484, 486, 453 A.2d 974, 976 (1982); *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1982); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

ing pregnancy and the immediate period after delivery;<sup>28</sup> the financial costs of raising, educating and maintaining the unplanned child;<sup>29</sup> and emotional distress.<sup>30</sup> Under established tort principles, all of the above injuries are foreseeable consequences of negligence that result in the conception and birth of unplanned children. Still, each jurisdiction has developed its own measure of damages, often encompassing rules for limiting wrongful pregnancy damages. In arriving at their decisions, courts consider society's interest in (1) encouraging an attitude of reverence for human life; (2) holding parents responsible for the care of children they bring into society; (3) improving the quality of human existence; (4) protecting the procreative rights of individuals; (5) holding tortfeasors liable for damages proximately caused by their actions; and (6) encouraging competent medical care.<sup>31</sup> In reconciling these conflicting interests, some courts emphasize traditional tort theories of recovery while others rely more heavily on public policy factors. Hence, no consensus has developed on the issue of what damages the wrongful pregnancy plaintiffs should recover.<sup>32</sup>

### A. No Recovery

The question of liability of the physician for negligent sterilization aside, damages resulting from the birth of a healthy unplanned child

28. See *White v. United States*, 510 F. Supp. 146, 149 (D. Kan. 1981); *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982); *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 443, 314 S.E.2d 653, 654 (1984); *Maggard v. McKelvey*, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981); *Miller v. Duhart*, 637 S.W.2d 184, 188 (Mo. Ct. App. 1982); *Kingsbury v. Smith*, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); *P. v. Portadin*, 179 N.J. Super. 465, 472, 432 A.2d 556, 559 (App. Div. 1981); *Weintraub v. Brown*, 98 A.D.2d 339, 349, 420 N.Y.S.2d 634, 641 (1983); *Mason v. Western Pa. Hosp.*, 499 Pa. 484, 486, 453 A.2d 974, 976 (1982); *McKernan v. Aasheim*, 102 Wash. 2d 411, 421, 687 P.2d 850, 856 (1984); *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1982).

29. See *Hartke v. McKelway*, 707 F.2d 1544, 1552 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 584, 667 P.2d 1294, 1299 (1983) (en banc); *Morris v. Frudenberg*, 135 Cal. App. 3d 23, 35-37, 185 Cal. Rptr. 76, 82-83 (1982); *Stills v. Gratton*, 55 Cal. App. 3d 598, 609, 127 Cal. Rptr. 652, 658-59 (1976); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 476-77 (1967); *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982); *Anonymous v. Hospital*, 33 Conn. Supp. 125, 128-29, 366 A.2d 204, 206 (1976); *Jones v. Malinowski*, 299 Md. 257, 270, 473 A.2d 429, 435 (1984); *Clapham v. Yanga*, 102 Mich. App. 47, 61, 300 N.W.2d 727, 734 (per curiam) (awarded damages to grandparents of minor child's baby), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1981); *Troppe v. Scarf*, 31 Mich. App. 240, 252, 187 N.W.2d 511, 518 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 77, 344 A.2d 336, 340 (App. Div. 1975); *Bowman v. Davis*, 48 Ohio St. 2d 41, 43, 46, 356 N.E.2d 496, 499 (1976) (per curiam).

30. See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982); *Green v. Sudakin*, 81 Mich. App. 545, 549, 265 N.W.2d 411, 413 (1978); *P. v. Portadin*, 179 N.J. Super. 465, 470, 432 A.2d 556, 558 (App. Div. 1981); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 77, 344 A.2d 336, 340 (Law Div. 1975); *Weintraub v. Brown*, 98 A.D.2d 339, 349, 470 N.Y.S.2d 634, 641-42 (1983).

31. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 695 n.6 (1984).

32. *Id.* at 679.

were not recognized prior to 1967. The issue in the earliest wrongful pregnancy cases was not whether particular elements of damages should be awarded, but whether the parents of an unplanned and unwanted but healthy child suffered any damages at all. Early decisions considered the birth of a healthy child, although unwanted, a blessing to the child's parents. This idea of "the child as a blessing" was first introduced in *Christensen v. Thornby*,<sup>33</sup> where the court said that "[i]nstead of losing his wife, the plaintiff has been blessed with the fatherhood of another child."<sup>34</sup> Subsequent cases have incorporated this rationale because the courts remained uneasy about encouraging sterilization and family planning. Therefore, these courts reason that the birth of a healthy child outweighs as a matter of law any injury that the parents may have suffered from the birth of an unplanned and unwanted child.

The early decisions were based on moral and religious considerations as illustrated by an observation of the court in *Shaheen v. Knight*:<sup>35</sup> "The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it (sic); but the procreation of a progeny having a legal title to maintenance by the father."<sup>36</sup> A few courts still refuse to recognize that any injury was suffered by parents of an unplanned healthy child, conceived and born as the result of a failed sterilization.<sup>37</sup> The propriety of this position was first challenged by a California court in 1967.<sup>38</sup> Thereafter, most courts have allowed parents to recover at least some portion of the damages they claim.

## B. Full Recovery

The first court to recognize damages for wrongful pregnancy applied the most liberal measure of damages.<sup>39</sup> In *Custodio v. Bauer*,<sup>40</sup> a California court awarded the parents of a tenth child, born after a negligently performed sterilization, damages for all pregnancy and birth-related costs as well as child-rearing expenses. The damages included economic, physical and emotional costs.<sup>41</sup> The *Custodio* court based its award on the theory that economic realities often outweigh parental pleasures and that the injury suffered was not the birth of the child but the financial

33. 192 Minn. 123, 255 N.W. 620 (1934).

34. *Id.* at 126, 255 N.W. at 622 (dictum).

35. 11 Pa. D. & C.2d 41 (1957).

36. *Id.* at 45.

37. *McNeal v. United States*, 689 F.2d 1200, 1202 (4th Cir. 1982) (per curiam) (construing Virginia law); *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 518, 219 N.W.2d 242, 246 (1974).

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

39. *Id.*

40. *Id.*

41. *Id.* at 323, 59 Cal. Rptr. at 476. The *Custodio* court noted that it would have also permitted the family an action for wrongful death had the mother died in childbirth. *Id.*



consequences that naturally result from an addition to the family. "[T]he compensation is not for the so called unwanted child . . . but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."<sup>42</sup> Because the court did not view the damages as deriving from the child's right to life but rather from an injury to the parents, the court held that the parents could recover "the amount which will compensate for all detriments proximately caused thereby."<sup>43</sup>

In *Bowman v. Davis*,<sup>44</sup> the Ohio court also awarded full damages, including the cost of rearing the child. The *Bowman* case was unusual because one twin was born healthy while the other was born with an unforeseeable congenital abnormality. The court awarded full child-rearing costs for each of the twins. Courts and commentators cite the *Custodio* and *Bowman* courts as the only courts to allow full recovery for wrongful pregnancy without a benefits offset. However, other courts contend that *Custodio* and *Bowman* do not provide much support for the full recovery approach.<sup>45</sup>

In *Bowman*, the plaintiffs received child-rearing costs as awarded in the lower court. The Ohio Supreme Court stated in a footnote to the opinion that "[a] third issue, that appellees' damages should be limited to the expenses of the pregnancy after a negligently performed sterilization, was not raised at the appellate level. To the extent that this issue is not settled in our decision of appellant's other propositions of law, we decline to decide it."<sup>46</sup> The question of the degree to which *Custodio* stands for full recovery arises because the California Court of Appeals did not have a complete set of facts and said "if successful on the issue of liability, [the plaintiffs] have established the right to more than nominal damages . . . . The propriety of further damages must be established under [certain] criteria as the facts may be developed."<sup>47</sup> Nonetheless, this court's holding makes possible the recovery by parents of all reasonably foreseeable damages proximately caused by a tortfeasor's act, including the costs of rearing an unplanned child.

A recent attempt by the Illinois Court of Appeals to award full damages was reversed by the Illinois Supreme Court.<sup>48</sup> The Illinois Court of Appeals' primary theory in support of full recovery was that individuals have a constitutional right not to bear children.<sup>49</sup>

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42. 251 Cal. App. 2d at 324, 59 Cal. Rptr. at 477.

43. *Id.* at 325, 59 Cal. Rptr. at 477.

44. 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

45. *E.g.*, *Byrd v. Wesley Medical Center*, 237 Kan. 215, 215-16, 699 P.2d 459, 462 (1985).

46. 48 Ohio St. 2d at 44 n.1, 356 N.E.2d at 498 n.1 (emphasis original).

47. 251 Cal. App. 2d at 325-26, 59 Cal. Rptr. at 477-78.

48. *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981), *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied*, 464 U.S. 846 (1983).

49. *Id.* at 273, 425 N.E.2d at 970.

In more recent cases, courts have not been following the extreme approaches of denying or awarding full damages. Two middle ground approaches have developed and are presently being employed by the courts. In using the first approach, courts focus on public policy considerations. These courts award pregnancy related damages and deny child-rearing costs.<sup>50</sup> The second approach relies on the application of well-established tort principles to wrongful pregnancy claims. Courts using this approach award child-rearing costs and offset them by benefits received.<sup>51</sup>

### C. *Partial Recovery — No Child-Rearing Costs*

The majority approach to damages in wrongful pregnancy claims is to award damages related to pregnancy and delivery and deny damages for the cost of rearing a healthy child. Under this theory, courts allow recovery of some or all of the following: medical and hospital expenses associated with pregnancy and delivery, physical and mental pain and suffering of the mother during pregnancy and delivery, costs of the failed sterilization procedure, lost wages of the mother, and loss of consortium of the father.<sup>52</sup>

The courts that deny child-rearing costs do not view a wrongful pregnancy claim as a simple medical malpractice action. These courts emphasize that the negligence resulted in the creation of human life while giving various public policy reasons for holding that an award of child-rearing costs is inappropriate. The predominant theory used to deny child-rearing costs is the same theory used by the courts that deny any recovery, *i.e.*, that a child is a blessing. This theory is articulated using two expressions with the same meaning. Some courts use a balancing approach and hold that "the benefits of joy, companionship, and affection which a normal, healthy child can provide must be deemed as a

50. See *Wilbur v. Kerr*, 275 Ark. 239, 243, 628 S.W.2d 568, 571 (1982); *Coleman v. Garrison*, 349 A.2d 8, 11-12 (Del. 1975); *Public Health Trust v. Brown*, 388 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980), *petition denied*, 399 So. 2d 1140 (Fla. 1981); *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 200, 447 N.E.2d 385, 389, *cert. denied*, 464 U.S. 846 (1983); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 62-63, 391 N.E.2d 479, 487-88 (1979); *Nanke v. Napier*, 346 N.W.2d 520, 522 (Iowa 1984); *Byrd v. Wesley Medical Center*, 237 Kan. 215, 215-16, 699 P.2d 459, 468 (1985); *Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); see also *supra* notes 24-28.

51. See *Hartke v. McKelway*, 707 F.2d 1544, 1552 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 584, 667 P.2d 1294 (1983) (en banc); *Morris v. Frudenberg*, 135 Cal. App. 3d 23, 35-37, 185 Cal. Rptr. 76, 82-83 (1982); *Stills v. Gratton*, 55 Cal. App. 3d 598, 609, 127 Cal. Rptr. 652, 658-59 (1976); *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982); *Anonymous v. Hospital*, 33 Conn. Supp. 125, 128-29, 366 A.2d 204, 206 (1976); *Jones v. Malinowski*, 299 Md. 257, 270, 473 A.2d 429, 435 (1984); *Clapham v. Yanga*, 102 Mich. App. 47, 61, 300 N.W.2d 727, 734 (per curiam), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1981); *Troppi v. Scarf*, 31 Mich. App. 240, 252, 187 N.W.2d 511, 518 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 77, 344 A.2d 366, 340 (Law Div. 1975).

52. See *supra* notes 24-28 and accompanying text.

matter of law to outweigh the costs of rearing that child.”<sup>53</sup> Other courts, as a matter of public policy, hold that parents cannot be deemed to have been damaged by the birth and rearing of a normal healthy child.<sup>54</sup> In other words, “[t]he existence of normal, healthy life is an esteemed right under our laws, rather than a compensable wrong.”<sup>55</sup> Some courts combine both expressions.<sup>56</sup> These courts reason that a child must be a blessing since parents chose to raise the child despite the availability of abortion or adoption. As further support of their position, these courts also point to the large number of childless couples and single persons who choose to become parents.<sup>57</sup>

Courts and commentators have criticized the “child-as-a-blessing” view. Arguing that the birth of a child can never be considered an injury to the parents or that the benefits of child rearing always outweigh the burdens is fallacious. First, courts adopting this rationale fail to consider the fact that millions of couples use many contraceptive measures as well as sterilization to avoid the consequence of pregnancy.<sup>58</sup> In many cases, the benefits of rearing a child do outweigh the burdens, but to assume that such is true in all cases is unrealistic.<sup>59</sup> Furthermore, the burdens of child rearing may not only outweigh the benefits, but “the birth of [an unwanted] child may be a catastrophe not only for the parents and the child itself, but also for previously born siblings.”<sup>60</sup>

Those courts holding that the benefits of child rearing always outweigh the burdens and those courts adopting the offsetting benefits theory equally misapply the *Restatement's* benefits rule.<sup>61</sup> These courts seem to

53. *Mason v. Western Pa. Hosp.* 499 Pa. 484, 487, 453 A.2d 974, 976 (1982); *accord* *Fassoulas v. Ramey*, 450 So. 2d 822, 824 (Fla. 1984) (per curiam); *Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); *Beardsley v. Wierdsma*, 650 P.2d 288, 293 (Wyo. 1982).

54. *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 201, 447 N.E.2d 385, 389, *cert. denied*, 464 U.S. 846 (1983); *Byrd v. Wesley Medical Center*, 237 Kan. 215, 215-16, 699 P.2d 459, 468 (1985); *Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Weintraub v. Brown*, 98 A.D.2d 339, 348-49, 470 N.Y.S.2d 634, 641 (1983).

55. *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 64, 391 N.E.2d 479, 487 (1979).

56. *See* *Public Health Trust v. Brown*, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980) (parent cannot be deemed to have been damaged by having to raise a normal, healthy child because the invaluable benefits of parenthood far outweigh any of the mere monetary burdens involved); *accord* *Nanke v. Napier*, 346 N.W.2d 520, 522-23 (Iowa 1984).

57. *See, e.g.,* *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); *Public Health Trust v. Brown*, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980).

58. This argument has been advanced both by courts that award child-rearing costs, *see* *Troppi v. Scarf*, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977); and by courts that deny child-rearing costs, *see* *McKernan v. Aasheim*, 102 Wash. 2d 411, 418, 687 P.2d 850, 854 (1984).

59. *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 583, 667 P.2d 1294, 1298 (1983).

60. *Terrell v. Garcia*, 496 S.W.2d 718, 722 (Ala. 1973) (Cadena, J., dissenting), *cert. denied*, 415 U.S. 972 (1974).

61. *See infra* note 97 and accompanying text.

combine all economic and emotional considerations into one. While the emotional benefits may outweigh the emotional burdens whenever an unplanned but healthy child is born, the same may not be true for economic benefits. Thus, those courts using "the child is a blessing" theory deny economic awards to parents because they derive emotional benefits from their children.<sup>62</sup>

Another reason for refusing recovery for child-rearing costs stems from the concern for the welfare of the child in question. Some courts argue that the child ultimately would be harmed when he finds out that he was not wanted and was reared with the funds supplied from another.<sup>63</sup> Such an award would foster development of what "[s]ome authors have referred to . . . as an 'emotional bastard' in a realistic, but harsh, attempt to describe the stigma that will attach to him . . ."<sup>64</sup> when he inevitably learns that his birth was attributable to a doctor's negligence rather than his parents' desires. The courts that use this rationale do not explain how they arrive at this conclusion. Absent empirical data in support of such contentions, justifying denial of recovery on the basis of speculation as to the possible psychological harm to the child is unreasonable. In fact, the mere filing of a wrongful pregnancy lawsuit and a damage award based on an alternative measure is as likely to cause the emotional damage feared by courts as is an award of child-rearing costs.<sup>65</sup> The argument that the child's awareness of an award of rearing costs will cause or increase his emotional damage is simply not logical.

A child will likely be damaged less by learning of the wrongful pregnancy suit than being born into a family which has no funds for education, maintenance and support.<sup>66</sup> Denial of child-rearing costs is an illogical way to show concern for the child when less drastic means such as protecting the anonymity of the parents are possible.<sup>67</sup> In any event, parents, not courts should weigh the risk of psychological damage to the unplanned child.<sup>68</sup>

The state's concern with the harmony of the family unit also serves to

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62. For a discussion of the parents' economic and emotional interests, see *infra* notes 109-15 and accompanying text.

63. *Boone v. Mullendore*, 416 So. 2d 718, 722 (Ala. 1982) (quoting *Wilbur v. Kerr*, 275 Ark. 239, 244, 628 S.W.2d 568, 571 (1982)); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977); *McKernan v. Aasheim*, 102 Wash. 2d 411, 416, 687 P.2d 850, 855-66 (1984).

64. *Boone*, 416 So. 2d at 722 (Ala. 1982); *accord Wilbur v. Kerr*, 275 Ark. 239, 244, 628 S.W.2d 568, 571 (1982).

65. *Boone*, 416 So. 2d at 724-25 (Ala. 1982) (Faulkner, J., concurring specially).

66. See *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324-25, 59 Cal. Rptr. 463, 477 (1967).

67. See *Anonymous v. Hospital*, 33 Conn. Supp. 126, 366 A.2d 204 (Super. Ct. 1976); *P. v. Portadin*, 179 N.J. Super. 465, 432 A.2d 556 (App. Div. 1981); *J.M.P. v. Schmid Laboratories, Inc.*, 178 N.J. Super. 122, 428 A.2d 515 (App. Div. 1981) (*per curiam*).

68. *Hartke v. McKelway*, 707 F.2d 1544, 1522 n.8 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 585, 667 P.2d 1294, 1300 (1983) (*en banc*); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176-77 (Minn. 1977).

deny child-rearing expenses. Courts see such an award as meddling with the integrity of the family. These courts contend that awarding child-rearing costs "could have a significant impact on the stability of the family relationship"<sup>69</sup> and "impede rather than enhance the marital familial relationship."<sup>70</sup> Of course, the opposite may be true. Any easing of the economic burden related to the rearing of the unplanned child may promote rather than disrupt family harmony.

Another objection to the recovery of child-rearing expenses is that such damages are too speculative and uncertain.<sup>71</sup> However, courts that have rejected this damage limitation contend that difficulty in ascertainment does not justify complete denial of recovery.<sup>72</sup> Juries in tort cases frequently are required to determine intangible damages, both emotional and pecuniary; therefore, such difficulty is no basis for adopting a new rule for wrongful pregnancy cases.<sup>73</sup> A related objection is that the award of child-rearing costs will necessitate the application of the benefits rule at the time of birth which will be an exercise in prophecy<sup>74</sup> and will present insurmountable problems of proof.<sup>75</sup> Yet such calculations, regularly made by actuaries, are based on well-recognized economic factors. The costs of rearing a child "are well appreciated by the average citizen through first-hand experience."<sup>76</sup> These calculations, particularly the benefits offset, may be difficult, but they are no different than the calculations in wrongful death cases.<sup>77</sup>

Several public policy reasons for denying child-rearing costs focus on the burden of unfairness to the physician. In *Rieck v. Medical Protective Co.*,<sup>78</sup> the court held that awarding child-rearing costs "would be wholly

69. *Boone*, 416 So. 2d at 721 (Ala. 1982); *accord* *Wilbur v. Kerr*, 27 Ark. 239, 244, 628 S.W.2d 568, 571 (1982); *Flowers v. District of Columbia*, 478 A.2d 1073, 1077 (D.C. App. 1984).

70. *Boone*, 416 So. 2d at 728 (Jones and Shore, JJ., concurring specially); *accord* *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 201, 447 N.E.2d 385, 390, *cert. denied*, 464 U.S. 846 (1983).

71. *Boone*, 416 So. 2d at 721 (Ala. 1982); *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974) (dictum), *aff'd*, 349 A.2d 8 (Del. 1978); *Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Sorkin v. Lee*, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980); *McKernan v. Aasheim*, 102 Wash. 2d 411, 416, 687 P.2d 850, 855 (1984); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

72. *Betancourt v. Gaylor*, 136 N.J. Super. 69, 75-76, 344 A.2d 336, 340 (Law Div. 1975); *Troppe v. Scarf*, 31 Mich. App. 240, 261, 187 N.W.2d 511, 521 (1971).

73. *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 582, 667 P.2d 1294, 1297-98 (1983) (per curiam); *Fulton-Dekalb Hosp. Auth. v. Graves*, 252 Ga. 441, 445, 314 S.E.2d 653, 656 (1984) (Gregory, J., dissenting).

74. *Coleman v. Garrison*, 349 A.2d 8, 12 (Del. 1975).

75. *Terrell v. Garcia*, 496 S.W.2d 124, 127 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 972 (1974).

76. *Jones v. Malinowski*, 299 Md. 257, 272, 473 A.2d 429, 436-37 (1984).

77. *Hartke v. McKelway*, 707 F.2d 1544, 1552 n.8 (D.C. Cir.), *cert. denied*, 464 U.S. 986 (1983); *Ochs v. Borrelli*, 187 Conn. 253, 260, 445 A.2d 883, 886 (1982); *Jones v. Malinowski*, 299 Md. 257, 272, 473 A.2d 429, 436-37 (1984); *Troppe v. Scarf*, 31 Mich. App. 240, 261-62, 187 N.W.2d 511, 521 (1976); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977).

78. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

out of proportion to the culpability involved, and . . . would place too unreasonable a burden upon physicians.”<sup>79</sup> The *Rieck* court was concerned that an award would create a new category of surrogate parent.<sup>80</sup> This argument is contrary to well-established tort principles. Tortfeasors usually are liable for all foreseeable harm naturally flowing from their negligent acts, and they must take their victims as they find them. Ordinarily, damages are not weighed against culpability.<sup>81</sup> No rational explanation for such an alteration of tort principles has been found in the wrongful pregnancy cases to date.

Courts also fear that fraudulent claims will proliferate if child-rearing costs are awarded.<sup>82</sup> However, fraudulent claims can occur only in situations where failure to promptly diagnose a pregnancy is alleged. In these cases, parents allege that they would have aborted the fetus had they been informed of the pregnancy soon enough to do so. The majority of wrongful pregnancy cases do not lend themselves to fraudulent claims. The desire not to have any more children is implicit in an attempt at sterilization. This fraudulent claim argument also indicates a lack of faith in the jury system. Both the unreasonable burden and the fraudulent claim arguments “ignore the judicial process which daily meets other problems of equal difficulty and complexity with commendable results.”<sup>83</sup>

Among the reasons for denying child support because of unfairness to the physician is the claim that the damages are too remote to be reasonably connected to the alleged negligence.<sup>84</sup> The first court to use the “too remote” reason applied this rationale to damages associated with pregnancy and child birth rather than child-rearing costs.<sup>85</sup> Subsequent decisions applied the remoteness argument to child rearing costs. Courts using this argument ignore strong public policy against tortious action and in support of compensation for such actions. “Once liability is proven, it is axiomatic that the tort-feasor is liable for all damages

79. *Id.* at 518-19, 219 N.W.2d at 245; *accord* *White v. United States*, 510 F. Supp. 146, 149 (D. Kan. 1981); *Kingsbury v. Smith*, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

80. *Rieck*, 64 Wis. 2d at 519, 219 N.W.2d at 245.

81. It is not the defendant's culpability, but rather the consequence of his negligence, that is at issue. If the defendant has caused a large injury, he must pay a large sum in compensation. It makes no sense to say that the degree of his negligence should limit the size of the injured plaintiff's recovery.

Note, *supra* note 6, at 1320.

82. *Id.*; *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

83. *Speck v. Finegold*, 268 Pa. Super. 342, 357, 408 A.2d 496, 504 (1979), *aff'd in part and rev'd in part*, 497 Pa. 77, 439 A.2d 110 (1981).

84. *See Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Hickman v. Myers*, 632 S.W.2d 869, 872 (Tex. Civ. App. 1982); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

85. *Christensen v. Thornby*, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934) (alleged damages based on pregnancy and childbirth expenses are normal incidents of childbirth and are too remote from sterilization performed to protect mother's health).

which ordinarily and in the natural course of things have resulted from the commission of the tort.”<sup>86</sup>

Some courts have denied child-rearing costs by defining the wrongful pregnancy cause of action as an action related only to pregnancy. Thus, these courts conclude that “[i]n the main the damages for wrongful pregnancy have been established prior to the child’s birth.”<sup>87</sup> However, such a policy or rule of law would subject physicians to liability for direct, foreseeable and natural consequences of all negligently performed operations except sterilization, an illogical result.<sup>88</sup>

The award of child-rearing expenses is denied by a number of courts through the determination that such issues should be resolved by the legislature rather than by the courts.<sup>89</sup> Such an argument, usually the last presented, is common when courts refuse to take a particular stand.

The use and misuse of public policy to deny child-rearing costs has been criticized on various grounds. In *Wilbur v. Kerr*,<sup>90</sup> dissenting Justice Dudley renounced the invocation of public policy because of “the lack of a standard by which [to] determine when to apply public policy and the lack of a meaningful definition by which to discover what constitutes public policy.”<sup>91</sup> Public policy is subject to changes that occur in society. In *Schork v. Huber*,<sup>92</sup> Justice Liebson also rejected the invocation of public policy when such policy is based on the opinions or beliefs of judges, because the court’s duty is to follow established public policy and not to formulate new policy.<sup>93</sup> “Public policy should not extend to making a judgment, as a matter of law, that persons have suffered no damages from the foreseeable consequences of a medical procedure, even though we judges may believe that the emotional benefits of parenting outweigh the economic consequences.”<sup>94</sup>

Strong dissents are found in cases which invoke public policy to deviate from established tort principles because “any decision based upon a

86. *Speck*, 268 Pa. Super. at 364, 408 A.2d at 508; *accord* *Troppi v. Scarf*, 31 Mich. App. 240, 246, 187 N.W.2d 511, 514 (1971).

87. *Bushman v. Burns Clinic Medical Center*, 83 Mich. App. 453, 463, 268 N.W.2d 683, 687 (1978); *accord* *White v. United States*, 510 F. Supp. 146, 149 (D. Kan. 1981); *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff’d*, 349 A.2d 8 (Del. 1975); *Hickman v. Myers*, 632 S.W.2d 869, 871 (Tex. Civ. App. 1982).

88. *Jones v. Malinowski*, 299 Md. 257, 269-70, 473 A.2d 429, 435 (1984).

89. *See* *Schork v. Huber*, 648 S.W.2d 861, 863 (Ky. 1983); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 62, 391 N.E.2d 479, 487 (1979); *Hickman v. Meyers*, 632 S.W.2d 869, 871 (Tex. Civ. App. 1982). Further objections are raised to recognizing the tort at all, and these objectors likewise would leave such recognition to the legislature. *E.g.*, *Ziembra v. Sternberg*, 45 A.D.2d 230, 234, 357 N.Y.S.2d 265, 270 (1974) (Cardamone, J., dissenting).

90. 275 Ark. 239, 628 S.W.2d 568 (1982).

91. *Id.* at 245, 628 S.W.2d at 572 (Dudley, J., dissenting).

92. 648 S.W.2d 861, 864 (Ky. 1984) (Liebson, J., dissenting).

93. *Id.* at 864.

94. *Id.*

notion of public policy is one about which reasonable persons may disagree."<sup>95</sup> The dissenters, like the courts that refuse to invoke public policy to deny child-rearing costs, apply well-established tort principles to support wrongful pregnancy claims.<sup>96</sup>

#### D. *Partial Recovery: Offsetting Child-Rearing Costs With Benefits*

A minority of courts finds that the benefits of having a healthy child do not necessarily outweigh the burdens.<sup>97</sup> When the parents are able to prove that the defendant's negligence resulted in the birth of a child, these courts award complete damages, including all expenses incidental to rearing the healthy child. However, these courts also permit the defendant to prove offsetting benefits conferred upon the parents as the result of the birth and rearing of a healthy child. The courts that allow proof of offsetting benefits apply traditional tort principles and cite the benefits rule. Section 920 of the *Restatement (Second) of Torts* provides for some reduction of the plaintiff's recovery if the defendant can show that his conduct "has conferred a special benefit to the interest of the plaintiff that was harmed."<sup>98</sup> The purpose of the rule is to preclude the plaintiff's possible overcompensation, the basis lying in the equitable principle of unjust enrichment. In a wrongful pregnancy case, the plaintiffs have a healthy child and a substantial damages claim. The application of the rule is intended to prevent a windfall to the parents and an undue financial burden on the physicians.

Courts use several arguments to support the award of child-rearing costs. A key argument is that a wrongful pregnancy claim is essentially no different from any other medical malpractice action. Therefore, no reason exists to distinguish this claim from any other negligence action.<sup>99</sup> These courts do not see as their roles the questioning of morals but only the assessing of damages as in any other negligence case.<sup>100</sup> Illustrative of this stance is language from *Sherlock v. Stillwater Clinic*:<sup>101</sup>

[P]retermittting moral and theological considerations we are not per-

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95. *Public Health Trust v. Brown*, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980) (Pearson, J., dissenting), *petition denied*, 399 So. 2d 1140 (Fla. 1981).

96. *Fassoulas v. Ramey*, 450 So. 2d 822, 826 (Fla. 1984) (Ehrlich, J., dissenting).

97. *See supra* note 51.

98. The benefits rule is stated as follows:

When 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.

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

99. *Ochs v. Borrelli*, 187 Conn. 253, 260, 445 A.2d 883, 886 (1982); *Jones v. Malinowski*, 299 Md. 257, 269, 473 A.2d 429, 435 (1984); *Troppi v. Scarf*, 31 Mich. App. 240, 252, 187 N.W.2d 511, 516 (1971).

100. *Troppi*, 31 Mich. App. at 244-45, 187 N.W.2d at 513.

101. 260 N.W.2d 169 (Minn. 1977).



suaed that public policy considerations can properly be used to deny recovery to parents of an unplanned, healthy child of all damages proximately caused by a negligently performed sterilization operation . . . where the purpose of the physician's action is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred.<sup>102</sup>

The *Sherlock* court further stated that damages are important because such damages serve as an added deterrent to negligent performance of sterilization procedures.<sup>103</sup>

Another key argument for awarding child-rearing costs is that complete denial of such damages impairs the parents' constitutional right to forego reproduction.<sup>104</sup> Courts using this argument generally cite *Griswold v. Connecticut*<sup>105</sup> and *Roe v. Wade*<sup>106</sup> for support of the proposition that a fundamental right exists to limit the size of one's family, to not procreate. These courts disagree with the invocation of public policy arguments to deny child-rearing costs because "public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right."<sup>107</sup> They argue that public policy actually favors the plaintiff in a wrongful pregnancy case because the right to a personal choice regarding birth control and family planning is constitutionally protected. In *Public Health Trust v. Brown*,<sup>108</sup> Judge Pearson raised this assertion in his dissent, asking rhetorically, "if we cannot interfere with an individual's choice to forego the benefit of parenthood . . . by what reasoning can the majority arrive at a rule, based on public policy, which effectively nullifies the individual's choice?"<sup>109</sup> Therefore, a minority of courts would not make an exception for tort liability.

In *Troppi v. Scarf*,<sup>110</sup> the Michigan Court of Appeals applied the benefits rule to a wrongful pregnancy case for the first time. The *Troppi* court reduced the amount of damages awarded for economic, emotional, and

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102. *Id.* at 174.

103. *Id.* at 175.

104. See *Hartke v. McKelway*, 707 F.2d 1544, 1552 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982); *Fassoulas v. Ramey*, 450 So. 2d 822, 827 (Fla. 1984) (Ehrlich, J., dissenting); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977).

105. 381 U.S. 479 (1965) (zones of privacy within fourteenth amendment due process clause are broad enough to include the right of married couples to use contraceptives free from governmental interference); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of privacy to use contraceptives free from governmental interference extended to unmarried persons).

106. 410 U.S. 113 (1973) (due process includes a woman's right to choose to terminate pregnancy within first trimester free from governmental interference).

107. *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982).

108. 388 So. 2d 1084 (Fla. Dist. Ct. App.) (Pearson, J., dissenting), *petition denied*, 399 So. 2d 1140 (Fla. 1980).

109. *Id.* at 1087 (citations omitted).

110. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

physical injury by the benefit accrued to the parents by the birth of the unplanned child.<sup>111</sup> The *Troppi* court viewed the economic, physical, and emotional aspects of parenthood as one interest. Such analysis has been adopted by most courts that apply the benefits rule.

This application of the benefits rule has been criticized.<sup>112</sup> Critics argue that the non-pecuniary benefits to the parents resulting from the child's birth may not be properly offset against the pecuniary interest impaired. The *Restatement's* definition of "interest" is much narrower:

Damages for pain and suffering are not diminishable by showing that the earning capacity of the plaintiff has been increased by the defendant's act. Damages to a husband from loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting a wife.<sup>113</sup>

If courts applied the *Restatement's* definition of interest to wrongful pregnancy claims, parents' economic injury would not be offset by proving emotional benefit. Rather, the cost of child-rearing would be offset by the expected financial benefit of having the child, and emotional distress damages would be offset by the emotional joys of child rearing.<sup>114</sup> Such an application of the benefits rule also would consider the emotional and intangible costs and detriments which accompany parenthood such as psychological effects, reduced free time, and added constraints on activities.

Some courts that recognize the same interest limitation reject its application to wrongful pregnancy actions.<sup>115</sup> The *Troppi* court held that "[s]ince pregnancy and its attendant anxiety, incapacity, pain, and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damages from the economic cost of an unplanned child in applying the 'same interest' rule."<sup>116</sup> In so holding, the *Troppi* court further stated that the pregnancy costs should not be separated from child-rearing costs and, thus, benefits of child rearing should be used to offset pregnancy costs as well as rearing costs.

The *Troppi* approach may have harsh results at times, particularly if

111. *Id.* at 255, 187 N.W.2d at 518.

112. See *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 588-89, 667 P.2d 1294, 1303-04 (1983) (Gordon, Vice C.J., concurring in part and dissenting in part); *Flowers v. District of Columbia*, 478 A.2d 1073, 1080 (D.C. App. 1984) (Ferren, J., dissenting); *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 444, 314 S.E.2d 653, 655 (1984).

113. *RESTATEMENT (SECOND) OF TORTS* § 920 comment b (1979).

114. See Comment, *Damages for Wrongful Birth of Healthy Babies*, 21 DUQ. L. REV. 605, 621-22 n.17 (1983).

115. *Troppi*, 31 Mich. App. at 255, 187 N.W.2d at 518 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977) (acknowledges the existence of the "same interest" limitation but does not use the *Restatement's* narrow definition of "same interest").

116. *Troppi*, 31 Mich. App. at 255, 187 N.W.2d at 518.

the plaintiff is denied recovery. For this reason, in *Bushman v. Burns Clinic Medical Center*,<sup>117</sup> the Michigan court refused to follow *Troppi* and held that the damages incurred from the pregnancy and delivery need not be offset by the benefits received from having the blessing of a healthy child.<sup>118</sup>

In addition to the "same interest" limitation on the benefits rule, courts also have considered the application of the avoidable consequences doctrine<sup>119</sup> to wrongful pregnancy claims.<sup>120</sup> The avoidable consequences doctrine provides that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."<sup>121</sup> Plaintiffs in wrongful pregnancy cases could avoid all the child-rearing damages by placing the unplanned child up for adoption. In addition, the delivery related damages and most of the pregnancy damages could be avoided by aborting the unplanned fetus. However, the doctrine requiring injured persons to minimize damages requires only that reasonable measures be taken to avoid damages.<sup>122</sup> Furthermore, the plaintiff is not required to take any action to minimize his damages.<sup>123</sup> Religious, moral, and emotional overtones are associated with a decision to abort a fetus or place a child for adoption. Therefore, most courts that have considered the issue have rejected the avoidable consequences doctrine and have held as a matter of law that requiring plaintiffs in wrongful pregnancy cases to minimize damages by abortion or adoption would be unreasonable.<sup>124</sup>

117. 83 Mich. App. 453, 268 N.W.2d 663 (1978).

118. *Id.* at 461, 268 N.W.2d at 684 (reference to child-rearing costs as damages for "wrongful life").

119. RESTATEMENT (SECOND) OF TORTS § 918 (1979).

120. See *Boone v. Mullendore*, 416 So. 2d 718, 728 (Ala. 1982) (Jones and Shore, JJ., concurring specially); *Flowers v. District of Columbia*, 478 A.2d 1073, 1077 (D.C. App. 1984); *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 203-04, 447 N.E.2d 385, 390-91, *cert. denied*, 464 U.S. 846 (1983); *Ziamba v. Sternberg*, 45 A.D.2d 230, 233, 357 N.Y.S.2d 265, 269 (1974); *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 371, 428 A.2d 1366, 1374-75 (1981) (Brosky, J., concurring).

121. RESTATEMENT (SECOND) OF TORTS § 918 (1979).

122. *Id.* comment c. See generally *Troppi*, 31 Mich. App. 240, 258, 187 N.W.2d 511, 519 (quoting *McCORMICK, DAMAGES* 35 (1935)) ("If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages").

123. See RESTATEMENT (SECOND) OF TORTS § 918 comment a (1979).

124. "[T]he best interest of the child, and the natural instincts of the parent, make it unreasonable to require parents to submit the child in the womb to abortion or the child in the crib to adoption." *Schork v. Huber*, 648 S.W.2d 861, 866 (Ky. 1983) (Liebson, J., dissenting); *accord*, *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 586 n.5, 667 P.2d 1294, 1301 n.5 (1983) (en banc); *Morris v. Frudenberg*, 135 Cal. App. 3d 23, 31, 185 Cal. Rptr. 76, 80 (1982); *Stills v. Gratton*, 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652, 658 (1976); *Fassoulas v. Ramey*, 450 So. 2d 822, 829 (Fla. 1984) (Ehrlich, J., dissenting); *Jones v. Malinowski*, 299 Md. 257, 274, 473 A.2d 429, 438 (1984); *Clapham v. Yanga*, 102 Mich. App. 47, 58-59, 300 N.W.2d 727, 733 (1980) (per curiam), *appeal denied*, 412 Mich. 889, 335 N.W.2d 1 (1981); *Troppi v. Scarf*, 31 Mich. App. 240,

In *Troppi v. Scarf*,<sup>125</sup> the court indicated that adoption may have too great an adverse psychological impact on both the child and the parents. A strong objection to requiring abortion to minimize damages was expressed by the dissent in *Mason v. Western Pennsylvania Hospital*.<sup>126</sup> In a concurring opinion, Judge Brosky stated that "[t]he very suggestion carries a pungent odor of moral depravity. The defendant, whose tortious act is responsible for the conception of the child, would now force the termination of its existence so that damages assessed against him might be minimized."<sup>127</sup>

The avoidable consequences doctrine has been used by some courts to bar recovery of child-rearing costs. The court in *Shaheen v. Knight*<sup>128</sup> was the first to suggest adoption as a means of avoiding damages.<sup>129</sup> The plaintiff's desire to keep the child seemed to be a key factor in the court's disallowance of child-rearing costs which were the only requested damages. When the parents do not abort the fetus or place the child up for adoption, some courts hold that the parents' inaction creates an irrebuttable presumption that their benefits exceed the burdens caused by the tort.<sup>130</sup> Courts that take this position implicitly are ruling as a matter of law that abortion and adoption are always reasonable measures to avoid damages.

In *Fassoulas v. Ramey*,<sup>131</sup> dissenting Judge Ehrlich strongly disagreed with the use of the avoidable consequences doctrine to conclusively presume that parents were benefited from the birth of a healthy unplanned child. A tortfeasor has to take an injured person as he finds him:

If the parents do not wish to undergo an abortion or adoption, then the tortfeasor cannot be heard to complain that his damages are greater than if he had caused a wrongful conception or wrongful birth by a woman who was willing to abort or place a child up for adoption."<sup>132</sup>

Another approach to the question of reasonableness of avoidance of damages has been to allow the trier of fact to decide whether failure to undergo an abortion or select adoption is reasonable or unreasonable. In

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260, 187 N.W.2d 511, 520 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977); *Kingsbury v. Smith*, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).

125. 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (1971).

126. 286 Pa. Super. 354, 428 A.2d 1366 (1981).

127. *Id.* at 371, 428 A.2d at 1374-75 (Brosky, J., concurring).

128. 11 Pa. D. & C.2d 41 (1957).

129. "Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such. In our opinion to allow such damages would be against public policy." *Id.* at 46.

130. See *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); *Public Health Trust v. Brown*, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980); *Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Sorkin v. Lee*, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980) (irrebuttable presumption not expressly stated but implied).

131. 450 So. 2d 822 (Fla. 1984) (per curiam).

132. *Id.* at 829 (Ehrlich, J., dissenting).

*Ziembra v. Sternberg*,<sup>133</sup> the court examined the circumstances surrounding the woman's refusal to abort and held the refusal reasonable.<sup>134</sup> The *Ziembra* court considered such factors as the stage to which the pregnancy had progressed, the health of the woman, and the type of professional counseling she had received.<sup>135</sup> The *Ziembra* court also held that the right to have an abortion may not be converted automatically to an obligation to have one.<sup>136</sup>

The *Ziembra* approach to avoidance of damages is the best approach. As one commentator has noted, "[t]he Restatement's avoidable consequences rule contemplates a case-by-case determination of whether it would have been reasonable in the circumstances for the plaintiffs to avoid increasing their injury; and questions of reasonableness are generally questions of fact, not of law."<sup>137</sup> In most cases, the trier of fact should decide the reasonableness of the parents' failure to minimize damages in light of the facts of each case. Only in cases where reasonable persons could not differ should the judge rule on the facts as a matter of law.<sup>138</sup>

Further problems in the application of the benefits rule stem from the proposition that the benefits can offset the damages only "to the extent that this is equitable."<sup>139</sup> Because the main benefit derived from parenthood is the emotional benefit, the more loving the parent, the less his economic recovery would be. This is hardly an equitable result.<sup>140</sup> Also, an unwanted, unplanned child is a benefit that was not sought by the parents. The *Restatement* notes that the purpose of the benefits rule is not to allow the defendant to "force a benefit on the plaintiff against his wishes."<sup>141</sup> However, the benefit offset approach leads to such consequences. "[T]he defendant can be analogized to an officious intermeddler, and when he argues that the damages assessed against him should be offset by the unsolicited benefits of parenthood, the resemblance is quite striking indeed."<sup>142</sup>

133. 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).

134. *Id.* at 233, 357 N.Y.S.2d at 269.

135. *Id.*

136. *Id.*

137. Note, *supra* note 6, at 1328; see also Note, *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 FORDHAM L. REV. 1107, 1119 (1985) (proposes that the *Restatement (Second) of Torts* intended to leave the issue of mitigation to the jury as indicated by § 283 comment c which states that the trier of fact should decide whether one's conduct is reasonable).

138. C. WRIGHT, THE LAW OF FEDERAL COURTS § 94, at 628 (4th ed. 1983).

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

140. "Whatever those child[-rearing expenses] are determined to be, they are simply not reduced by the satisfaction, love, joy and pride which an unplanned child may provide his parents." *Mason v. Western Pa. Hosp.*, 499 Pa. 484, 496, 453 A.2d, 974, 981 (Larsen, J., concurring and dissenting).

141. RESTATEMENT (SECOND) OF TORTS § 920 comment f (1979).

142. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 MIAMI L. REV. 1409, 1416 (1977).

Courts that have adopted the rule that child-rearing costs are not recoverable as a matter of law usually considered but for various reasons rejected the benefit offsetting approach. In *Kingsbury v. Smith*,<sup>143</sup> the court refused to adopt the benefits rule and argued that logic did not allow both a detriment and a benefit to result from the identical medical malpractice.<sup>144</sup> Yet, the benefits rule would not have been devised if the same conduct that injures could not simultaneously confer a benefit. In *Beardsley v. Weirsdma*,<sup>145</sup> the court said that the benefits rule, with its concomitant balancing, reduces the child to an object, thereby demeaning both the child and the courtroom where the case is being tried.<sup>146</sup> However, the benefits rule has been applied in many actions of torts against a person. In speculating on possible results of the application of the benefits rule, the *Beardsley* court foresaw the "ridiculous result that benefits could be greater than damages, in which event someone could argue that the parents would owe something to the tortfeasors."<sup>147</sup> This argument fails if the "same interest" limitation is applied.

The court in *Fulton-Dekalb Hospital Authority v. Graves*<sup>148</sup> observed that the use of the benefits rule applied the theory of consequential damages and consequential benefits to human life and parenthood. The court was not willing to rely upon such a theory in this area of delicate human relations. On a related basis, the court in *Flowers v. District of Columbia*<sup>149</sup> objected to the benefits rule because "a parent seeking to recover for an unplanned child [would] be strongly tempted to denigrate the child's value to the extent possible in order to obtain as large a recovery as possible."<sup>150</sup> Like *Beardsley*, the *Flowers* objection loses force when the "same interest" limitation is applied.

The court in *McKernan v. Aasheims*<sup>151</sup> contended that to determine at an early state in the child's life whether the birth benefited or damaged its parents is impossible because "[t]he child may turn out to be loving obedient and attentive, or hostile unruly and callous. The child may grow up to be President of the United States, or to be an infamous criminal."<sup>152</sup> In *Coleman v. Garrison*,<sup>153</sup> the court simply objected to applying the rule because such application would be an exercise in prophecy. Yet

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143. 122 N.H. 237, 442 A.2d 1003 (1982).

144. *Id.* at 243, 442 A.2d at 1006.

145. 650 P.2d 288 (Wyo. 1982).

146. *Id.* at 293; *accord* Cockrum v. Baumgartner, 95 Ill. 2d 193, 202, 447 N.E.2d 385, 390, *cert. denied*, 464 U.S. 846 (1983); Nanke v. Napier, 346 N.W.2d 520, 523 (Iowa 1984).

147. *Beardsley*, 650 P.2d at 293.

148. 252 Ga. 441, 444, 314 S.E.2d 653, 655 (1984) (*per curiam*).

149. 478 A.2d 1073 (D.C. App. 1984).

150. *Id.* at 1076; *accord* Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982); Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86 n.4 (Fla. Dist. Ct. App. 1980), *petition denied*, 399 So. 2d 1140 (Fla. 1981); Weintraub v. Brown, 98 A.D.2d 339, 349, 470 N.Y.S.2d 634, 641 (1983).

151. 102 Wash. 2d 411, 687 P.2d 850 (1984).

152. *Id.* at 419-20, 687 P.2d at 855; *accord* White v. United States, 510 F. Supp. 146, 150 (D.

in cases involving the wrongful death of a child, cases in which the same problems exist, courts do not hesitate to permit an award of damages. The continuing resistance of a majority of courts to award full damages in wrongful pregnancy actions has led to further refinement and clarification of the benefit offsetting approach.

#### E. *Recovery Based on Parents' Harmed Interest Offset By Benefits*

The difficulties courts have experienced in setting damages in wrongful pregnancy cases stem from viewing the claim as one for the birth of a child. A different analytic approach views the claim as one for expenses resulting from the birth of a child.<sup>154</sup> While other approaches consider the injury to be the product of the negligent act, *i.e.*, the healthy child, this approach emphasizes that the injury is the burdens—which the parents have tried to avoid by sterilization—forced upon them as a direct and foreseeable consequence of the physician's negligence.<sup>155</sup> Refocusing from the child to the parents provides a different approach for calculating damages. The question that courts must ask is what interest the plaintiff sought to protect in attempting to avoid procreation, *i.e.*, what was the parents' motivation or reason for undergoing a sterilization operation? Once the interest of the plaintiff has been determined and damages have been proved, the court must determine whether the tortfeasor has conferred upon the plaintiff a benefit with regard to that interest.

The *Hartke* court identified three different reasons for undergoing sterilization: socioeconomic,<sup>156</sup> eugenic,<sup>157</sup> and therapeutic.<sup>158</sup> In these three circumstances, different parental interests are impaired when the physician's negligent operation results in conception, pregnancy, and birth. Damages in turn depend on both the harm and the benefits conferred upon the interest that the parents sought to protect. The reason for choosing sterilization, as observed by the *Hartke* court,

is in effect a calculation of the way in which [the parents] anticipate the costs of child birth to outweigh the benefits. That calculation, untainted by bitterness and greed, or by a sense of duty to a child the parents have brought into the world, is usually the best available evidence of the extent to which the birth of the child has in fact been an injury to them.<sup>159</sup>

Kan. 1981); *Public Health Trust*, 388 So. 2d at 1086; *James G. v. Caserta*, 332 S.E.2d 872, 878 n.11 (W. Va. 1985).

153. 349 A.2d 8, 12 (Del. 1975).

154. This approach has been suggested by courts and commentators but was delineated for the first time in *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir.), *cert. denied*, 414 U.S. 983 (1983). See *supra* note 43 and accompanying text.

155. *Jones v. Malinowski*, 299 Md. 257, 270, 473 A.2d 429, 435-36 (1984).

156. *Hartke*, 707 F.2d at 1553-54 (to prevent financial burden and/or effect on lifestyle).

157. *Id.* (to prevent the birth of a physically and/or mentally impaired child).

158. *Id.* (to prevent harm to the mother's physical and/or mental health).

159. *Hartke*, 707 F.2d at 1555.

In cases of eugenic sterilization<sup>160</sup> the injury contemplated by the parties at the time of sterilization is the birth of an impaired child. If a healthy child is born, the interest that the parents sought to protect remains unharmed. In this case, just damages would cover the costs of the unsuccessful sterilization and any emotional distress suffered by the parents up to the time they knew that their child would be born healthy and unimpaired. If, on the other hand, the child is born impaired, then the damages should be similar to those awarded in wrongful birth cases. The parents sought to avoid the birth of an impaired child; hence, costs associated with the impairment should be awarded. Such damages would include extraordinary pecuniary costs associated with the physical or mental impairment as well as emotional distress.

In cases of therapeutic sterilization<sup>161</sup> the injury sought to be avoided at the time of sterilization is the impairment of the mother's health. If the mother remains well throughout pregnancy and delivery, then the contemplated injury does not occur. In such cases, damages should be limited to the costs of the unsuccessful sterilization operation and any emotional distress arising from the anticipated effect of pregnancy and childbirth on the mother's health. If, however, the mother's health was impaired and the parents incurred medical costs and costs for child rearing assistance, then these costs would be recoverable in addition to all pregnancy related costs.

In cases of socioeconomic<sup>162</sup> sterilization, the parents clearly seek to avoid the economic burden of a child. Even if the child is born healthy, the interest that the parents sought to protect has been harmed. Just damages should include liberal child rearing costs. In a dissenting opinion, Judge Ferren of the District of Columbia observed that "[i]n a case where plaintiff can prove that financial straits motivated sterilization . . . [plaintiff] seeks compensation only for provable financial injury for physician malpractice. Accordingly, this would not be a financial windfall; . . . [plaintiff] would merely be sustained in the tight financial position she found herself in before the physician's negligence."<sup>163</sup> Of course, any emotional damages would be offset by any emotional benefits from having a child.

When the reason for sterilization is more social than economic, the interest the parents seek to protect at the time of sterilization is harder to identify,<sup>164</sup> and the damages are harder to assess. Lifestyle or career dis-

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160. See *supra* note 11.

161. See *supra* note 10.

162. See *supra* note 12.

163. *Flowers v. District of Columbia*, 478 A.2d 1073, 1082 (D.C. App. 1984) (Ferren, J., dissenting).

164. Comment, *Recovery of Childbearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167, 1195 (1983).



ruption may have a financial aspect but such disruption may also be completely non-pecuniary. In the latter situation, offsetting damages by non-pecuniary benefits of child-rearing may drastically reduce the award.<sup>165</sup>

Occasionally plaintiffs possess more than one reason for a decision to undergo sterilization.<sup>166</sup> In a footnote, the *Hartke* court observed that the motivational analysis is not a cureall:

This approach will be primarily useful in cases in which the evidence of the reason for undergoing sterilization is unambiguous and overwhelming, as it is in this case. Where there is a mixture of motivations, and the socioeconomic reasons are at least a but-for reason for undergoing the operation, the trier of fact will have to look to more direct, but perhaps less reliable, evidence of whether the birth of a child constitutes damage to parents.<sup>167</sup>

However, damages will most accurately reflect the injury suffered if the defendant pays for the very risks that the plaintiff sought to avoid and those risks come to pass.<sup>168</sup> Cases decided subsequent to *Hartke* have incorporated this rationale. In *University of Arizona Health Sciences Center v. Superior Court*<sup>169</sup> and *Jones v. Malinowski*,<sup>170</sup> the courts indicated that the trier of fact must inquire into the parents' motivation for undergoing the sterilization operation.<sup>171</sup> The *Jones* court held that, as a prerequisite to recovery, the interest harmed by the negligent sterilization must be the same interest that the sterilization was meant to protect. Thus, a physician is not liable for child-rearing costs every time a child is born subsequent to a sterilization procedure on one of the parents. A physician would be liable for these costs only when the plaintiffs prove the physician was negligent, and the fact finder determines that the economic interest of the parents was harmed.<sup>172</sup>

#### IV. CONCLUSION

The tort claim of wrongful pregnancy has been recognized in almost all jurisdictions presented with the issue. However, courts are in disagreement on the question of damages. Four different approaches have been used. Early courts denied all damages on the theory that the birth of

165. *Id.* at 1196.

166. *Jones v. Malinowski*, 299 Md. 257, 260, 473 A.2d 429, 430 (1984) (plaintiff sought to avoid another pregnancy for economic reasons and to prevent recurrence of prior traumatic experiences with pregnancy and childbirth, i.e., first child — breach birth, second child — congenital brain disease, third child — congenital heart disease); *Ball v. Mudge*, 64 Wash. 2d 247, 248, 391 P.2d 201, 203 (1964) (plaintiff sought to avoid expense of childbirth and rearing; obstetrician advised against pregnancy after plaintiff's delivery of three children by Caesarian section in as many years).

167. *Hartke*, 707 F.2d at 1555 n.12.

168. *Id.* at 1555.

169. 136 Ariz. 579, 667 P.2d 1294 (1983) (en banc).

170. 299 Md. 257, 473 A.2d 429 (1984).

171. *Id.* at 272, 473 A.2d at 437.

172. *Id.* at 272, 473 A.2d at 436.

a child was a blessed event. A few courts have awarded all damages and costs associated with childbearing and child rearing without an offset. These two approaches, by far the most extreme, have received little support. Most courts have resorted to either of two middle ground approaches. The majority of courts allow the recovery of damages associated with the pregnancy and delivery and deny child-rearing costs. A minority of courts allow the recovery of all damages and apply the benefits rule to offset damages by benefits received.

Viewed simply as a negligence case, the negligent physician is responsible for the expenses which are reasonably foreseeable consequences of his actions. When stripped of its emotional and value overtones, the issue remains one of compensation for an injury. Courts should not rule as a matter of law that public policy considerations always outweigh the economic burden to parents. Parents who seek sterilization have already decided that for them the burdens outweigh the benefits. Such a decision is not an indication that the parents view the child's life as having little value. A decision not to have a child is certainly no more a denigration of the value of a child's life than is the thought that accidental procreation reflects a true appreciation of the value of life. Tortfeasors should not be immunized from full accountability for their tortious conduct just because their negligence results in human life. Juries should be allowed to consider all the arguments and, based on their own experience, weigh all factors when ruling on the issue of damages.

Complete recovery in wrongful pregnancy cases will deter negligence, hold tortfeasors accountable for their wrongs, and compensate parents who deliberately attempted to prevent childbirth. The benefits rule should be applied to offset benefits of the same interest. Only interests harmed by the negligence should be compensated. The avoidable consequences doctrine should also be applied on a case-by-case basis.

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