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Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat

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WRONGFUL BIRTH DAMAGES: MANDATE AND MISHANDLING BY JUDICIAL FIAT

INTRODUCTION

At one time, procreation was thought to be the chief purpose of marriage.[1] That idea has ceased to enjoy popularity. Today for many people the addition of another mouth to feed is no longer a "blessed event."[2] In fact, it is something they wish to avoid. Thus, the practices of contraceptive use, abortion, and sterilization have increased in recent years,[3] and so, inevitably, has the number of related lawsuits.[4] Among the most controversial of the ensuing causes of action is that of "wrongful birth."[5] In a wrongful birth action the

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1. *See* Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (Lycoming Cty. 1957).

2. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 475 (1967); Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169, 173 (1977).

3. A. GUTTMACHER, PREGNANCY, BIRTH AND FAMILY PLANNING 306 (1973).

4. Among these suits is one type not directly addressed in this note, *viz.*, products liability suits for birth control pills or devices. In Whittington v. Eli Lilly and Co., 333 F. Supp. 98 (S.D.W. Va. 1971), the plaintiff sued the manufacturer of an oral contraceptive for breach of warranty of fitness. Because the product had been advertised as *"virtually"* 100% effective, the claim was denied.

5. Wrongful birth actions are often confused with suits for "wrongful life." A suit for wrongful life is brought by the child himself to recover damages for wrongfully being born, and is not necessarily confined to the context of birth control failure. For instance, in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), a child sued his father for allowing him to be born illegitimate. Actions for wrongful life have been unsuccessful, with only two exceptions. *See* Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973); Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977). *Park* granted damages for *both* wrongful life and wrongful birth, but was later modified to include only the parents' claim. *See* note 196 *infra* and accompanying text.

The term "wrongful life" has been employed by courts in referring to two disparate situations. Besides the type of action represented by *Zepeda*, *Jorgensen*, or *Park*, wherein negligence has caused a child to be conceived, there is also the situation presented when a child conceived absent negligence of a third party is permitted to *live* due to a negligently performed abortion. *See, e.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976). Clearly there is a distinction: in one context, the wrong begins with conception; in the other, the wrong occurs later. The "wrongful life" in *Stills* is the unsuccessful killing, rather than the creation of life. Adding to the confusion, rather than solving the problem, the court in Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169 (1977), labelled the cause of action there—a negligent sterilization—"wrongful conception." *Id.* at 170.

As used in this note, the term "wrongful birth" stands for the type of lawsuit in which a parent or parents of an unplanned child sue for the damages they allegedly

parents of an unplanned child seek to shift to the defendant[6] various costs, including medical expenses of pregnancy and delivery, pain and suffering,[7] and the more formidable costs of rearing and educating a child.[8] As the history of this litigation has progressed, the damages claimed have been more extensive.

The litigation arises in several contexts. Malpracticed sterilization operations, including both tubal ligations and vasectomies[9] constitute the major number of suits. Included also are failures to diagnose pregnancy in time for abortion and failures to perform successful abortions. The suits are brought mainly on the basis of negligence.[10] However, breach of warranty,[11] breach of contract,[12] and misrepresentation[13] have also been alleged as bases of liability. Often the tort and contract bases are pleaded alternatively.[14]

These situations seem to fit easily into a negligent tort context: there is duty,[15] breach, proximate cause,[16] and ostensible damage.

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have incurred as a result of his conception or birth, or both. Pretermitting its self-assigned label, *Sherlock* is treated as a suit for wrongful birth, as is *Stills*.

6. Usually the defendant in such a case is a physician, clinic, or hospital. However, in Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971), the defendant was a pharmacist who negligently substituted tranquilizers for the plaintiff's birth control prescription. Suits against physicians often include co-defendants. *See, e.g.*, Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973) (hospital director); Hackworth v. Hart, 474 S.W.2d 377 (Tenn. 1971) (lab technician).

7. Two varieties of pain and suffering have been recognized. In addition to that suffered in the course of childbirth, pain and suffering in *raising a child* has been approved as compensable. *See* Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975).

8. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971). This is not to say, however, that all types of damages are always claimed. In Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967), the plaintiffs did not claim rearing costs as damages; conversely, in Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), those were the only damages claimed.

9. Negligence is particularly difficult to prove in vasectomy cases, due to the frequency of recanalization. *See* Lombard, *Vasectomy*, 10 SUFFOLK L. REV. 25, 43 (1975). This contingency led to the verdict for defendant in Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

10. *See, e.g.*, Lane v. Cohen, 201 So. 2d 804 (Fla. App. 1967); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974).

11. *See, e.g.*, Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973); Coleman v. Garrison, 349 A.2d 8 (Del. 1975).

12. *See, e.g.*, Baldwin v. Sanders, 266 S.C. 394, 223 S.E.2d 602 (1976).

13. *See, e.g.*, Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

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

15. As in all other medical malpractice actions, the physician is bound to the standard of the skill and learning possessed by other members of the profession in good standing. *See generally* W. PROSSER, LAW OF TORTS § 32 at 162 (4th ed. 1971).

16. The causation issue has been carried to extremes. For example, some

However, the underlying issues are not quite so simple, and the courts are not agreed on the questions of whether damage exists and, if so, what the measure of damages should be. This note challenges the simplistic tort treatment accorded wrongful birth damages in most jurisdictions. The discussion begins with the question of injury. Then, assuming that injury does exist, the note traces the issues involved in measuring damages, including the questions of speculation, benefits conferred, and mitigation. Without correct application of these three principles to reduce or eliminate damages, the recoverable damages represent an undue financial burden on defendants, completely disproportionate to the injury involved.

While there is some authority for the proposition that the birth of an unplanned child constitutes no injury,[17] the more prevalent and arguably more sensible approach is to admit that it does. It does not follow, however, that where injury exists, damages must always be awarded.[18] Indeed, in the wrongful birth context, there are several reasons for which recovery can and should be denied. Public policy considerations, particularly those concerning the child's well-being and the possibility of fraud, should militate against recovery.[19] Moreover, despite the finding of injury, the cause of action itself is unknown at common law and should await legislative action, rather than arise as judicial fiat.[20] Thus, it would appear that the courts have had sufficient reason to deny recovery of wrongful birth damages.

The majority of courts permit recovery of damages which can be ascertained only through speculation and conjecture. This is true because the majority approach allows recovery for all consequential damages proximately caused by the defendant's act.[21] However, the limitation of proximate cause, when applied to the "wrong" of human life, is really no limitation at all: a human life is a complex, ongoing entity, interacting in diverse ways with other lives and interests. Recognition of this problem of speculation should lead to

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defendants have called the act of sexual intercourse an "intervening cause" which cuts off their liability. *See, e.g.*, Bishop v. Byrne, 265 F. Supp. 460, 464 (S.D.W. Va. 1967); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 472 (1967). This defense has been unsuccessful.

17. *See* Shaheen v. Knight, 11 Pa. D. & C.2d 41 (Lycoming Cty. 1957).

18. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242, 244 (1974).

19. *Id.* at 245.

20. Clegg v. Chase, 89 Misc.2d 510, 391 N.Y.S.2d 966, 968 (1977).

21. *See, e.g.*, Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975). *See also* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

denial or restriction of damages, yet it has been addressed by only a few courts.[22] It is clear that the only damages which can be assessed with reasonable certainty are the costs of pregnancy and delivery. Unless such a limitation is imposed, the damages recoverable are both speculative in nature and indefinite in scope.[23]

If damages are not denied on grounds of public policy or speculation, they should be diminished in two ways. First, they should be depleted by the amount of benefit accruing to the plaintiffs. Just as there are various sorts of apparent injury involved in the birth of an unplanned child, there are also various benefits conferred by his addition to the family. A true application of the benefit rule[24] would involve weighing each type of benefit against each corresponding type of detriment. The usual approach, however, is to view the total benefit as outweighed by the total costs.[25] The next manner in which damages should be limited is by application of the rule of avoidable consequences. Plaintiffs should not be permitted to recover damages which could have been avoided by reasonable conduct. Abortion and adoption may in some cases be reasonable alternatives to delivering and raising an unplanned child, and thus should be considered on the issue of mitigation. Nevertheless, it has been held as a matter of law that such alternative conduct should not be required.[26] Since the benefit rule has been viewed too simplistically, and where the doctrine of avoidable consequences has been arbitrarily rejected, courts should now reconsider their positions.

By not implementing restrictions on recovery, courts have created more present and potential[27] problems than they have solved. They have perhaps succeeded in establishing a deterrent to negligent conduct, but they have unjustly enriched plaintiffs and imposed undue financial burdens on defendants. It is now time for the courts to re-examine their approaches to wrongful birth damages. This re-examination should begin with the question of whether injury and a cause of action should be recognized.

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22. *See, e.g.*, Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

23. *See id.* at 245.

24. The benefit rule requires that where the defendant causes harm to the plaintiff or the plaintiff's property but at the same time confers a benefit to that same interest, the value of the benefit should be used to offset the damages. *See* RESTATEMENT OF TORTS § 920 (1939).

25. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

26. *Id.* at 519-20.

27. *See* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974). In that case, one reason for denying recovery was that the tort would have no just or sensible stopping point. *Id.* at 245.

INJURY IN FACT AND CAUSE OF ACTION

For liability to arise in a cause of action founded upon negligence, more than conduct must be present. Besides duty, breach of duty, and proximate cause, a negligent tort action requires actual loss or damage to the interests of another party.[28] In the wrongful birth context the question becomes whether the parents of the unplanned child have suffered injury as a result of the alleged malpractice. Unmistakably, pregnancy and child-raising cost money; yet treating unplanned parenthood as a civil wrong has elicited radically different reactions from the courts. Jurists do not agree whether any injury exists, and those who agree there is injury disagree on whether a wrongful birth cause of action is cognizable at law. Although some courts hold otherwise,[29] it is realistic to admit that the birth of an unplanned child constitutes injury.[30] Such a realization, however, does not mandate the awarding of damages if public policy dictates differently.[31] There are significant policy considerations militating against full recovery for wrongful birth. Furthermore, because the action is previously unknown at common law and involves moral and ethical issues, the decision of whether a cause of action exists would most appropriately lie with state legislatures.[32] Yet in spite of the far-reaching issues, these initial questions of injury in fact and cause of action have been decided only by courts.

Presently the majority view is that an unplanned child is an injury to his parents. This viewpoint began to find increasing acceptance in the late 1960's, possibly as a result of the Supreme Court decisions in *Griswold v. Connecticut*[33] and *Roe v. Wade*.[34] Dicta in *Roe* painted unwanted pregnancy as clearly injurious:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned,

28. W. PROSSER, LAW OF TORTS § 30 at 143 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 281 (1965).

29. *See, e.g.*, Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (Lycoming Cty. 1957).

30. *See, e.g.*, Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169, 175 (1977). The court in that case declared it is myopic to view the unplanned child nowadays as anything but a net loss.

31. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242, 244 (1974).

32. Clegg v. Chase, 89 Misc.2d 510, 391 N.Y.S.2d 966, 968 (1977).

33. 381 U.S. 479 (1965).

34. 410 U.S. 113 (1973).

> associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.[35]

Moreover, as is often pointed out, the sheer volume of contraceptive practice in the United States[36] demonstrates that child-bearing and child-rearing are tasks that persons wish to avoid. What was once a "blessed event"[37] is now a disease[38] or disability.[39]

Notwithstanding the dicta in *Roe*, wrongful birth decisions offer little explanation of how unplanned human life constitutes injury to parents.[40] The majority apparently find injury *per se* in whatever consequences flow from the negligent act.[41] Without explaining why injury exists, they hold that all provable injuries must be compensated.[42]

While most courts do not separate consequences of birth control failure into injuries and non-injuries, some have recognized a positive element in parenthood. To reconcile the conflicting aspects of such consequences, they have employed the "offsetting benefit" rule, subtracting the value of the benefit from the cost of the injury.[43] Of course, such an approach is predicated upon the existence of injury. It does not go so far as to deem unplanned parent-

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35. *Id.* at 153.

36. During the first half of this decade, an estimated 3,566,000 men in this country voluntarily became sterilized. *See* Lombard, *Vasectomy*, 10 SUFFOLK L. REV. 25 (1975). Recent studies also indicate that sterilization is fast becoming the preferred contraceptive measure among married persons. Statistics in 1975 showed that 6.8 million couples had chosen sterilization, while only 7.1 million married women used oral contraceptives. *See Sterilization Becoming Top Birth Control*, The Minneapolis Star, July 22, 1977, at 1A, col. 1.

37. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 475 (1967).

38. In a paper presented before the annual convention of the Association of Planned Parenthood Physicians, three doctors from the Center for Disease Control in Atlanta referred to pregnancy as "the Number Two Sexually Transmitted Disease." *See* National Right to Life News, January, 1977, at 10, col. 2. Moreover, the chief of abortion surveillance at the CDC contends that so labelling pregnancy is demonstrative of restraint, inasmuch as the most widely read text on obstetrical procedure refers to unwanted pregnancy as a "venereal disease." *See* National Right to Life News, March, 1977, at 9, col. 2.

39. *Cf.* General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (disability not covered by company's insurance plan).

40. *See, e.g.*, Jackson v. Anderson, 230 So. 2d 503 (Fla. App. 1970); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

41. *See, e.g.*, Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975).

42. *Id.* at 340.

43. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 517-18 (1971).

hood a benefit; rather, it labels parenthood an injury with beneficial aspects.[44]

A more radical approach, taken by only one court,[45] is division of ensuing consequences into compensable and non-compensable injuries. This procedure has resulted in separation of pregnancy costs from child-rearing costs.[46] In so doing, it compromises the two dichotomous viewpoints on wrongful birth, by compensating what nearly every court agrees is an injury[47] and denying recovery for what the courts cannot agree is injurious.[48] Thus, while taking a somewhat moral stance, the decision rests firmly on legal principles. Although it severely restricts recovery, it admits the existence of injury.

Some courts, however, have declined to hold that an unplanned child constitutes injury. One approach taken to reach this conclusion appears to be nothing more than a private, nonobjective feeling on the part of a particular judge or jury. For instance, one court held that because the plaintiff parents would neither place the child for adoption nor sell the child, the jurors as reasonable persons might well conclude that no injury was suffered and that the cost of birth was "far outweighed by the blessing of a cherished child."[49] Besides its problem of patent subjectivity, this holding confuses the question of injury with two other issues. As mentioned earlier, the injury question is distinguishable from the question of offsetting benefits; however, some cases purporting to hold there is no damage do so on the basis of the overriding benefits.[50] Furthermore, such a holding blurs the distinction between injury and mitigation of damages.[51] The questionable conclusion reached is that by failing to mitigate their alleged injury by abortion[52] or adop-

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44. *See* Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169 (1977).

45. *See* Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

46. *Id.* at 761.

47. *See, e.g.*, Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169 (1977).

48. *Compare* Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (Lycoming Cty. 1957) *with* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 475 (1967).

49. Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201, 204 (1964).

50. *See, e.g.*, Terrell v. Garcia, 496 S.W.2d 124, 127 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

51. This blurred distinction occurs in the earlier cases, before courts began to suggest that wrongful birth lends itself easily to applications of tort law.

52. While it has been suggested that the failure to abort indicates no damage has been incurred, most courts apparently believe abortion is too drastic a measure to

tion,[53] plaintiffs have impliedly stated they have suffered no damage[54] or have suffered damage wholly outweighed by the benefits of parenthood.[55] Clearly, the issues are separate: in other tort situations, the failure of a plaintiff to mitigate damages may curtail or preclude his recovery, but does not prove that no injury has occurred.[56] Thus, the usual logic employed to find a lack of injury cannot withstand close scrutiny.

Another approach taken to find no injury is quite logical, but has been applied by only one court. This approach looks to the *purpose* for which the birth control method was sought or employed, in order to determine whether the plaintiff's interests have been injured. In *Christensen v. Thornby*,[57] the first wrongful birth case, the plaintiff husband had undergone a vasectomy to avoid impregnating his wife. Childbirth, according to the couple's physician, would have endangered the wife's life.[58] The subsequent delivery was uneventful, but the husband brought suit against the doctor who had attempted the sterilization. The court denied relief, stating that because the purpose of the operation was not to save the expense incident to childbirth, the plaintiff's interests had not been interfered with: "Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child."[59] Avoidance of pregnancy and delivery costs, said the court, was "remote" from the alleged purpose of the sterilization.[60] The *Christensen* holding correctly recognizes that the consequences resulting from unsuccessful birth control may not always be the consequences which the plaintiff sought to avoid. A more simplistic evaluation of injury, ignoring the purpose of the contraceptive practice, would permit recovery even

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be required for purposes of mitigation. Mitigation is not even addressed in the majority of cases. However, the strongest statement against abortion was made in the major case on wrongful birth recovery. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971).

53. Adoption, rather than abortion, was referred to in both *Shaheen* and *Ball*, the two cases which most clearly blur the distinction between damage and mitigation. Both decisions, it should be noted, were rendered prior to *Roe v. Wade*.

54. *See* Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

55. *Id.*

56. *See, e.g.*, Young v. American Export Isbrandtsen Lines, Inc., 291 F. Supp. 447 (S.D.N.Y. 1968).

57. 192 Minn. 123, 255 N.W. 620 (1934).

58. While several cases have involved sterilizations performed to protect the wife's health, *Christensen* is the only case in which the woman's life was in danger. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

59. 255 N.W. at 622.

60. *Id.*

when a plaintiff is clearly benefitted.[61] Determination of purpose, moreover, is a very subtle bit of reasoning, grounded on the belief that injury is relative to intent.[62]

Despite its ascendancy in logic, such an approach presents difficulties in its application. While the explanation most often given for the use of contraceptive measures is avoidance of child-raising expenses,[63] plaintiffs have often pleaded *both* health and financial reasons.[64] Making the purpose test impractical to administer, one plaintiff pleaded health and financial purposes alternatively.[65] Additional problems arise since reliance upon success of birth control may produce further interests not contemplated at the time of consultation with the physician.[66] Consequently, although evaluation of purpose removes determination of injury from the subjective feelings of individual judges and juries, it is simply not practicable.

The subjective nature of decisions holding no injury to exist as a matter of law becomes more visible when the unplanned child is abnormal. Two jurisdictions which do not permit recovery for the birth of a normal, healthy child do allow damages for a child born with defects.[67] The compensable injury in such cases is the financial detriment generated by the defects.[68] Unless it can be stated as a matter of law that a child's value to his parents is a function of his physical health or intelligence quotient, these holdings should be recognized as manifestations of personal prejudice, rather than legal concepts of injury.

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61. For example, a couple might fervently desire to have a child, and might be financially willing and able to support him, but, like the Christensens, be advised to avoid pregnancy due to expected complications in childbirth. If the delivery were uneventful, it would appear that the negligence had bestowed upon the parents a definite benefit without injury.

62. It is interesting to note that the court in *Troppi* made much of evaluating the purpose of the contraceptive method with reference to the benefit conferred. It did not, however, suggest that such a determination should bear upon the initial designation of injury. *See* Troppi v. Scarf, 31 Mich. App. 340, 187 N.W.2d 511, 518 (1971).

63. *See, e.g.*, Terrell v. Garcia, 496 S.W.2d 124, 125 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

64. *See, e.g.*, Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201, 203 (1964).

65. *See* Coleman v. Garrison, 327 A.2d 757, 760 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

66. For instance, a couple might choose an early retirement, believing no more children would be born to them.

67. *See* Jacobs v. Thiemer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hospital, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). *See also* Becker v. Schwartz, 47 U.S.L.W. 2426 (N.Y. Ct. App. Dec. 27, 1978).

68. *See* note 67 *supra*.

At the same time, the holding of no injury in the case of a deformed child seems equally subjective and artificial. Such a holding was made in a case in which a physician had failed to apprise the parents that the mother's having contracted rubella during her pregnancy might harm the fetus.[69] When the child was born with defects, the parents sued, claiming they would have aborted the fetus if the prognosis had been known.[70] While voicing its sympathy,[71] the court held damages not recoverable due to the "preciousness of the single human life."[72] Thus, no clear explanation of the lack of injury was given. Perhaps in recognition of that fact, the court based its denial of recovery on the added theory that wrongful birth does not constitute a cause of action.[73]

Even if an injury does exist, there may be no cause of action for wrongful birth. Recognizing the singular nature of these lawsuits, and admitting the suits were not previously known at common law, some courts have justifiably balked at the prospect of creating a new tort. They have voiced the opinion that because these actions are complex, and involve substantial moral and ethical issues, recovery cannot be permitted absent legislative approval.[74] One court stated:

> [I]f a cause of action of this particular nature . . . should be sanctioned, it should be by the duly elected legislature after complete public debate. A decision of this nature involving conflicting mores and far flung social ramifications should not depend upon the personal religious and social views of a particular judge or jury.[75]

Waiting for the state legislatures to act, therefore, would obviate the problem of subjectivity in determining injury. Interestingly, the same sentiment has been echoed in virtually every lawsuit for

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

70. *Id.* at 691.

71. The court expressed its condolences for what it termed "the unfortunate situation in which [the] parents find themselves." Nevertheless, the court found that the child's "right to live" precluded the parents' "right not to endure emotional and financial injury." 227 A.2d at 693. It is therefore questionable that the court would have come to the same decision in a context not involving abortion. Indeed, the opinion was later distinguished on that ground in Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 204 (1975).

72. 227 A.2d at 693.

73. *Id.*

74. *See, e.g.*, Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966, 968 (1977).

75. Maley v. Armstrong, IV Reporter on Human Reproduction C-13, C-15. This 1967 case, not generally reported, may well have been the first case tried in the

wrongful life.[76] Until a recent exception,[77] state courts in those situations had adhered to their deferential stance, refusing to recognize the cause of action without legislative guidance. Since wrongful birth and wrongful life cases involve basically the same moral issues,[78] activism in one context and passivity in the other make little sense. The more acceptable approach is deference to the legislatures.

Most courts have not deferred such a decision, however, and what has ensued is unmistakable legislation by the judiciary. Not only have the courts created a previously unknown cause of action,[79] they have even assumed the task of delineating compensable damages.[80] Recent wrongful birth decisions have become the counterparts of wrongful death statutes,[81] even though wrongful death suits met with judicial reluctance until popular pressure produced legislation.[82] Because the perceived injury in wrongful death cases required a complex computation of damages, taking into account the prospect of valuing human life, exact and thoughtful legislation was deemed appropriate. For the same reasons, it is appropriate in the wrongful birth context for courts to refrain from legislating.

It is apparent that a court's determination of no injury in the wrongful birth context is a subjective, strained, and artificial way in which to prevent recovery. However, recovery can be denied for other reasons, including considerations of public policy. Before recognizing or refusing to recognize the injury or cause of action,

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United States wherein the "Pill" was at issue as contrasted to the vasectomy or sterilization operation.

76. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 859 (1963).

77. Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *modified*, Becker v. Schwartz, 47 U.S.L.W. 2426 (N.Y. Ct. App. Dec. 27, 1978) (companion case to Park v. Chessin).

78. In Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169 (1977), the court recognized it was faced with the issues, but decided the case notwithstanding them. *Id.* at 174. In Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971), the court stated at the outset: "resolution of the case before use requires no intrusion into the domain of moral philosophy." *Id.* at 513.

79. *See* Clegg v. Chase, 89 Misc.2d 510, 391 N.Y.S.2d 966, 968 (1977).

80. *See, e.g.*, Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169 (1977).

81. *Compare* Sherlock v. Stillwater Clinic, ___ Minn. ___ , 260 N.W.2d 169 (1977) *with* ARK. STAT. ANN. § 27-909 (1962) *and* FLA. STAT. ANN. § 768.21 (West. Supp. 1978) *and* IND. CODE § 34-1-1-2 (1976) *and* MINN. STAT. ANN. § 573.02 (West. Supp. 1978).

82. *See, e.g.*, Grosso v. Delaware, Lackawana & Western R.R. Co., 50 N.J.L. 317, 13 A. 233 (1888); Hyatt v. Adams, 16 Mich. 180 (1867). *See generally* F. TIFFANY, DEATH BY WRONGFUL ACT § 16 (1893); Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

therefore, courts should consider the public policy implications of wrongful birth.

Public Policy[83]

Considerations of public policy have been employed to mandate wrongful birth recovery, as well as to deny it. Because public policy

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83. Public policy cannot be fully analyzed without a determination of what it is and where it originates. A standard definition of "public policy" reads:

> the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like; . . . that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men having due regard to all the circumstances of each particular relation and situation.

Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney, 95 Ohio St. 64, 115 N.E. 505, 507 (1916). According to the Supreme Court, the very essence of public policy is the interest of persons other than the parties. *See* Beasley v. Texas & P.R. Co., 191 U.S. 492, 498 (1903). Therefore, taking the general welfare into account, a state may impose its views and values upon the parties to a lawsuit. Indeed, such has been done in various types of actions where damages have been denied, based on overriding public considerations. *See, e.g.*, Thome v. Macken, 58 Cal. App. 2d 76, 136 P.2d 116, 120 (1943) (public policy held to preclude cause of action for alienation of affection).

Because public policy reflects the community conscience, Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 796 (N.D. Ohio 1965), it varies with the habits, capacities, and opportunities of the public. Chaffee v. Farmers' Coop. Elevator Co., 39 N.D. 585, 168 N.W. 616, 618 (1918). Hence, it varies with the times. Landgraver v. Emanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301, 302 (1955). The community conscience makes itself known in the constitution and statutes of a state. This is where direct or indirect statements of public policy are found. *See* Higgins v. Nationwide Mut. Ins. Co., 50 Ala. App. 691, 282 So. 2d 295, 298 (1973); Dairyland County Mutual Ins. Co. v. Wallgreen, 477 S.W.2d 341, 342 (Tex. Civ. App. 1973). Thus, public policy is somewhat narrower than a national trend, being more uniquely attributable to a state than to a nation.

If public policy appears in state statutes, its origin is clear: the legislators who make the state statutes must be the formulators of state policy. In Poelker v. Doe, 432 U.S. 519 (1977), a different conclusion was reached, but through similar reasoning. The Supreme Court there ruled that a city's mayor might institute practices on the basis of policy, because of his status as an elected official.

In most wrongful birth cases, however, courts have not looked to the policies designated by elected officials, whether executive or legislative. For instance, in Troppi v. Scarf, 31 Mich. App. 340, 187 N.W.2d 511 (1971), the court stated:

> To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.

Id. at 517. In reaching the opposite conclusion, another court observed, "We are of the opinion that to allow damages for the birth of a normal child is foreign to the universal public sentiment of the people." Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (Lycoming

changes with the times,[84] courts should give it recurring attention. Presently there are significant reasons for precluding recovery or denying the wrongful birth cause of action altogether. Thus, the problems of evaluating wrongful birth damages could be avoided by invoking public policy.

Assuming that the birth of a child, normal or abnormal, does constitute an injury to his parents, public policy considerations may nevertheless militate against recovery. The issue of public policy has been raised in virtually[85] every wrongful birth action.[86] That issue has assumed two forms: one argument is that the birth control method itself is against public policy; the other is that public policy is contravened by awarding damages in the event of birth control failure. With the advent of national and state family plannng programs,[87] the first argument has become wholly unpersuasive.[88] It was quickly dismissed even when first raised in 1934,[89] and has since been resurrected only in wrongful birth cases involving abortion.[90] At present, its only use can be where state laws prohibit abortion in the time frame in which the abortion was desired, sought, or performed. The broad sweep of *Roe v. Wade* renders such application

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Cty. 1957). The *Shaheen* court did not explain how it came to perceive that public sentiment; the *Troppi* opinion ignores the fact that an act, albeit by millions, may violate state policies and state laws. Witness the widespread use of marijuana in this country.

A wrongful birth holding that because many people practice birth control, public policy commands recovery, would thus be a misapplication of law. If a court chooses to look at the number of people desiring to limit their family size, it might just as well observe the overwhelming number who desire to adopt others' unwanted children. *See* Kwitny, *Suicide, Motherhood And Madness—But Not Adoption?* Wall St. J., Dec. 2, 1977, at 14, col. 6. Either approach would ignore the Supreme Court's directive in *Poelker*. The more sensible approach would be to allow the majority to set policies through their elected officials.

84. Landgraver v. Emanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301, 302 (1955).

85. In Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976), the issue of public policy was not raised; the court, declining to raise the issue *sua sponte*, held it must be waived.

86. *E.g.*, Jackson v. Anderson, 230 So. 2d 503 (Fla. App. 1970); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, ____ Minn. ____ , 260 N.W.2d 169 (1977).

87. *See, e.g.*, MICH. COMP. LAWS ANN. § 400.14b (1968).

88. For a discussion of the historical perspective, and the arguments that sterilization should be against public policy, see Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 ROCKY MTN. L. REV. 233, 277-84 (1942).

89. *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620, 621 (1934).

90. *See, e.g.*, Jacobs v. Thiemer, 519 S.W.2d 846, 848 (Tex. 1975).

particularly unlikely, by severely restricting state action in the abortion situation.[91]

However, the argument that recovery conflicts with public policy is raised frequently in wrongful birth cases, and has been dealt with in different ways. A few courts have denied recovery altogether on grounds of policy;[92] another has permitted only partial recovery.[93] Finally, some courts have metamorphosed the moribund argument that sterilization is itself in contravention of public policy. Turning the argument around, these courts have held that public policy necessitates the awarding of damages.[94] The suggestion is that because national policy favors family planning, it looks with favor on the awarding of damages whenever such planning goes awry; or, in its negative form, that because states may not interfere with the right to limit family size, they may not refuse damages when that right is negligently disrupted.[95] While the prohibition of recovery finds more than adequate support in policy considerations, the opposite approach is not so convincing.

That public policy can be employed to deny wrongful birth recovery is best illustrated by *Rieck v. Medical Protective Co.*,[96] in which the court found more than one policy argument sufficient to preclude awarding damages. The case recognized the injustice of the unplanned child's rearing costs not being proportionate to a physician's culpability.[97] For this reason, the court suggested, wrongful birth recovery would unreasonably burden physicians.[98] The court also observed that recovery would open the way for fraudulent claims.[99] While *Rieck* pointed to both these reasons, either of them would be sufficient to justify denial of recovery.

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91. Although *Roe v. Wade*, 410 U.S. 113 (1973), is frequently cited the the proposition that states may not prohibit abortions within the first trimester of pregnancy, the decision reaches much further. With regard to the final three months, for instance, the Court stated that a state could not prohibit abortion during that period if the abortion were necessary to preserve the life or health of the mother. Moreover, in *Doe v. Bolton*, 410 U.S. 179 (1973), "health" includes both physical and emotional health. Thus, what appears to be limited abortion is really closer to abortion on demand.

92. *See, e.g.*, Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

93. *See* Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

94. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 516-17 (1971).

95. *See* Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496, 499 (1976).

96. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

97. *Id.* at 245.

98. *Id.*

99. *Id.*

As *Rieck* correctly demonstrates, shifting the costs of raising a child to the defendant physician imposes undue financial burdens on physicians, while allowing parents to retain all benefits:

> To permit the parents to keep their child and shift the entire cost of its upbringing to a physician . . . would be to create a new category of surrogate parent. Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the parents . . . . [E]very financial cost or detriment . . . would be shifted to the physician.[100]

This "surrogate parent" argument can be supported, by analogy, with other policy decisions on family law. For instance, a father may not contract away his obligation to support his child.[101] Similarly, separation agreements attempting to relieve husbands of their duties to support their wives are against public policy, and therefore unenforceable.[102] Clearly, state policies favor leaving support duties within the family.

Moreover, the *Rieck* rationale has the further effect of preventing crippling financial burdens on physicians, thus ensuring medical help by willing physicians at reasonable prices.[103] Granted, the opposite approach would certainly spread the risks, by means of malpractice insurance. But if, in fact, liability is not proportionate to culpability, it is more reasonable to place the risk with those who derive the benefits.

Perhaps the strongest policy reason for denying recovery is that wrongful birth invites fraudulent claims.[104] By its very nature, such an action involves the pleading of a mental state. While the parents may initially desire to avoid having children, there is no guarantee that this wish continues throughout the pregnancy and after childbirth. This problem becomes especially acute since courts have almost universally declined to require parents in such an action to mitigate damages, by either aborting the fetus or placing the

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100. *Id.* at 244.

101. *See, e.g.*, Massey v. Flinn, 198 Ark. 279, 128 S.W.2d 1008, 1012 (1939).

102. *See, e.g.*, Myles v. Arnold, 162 S.W.2d 442, 445 (Tex. Civ. App. 1942).

103. The significant state interest in rising malpractice costs has led one state to restrict malpractice liability by statute. *See* IND. CODE § 16-9.5-2-2 (1976).

104. *See* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

child for adoption.[105] Because courts will not inquire into the parents' motives in declining to exercise these options, plaintiffs' claims are virtually immunized from defenses charging fraud.

Fraud is especially a problem where the action involves nothing more than a failure to diagnose pregnancy, the plaintiff learning later that she is pregnant and that state law prohibits abortion. In such a case, the plaintiff mother need only allege that she would have had an abortion, had there been time. Under the present case law, every woman whose doctor fails to diagnose her pregnancy could bring a wrongful birth action and hold the doctor accountable for every cost of rearing and educating the child. Unless physicians are to be subjected to claims such as this, courts must deny recovery, and the vehicle of public policy appears the most pragmatic way of accomplishing that objective.

Additionally, public policy should be invoked to protect the interests of the child himself. Although the *Rieck* court did not base its denial of recovery on this consideration, it stated: "We do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship."[106] Another court, however, did use this theory in limiting recovery to the costs of pregnancy and delivery.[107] In so doing, this court indicated it wished to avoid "the unfortunate prospect of ruling, as a matter of law, that under certain circumstances a child would not be worth the trouble and expense necessary to bring him into the world."[108] It has also been feared that such a ruling would render the unplanned child an "emotional bastard."[109] Such arguments constitute viable policy reasons for denying or restricting wrongful birth recovery.

Attempting to rebut these arguments, courts allowing full recovery have suggested that the child should not be thought of as unloved, but as unplanned.[110] Indeed, some courts have dismissed the contention by stating that a child learning of his parents' wrongful birth suit will feel no differently than he would upon learning of their own ineptitude at birth control.[111] This reasoning overlooks two

105. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 521 (1971).

106. 64 Wis. 2d 514, 219 N.W.2d 242 at 245-46.

107. *See* Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (1975).

108. 327 A.2d at 761.

109. 11 Pa. D. & C.2d 41 at 45.

110. *See, e.g.*, Jackson v. Anderson, 230 So. 2d 503 (Fla. 1970).

111. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 477 (1967); Sherlock v. Stillwater Clinic, ____ Minn. ____ 260 N.W.2d 169, 173 (1977).

important facts: first, the suits often allege that the parents would have aborted the child, had they had the opportunity;[112] second, complainants frequently seek damages for pain and suffering far in excess of the costs of raising the child.[113] One partial solution, implemented in only one case, is to use a pseudonym in place of the parents' names.[114] It is doubtful, however, that this measure would prevent the child from learning of the lawsuit from his family and relatives. Thus, the view that there will be no adverse effect on the unplanned child is simply unrealistic, and courts should utilize policy arguments to prevent psychological trauma.

Adverse effect on family relationships might also prove reason enough to deny the cause of action. One distinguished jurist has labelled wrongful birth actions as suits which "pit parent against child."[115] Although he has never decided a wrongful birth case, Justice Rehnquist believes they are examples of situations in which individual rights should bow to institutional rights.[116] By denying either recovery or the cause of action, courts could remove themselves as forums for disruption of family harmony. Public policy considerations are more than adequate to achieve this result.

Using the public policy rationale to require recovery for wrongful birth is questionable in light of some recent decisions. Recovery in a leading case, *Troppi v. Scarf*,[117] was predicated upon two policy considerations. After citing the state's family planning services as evidence of policy favoring contraception,[118] the court relied on *Griswold*, stating:

> Contraception has been held to be within a constitutionally protected 'zone of privacy' . . . . The state may

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112. *See, e.g.*, Jacobs v. Thiemer, 519 S.W.2d 846 (Tex. 1975).

113. *See, e.g.*, Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242, 243 (1974).

114. *See* Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976).

115. Washington Post, Feb. 4, 1978, at A6, col. 1. Mr. Justice Rehnquist, addressing law students at the University of Miami, commented on the *Sherlock* case:

> What is the effect of such a lawsuit going to be upon this child from the time of his birth through the subsequent 17 or 18 years which he will in the normal course of events spend with the parents? To pit children against their parents in [the courts] . . . may leave the family unit in a shambles.

Id.

116. *See* Will, *When Individual Rights Must Yield*, Washington Post, Mar. 16, 1978, at A23, col. 3.

117. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

118. *Id.* at 516-17.

> not infringe upon the rights of a husband and wife to use contraceptives to limit the size of their family. Since the state may not infringe upon this right, it may not constitutionally denigrate the right by completely denying protection provided as a matter of course to such rights.[119]

This argument has been interpreted in another case to mean a state may not prefer some types of malpractice over others, by granting damages only in certain instances.[120] In the few years following *Griswold* and *Roe*, such holdings were probably inevitable. However, the strength of those decisions has been eroded somewhat by subsequent cases; thus, the position that public policy mandates recovery may now be too extreme.

Assuming, *arguendo*, that denial of recovery constitutes state interference with rights, there is still evidence in two recent Supreme Court decisions that certain amounts of state interference with such rights will be tolerated. In *Maher v. Roe*,[121] the Court held the State of Connecticut could exclude nontherapeutic abortions from its federally funded Medicaid program without impinging upon the constitutional right of a woman to decide whether to terminate her pregnancy. Holding that the state action was not interference with the right to privacy, the Court stated, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[122] Thus, a court could reasonably deny recovery for rearing and educating an unplanned child, in order to encourage adoption of such children. This would constitute something less than "direct state interference," and would be based on sound policy.

Similarly, in *Poelker v. Doe*[123] the City of St. Louis was upheld in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions. The Constitution, said the Court, does not forbid a state or city from expressing such a preference for childbirth, since a state has a vital interest in potential human life.[124] Surely that interest should extend to preclude damages which might psychologically affect life adversely. Undoubtedly, in light of these

119. *Id.* at 517.
120. *See* Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496, 499 (1976).
121. 432 U.S. 464 (1977).
122. *Id.* at 475.
123. 432 U.S. 519 (1977).
124. *Id.* at 521.

two decisions, the holding that constitutional law mandates recovery is no longer sound.

The *Troppi* holding admits of two other closely related fallacies. While the court could have limited recovery to pregnancy and delivery expenses, it based its decision on the theory that it could not "completely deny" damages because of constitutional principles.[125] Employing the same sort of reasoning, the court held that damages were required for their deterrent effect: "To absolve defendant of *all* liability here would be to remove one deterrent against the negligent dispensing of drugs."[126] Of course, wrongful birth recovery might prove a deterrent to negligence; nevertheless, it is questionable that recovery must be granted for all types of alleged damages in order to provide that prophylactic effect.[127] Manifestly, holdings such as that of *Troppi* require logical re-evaluation.

In fact, the entire question of recovery should be re-examined. Although it is artificial to conclude that no injury is suffered in the birth of an unplanned child, the determination of injury does not end the inquiry. Not only recovery but also the cause of action itself were heretofore unknown at common law, and, because of their complexity, might best be left for legislative decision. To avoid deciding the issues themselves, courts should look to public policy for reasons to deny recovery, limit it, or deny the cause of action altogether. Public policy could be employed, among other reasons, to prevent fraudulent claims and to protect the unplanned child's emotion well-being. Recent Supreme Court decisions indicate that courts would be justified in denying or restricting recovery. Unless this is done, courts must embark upon the labyrinthine path of measuring damages.

MEASURE OF DAMAGES

If a cause of action for wrongful birth is recognized, and public policy considerations are not employed to deny recovery or restrict

125. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 517 (1971).

126. *Id.* (Emphasis added.)

127. It is interesting to note that deterrence is regarded as a much more viable issue in wrongful birth than in wrongful life. As one commentator has noted, "It is questionable whether one who gives into his lusts in spite of possible claims of child support in paternity suits, theological condemnation, social stigma, personal frustration and guilt, possible criminal penalties, and the danger of venereal disease, is likely to be deterred because of a possible 'wrongful life' action." Note, *Damages—The Not So Blessed "Blessed Event"*, 46 N.C.L. REV. 948, 954 n.26 (1968). This, of course, pertains to only one type of wrongful life action. It would seem that for physicians the deterrent effect would be the same as in wrongful birth cases.

it, legal reasons remain for denying, restricting, or diminishing the damages claimed. Normally[128] in tort cases, the objective in measuring damages is to achieve compensation,[129] no more and no less.[130] The purpose of compensation is to restore the wronged party to the position he would have occupied, had the wrong not been committed.[131] Clearly, in the wrongful birth situation,[132] this is not an easy task: a new life simultaneously brings with it both costs and comforts, none of them easily assigned a price. Equally clear is the fact that the plaintiff could most effectively be restored to his original financial position by aborting the fetus or placing the child for adoption; such a procedure would not only reduce the damages, but would eliminate the need to evaluate the benefits conferred. Yet courts, for the most part, have declined to use the basic legal principles which would restrict recovery. They have awarded speculative damages; they have misapplied the principle of offsetting benefits; and finally, they have excused plaintiffs from mitigating their damages. The result is the awarding to plaintiffs of more than the requisite compensation. Thus, to prevent plaintiffs from being overcompensated at the expense of defendants, courts recognizing a cause of action and compensable injury must implement the rules of law.

Perhaps the best solution is to restrict recovery to the costs of pregnancy and delivery. This would limit damages to those which can be assessed with reasonable certainty. Further, it would obviate the need to subtract speculative benefits. Moreover, it would succeed in creating a deterrent[133] to negligent conduct without unjustly

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128. The exception is punitive damages. C. MCCORMICK, DAMAGES § 77 at 275 (1935) [hereinafter cited as MCCORMICK]. Punitive damages have been claimed in only one wrongful birth action. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 467 (1967).

129. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967); MCCORMICK, *supra* note 128, § 137 at 560.

130. MCCORMICK, *supra* note 128, § 137 at 561.

131. *Id.*

132. The measure of damages in a wrongful birth action depends initially upon whether the suit is brought as a tort or as breach of contract. In tort cases, liability is limited only by the doctrine of proximate cause; in contract cases, on the other hand, losses caused by the defendant's breach are also subject to the limitation of Hadley v. Baxendale, 9 Exch. 341 (1854). That limitation is that special damages are not recoverable unless they arise naturally from the breach or were reasonably within the contemplation of the parties at the time the contract was made. In wrongful birth cases, the distinction is of little significance, since a physician is uniquely in a position to foresee the possible expenses his negligence might cause. *But see* LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976), in which the court denied the plaintiffs' claim because the birth of an abnormal child was not a foreseeable consequence.

133. Punitive damages might increase the deterrent effect.

enriching the complainants. The alternatives to this approach present possibly insurmountable problems of proof.

Ascertainability of Damages

An elementary principle of damages requires a plaintiff to establish with reasonable certainty not only the existence of injury but also the amount of damage.[134] To some extent, this rule is an insistence upon some factual basis a jury can use to fix damages without conjecture and speculation.[135] It is generally held that where the plaintiff can prove injury, but not its extent, he must prove the amount only within reasonable certainty; in other words, he is not held to mathematical precision.[136] The Supreme Court has interpreted this rule as requiring proof of facts from which the trier of fact may infer a "just and reasonable" estimate of the extent of damage.[137] Absent such a showing, the damage claims should be dismissed as speculative.[138]

Most wrongful birth decisions have not dealt with the issue of whether damages can be determined with reasonable certainty. Those which have addressed the question have done so only briefly, most of them suggesting the rule presents no serious problems.[139] Claims such as lost wages, medical and hospital costs, and rearing costs can be computed, these courts say, with some exactitude;[140] and although pain and anxiety involve more guesswork, they are elements of damage which traditionally have been entrusted to juries in other contexts.[141] Therefore, the conclusion of the courts is that ascertainment of *gross* damages is a routine task, the only problems of conjecture being involved in application of the benefit rule[142] to reach a *net* result.[143]

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134. D. DOBBS, REMEDIES § 3.3 (1973) [hereinafter cited as DOBBS].

135. *Id.*

136. Hawkinson v. Johnston, 122 F.2d 724, 731 (8th Cir. 1941); Wilson v. Farmers Chemical Assn., 444 S.W.2d 185 (Tenn. App. 1969).

137. Bigelow v. RKO Pictures, Inc., 327 U.S. 251 (1946).

138. Shannon v. Shaffer Oil & Ref. Co., 51 F.2d 878 (10th Cir. 1931); DOBBS, *supra* note 134.

139. *See, e.g.*, Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971). *See also* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 704 (1967) (dissenting opinion).

140. *See, e.g.*, Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 175 (1977).

141. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971).

142. *See* note 24 *supra*.

143. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 521 (1971).

While suggesting that only the computation of benefits poses difficulty, the court in *Troppi* added a defensive statement:

> We do not, in the assessment of damages, require a mathematical precision in situations of injury where, from the nature of the circumstances, precision is unattainable. Particularly this is true where it is *defendant's own act or neglect that has caused the imprecision.*[144]

It is questionable, however, that in wrongful birth actions, the defendant is responsible for the imprecision. The imprecise damages, such as rearing costs and pain and suffering, are those strictly within the control of the plaintiffs. The amount of suffering is to a large extent a function of the plaintiff's ability or willingness to deal with the problem emotionally. The *Troppi* court severely lessened the burden of reasonable certainty by confusing causation of injury with speculation in damage computation.

Taking the opposite approach on this issue, some courts have correctly expressed concern that the alleged damages admit of speculation.[145] One case which stands definitely against awarding speculative damages for wrongful birth is *Coleman v. Garrison.*[146] There the court limited recovery to the readily ascertainable damages attributable to childbirth, contending that any attempt to assess rearing costs could only be "an exercise in prophecy, an undertaking not within the specialty of our fact-finders."[147] *Coleman* thus adhered strictly to the rule of compensating only what is provable. Medical expenses incurred in the course of childbirth are provable in the same manner as hospital and doctor bills in personal injury cases. Likewise, loss of consortium within that limited time frame is comparable to a determination in the personal injury context. It is when the courts choose to extend recovery beyond childbirth that damages become speculative.

Once courts undertake to assess damages beyond childbirth, they enter the realm of speculation, especially with respect to the frequently claimed[148] damages for rearing and educating the unplanned

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144. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 521 (1971) (emphasis added). The same statement was made by the Supreme Court in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

145. *See, e.g.*, Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973).

146. 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

147. 349 A.2d 8 at 12.

148. *See, e.g.*, Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169 (1977); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973). In *Terrell*, these were

child. It is unclear whether those costs consist solely of bare necessities or of support similar to that which other children in the family receive. Two courts have apparently construed wrongful birth complaints as demanding the latter, for the opinions speak of "varying family environments"[149] and "standard of living."[150] Under the principle of taking the victim as one finds him, this would seem to be the correct interpretation. However, it certainly invites and necessitates more conjecture than would an approach compensating only necessities. Moreover, the conjecture would be still greater where the birth control failure resulted in the birth of a first child, where a jury would not have the guidance of evidence of past performance.[151] If the majority approach attempts to compensate for expenses equal to those spent on previous children, those courts should, at the very least, require evidence of the quality of food, clothing, toys, medical and dental care, and living quarters which the previous children enjoy. Otherwise, the award could only be speculative, ignoring the individuality of the family.

Kindred problems are raised by the period of time over which rearing costs are to be computed, as well as by the unpredictable nature of education costs. Among other cases, *Sherlock v. Stillwater Clinic*,[152] the most definitive statement on wrongful birth damages, decreed that rearing costs were to extend to the child's majority.[153] This is patently inadequate, for a parent's obligation to provide education may extend beyond the child's majority.[154] Furthermore, because the age of majority varies from state to state, parents who move to different states may incur substantial gains or losses. Most significantly, education costs logically should reflect the ability of the child. It is stating the obvious to say this cannot be evaluated within the few years of birth allowed by statutes of limitations. Therefore, because of the extensive costs of education,[155] courts

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the only damages claimed. The court's denial of recovery can possibly be explained thereby. The narrow question, said the court, was "whether the parents of an unwanted child may recover only for the economic loss of rearing and educating such child." 496 S.W.2d at 127.

149. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974).

150. Terrell v. Garcia, 496 S.W.2d 124, 127 (Tex. Civ. App. 1973).

151. In a first child situation, however, the jury could have at its disposal any of the various studies done on the costs of raising a first child; but again, these are only averages. *See* note 169 *infra*.

152. ___ Minn. ___, 260 N.W.2d 169 (1977).

153. *Id.* at 176. *See also* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971).

154. *See* Hight v. Hight, 5 Ill. App. 3d 991, 284 N.E.2d 679 (1972).

155. The average cost in 1977 for four years of college education was $8,416. Information provided courtesy of Population Reference Bureau, Inc., Washington, D.C.

should give special attention to the speculation problems inherent in claims for the costs of rearing and educating an unplanned child.

Speculation regarding the length of support and extent of education is augmented in cases where the unplanned child is abnormal. Although *Sherlock* dealt with damages arising from the birth of a healthy child, the opinion alluded to parents' support obligations for a defective child.[156] Parents of a child with serious defects will be legally responsible for his support even after he reaches majority.[157] Thus, jurors would have to determine the child's life expectancy or, at least, the number of years the child would live before his parents died. On the other hand, severely defective children often die very young; they may not require support to the age of majority. Hence, life expectancy must be a fundamental determination in assessing rearing costs for the wrongful birth cases involving abnormal children. Similarly, education costs would inevitably be conjectural, since they would reflect abilities and disabilities not yet measurable. A physically handicapped child, for instance, might well complete a college education. To evaluate such damages, jurors must become something akin to fortune tellers.

While disallowing recovery for a normal, healthy child, some courts grant damages for a defective one.[158] The theory underlying such a result is that the amount of damage is there more clearly apparent. However, such reasoning is questionable. Employing this logic, two courts have limited recovery to those expenses which reflect the difference between the costs of caring for a child with birth defects and the costs of raising a normal child.[159] According to one court, these damages, including medical costs, are easily proved, being similar to expenses in personal injury litigation.[160] This reasoning overlooks the fact that there is much speculation involved in assessing the damages for rearing a normal child, and even more

156. *See* Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 176 n.11 (1977).

157. *See* McCarthy v. McCarthy, 301 Minn. 270, 222 N.W.2d 331 (1974); Dehm v. Dehm, 545 P.2d 525 (Utah 1976).

158. *See, e.g.*, Jacobs v. Thiemer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hospital, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

159. *See* note 158 *supra*. Neither court has attempted to point out exactly where the line is drawn between normal and abnormal. Thus, it is not clear how physically or mentally defective a child must be before the parents can seek redress in these courts. Moreover, it is difficult to conceive of a system which more clearly "pits parent against child," since in a borderline situation the parents would be forced to argue the child's defects in order to recover. *See* note 115 *supra* and accompanying text.

160. Jacobs v. Thiemer, 519 S.W.2d 846, 849 (Tex. 1975).

speculation in determining the costs of rearing an abnormal child. The difference, therefore, represents double speculation.

Declining to indulge in the speculative evaluation of defects, the court in one case involving an abnormal child[161] denied all recovery, holding that triers of fact cannot possibly compute the differences between no life at all and life with defects:

> In order to determine [the parents'] compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child.[162]

This holding astutely appreciates the problems of speculation inherent in assessing the costs and value of a human life which parents allege they would rather have destroyed. It has the further advantage of refusing to treat a young human life as defective merchandise for which the disgruntled parents can receive a rebate. Courts unwilling to distinguish between normal and defective children could justifiably deny recovery on grounds of speculation.

Whether evaluating the damages of normal or abnormal children, courts on the whole have ignored the speculative nature of damages. In one case, the jury's verdict totalled $462,500;[163] in another, the award was only $19,500;[164] in still another, the jury did not find damage.[165] *Troppi* was settled out-of-court for $12,000 after $250,000 damages were claimed;[166] *Sherlock* was settled for $17,000.[167] Nevertheless, these striking disparities have commanded

161. In *Jacobs*, the claim was based on the doctor's failure to diagnose rubella in the mother; in *Gleitman*, the doctor failed to advise the mother that her having had rubella might result in birth defects. Both actions arose against a background of illegal abortions in both states, prior to the decision of *Roe v. Wade*.

162. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 693 (1967).

163. *See* Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496, 498 (1976). The *Bowman* verdict is somewhat misleading because twins were born, one of them with defects. $12,500 of the award represents the father's claim for loss of consortium and expenses.

164. *See* Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 171 (1977).

165. *See* Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

166. Evening Star (Wash., D.C.), No. 12, 1971, at A4, col. 1.

167. 21 ATLA L. Rep. 190, citing letter from John F. Eisberg, St. Paul, Minn., counsel for plaintiff.

no attention. Two jurisdictions have approved the use of the special verdict to prevent excessive awards,[168] but no reported case has held a verdict excessive. Apparently neither judges nor juries are quite sure of what a just verdict should be. This confusion arises in part from the speculative nature of wrongful birth damages.

The treatment of these speculative damages to date has been unrealistically simplistic. Studies made by economists and statisticians on the costs of children demonstrate the complexity of the damage issue.[169] In evaluating damages, factors to be considered should include the geographic location, income level, and type of residence of the plaintiffs.[170] In addition, to compute rearing costs with any accuracy, a jury would have to take into account the economic principle of economies of scale:[171] obviously, the costs of raising a first child are greater than those of raising a second,[172]

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168. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 480 (1967); Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 176 (1977); Martineau v. Nelson, ___ Minn. ___, 247 N.W.2d 409, 417 n.18 (1976).

169. *See generally* Reed & McIntosh, *Costs of Children*, 2 Research Reports, Commission on Population Growth and the American Future 333-50.

170. Direct Cost of Raising a Child to Age 18 in the United States at 1977 Prices[a]

(By region, cost level, and type of residence)

	Farm costs	
Region	*Low*	*Moderate*
Total U.S.	$33,124[b]	$48,988[b]
North Central	31,764	47,046
South	35,365	52,617
Northeast	32,382	45,840
West	n/a	n/a
	Rural nonfarm costs	
Region	*Low*	*Moderate*
Total U.S.	$35,006	$53,830
North Central	31,675	47,237
South	34,415	55,173
Northeast	37,618	57,355
West	40,476	58,255
	Urban costs	
Total U.S.	$35,261	$53,605
North Central	36,849	50,671
South	34,654	54,863
Northeast	31,861	53,586
West	38,243	56,065

a Undiscounted figures

b West excluded

Information provided courtesy of Population Reference Bureau, Inc., Washington, D.C.

171. *See generally* G. STIGLER, THE THEORY OF PRICE 146-160 (3d ed. 1966).

172. T. Espenshade, The Value and Cost of Children, 32 *Population Bulletin* 28 (Population Reference Bureau, Inc., Washington, D.C., 1977).

fifth, or tenth. Nearly all the wrongful birth cases involve plaintiffs who are already the parents of numerous children.[173] Evaluation of economies of scale would be complicated by the child's gender, since availability of clothing and sleeping quarters would be related to the sex of the unplanned child and those of his siblings. Complicated as these inquiries might seem, they are necessary if plaintiffs are to receive just compensation and defendants protected from excessive verdicts based on speculation.

Unless complicated methods of proof are employed to aid them, juries simply cannot avoid speculation in wrongful birth cases, because they are neither economists nor fortune tellers.[174] For the most part, the damages cannot be known until the child is grown. The issues are extremely complex, involving a multitude of factors not within the fact-finders' expertise. The ensuing speculation is contrary to a basic principle of law which requires that a plaintiff prove his damages within reasonable certainty. Therefore, courts recognizing a cause of action must either deny recovery altogether or restrict it to reasonably ascertainable damages such as the expenses of childbirth and delivery.[175] Additional damages should be dismissed as speculative. But because courts have declined to dismiss speculative damages, virtually every type of damage imaginable has been deemed recoverable.

Damages Recoverable

Unwilling to invoke the rule against speculation to deny recovery, courts have granted a wide variety of damages. Although many wrongful birth decisions deal with the issue of damages, few are definitive. For the most part, courts have simply stated that plaintiffs should recover all consequential damages proximately caused by the defendants' negligence.[176] Few types of alleged damages have been deemed unworthy of recovery; one court even went so far as to suggest additional damages it might award,[177]

173. *E.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (tenth child); Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975) (fifth child); Jackson v. Anderson, 230 So. 2d 503 (Fla. 1970) (fourth child); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (third child); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (eighth child).

174. At the very least, an expert witness should be produced, but no reported case speaks of such testimony.

175. *See* Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

176. *See, e.g.*, Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336, 340 (1975).

177. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 476 (1967).

assuming causation could be proved. In other negligent tort contexts, the principle of proximate cause constitutes a limitation on the recoverable damages, but in wrongful birth this supposed limitation is negligible. This is because the birth of an unplanned child initiates interactions with numerous, varied interests. Thus, proximate cause is not really a limitation, but rather an invitation to the legal imagination. An examination of the damages presently recoverable demonstrates that recovery in this unique tort area is essentially unrestrained. For this reason courts should re-evaluate their approaches to wrongful birth damages, in order to impose some meaningful limitation on consequential damages.

Damages arising as consequences of the proximate cause of negligence in wrongful birth actions include physical, emotional, and financial injuries. Courts have recognized as damages the pain, trauma, and injury of childbirth, as well as the mother's pain, nervousness, and anxiety throughout pregnancy.[178] In addition, one court has recognized the "physical inconvenience" of rearing the child as a compensable injury.[179] Loss of consortium has been awarded for both wife and husband;[180] as a sort of extension of loss of consortium, one complaint asked for the value of the wife's "society, comfort, care and protection" lost to "other members of the family" during and after confinement for the unplanned birth.[181] Moreover, emotional damages often comprise the greater part of the amount asked.[182] Claims of emotional injury, however, are not confined to the time of the unwanted pregnancy, as one might expect. Instead, damages are now being awarded for the "emotional upset" involved in rearing a child.[183] Accompanying financial injuries naturally include the medical expenses of pregnancy and delivery.[184] Of course, the most substantial financial damages are the costs of rearing and educating the child; such damages are claimed in virtually every wrongful birth case.[185] Furthermore, lost wages have been approved as damages,[186] and opportunity costs have been deemed consequen-

178. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

179. *See* Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336, 340 (1975).

180. *See, e.g.*, Sherlock v. Stillwater Clinic, ____ Minn. ____, 260 N.W.2d 169 (1977). *But see* Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947).

181. Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496, 497 (1976).

182. *See, e.g.*, Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974), in which the claim of $300,000 was alleged to include both emotional stress and rearing costs.

183. *See* Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336, 340 (1975).

184. Sherlock v. Stillwater Clinic, ____ Minn. ____, 260 N.W.2d 169, 175 (1977).

185. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

186. *Id.*

tial damages, if provable.[187] The indisputable trend is the seeking of every type of damage imaginable.

In addition to those damages easily classified as physical, emotional, or financial, some unorthodox damages have been alleged and held compensable. In *Bowman v. Davis*,[188] an unsuccessful tubal ligation resulted in the birth of twins, one of whom was deformed. Among the damages the parents asserted was the cost of "special attention."[189] Still more uncommon was the request of compensation for the fact that the mother "must spread her society, comfort, care, protection and support over a large group."[190] This seems odd, inasmuch as the plaintiffs already had four children before the twins were born.[191] Perhaps what underlies such a claim is a request for the act of loving, or at least for the most basic maternal caring. If this is so, a court should give serious consideration to requiring mitigation of damages; if such is not the correct interpretation, the allegation appears to state nothing more than the obvious. In any event, *Bowman* represents an entry into a whole new realm of recoverable claims.

The unorthodox damages claimed in *Bowman* are somewhat analogous to a separate cause of action by the children for the diminution in parental care occasioned by the addition of a new sibling. Claims presented in this way have been unanimously unsuccessful.[192] In one such case, the siblings' claim for loss of affection was coupled with a claim for the reduction in family wealth. The court denied that count, stating: "While children may expect future care, affection, training and financial support, they have no vested right to it .... There is no 'proportional' share of the parents' worldly goods to which the children are entitled."[193] The sole distinguishing factor between this correctly denied claim and that in *Bowman* is the phrasing of the complaints. One court perceived the fallacy and the other did not. It thus appears that by use of semantics, what should not be recoverable can be phrased as an apparent consequential damage. Clearly, not every consequence of proximate cause in this context should be treated as a recoverable damage.

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187. *See* Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265, 267 (1974).

188. 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

189. *Id.* at 497.

190. *Id.*

191. *See id.*

192. *See, e.g.*, Aronoff v. Snider, 292 So. 2d 418 (Fla. App. 1974).

193. Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834, 840 (1974).

Indeed, not all damages alleged in connection with wrongful birth actions have been allowed, and foremost among those rejected is the related count for wrongful life[194] often included in a wrongful birth complaint.[195] In asserting a claim for wrongful life, the unplanned child seeks compensation for wrongfully being born. Until recently, these appended claims had met with universal disapproval. However, New York at one time approved a combined recovery for wrongful birth plus wrongful life.[196] In a remarkable case, parents had been advised inaccurately by their physician that a future baby would not suffer from the same genetic defect as had their first child. Relying on that advice, they had another child, who suffered from the same hereditary kidney disease. The court, in granting the infant's cause of action, held there is a "fundamental right of a child to be born as a whole, functional human being."[197] Thus, the court permitted recovery for injuries and conscious pain and suffering. Notwithstanding this case, other wrongful birth plaintiffs seeking to append damages for wrongful life have failed to obtain recovery.[198] In the case standing most definitely against recovery for wrongful life as an adjunct of wrongful birth, the court observed it could not measure the value of life with defects against the value of no life at all.[199] Apart from the difficulty of measuring such damages, courts should consider whether they are equipped to handle the possible flood of litigation that may follow from labelling an individual's own life a civil wrong.[200] If proximate cause is regarded as the sole limitation on this type of litigation, wrongful life is certain to become a usual appendage of wrongful birth recovery.

Wrongful death could also be alleged in connection with wrongful birth, if the mother should die in childbirth from conse-

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194. *See* note 5 *supra*.

195. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966, 968 (1977).

196. Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *modified*, Becker v. Schwartz, 47 U.S.L.W. 2426 (N.Y. Ct. App. Dec. 27, 1978) (companion case to Park v. Chessin).

197. *Id.* at 114. When the holding was modified, the "right" was rejected.

198. The usual reason for denial of recovery is the failure to state a recognized cause of action. *See, e.g.*, Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966, 968 (1977).

199. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967).

200. If wrongful life is recognized as a claim against physicians who negligently permit conception or birth to occur, it might also logically be granted against putative fathers for siring the unplanned children. This was the claim in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), in which recovery was denied. If liability should extend to putative fathers, it could also extend to mothers who fail to have abortions. Given the frequency of illegitimacy in this country, an extensive amount of litigation would certainly result.

quences of the unplanned pregnancy. Such was the dicta in a California case[201] in which the court enumerated damages it would deem recoverable if proven to flow from the proximate cause in wrongful birth.[202] The court plainly made no attempt to curtail the possible varieties of recovery.

In fact, the only significant effort to restrict the types of damages recoverable is the case of *Coleman v. Garrison*.[203] That decision allows only the following damages: (1) pain, suffering and discomfort of the mother as the result of the pregnancy; (2) the cost of the ineffective sterilization; (3) loss to the husband of the comfort, companionship, services and consortium of his wife; however, loss of consortium is limited to the loss arising from pregnancy and immediately after birth; and (4) medical expenses incurred as a result of the pregnancy.[204] These limitations were based on principles of public policy and the possibility of speculation.[205] This approach has the further merit of not subjecting the child's life value to the benefit rule,[206] which brings with it many complicated issues. Unfortunately, *Coleman* stands alone in its approach to recoverable damages.

Considering the multifarious damages recoverable in wrongful birth, it is apparent that proximate cause presents no meaningful limitation. Consequently, unless courts are to be inundated with claims and defendants are to be burdened with enormous verdicts, damages must be restricted in some way. A possible solution to this problem is the *Coleman* approach, allowing recovery for only certain types of damages. If this is not done, however, two other legal principles are available. These are the rules of offsetting benefits and mitigation of damages. While these rules could be used to lessen the burden imposed on defendants, the courts for the most part ignore or misapply the principles.

"Benefits Conferred"

The most controversial aspect of damage measurement in wrongful birth litigation has developed as a result of the application of the rule of offsetting benefits.[207] As defined in the Restatement of Torts, the rule states:

201. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).
202. *Id.* at 476.
203. 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).
204. *Id.* at 761-62.
205. Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975).
206. *See* note 24 *supra*.
207. The rule of offsetting benefits is often confused with the rule of avoidable consequences, or mitigation of damages. Thus, when courts speak of mitigating

> Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the *interest which was harmed*, the value of the benefit conferred is considered in mitigation of damages, where this is equitable.[208]

While a number of courts have purported to endorse the use of this rule of wrongful birth cases,[209] no court has fully analyzed the "same interest" limitation, a limitation which might well alter the recovery granted in many jurisdictions.

Only two courts have ever addressed the Restatement's limitation, and they have come to opposite conclusions. In a California case,[210] the plaintiff wife had submitted to a tubal ligation operation to protect her physical condition. The court there applied the benefit rule and determined that "[i]f the failure of the sterilization operation and the ensuing pregnancy benefited the wife's emotional and nervous makeup, and any infirmities in her kidney and bladder organs, the defendants should be able to offset it."[211] A careful reading of the Restatement reveals the correctness of that approach. With several examples, it plainly states that the "interest" is not the plaintiff, but the plaintiff's purposes. For instance, damages alleged for pain and suffering cannot be offset by pecuniary gain; similarly, damages for loss of consortium cannot be diminished by a simultaneous absence of expenses.[212] Perhaps even more appropriate, by analogy, is the statement, "[O]ne who has harmed another's reputation by defamatory statements cannot show in mitigation . . . that the other has been financially benefited from their publication, unless damages are claimed for harm to pecuniary interests."[213] Applying this to the wrongful birth context, it is evident that employment of the offsetting benefits rule necessitates

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damages, they often are referring to the procedure of offsetting benefits. As used in this note, the term "mitigation of damages" refers only to avoidable consequences, and does not include offsetting benefits.

208. RESTATEMENT OF TORTS § 920 at 616 (1939) (emphasis added). *See also* DOBBS, *supra* note 134, § 3.6; MCCORMICK, *supra* note 128, § 40.

209. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 476 (1967); Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204, 206 (1976); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 517-18 (1971); Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 176 (1977).

210. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rtpr. 463 (1967).

211. *Id.* at 476.

212. RESTATEMENT OF TORTS § 920, Comment b (1939).

213. *Id.*

determination of the purpose for which birth control was attempted. Thus, the California case is an exact application of the principle outlined in the Restatement.

The Restatement also demonstrates that benefits of one type may not be converted to pecuniary benefits in order to satisfy the principle. Yet in *Sherlock*, the only other case attempting to analyze the rule, the court stated that such conversion of a child's society to monetary amounts was entirely appropriate: the underlying purpose of that limitation in the Restatement, said the court, was to prevent unjust enrichment.[214] While it is evident that such is the purpose of the rule requiring subtraction of benefits, it cannot possibly be the purpose of the "same interest" limitation, for the limitation restricts the degree to which unjust enrichment can be eliminated. In view of the substantial benefits accruing to parents in these actions, a blind application of the benefit rule without regard to its limitation is legally erroneous. Admittedly, the Restatement sets out a complicated task, but the *Sherlock* approach is far too simplistic.

An accurate application of the benefit rule would require two steps. First, the *purpose* of the birth control method must be ascertained. In recognizing this, one court suggested that what should be considered included "the diversity of purposes and circumstances of the women who use . . . contraceptives."[215] Among the factors to be evaluated, said the court, are "family size, family income, age of the parents, and marital status."[216] The court further recognized that the conferred benefits will vary widely from case to case.[217] However, this approach omits the second step, application of the "same interest" rule. This second step would necessitate separating both the damages and benefits according to the "interest" affected, and subtracting each benefit according to its type. Accordingly, physical damages would be offset by physical benefits; emotional damages, by emotional benefits; and financial damages, by financial benefits. The first step, although never so defined, actually determines whether injury exists, and, if so, its extent; then the second step diminishes the damages by subtracting the benefits.

The potential benefits of a child, albeit unplanned, are many;[218]

214. Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 176 (1977).

215. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 518 (1971). The *Troppi* analysis seems to go to the initial issue of whether injury has been incurred; however, the court confined its remarks to the area of benefit.

216. *Id.* at 519.

217. *Id.*

218. *See generally* L. HOFFMAN & M. HOFFMAN, *The Value of Children to Parents*, PSYCHOLOGICAL PERSPECTIVES ON POPULATION (J. Fawcett ed. 1973). Two

however, most have not been specifically pointed out in the opinions. The financial detriment incurred in raising a child could be offset by his potential earning capacity.[219] This would be similar to the determination of loss made in wrongful death actions.[220] Additionally, the child represents some financial security for the parents' old age.[221] But courts have expressed more concern for emotional, rather than financial, benefits.[222] Such advantages are certainly greater in number and more diverse, although it must be remembered that each case involves different considerations. Advantages occurring most frequently are companionship, love and affection, fun and avoidance of boredom, and the satisfaction of watching children grow and develop.[223] These benefits, however, have been discussed at length only by the courts which hold that benefits outweigh

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psychologists at the University of Michigan have developed an elaborate value system which enumerates eight categories of non-economic values of children: (1) *Adult status and social identity.* Having children is tangible evidence of one's adulthood. This is particularly true for women; many of them feel that raising a family is fulfillment of a social role. (2) *Expansion of the self, tie to a larger entity, "immortality."* Because children usually outlive their parents, children may provide parents with a sense of immortality: parents' characteristics, embodied in their offspring, continue to live after the parents have died. Also, children may contribute to their parents' personal growth by unlocking latent emotions such as the feeling of being needed. (3) *Morality.* This dimension refers to sacrifice for others. Children afford parents the opportunity to subordinate self-interest for the good of the children. (4) *Primary group ties, affiliation.* A family offers a sense of emotional security. While this has been true throughout history, it is especially important in modern societies where increasing geographic mobility and growing bureaucracy threaten individual identity. (5) *Stimulation, novelty, fun.* The birth of a child generates a sense of something new and different happening. In so doing, it may help to dissipate the tedium of everyday life. Playing with children can give parents pleasure and allow them, in a sense, to relive their own youth. (6) *Creativity, accomplishment, competence.* The challenges of child-raising may fulfill adult needs for creativity and achievement. (7) *Power, influence, effectance.* Having children enables parents to exert their influence to shape the lives of others. (8) *Social comparison, competition.* Offspring may represent prestige or wealth, as well as attesting to the parents' sexuality. *Id.* at 46-61.

219. *See* T. Espenshade, The Value and Cost of Children, 32 *Population Bulletin* 20 (Population Reference Bureau, Inc., Washington, D.C., 1977).

220. *See, e.g.*, Missouri Pac. R.R. Co. v. Maxwell, 194 Ark. 938, 109 S.W.2d 1254 (1937); Siebeking v. Ford, 128 Ind. App. 475, 148 N.E.2d 194 (1958). *See generally Annot.*, 14 A.L.R. 485 (1950). Most courts in wrongful death actions permit recovery for expected *post-majority* contributions of the child also.

221. Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973).

222. For instance, in *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971), the court mentioned the child's earnings as a potential benefit, but stressed the aid, comfort, and society conferred. *Id.* at 518.

223. T. Espenshade, The Value and Cost of Children, 32 *Population Bulletin* 20 (Population Reference Bureau, Inc., Washington, D.C., 1977).

damages as a matter of law.[224] Unorthodox damages such as "change in family status"[225] would require offsetting of benefits such as sibling companionship.[226] Additional benefit in that regard might be the potential help with housework an added child represents.[227] In any event, benefits can be found to offset most types of damages.

The type of damage which, of course, lends itself least to offsetting by benefits is that involved in the physical disruption of life by pregnancy and childbirth. While there is medical evidence that pregnancy in general and breast-feeding in particular prevent certain types of cancer,[228] that benefit is hardly provable in any particular case. Similarly, there is evidence that pregnancy heightens sexual response and satisfaction;[229] it would seem, therefore, that loss of consortium might be offset if defendants chose to undertake that aspect in discovery. Realistically, these physical benefits are not likely to be proved. Thus, it appears that if any injury is to be compensated without diminution, it is the physical pain and trauma of pregnancy and delivery. The rule of offsetting benefits would have little application to such damages.

With one exception,[230] applications of the rule have been made without regard to the "same interest" limitation and governed by exceedingly facile principles. The courts have declared that valuing the aid, comfort, and society of a child is nothing extraordinary, as it is traditionally done in wrongful death actions.[231] They therefore en-

224. *See, e.g.*, Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973).

225. Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496, 497 (1976). A similar claim was made in Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976).

226. Companionship for previous children has been named, in a survey, as the primary reason parents have for wanting more children. T. Espenshade, The Value and Cost of Children, 32 *Population Bulletin* 22 (Population Reference Bureau, Inc., Washington, D.C., 1977).

227. *Id.* at 10.

228. S. KIPPLEY, BREAST-FEEDING AND NATURAL CHILD SPACING: THE ECOLOGY OF NATURAL MOTHERING 3 (1974).

229. A. COLMAN & L. COLMAN, PREGNANCY: THE PSYCHOLOGICAL EXPERIENCE 48, 49 (1971).

230. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 476 (1967).

231. Ironically, the two jurisdictions which contend most strongly that analysis of benefits in wrongful birth can be handled the same way as losses in wrongful death are the same jurisdictions which have revolutionzed wrongful death actions by interpreting "pecuniary" losses in their statutes to include loss of aid, comfort and society. The upshot of this revised interpretation is to make the loss of life much greater in value than the statutes suggested; yet in wrongful birth, the "benefits conferred" still result in a net loss to the parents. *Compare* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) *and* Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169 (1977) *with* Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1962) *and* Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

dorse the procedure of subtracting the total benefits from the total damages.[232] This analogy with wrongful death, however, carries with it certain difficulties. First, wrongful death actions proceed on the theory that a life is worth more than the cost of its support; wrongful birth assumes the opposite.[233] Furthermore, there is difficulty in asking jurors to value as benefit the companionship of a child whose companionship was unwanted. Finally, in wrongful death actions, there is no possibility of psychological harm to the individual whose existence is valued: he will never learn how little or how much he was worth. The unplanned child, on the other hand, does not have the benefit of eternal ignorance on this issue.[234] It is this realization that has prompted a few courts to hold, on grounds of public policy, that the damages must be outweighed by the benefits.[235]

The holding that benefits of parenthood outweigh the detriments as a matter of law ignores the "same interest" limitation of the benefits rule, for it does not attempt to classify the damages. Such a holding is almost indistinguishable from a holding that no injury has been suffered. Indeed, some decisions appear to say both at the same time.[236] Those rationales were summarily rejected by *Sherlock*, which stated it is "myopic to declare today that the benefits exceed the costs as a matter of law."[237] Nevertheless, more than one reason has been employed to support the conclusion. For instance, one court has stated that the parents, in electing to keep their child, have impliedly valued his benefits as outweighing his detriments.[238] Of course, this assumes that couples make detailed economic calculations of the profits and losses children represent, and therefore is entirely unrealistic. Other courts have taken a less artificial stance, simply admitting that their holdings are grounded on a desire to avoid valuing the life of a living person. For example, the court in *Coleman*, while conceding net damage in the fact of pregnancy, declined to find it in human life. "To make such a determination," said the court, "would, indeed, raise the unfortunate prospect of ruling, as a matter of law, that under certain circumstances a child would not be worth the trouble and expense necessary to

232. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 521 (1971).

233. *See* Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 177 (dissenting opinion).

234. *See* Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974).

235. *Id.*

236. *E.g.*, Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (Lycoming Cty. 1957).

237. ___ Minn. ___, 260 N.W.2d 169, 175 (1977).

238. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974).

bring him into the world."[239] *Coleman* therefore represents an honest effort at compensation, and a sincere attempt to protect the child's self-image. In one sense, it may be viewed as emotional, but on the other hand, it is equally a refusal to weigh emotional factors.

Perhaps the most popular, and undoubtedly the most emotional approach to valuing benefits has been the holding that the benefits a child brings with him are *invaluable*: "Who can place a price tag on a child's smile or the parental pride in a child's achievement?"[240] Accompanying such statements have been suggestions that the benefits are so intangible as to present "insurmountable problems of proof."[241] It is possibly this recognition, coupled with concern for the child's emotional well-being, that has led courts to hold that benefits outweigh damages as a matter of law. Again, such a holding as a matter of law fails to recognize the "same interest" limitation of the Restatement.

If the particular benefits a child brings with him do not outweigh the damages as a matter of law, then the valuing of benefits is subject to the same objection as is the valuing of damages: the benefits are conjectural and speculative. In fact, benefits admit of even more speculation than do damages, for many damages can be gleaned from human experience with children in general. Benefits, on the other hand, pertain peculiarly to the particular individual. His intelligence, self-reliance, self-discipline, and affection should all be taken into account. Yet this is not possible at the stage at which a wrongful birth action is brought. On what can the jurors base their valuation of the child's aid, comfort, and society? Unquestionably, it can only be based upon a juror's experience with other children.[242] This is inappropriate for two reasons: first, the child is unique; second, the benefit being weighed is the benefit to a parent who has complained of being saddled with the unplanned child. Even more than the valuation of rearing costs, therefore, the valuation of benefits is "an exercise in prophecy."[243]

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239. *Id.*

240. Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973).

241. *Id.* at 127.

242. This is wholly unlike the evidentiary process in actions for the wrongful death of a minor, in which plaintiffs can introduce evidence of the affection that existed between them and the deceased. *See, e.g.*, Gardner v. Hobbs, 69 Idaho 288, 206 P.2d 539 (1949).

243. *Cf.* Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975) (evaluation of damages labelled an exercise in prophecy).

Despite any problems of speculation, the apparent trend in wrongful birth cases is benefit-offsetting by the jury. By allowing jurors to indulge in conjecture, and by disregarding the "same interest" limitation, courts are ignoring some basic principles of negligent tort law while professing to deal with wrongful birth as a tort. At the same time, they are subjecting children to possible psychological trauma. It would seem that the rule of offsetting benefits in the wrongful birth context involves almost unmanageable complexities and creates more problems than it solves. Without it, however, the plaintiffs' compensation would certainly be overcompensation. This is especially true since plaintiffs are permitted to allege enormous damages without being required to mitigate them.

Mitigation of Damages

While purporting to deal with wrongful birth in terms of ordinary tort principles such as proximate cause and offsetting benefits, courts permitting recovery have almost universally excused plaintiffs from their usual duty to mitigate damages. Also known as the avoidable consequences rule, this principle denies recovery for any damages which could have been avoided by reasonable conduct on the plaintiff's part after a wrong has been committed by the defendant.[244] Application of the rule to wrongful birth actions would possibly require a pregnant woman to abort the unplanned fetus, or the parents of the unplanned child to offer him for adoption. If either abortion or adoption were reasonable conduct, and the plaintiff failed to perform such conduct, recovery for damages such as rearing costs could be denied. By refusing to apply this rule in wrongful birth suits, courts remove the action from a true tort context, allow unjust enrichment to accrue to plaintiffs, and impose an unjust burden of damages upon defendants.

As defined in the Restatement of Torts and various treatises, the rule of mitigating damages requires only *reasonable* conduct by the plaintiff.[245] Construed in other tort contexts, reasonableness may require a plaintiff to submit to painful treatment or even surgery.[246] Thus, in the abortion situation, two questions arise: (1) How dangerous is the operation? and (2) Would a reasonable person submit to it?

244. McCormick, *supra* note 128, § 33.

245. Dobbs, *supra* note 134, § 3.7; McCormick, *supra* note 128, § 33; Restatement of Torts § 918 (1939).

246. *See, e.g.*, Hendler Creamery Co. v. Miller, 153 Md. 264, 138 A. 1 (1927); Potts v. Guthrie, 282 Pa. 200, 127 A. 605 (1925).

Those questions are separated because abortion involves, for some persons, moral and religious issues. It is clear that abortion is not regarded as a "dangerous" operation,[247] particularly when compared to other forms of surgery.[248] But even recognizing the number of women who seek abortions, it is not so clear that abortion is for every plaintiff in every situation a reasonable alternative. In other tort cases, the question of whether a person with religious scruples has acted reasonably is determined by a jury, in light of surrounding circumstances.[249] Yet in wrongful birth cases, rather than deciding reasonableness on a case-by-case basis, some courts have stated that abortion is so drastic a measure that it cannot be required of any plaintiff.[250] Most interesting among these statements is that of *Troppi*. There the court first spoke of the principle that "the tortfeasor takes the injured party as he finds him," mentioning that the women's mental and emotional makeup could be inconsistent with aborting.[251] However, the court then held that such an issue of reasonableness should be withheld from the jury.[252] Those two statements are patently inconsistent. A more sensible conclusion was reached in a New York case, where the court held that the plaintiff must be given the opportunity to establish the circumstances surrounding her decision not to undergo an abortion.[253] This approach thus comprehends what *Troppi* ignores: taking the victim as one finds him does not mean taking the victim's word for the reasonableness of his actions. Abortion may be unreasonable as a matter of fact in many cases, but it is not necessarily unreasonable as a matter of law.

While adoption seemingly would not entail the same moral and religious objections inherent in abortion, courts have treated the

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247. A. GUTTMACHER, W. BEST, & F. JAFFE, PLANNING YOUR FAMILY 185 (1964).

248. The Center for Disease Control states that legal abortion is safer than a tonsillectomy, an appendectomy or pregnancy and childbirth. The death rate for legal abortions performed during the first trimester of pregnancy was 1.7 per 100,000; for tonsillectomy, 5 per 100,000; for appendectomy, 352 per 100,000. For childbirth and pregnancy, the death rate was 13 per 100,000 live births.

249. The landmark case is Lange v. Hoyt, 114 Conn. 590, 159 A. 575 (1932), in which the mother of a child injured in an automobile accident was a Christian Scientist.

250. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971); Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 176 (1977).

251. 187 N.W.2d at 520.

252. *Id.*

253. Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974). Reasonableness was all the more questionable in *Ziemba*, since the plaintiff was informed of her pregnancy at four to four and one-half months after conception.

two options identically, stating it would also be unreasonable to require parents to mitigate damages by offering the unwanted child for adoption.[254] The rationale is that many parents feel obligated to raise their own children.[255] Of course, such an approach is legally illogical. What a plaintiff "feels obligated" to endure is irrelevant; reasonableness is the recognized and required standard of conduct. Accordingly, if the plaintff's subjective obligation is not reasonable conduct, damages should be denied for whatever consequences the reasonable conduct might have avoided.

The reasonableness of adoption as a method of mitigating damages is particularly conspicuous where the child involved is illegitimate. Certainly the damages accruing to a single, unwed parent are greater than those in cases of married couples.[256] For an unwed mother there may be damage to reputation and additional mental anguish. Furthermore, a single parent is much less likely to be capable of supporting the child. Perhaps grappling silently with these considerations, the only decision involving an illegitimate wrongful birth dismissed the argument that the plaintiff should be required to relinquish her child, but held that the triers of fact could assess the "amounts chargeable" to the plaintiff under her duty to mitigate damages.[257] By offering the question to the jury, the court adhered to established principles of tort law. In light of the surrounding circumstances, adoption may well have been a reasonable alternative.

It has been suggested that adoption is viable as a method of mitigating damages only if the unplanned child is normal, since an abnormal child's chances of being adopted are negligible.[258] This argument does nothing to alter the basic principle that plaintiffs are required to do only what is reasonable, in light of all the circumstances, and that juries determine what is reasonable. Jurors, like parents, might well decide that offering an abnormal child for adoption would result in his never having a home, and that doing so would not constitute reasonable conduct.[259] Thus, the reasonableness of adoption, even for abnormal children, can safely be left to a jury.

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254. *See, e.g.*, Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 176 (1977).

255. Troppi v. Scarf, 31 Mich. App. 2d 240, 187 N.W.2d 511, 520 (1971).

256. *Id.* at 518.

257. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652, 659 (1976).

258. *See* Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187, 1203-04 (1976).

259. However, it is questionable that abnormal children really will not be adopted. The Director on Adoption for the Child Welfare League of America has

Part of the opposition to recognizing abortion or adoption as reasonable conduct appears to lie in the belief that such measures would inflict great emotional stress and harm upon the parents. But although courts have acknowledged this possibility of mental pain and anguish,[260] they have overlooked a corollary to the avoidable consequences rule. That principle is that plaintiffs may recover for harm they suffer in their reasonable efforts to reduce damages.[261] Therefore, if the mitigating measure is reasonable, and the harm suffered will be less expensive than the avoidable consequences, a strict application of law not only requires that the steps be taken, but also guarantees plaintiffs compensation for the anguish this causes them.

Determining as a matter of law that mitigation will entail undue mental anguish seems an exceedingly subjective legal conclusion. For parents who have endeavored not to have a child, pleaded his birth as an injury to them, and alleged damages in tens or hundreds of thousands of dollars, the suggestion of adoption should not seem wholly unreasonable. Moreover, it should appeal to courts, since courts are traditionally concerned with a child's best interests. This is true for three reasons. First, in the domestic relations context, children are assigned to homes with parents who want them. Next, recent evidence indicates that adopted children fare better than children living with their biological parents.[262] Finally, the very fact that a wrongful birth action was filed because of him may adversely affect a child. This contingency would be obviated if the unplanned child were adopted. When viewed objectively, adoption is plainly a plausible solution to unwanted child support obligations. Hence, it should not be held unreasonable as a matter of law on the issue of mitigating damages.

Holding adoption unreasonable as a matter of law possibly contravenes public policy. Although public policy has not been addressed on the issue of damage mitigation, courts have employed it to find no injury; in so doing, some have mentioned the alternative of adoption. For instance, one court pointed out, "Many people would be willing to support this child were they given the right of custody

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stated that the demand for adoptive children is now so great that even handicapped and retarded youngsters can be placed. *See* Kwitny, *Suicide, Motherhood and Madness—But Not Adoption?*, Wall St. J., Dec. 2, 1977, at 14, col. 6.

260. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971).

261. *See* MCCORMICK, *supra* note 128, § 35.

262. *See IQ., Culture and Adopted Children*, SCIENCE NEWS, Sept. 3, 1977, at 150.

and adoption . . . ."[263] The court then concluded that awarding damages would be against public policy.[264] While this holding has the defect of looking to the wrong source for public policy,[265] the same holding can be based on policy as manifested in state statutes favoring adoption of unwanted children.[266] Besides serving the significant state interest of placing children with parents who truly want them, viewing adoption as a reasonable mitigation measure has two more advantages. First, it would significantly reduce the financial burden imposed upon defendants, since rearing costs are often the major part of the damages requested. Also, it might serve as a deterrent to fraudulent claims. Parents who have decided subsequent to the negligent act that they do desire an additional child would not be compensated for what they no longer deem an injury. Public policy for all these reasons affords courts a rationale for considering adoption as a reasonable method of mitigating damages.

Interestingly, what has been viewed as public policy for purposes of finding injury has been ignored when the issue is mitigation of damages. To find the fact of damage, courts have pointed to the decision in *Roe v. Wade.*[267] Yet to reach the conclusion that mitigation of damages should not be required, they have bypassed the notion that abortion is now considered a lawful alternative to childbearing. *Troppi*, decided before *Roe*, observed that abortion at that time was still a felony in many jurisdictions; as a result, it could not be considered a reasonable method of mitigation.[268] However, such is no longer the case. Of course, this is not to say that whatever is lawful is reasonable. The right to have an abortion cannot be converted into an obligation to have one.[269] But what common and statutory law declare lawful certainly cannot be summarily dismissed as unreasonable as a matter of law.

To date the question of mitigating damages has been raised in wrongful birth cases only in regard to abortion or adoption. However, it would find application to damages other than the costs of rearing and educating the child. For example, the principle might also apply to mental pain and suffering. Thus, a plaintiff who pleads

263. Shaheen v. Knight, 11 Pa. D. & C.2d 41, 46 (Lycoming Cty. 1957).

264. *Id.*

265. *See* note 83 *supra.*

266. *See, e.g.*, MICH. STAT. ANN. § 710.1 *et seq.* (1968); MINN. STAT. ANN. § 259.21 *et seq.* (1971).

267. *See, e.g.*, Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169, 175 (1977).

268. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971).

269. Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265, 269 (1974).

damages for the mental anguish involved in pregnancy or child-raising might be required to seek psychiatric help. If such help is less expensive than the allegedly injurious consequences, the defendant would compensate the plaintiff for avoiding the consequences. Furthermore, if opportunity costs are alleged as damages, the parent might be required to send the child to a day-care center and continue to work. Again, the defendant would be responsible for the child care costs, if these were less than the lost wages. The possibility of holding a defendant liable for opportunity costs points up the inherent injustice in holding mitigation measures unreasonable as a matter of law. It seems inconceivable that a court would hold, as a matter of law, that no mother should ever be required to remain employed for the first few years of her child's life. Yet for many women that is a moral obligation: it is what the mother "feels obligated"[270] to do. Therefore, under the present analyses, it would appear that the refusal to return to work would be afforded the same immunity as refusals to mitigate damages through abortion or adoption. Such immunity for opportunity costs would invite fraud by guaranteeing plaintiff mothers paid vacations from employment, without inquiry into their motives. Unless the mitigation issue is submitted to the jury on all damages questions, unjust enrichment will inevitably result from the verdict.

If courts do not defer the mitigation question to the juries, they are not treating wrongful birth as the simple negligence action they suggest it is. To hold as a matter of law that plaintiffs are not required to avoid huge consequential damages allows plaintiffs to take advantage of one side of tort law. Moreover, it imposes an unjust financial burden on defendants. The major problem with such an approach is that it assumes too much. It may be that mitigation measures such as abortion and adoption are unreasonable for some parents, or for most parents, but such measures are not always unreasonable as a matter of law. For this reason, the surrounding circumstances of each case should be examined, as should the motives of plaintiffs in failing to mitigate damages. Under the view that mitigation is unreasonable, evidence that a plaintiff had willfully abandoned a previous child, or had campaigned for less stringent abortion laws, would not even be admissible for impeachment purposes, since the motives are deemed irrelevant. If pregnancy and child-raising are as injurious as plaintiffs suggest in their complaints, inquiry into their motives for not lessening those injuries

270. *Cf.* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971) (holding adoption unreasonable because parents feel obligated to raise their own children).

seems completely appropriate. Mitigation is perhaps the most effective vehicle courts can use to prevent unjust enrichment. In view of the vast potential liability with which defendants may be encumbered, every method of diminishing damages, including mitigation, should be employed.

POTENTIAL LIABILITY

Although courts[271] and commentators[272] have attempted to make it such, wrongful birth is not an ordinary tort. It is one thing to compensate destruction; it is quite another to compensate creation. This so-called "wrong" is unique: it is a new and on-going condition.[273] As life, it necessarily interacts with other lives. Indeed, it draws its "injurious" nature from the predilections of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages.

The damages—in fact, the issues—flowing from the elements of the wrongful birth cause of action have just begun to be litigated. In the exercise of judicial activism, courts have opened a veritable floodgate. Those courts denying recovery, and one court which granted it, have recognized this. In *Rieck*, the court prohibited recovery on grounds, *inter alia*, that the tort "would enter a field that has no sensible or just stopping point."[274] An examination of the potentials of wrongful birth liability evidences the validity of the *Rieck* proposition.

The possible damages yet to be alleged in the context of birth control failure are staggering. Courts have already alluded to the damages incurred in "replan[ning] family life."[275] Therefore, it does not seem unreasonable to predict that more mothers will allege and recover opportunity costs—that is, the value of their lost career opportunities.[276] Moreover, the injury incurred in replanning family life would undoubtedly be greater in the case of a single, unwed mother.

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271. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

272. *See, e.g.*, Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1189, 1204 (1976).

273. Perhaps the closest analogy in ordinary tort law is that of a personal injury which leads to other injuries before it heals.

274. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242, 245 (1974). *Accord*, Howard v. Lecher, 53 App. Div. 2d 420, 386 N.Y.S.2d 460, 462-63 (1976).

275. Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204, 205 (1976).

276. The Rockefeller Commission has estimated these costs at $40,000. Report, Population and the American Future 80 (1972). However, this is only an estimate, and would vary with the education and skills of the individual.

As one court mentioned, hypothetically, an unwed college coed might become pregnant as the result of a negligently filled birth control prescription.[277] This foreshadowed the case of *Stills v. Gratton*,[278] in which a doctor performed an unsuccessful abortion on an unwed college student. Naturally, the damages suffered by such a plaintiff would have to include opportunity costs, unless the woman could complete her education uninterrupted. In that case, however, someone else would have to care for the child. Day care center costs might therefore be granted, as well as the cost of a babysitter while the student did her homework. Carried to its logical conclusion, the doctrine of proximate cause might necessitate the granting of damages if the student's grades suffered as a result of the negligence. Thus, "replanning family life" may have far-reaching ramifications.

These costs of replanning a lifestyle might also logically include damages for the loss of freedom the parent or parents experience with the addition of a new family member. A baby requires much attention which parents might rather devote to other activities. The encumbrance of freedom is certainly one reason many couples choose not to have children.[279] For such persons, child-raising may represent a lower status;[280] thus, damages for that sort of mental suffering might be claimed.

Replanning family life necessarily encompasses replanning the household. The addition of an unplanned child to a family of several members might logically require the addition of another room to the home, or even another home. If another home is required, moving expenses would also be involved. Similarly, the family car might prove inadequate. If the measure of tort damages is applied strictly, such consequences are unmistakably compensable. The greatest limitation on damages is plainly the attorney's imagination.[281]

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277. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 518 (1971).

278. 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

279. *See What Life Is Like with Twelve Children . . . Two . . . None*, U.S. NEWS & WORLD REPORT, Oct. 4, 1976, at 60.

280. *See Nobody Home: The Erosion of the American Family*, PSYCHOLOGY TODAY, May, 1977, at 43.

281. In Sherlock v. Stillwater Clinic, ___ Minn. ___, 260 N.W.2d 169 (1977), the court expressed its hopes that attorneys themselves would curtail wrongful birth litigation: "It is therefore our hope that future parents and attorneys would give serious reflection to the silent interests of the child and, in particular, the parent-child relationships that must be sustained long after legal controversies have been laid to rest." *Id.* at 177.

Even if recovery were limited to the costs of pregnancy and delivery, courts could be faced with multitudinous claims. A first-time mother could surely sue her negligent physician for a new maternity wardrobe, as well as for any educational materials she might require. In the event of stretch marks, or a Caesarean section, damages for disfigurement might be alleged. Were the pregnant woman to consume more food than usual, or unusually expensive food during pregnancy, the doctor would be liable, under the doctrine of proximate cause, for the added food costs. Furthermore, because the defendant must take his plaintiff as he finds him,[282] it would appear that the parents might choose among delivery options such as midwifery or natural childbirth, and the defendant would have to compensate them for any additional costs their option entailed.

An even broader scope of damages might be realized once the psychological aspects of pregnancy are fully litigated. While adverse complications are possible in any pregnancy, they are much more likely to occur in unwanted pregnancy.[283] Besides the mental injury, there could be physical symptoms with possibly lasting effects.[284] Moreover, psychological trauma could be claimed by both parents.[285] Psychiatric care could, therefore, constitute a major aspect of recovery.

Like potential damages, the potential contexts of wrongful birth are virtually limitless. A recent suit, for example, charges the defendant in an automobile accident with causing the plaintiff's Fallopian tubes to become untied; as a result, the plaintiff alleges, she later conceived a child.[286] In a different situation, the pregnant woman herself might be the defendant: with the recent abrogation of interspousal immunity,[287] there would be nothing to prevent a disgruntled husband from bringing a wrongful birth action against

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282. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971). The *Troppi* court construed the rule to mean the defendant must accept a subsequent choice of the plaintiff.

283. *See generally* A. MCFARLANE, THE PSYCHOLOGY OF CHILDBIRTH (1977).

284. *See generally* S. CHERRY, UNDERSTANDING PREGNANCY AND CHILDBIRTH (1973).

285. *See generally* A. COLMAN & L. COLMAN, PREGNANCY: THE PSYCHOLOGICAL EXPERIENCE (1971).

286. This case, entitled Howard v. Schneider Transport, was filed in Lake County, Indiana, on June 2, 1976. It is now pending in Porter County, Indiana (Cause No. 77-PSC-345).

287. *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970).

his wife for her negligent failure to take birth control pills. The hypothetical husband could seek to absolve his duty to support an unwanted child proximately caused by his wife's negligence. The apparent absurdity of these cases does not diminish their very real possibility.

More readily apparent, perhaps, is the prolific nature of the cases in which a physician fails to inform his patient of the possibility that the child she is carrying may be born with defects.[288] How far that duty will be carried is undetermined. Must a physician inform every mother-to-be, for instance, of the possibility of Mongolism, in case the woman would decide to abort?[288a] Is a physician now required to delve into the genetic structure of his patients? Recognizing this potential liability, one court denied the parents' cause of action, refusing to impose upon all obstetricians the duty of becoming forced genetic counselors.[289] The majority reasoned that recovery would make the physician an insurer of the genetic health of newborns.[290] Such a burden is apparently the trend.[291]

Another potential burden lies in the unsuccessful vasectomy situation. There is no reason to believe that each man who has a vasectomy has one sexual partner; a single man might sire more than one child before the negligence is discovered. In such a case, the physician would be burdened with the consequential damages of promiscuity, since a strict application of proximate cause theory would render the doctor wholly liable.

From these real and hypothetical examples, two observations are clear. First, unless some restriction is placed on recovery, wrongful birth damages will proliferate. Second, bearing the brunt of that proliferation will be not only the defendants, but also the general public, due to the costs of malpractice insurance.[292] Even more disturbing, especially for population planners, should be the fact that studies reveal physicians became reluctant to perform sterilizations following the initial wrongful birth cases.[293] Therefore,

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288. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

288[a] Apparently he must do so, at least where the mother is over thirty-five years of age. *See* Becker v. Schwartz, 47 U.S.L.W. 2426 (N.Y. Ct. App. Dec. 27, 1978).

289. Howard v. Lecher, 53 App. Div. 2d 420, 386 N.Y.S.2d 460, 462 (1976).

290. *Id.*

291. *See* notes 196 and 197 *supra* and accompanying text.

292. *See generally* Makovsky, *Malpractice and Medicine*, Society, Jan./Feb., 1977, at 25.

293. *See* Note, *Elective Sterilization*, 113 U. PA. L. REV. 415 (1965).

in granting damages because public policy favors family planning,[294] the courts may be thwarting that very policy.

Much of the proliferation of damages in this context is simply a reflection of the "take your victim as you find him" approach taken by most courts. The exploration of individual idiosyncracies will inevitably lead to more and more damages. Prohibition of recovery, restriction of recovery, or mitigation of damages would serve to relieve the situation. Absent any limitation, the cause of action clearly has "no sensible or just stopping point."[295]

CONCLUSION

Wrongful birth is not an ordinary tort, and, while it is apparent that some injury does exist, there are substantial public policy reasons for limiting recovery or denying the cause of action altogether. The wrongful birth cause of action is one previously unknown at common law; because it involves significant moral issues, it would best be left to legislative bodies, where a full debate can take place. Most courts, however, have been unwilling to invoke either process or policy considerations to deny recovery. The result of their treatment of wrongful birth has been the granting of speculative damages, offset by speculative benefits, without regard to basic principles of law. While ostensibly treating wrongful birth as a simple negligent tort, the courts actually pick and choose among various tort principles. Such an approach encourages fraud and provides unjust enrichment by permitting plaintiffs to forego their usual duty to mitigate damages—in this situation by either abortion or adoption. Hence, it is not only an unwarranted attempt at judicial legislation, but also an inadequate one.

The potential impact of this judicial activism is not yet known. The problems inherent in damage calculation are only beginning to evolve; the action is still rather young. By not restraining recovery, the courts are unleashing litigation which brings with it unprecedented and possibly untamable damages.

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294. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 517 (1971).

295. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242, 245 (1974).