



NEW MEXICO LAW REVIEW

Volume 23
Issue 2 July 1993

Summer 1993

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Recommended Citation

Lori M. Bencoe, *Lovelace Medical Center v. Mendez: A New Approach to Damages Awards in New Mexico*, 23 N.M. L. Rev. 451 (1993).

Available at: <https://digitalrepository.unm.edu/nmlr/vol23/iss2/20>

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Lovelace Medical Center v. Mendez: A New Approach to Damages Awards in New Mexico

I. INTRODUCTION

In 1991, New Mexico became the second state to hold that the parents of a healthy child born as the result of a hospital's negligent failure to perform an effective sterilization procedure are entitled to damages for the cost of raising the child to adulthood.¹ A majority of jurisdictions limit the damages awarded for negligently performed sterilization procedures to the expenses and pain and suffering that are directly associated with the mother's pregnancy, birth, and subsequent successful sterilization procedure.² *Lovelace Medical Center v. Mendez* is noteworthy for four reasons.³ First, it extends recovery in negligent sterilization suits beyond the norm by allowing full child rearing costs.⁴ Second, it denies the offset or mitigation of these damages.⁵ Third, it only allows recovery for the pain and suffering directly associated with the pregnancy and birth of the child. It does not allow damages for pain and suffering associated with the financial and emotional burdens of caring for an additional family member.⁶ Fourth and most important, it presents a formula that, aside from supporting its holding in this case, serves as a tool for evaluating when damages should and should not be recoverable.⁷ For

1. *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991) (mother received negligent tubal ligation). Wisconsin was the first state to allow such damages for the cost of raising a child in a wrongful conception medical malpractice action. See *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990).

This medical malpractice claim is a wrongful conception or pregnancy claim, because conception and pregnancy resulted from a physician's negligence. *Lovelace*, 111 N.M. at 348-349, 805 P.2d at 615. Wrongful conception claims should be distinguished from wrongful birth and wrongful life claims. *Id.* Wrongful life claims are brought by a child who is born unhealthy or abnormal due to a physician's negligence. *Id.* Wrongful birth claims are brought by the parents of such a child. *Id.*

2. See *infra* notes 8-23 and accompanying text; see also David J. Burke, Comment, *Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Consideration*, 8 PACE L. REV. 313 (1988).

3. *Lovelace*, 111 N.M. at 341-42, 805 P.2d at 609-10. The first portion of the supreme court opinion, which is not the topic of this comment, dealt with whether the court of appeals had jurisdiction over the interlocutory appeal although it granted certiorari after the expiration of the twenty day period provided by statute. *Id.* at 337-341, 805 P.2d at 604-608; see also N.M. STAT. ANN. § 39-3-4 (1978). The supreme court affirmed the court of appeals' jurisdiction by acknowledging that the legislature had the constitutional authority to limit appellate courts' jurisdiction to hear interlocutory appeals. It then concluded that the legislature did not intend to control jurisdiction when it promulgated N.M. STAT. ANN. § 39-3-4, but rather, intended that the statute serve only a "housekeeping" purpose. *Lovelace*, 111 N.M. at 339, 805 P.2d at 606.

4. *Lovelace*, 111 N.M. 336, 805 P.2d 603. See *infra* notes 8-33 and accompanying text.

5. See *infra* notes 31-33 and accompanying text.

6. *Lovelace*, 111 N.M. at 347, 353, 805 P.2d at 614, 620. *Lovelace* explained that this was because the "intangible benefits and burdens a child provides are too speculative" and because allowing such damages "encourag[es] parents to denigrate their children. . ." and "encourage[s] the parties and the jury to engage in distasteful moral determinations." *Id.* at 353, 805 P.2d at 620. To date, only one jurisdiction even implies that such damages are proper. See *Burke v. Rivo*, 551 N.E.2d 1, 3 (Mass. 1990), discussed *infra* note 96.

7. As a practical matter, the formula may also serve as a tool for analyzing the strength of a litigant's claim.

these reasons, *Lovelace* provides much more than just a precedent for future wrongful conception cases; it will be useful in arguing and deciding a wide variety of tort claims in the future.

This Comment briefly reviews the recoverability of damages for wrongful conception negligence in other jurisdictions. It then presents the New Mexico Supreme Court's holding in *Lovelace*, examines its well-reasoned formula for determining when damages should and should not be allowed, and critiques its application to the Mendezes' claim.⁸ Finally, this Comment applies the formula to a hypothetical case in order to evaluate its usefulness in arguing and deciding other damages claims.

II. THE WORLD BEFORE *LOVELACE V. MENDEZ*: WRONGFUL CONCEPTION DAMAGES ALLOWED IN OTHER JURISDICTIONS

The highest courts of most states have heard wrongful conception claims, and have made decisions about the types of damages that should and should not be allowed. While nearly every state allows recovery for the pain and suffering and costs associated with the unwanted pregnancy and birth itself, a majority of states deny recovery for child rearing costs.⁹ Most states that deny child rearing costs cite public policy-related reasons for doing so. Their explanations of policy differ, however.

Some state courts have held that the birth of a healthy child is simply not an injury to its parents.¹⁰ A Florida court explained that since the child's birth is not an injury, and since the child is the parents' and not the physician's, the legal obligation of raising it rests with the parents.¹¹ The Illinois Supreme Court ruled that allowing parents to transfer the cost of rearing the child to the physician goes against the policy of preserving family relations.¹² The Arkansas Supreme Court explained that allowing child rearing costs would turn the child into an:

"emotional bastard," who will someday learn that its parents did not want it and, in fact, went to court to force somebody else to pay for its raising, [and that this] will be harmful to that child. It will undermine society's need for a strong and healthy family relationship.¹³

Another group of states bases its denial of child rearing costs on the theory that the benefits of a healthy child outweigh the burdens.¹⁴ Washington denied child rearing costs because, in order to be entitled to them, parents would be required to show that the child would be "more trouble

8. *Lovelace*, 111 N.M. at 342-347, 805 P.2d at 609-614.

9. See *infra* notes 8-23 and accompanying text.

10. See *O'Toole v. Greenberg*, 477 N.E.2d 445, 448 (N.Y. 1985); *Fulton-De Kalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 654-55 (Ga. 1984); *Hickman v. Myers*, 632 S.W.2d 869, 870 (Tex. 1982).

11. *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984).

12. *Cockrum v. Baumgartner*, 447 N.E.2d 385, 390 (Ill. 1983).

13. *Wilber v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982).

14. See *McKernan v. Aasheim*, 687 P.2d 850 (Wash. 1984); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982); *Narnke v. Napier*, 346 N.W.2d 520, 522-23 (Iowa 1984); *Mason v. W. Penn. Hosp.*, 453 A.2d 974, 976 (Penn. 1982).

than it was worth."¹⁵ A couple of state courts have explained that it is simply bad policy to attempt to measure the monetary value of a human life against its costs.¹⁶ The District of Columbia considers child rearing costs to be one of the "highly personal matters that seem particularly unsuited for the traditional adversarial process of a negligence action in a court of law."¹⁷

A few states deny child rearing damages because they find it impossible to measure them. Utah, Washington and Wyoming have all found such damages too speculative to calculate.¹⁸ The Virginia Supreme Court explained that "a court or jury is not capable of determining with any reasonable certainty the costs of bringing a child to maturity less the offsetting value of the child's life."¹⁹

Still other states deny recovery for child rearing costs "based on public policy" without explaining the specific reasons which preclude recovery.²⁰ Kentucky's Supreme Court found the question of recovery for child rearing damages in a wrongful conception action to be one of public policy, and refused to decide it, because the Kentucky legislature had not addressed the public policy issue of whether such damages would be proper.²¹

Finally, Nevada recently denied recovery for *all* damages sought in a wrongful conception lawsuit, based on the rationale that "the birth of a normal child is not a civil wrong for which the court will provide a remedy in the form of an action for damages."²² The Nevada court explained that tort actions are only properly maintained when the plaintiff actually suffers injuries.²³ Since the birth of a healthy child was not an injury, the parents had no viable negligence action.²⁴ The court, in dicta, held it would have been proper for the parents to seek damages for their financial losses in a breach of contract action instead.²⁵

A minority of jurisdictions allows child rearing damages in wrongful conception cases, but requires these damages to be offset by the value of the emotional benefits which the unplanned child presumably confers

15. *McKernan*, 687 P.2d at 855.

16. *See Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982); *Coleman v. Garrison*, 349 A.2d 8, 12 (Del. 1975).

17. *Flowers v. District of Columbia*, 478 A.2d 1073, 1077 (D.C. 1984).

18. *See C.S. v. Nielson*, 767 P.2d 504, 516 (Utah 1988); *McKernan v. Aasheim*, 687 P.2d 850, 855 (Wash. 1984); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982); *see also Jackson v. Bumgardner*, 347 S.E.2d 743, 749-50 (N.C. 1986).

19. *Miller v. Johnson*, 343 S.E.2d 301, 307 (Va. 1986).

20. *See Johnson v. Univ. Hosp. of Cleveland*, 540 N.E.2d 1370 (Ohio 1989); *Rinard v. Biczak*, 441 N.W.2d 441 (Mich. Ct. App. 1989); *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987); *Smith v. Gore*, 728 S.W.2d 738, 751 (Tenn. 1987); *Macomber v. Dillman*, 505 A.2d 810, 813 (Me. 1986); *P. v. Portadin*, 432 A.2d 556, 559 (N.J. 1981).

21. *Schork v. Huber*, 648 S.W.2d 861 (Ky. 1983).

22. *Szekeress v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986).

23. *Id.*

24. *Id.*

25. *Id.* at 1079.

on its parents.²⁶ The Minnesota court noted that "it would seem myopic to declare . . . that th[e] benefits [of having a child] exceed the costs as a matter of law."²⁷ The courts that allow damages to be diminished by offsetting benefits must deal with the issue of calculating the value of the emotional benefits which the child will confer on its parents.

Wisconsin's supreme court was the first to hold that the parents of a healthy child who bring a wrongful conception case should be entitled to recover child rearing costs without offsetting for benefits.²⁸ The Wisconsin court found it would not be equitable to apply the principle of offsetting damages in a wrongful conception case.²⁹ Since the parents presumably knew what emotional benefits they were giving up by deciding not to have more children, it would be unfair "to not only force this benefit upon them but to tell them they must pay for it as well . . ."³⁰

Wisconsin also refused to hold the parents responsible for not mitigating their damages because they did not terminate the pregnancy with abortion or put their child up for adoption.³¹ Other jurisdictions that have considered mitigation of damages as a defense in wrongful conception suits have also concluded that it would impose inappropriate burdens on the parents.³²

New Mexico followed Wisconsin in allowing recovery for child rearing costs while precluding their offset.³³ *Lovelace* held that child rearing costs cannot be offset by the value of emotional benefits that an unplanned birth presumably confers on the parents.³⁴ *Lovelace* also followed Wisconsin in concluding that the plaintiffs in a wrongful pregnancy suit cannot be held responsible for failing to mitigate their damages by obtaining an abortion or putting the child up for adoption.³⁵

26. See *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990); *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984); *Univ. of Ariz. Health Sciences Ctr. v. Superior Ct.*, 667 P.2d 1294, 1299 (Ariz. 1983) (en banc); *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); see also Sandra Gooding Sylvia, Comment, *One More Mouth to Feed: A Look at Physicians' Liability for the Negligent Performance of Sterilization Operations*, 25 ARIZ. L. REV. 1069 (Fall 1983); Philip Braverman, Note, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 FORDHAM L. REV. 418 (1978).

27. *Sherlock*, 260 N.W.2d at 175-76.

28. *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990).

29. *Id.* at 249.

30. *Id.*

31. *Id.* at 247.

32. See *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984); *Univ. of Ariz. Health Sciences Ctr. v. Superior Ct.*, 667 P.2d 1294 (Ariz. 1983); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977).

33. See *Lovelace v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991).

34. *Id.* at 347, 352-53, 805 P.2d at 614, 619-620. The court found that it would contradict public policy to allow recovery for the emotional distress associated with having an unexpected child, and held that it would be unfair to consider emotional benefits while ignoring emotional burdens. *Id.* at 346, 805 P.2d at 613; see also *supra* note 5 and accompanying text and *infra* notes 101-103 and accompanying text.

35. *Id.* at 347, 353-54, 805 P.2d at 614, 620-21. The supreme court adopted the court of appeals' position. *Id.* at 341, 805 P.2d at 608. The parents' only means of mitigating the cost of raising a child would be to abort the child or to place it for adoption. *Id.* at 347, 353-54, 805 P.2d at 614, 622-23. The court held simply that it would be against public policy to consider whether parents should have taken such options. *Id.* The court avoided discussion of whether the Mendezes might

III. THE *LOVELACE MEDICAL CENTER V. MENDEZ* OPINION AND FORMULA ANALYSIS AND DISCUSSION

Important as the court's holding may be to New Mexicans involved in future wrongful conception cases, *Lovelace's* holding is not its most important feature. The formula which Justice Montgomery presented in reaching the holding will have a much broader impact on New Mexico law, especially as an analytical construct for practitioners and courts to apply to cases that present a question of recoverability for less than conventional damages.

The *Lovelace* court employed traditional tort principles as well as an innovative formula to identify "legally compensable harms" in determining whether to allow the Mendezes to recover an unconventional category of damages.³⁶ The supreme court created and applied this formula, although it could have allowed child rearing damages based on policy arguments alone, as the court of appeals did.³⁷ Perhaps the supreme court presented the formula to strengthen its decision because it found the policy arguments insufficient to stand alone. It is more likely that the court seized *Lovelace Medical Center v. Mendez* as a perfect opportunity to develop and present an analytical construct to assist practitioners and courts in bringing and deciding claims that present difficult damage recoverability questions.

A. *The Supreme Court's Adoption of the Court of Appeals' Opinion*

The supreme court began the damages portion of its opinion by affirming the court of appeals' approach to measuring damages.³⁸ Because there was no question that negligence had occurred in *Lovelace* and that negligence had resulted in injury, the real issue was how to measure damages in order to compensate the plaintiffs.³⁹ The supreme court affirmed the court of appeals' rationale that, as in all tort cases, it is only proper to compensate the plaintiff for financial losses that were proximately caused by the negligence and were a foreseeable result of the negligence.⁴⁰ The supreme court upheld the court of appeals' conclusion that precluding recovery for child rearing costs would not serve any valid

have considered abortion or adoption to be reasonable, and made no conclusions about whether proof of such subjective reasonableness might have assisted *Lovelace* in showing that the Mendezes should have mitigated their damages.

36. *Lovelace*, 111 N.M. at 342-347, 805 P.2d at 609-614 (opinion of Montgomery, J.) (injury and harm formula discussion).

37. *Id.* at 342-354, 805 P.2d at 609-621.

38. See *supra* note 3 and accompanying text.

39. *Lovelace*, 111 N.M. at 342, 805 P.2d at 609. The court of appeals noted that in order to reconcile the pertinent issues brought before it on an interlocutory appeal of a motion for partial summary judgment, the court would assume that the Mendezes had shown liability although they had not yet done so before a trial court. *Id.* at 347, 805 P.2d at 614.

40. *Id.* at 349, 805 P.2d at 616 (opinion of Alarid, J., adopted by the supreme court at 111 N.M. 341, 805 P.2d 608).

policy rationales.⁴¹ It agreed that the family's interests are only truly valued when the economic burdens of raising a child are recognized and held compensable.⁴²

The supreme court opinion was not entirely repetitive of the court of appeals' opinion, however. It took exception with Judge Alarid's definition of "injury" as the wrongful act or tort *itself*, and also with his conclusion that the injury in *Lovelace* "consisted of the physician's wrongful acts."⁴³

The supreme court explained that the tort, or wrongful act, is not the same thing as the injury.⁴⁴ The wrongful act occurs first.⁴⁵ The injury is the harm that results from the wrongful act.⁴⁶ In *Lovelace*, the hospital's wrongful acts were performing the sterilization procedure negligently and then failing to notify Mrs. Mendez that the procedure had not been successfully completed and that she was still fertile.⁴⁷ The injuries resulting from the wrongful acts are different, and must be considered separately. The supreme court defined the Mendezes' injuries in the third step of a four-step formula first announced in this case.⁴⁸

B. The Lovelace Formula

The supreme court set up and applied a four-step formula for assessing recoverability of damages in tort. First, this formula defines wrongful acts and identifies those which occur.⁴⁹ Second, it defines harm and analyzes whether the wrongful act results in harm. Third, it determines whether the law defines the identified harm as a legally compensable

41. *Id.* at 350-352, 805 P.2d at 617-19 (opinion of Alarid, J., adopted by the supreme court at 111 N.M. 341, 805 P.2d 608); *see also supra* notes 8-23 and accompanying text (discussion of policies for precluding recovery).

42. *Id.* at 352, 805 P.2d at 619 (opinion of Alarid, J., adopted by the supreme court at 111 N.M. 341, 805 P.2d 608).

43. *Id.* at 341, 805 P.2d at 608 n.5 (emphasis added); *see also id.* at 351, 805 P.2d at 618 (Judge Alarid's discussion of injury).

Judge Alarid's interpretation of "injury" was based on *Clark v. Cassetty*, where the court contrasted "injury" with "damage" by explaining that "injury means something done against the right of the party, producing damage, whereas damage is the harm, detriment, or loss sustained by reason of the injury." *Clark*, 71 N.M. 89, 92, 376 P.2d 37, 40 (1962) (Clark sued Cassetty for igniting Clark's wheat fields after negligently driving his truck onto Clark's property with a defective muffler).

Judge Alarid used the term "injury" in *Lovelace* to explain Mendez's harms. *Lovelace*, 111 N.M. at 351, 805 P.2d at 618. He explained that the injury was "the doctor's act in only ligating one fallopian tube and then failing to inform Maria Mendez that she . . . should continue using some means of birth control." *Id.* Alarid's definition of the term injury led to the practical conclusion that all damages proximately caused by or foreseeably resulting from the doctor's negligence should be recoverable. *Id.*

44. *Id.* at 342, 805 P.2d at 609 (the supreme court interpreted *Clark* differently than did the court of appeals).

45. *Id.*

46. *Id.* In *Clark*, the wrongful act of driving with a defective muffler caused the resulting injury of destroying Clark's wheat, 71 N.M. at 92, 376 P.2d at 39. The court also relied on the RESTATEMENT (SECOND) OF TORTS for definitions of harm and injury. *See infra* notes 53-57 and accompanying text.

47. *Lovelace*, 111 N.M. at 342, 805 P.2d at 609.

48. *See infra* notes 47-103 and accompanying text.

49. The court stressed the difference between wrongful acts and resulting injuries because the determination of each is a separate step of the formula.

injury. Finally, it decides whether to allow damages to compensate for the injury. An explanation of the formula and examination of its application to each step of the Mendezes' claim against Lovelace follows.

1. The "Wrongful Act"

According to *Lovelace*, the court must first define the defendant's wrongful acts, and then determine whether the law provides those affected thereby with any viable causes of action as a means of recourse.⁵⁰ Lovelace's wrongful acts included tying only one of Mrs. Mendez's fallopian tubes and then failing to warn her that she was still fertile.⁵¹ New Mexico tort law provided the Mendezes with a viable negligence action as a means of recourse for Lovelace's actions.⁵²

2. The Resulting "Harm" to Plaintiff

Second, the court decided whether any harm had resulted from the wrongful acts that took place.⁵³ The key to understanding this step and the next, lies in understanding the different definitions the court assigned to "harm" and "injury."⁵⁴ For this reason, the court's definition of both terms will be explained here, although the determination of whether a harm is also a legally compensable injury is not made until the next step of the formula.

The supreme court adopted the Restatement's definitions of harm and injury.⁵⁵ The Restatement defines harm as "a loss or detriment in fact of any kind to a person resulting from any cause."⁵⁶ The comments, cited by the supreme court, describe harm further:

[H]arm . . . is the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person, or in physical things, and also the detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests.⁵⁷

As the definition illustrates, wrongful acts can cause a vast array of harms.

Injuries are a more narrow subcategory of harms, defined by the Restatement as "invasion[s] of any *legally protected* interest of another."⁵⁸ Thus, injuries are those harms which are legally compensable. The fact that a wrongful act harms an individual does not in itself warrant legal compensation. A harm only becomes an "injury" after a court concludes

50. *Lovelace*, 111 N.M. at 342, 805 P.2d at 609.

51. *Id.*

52. *Id.*; see also *supra* note 37 and accompanying text.

53. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610.

54. *Id.*

55. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 7 (1965).

56. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610 (citing RESTATEMENT (SECOND) OF TORTS § 7(2) (1965)).

57. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 7(2) cmt. b (1965)).

58. *Id.* at 342, 805 P.2d at 609 (citing RESTATEMENT (SECOND) OF TORTS § 7(1) (1965)) (emphasis added).

that it is legally compensable.⁵⁹ The "injury" determination is the third step of the formula. Before it can be made, the court must conclude whether a harm resulted from a wrongful act. Furthermore, it must define that harm. If the person affected by a wrongful act has suffered a loss or detriment that falls within the Restatement's definition, then the wrongful act has resulted in harm.

The supreme court concluded that the Mendezes suffered two distinct harms as a direct result of Lovelace's alleged negligence.⁶⁰ First, the court found that Lovelace's wrongful acts compromised the Mendezes' interest in and right to plan the size of their family.⁶¹ Second, Lovelace's wrongful acts harmed the Mendezes' interest in maintaining their family's financial well being. Against their wishes, the Mendezes were placed in a position of raising an additional child, the costs of which they stated they were quite unable to bear.⁶²

3. The "Harm" of a Legally Protected Interest is an "Injury"

In the third step of the formula, the court decided whether the harm suffered as the result of a wrongful act was an injury or merely a harm for which the law will not compensate. Although harm was defined broadly in the previous section to include nearly all types of losses,⁶³ *Lovelace* held that only those harms which the law recognizes as legally compensable are truly "injuries."⁶⁴ Harms to interests that the law recognizes or protects constitute "injuries."

The court defined "legally protected interests" as those which the common law recognizes as "worthy of legal protection."⁶⁵ After a court posing this question identifies the particular interest that has been harmed,⁶⁶ an examination of precedent can reveal whether past courts considered the interest to be worthy of legal protection.⁶⁷

The *Lovelace* court reviewed each of the Mendezes' harmed interests to determine whether each constituted an "injury."⁶⁸ Relying on precedent, the court found that the Mendezes' interest in economic stability was

59. *Id.* The court observed that the Restatement's differentiation between "injury" and "harm" was "very close to, if not the same as, the distinction between 'injury' and 'damage' . . . recognized in *Clark v. Cassetty*." *Id.* at 343, 805 P.2d at 610 n.7; see also *supra* note 43 and accompanying text.

60. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610. It is important for the defendant's wrongful act to cause the harms suffered, as they clearly did in this case.

The court applied the definition of "harm" from the RESTATEMENT (SECOND) OF TORTS to the Mendezes' claims, and concluded that they had suffered losses to self, personhood and property. See *supra* note 55 and accompanying text.

61. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610.

62. *Id.*

63. *Supra* notes 54-55 and accompanying text.

64. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610 (emphasis added).

65. *Id.*

66. The interests harmed were defined in the previous step of the formula. See *supra* notes 59-60 and accompanying text.

67. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610.

68. *Id.* at 345-46, 805 P.2d at 612-13.

considered worthy of protection.⁶⁹ The Mendezes' interest in controlling the size of their family has also been afforded protection in many cases.⁷⁰ The court thus concluded that the Mendezes had suffered two injuries at law.

4. The Law Must Provide Compensation for the "Injury"

In the fourth and final step of the formula, the court analyzed whether the law would actually allow compensation in the form of damages for an injured interest. Just because an interest has been deemed "worthy" of legal protection does not mean that the law has traditionally compensated for it. The law has denied protection to a number of interests which it has held worthy of protection.⁷¹ Courts have denied compensation for worthy interests when the calculation of resulting damages would require too much speculation⁷² and when awarding damages would contradict public policy.⁷³

a. Compensation for Injuries to Economic Stability

The court analyzed the propriety of granting compensation for injuries to economic stability. Recognizing that courts routinely allow compensation for this injury, the *Lovelace* court found that the Mendezes' injury should be compensable.⁷⁴ Following the formula, the court defined the

69. *Lovelace*, 111 N.M. at 344, 805 P.2d at 611. The court reviewed a number of tort contexts unrelated to the Mendezes' in which the plaintiffs' harmed economic interests formed at least a partial basis for their claims. *Id.*; see also *Sharon Steel Corp. v. Lakeshore Inc.*, 753 F.2d 851 (10th Cir. 1985) (allowing recovery for economic losses resulting from product liability); *Schmitz v. Smentowski*, 109 N.M. 386, 399, 785 P.2d 726, 739 (1990) (allowing recovery for jeopardy to business resulting from tortious & coercive contractual relations); *Williams v. Ashcraft*, 72 N.M. 120, 381 P.2d 55 (1963) (allowing recovery for economic losses resulting from tortious interference with business relations).

The court also cited a number of negligent sterilization/wrongful conception claims in which economic hardship was cited as one reason for allowing at least partial recovery for the costs associated with raising the child. *Lovelace*, 111 N.M. at 344, 805 P.2d at 611 (citing *Marciniak v. Lundborg*, 450 N.W.2d 243, 246 (Wis. 1990); *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990); *Univ. of Ariz. Health Sciences Ctr. v. Superior Ct.*, 667 P.2d 1294 (Ariz. 1983); *Ochs v. Borrelli*, 445 A.2d 883, 885-86 (Conn. 1982)).

70. *Lovelace*, 111 N.M. at 345, 805 P.2d at 612. This interest has even been protected generally on constitutional grounds. *Id.* (citing *e.g.*, *Roe v. Wade*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Ochs v. Borrelli*, 445 A.2d 883, 885 (Conn. 1982)).

71. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610. Loss of consortium and alienation of affections are actions that recognize "worthy interests" for which New Mexico courts deny damages. *Id.*

72. *Id.* (citing *Roseberry v. Starkovich*, 73 N.M. 211, 215-218, 387 P.2d 321, 324-26 (1963)) (*Roseberry* court denied recovery for loss of consortium due to the difficulty in measuring and quantifying damages of such an intangible nature); see also *supra* notes 16-17 and accompanying text.

73. *Id.* (citing *Thompson v. Chapman*, 93 N.M. 356, 358, 600 P.2d 302, 304 (1979) (court denied recovery for alienation of affections, an action brought against a third party for causing one spouse's loss of the other spouse's affections, because the interest in maintaining spousal affections, which the action was once thought to protect, is only harmed when the action is brought)); see also *supra* notes 9-25 and accompanying text.

74. *Lovelace*, 111 N.M. at 344, 805 P.2d at 611; see also *supra* note 69 and accompanying text (citing cases, including negligent sterilization/wrongful conception cases, that allow compensation for economic injuries).

result of the Mendezes' injury before deciding what damages to allow.⁷⁵ It found the result of the injury to the Mendezes' economic stability was economic instability.⁷⁶ The court's goal was to compensate the Mendezes for this loss by putting them in their pre-injury position.⁷⁷ The court held that the Mendezes were entitled to recover damages for the cost of raising their child to adulthood.⁷⁸

The court supported this holding with favorable precedent.⁷⁹ Its analysis of the propriety of granting damages did not end there, however. The court acknowledged that damages were proper for two additional reasons. First, the amount of the loss could be calculated with relative certainty.⁸⁰ Second, allowing damages did not contradict public policy.⁸¹ The court reached this holding after concluding that given the parents' motivations, it is proper to allow such damages.⁸²

The *Lovelace* court concluded that the parents' motivations in seeking sterilization are important, but not determinative of whether they can recover damages for child-rearing costs.⁸³ It held that such damages properly compensated the Mendezes, because the record clearly indicated that economic interest was Mrs. Mendez's primary reason for seeking sterilization, and the hospital's negligent acts clearly harmed this interest.⁸⁴

Before reaching this conclusion, however, the court struggled with the potential impropriety of granting such damages had the plaintiff sought sterilization for other reasons.⁸⁵ The court's concern centered on whether the plaintiff who sought sterilization to preserve interests other than economic stability would truly be compensated for his lost interests with a damages award intended to raise the child to adulthood.⁸⁶ Some jurisdictions have held that such an award, under such circumstances, would constitute a windfall.⁸⁷ The New Mexico Supreme Court was:

75. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610.

76. *Id.*

77. *Lovelace*, 111 N.M. at 349, 805 P.2d at 616 (court stated that "the purpose of compensatory damages is to make an injured person whole [or to] . . . fully and fairly compensate . . . for the injuries received.").

78. *Id.* at 345, 805 P.2d at 612. The calculations of an economic expert aided the court in determining a dollar amount for this cost. *Id.* at 348, 805 P.2d at 615.

79. *Id.* at 345-46, 805 P.2d at 612-13.

80. *Id.*

81. See *Lovelace*, 111 N.M. at 344-45, 805 P.2d at 611-12.

82. *Lovelace*, 111 N.M. at 344-45, 805 P.2d at 611-12.

83. *Id.*

84. *Id.* at 345, 805 P.2d at 612.

85. *Id.* at 344-45, 805 P.2d at 611-12. Some of the alternative motives hypothesized were prevention of genetic defects and protection of the mother's health. *Id.* at 345, 805 P.2d at 612 (citing *Jones v. Malinowski*, 473 A.2d 429, 436 (Md. 1984)).

86. *Id.*

87. See *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir. 1983) (court held that because the mother's reason for seeking sterilization was therapeutic, she could not assert economic damages for the cost of raising the child after the fact, because such an award would provide her with a windfall).

Other jurisdictions have also held that child rearing expenses cannot be recovered unless the parents were motivated by economic considerations to seek sterilization, due to the windfall theory. See, e.g., *Burke v. Rivo*, 551 N.E.2d 1, 6 (Mass. 1990); *Univ. of Ariz. Health Sciences Ctr. v. Superior Ct.*, 667 P.2d 1294, 1300 (Ariz. 1983); *Jones v. Malinowski*, 473 A.2d 429, 436 (Md. 1984).

reluctant to hold that child-rearing expenses are recoverable only when the parents' sole, or even primary, motivation is economic. A person's original reasons for seeking sterilization should not be conclusive as to whether an economic interest has been injured.⁸⁸

The court further noted that "the motivation rule entails difficult tasks for the jury in sorting out the parents' differing motivations and encourages after-the-fact reformulations of the parents' actual intentions."⁸⁹ The *Lovelace* court thus posed the difficult question of whether damage awards should compensate only for the specific interests of the parents that are "actually" injured as a result of negligent sterilization.⁹⁰ "Actually" injured interests are those which the parents seek to protect by seeking sterilization. This requires the court to ascertain the parents' motives.⁹¹ While hinting in its opinion that only actually-injured interests are compensable the court stopped short of providing an answer because, in this case, the damages allowed were designed to compensate for the specific interest in economic stability which had been injured.⁹²

b. Compensation for Injuries to Independent Family Planning

The court also appraised the propriety of granting compensation for the injury to the interest in independent family planning, and concluded that such damages would be improper.⁹³ Again, the court defined the results of the Mendezes' injury before analyzing whether to allow damages. The court's goal was to compensate the Mendezes for the losses resulting from this injury.⁹⁴ The direct result of the injury to the Mendezes' family planning autonomy was that Mrs. Mendez remained fertile, conceived, and gave birth to an additional child.⁹⁵ The consequential results of the injury are best described as "emotional distress as the result of the unwanted pregnancy" and/or birth of the child,⁹⁶ and also perhaps a "diminution of attention and affection to other children."⁹⁷

The court explained that although some jurisdictions allowed damages to compensate for such losses,⁹⁸ it would not, for two reasons. First, it

88. *Lovelace*, 111 N.M. at 345, 805 P.2d at 612.

89. *Id.*

90. *Id.*

91. *Id.*; see also *Malinowski*, 473 A.2d at 436.

92. *Lovelace*, 111 N.M. at 345, 805 P.2d at 612. The court's discussions of the compensatory nature of damages, 111 N.M. at 349, 805 P.2d at 612, and of the problems with the motivation rule, *id.*, suggest that in future cases it might reject the motivation rule and allow recovery for damages without the support of a "motivation", as long as the plaintiff's interest is worthy of legal protection and has been injured as a proximate result of the defendant's wrongful acts.

93. *Lovelace*, 111 N.M. at 346-47, 805 P.2d at 613-14. The court did allow damages to compensate for the physical and emotional pain and suffering associated with the pregnancy and birth itself. *Id.* at 347, 805 P.2d at 614.

94. See *supra* notes 76-77 and accompanying text.

95. *Lovelace*, 111 N.M. at 343, 805 P.2d at 610.

96. *Id.* at 346, 805 P.2d at 613.

97. *Id.*

98. See *Burke v. Rivo*, 551 N.E.2d 1, 3 (Mass. 1990). The Massachusetts court held that the parents of a child born unexpectedly as the result of an unsuccessful sterilization should be entitled

held that compensatory damages for such injuries would be too difficult to measure.⁹⁹ Second, it concluded that it would be bad policy to allow them.¹⁰⁰ The court reasoned that allowing parents to seek damages for this type of emotional distress would require proof that they suffered psychological detriments as a result of having a child that they did not want or expect to have.¹⁰¹ Allowing parents to litigate such issues would be injurious to their children.¹⁰²

Similar policy concerns caused the court to refuse to allow damages to be offset by the benefit of having the child.¹⁰³ Because it would contradict public policy to allow recovery for emotional burdens, the court reasoned that it would be unfair to consider emotional benefits.¹⁰⁴ The court also stated that it was inconsistent to allow compensatory damages for the injury to economic stability to be offset by the benefits that were intended to mitigate damages for the injured interest in family planning.¹⁰⁵

IV. DISCUSSION AND APPLICATION OF THE *LOVELACE* FORMULA

The Mendezes' injuries stemmed from the invasion of two protected interests—economic stability and autonomous family planning. The supreme court, in determining whether to allow compensation for these injuries, provided a formula that could be applied to any interest which a plaintiff alleges has been harmed. The formula serves as a yardstick for concluding that damages should, or should not, compensate for a harmed interest.

In review, the formula has four steps. First, the plaintiff must define the defendant's wrongful acts, and must assert a viable cause of action against him.¹⁰⁶ Second, using the court's definition of harms, the plaintiff must ascertain that the wrongful act caused harm to the plaintiff.¹⁰⁷ Third, relying on precedent, the plaintiff must conclude that the defendant's

to damages not just for economic costs associated with the birth and with raising the child, but also for:

the wife's pain and suffering in connection with the pregnancy and birth and with the second sterilization procedure . . . [and] for emotional distress [the parents] sustained as a result of the unwanted pregnancy.

Id. at 3-4. *Burke* also allowed offsetting benefits. *Id.*; see also *supra* note 26 and accompanying text.

99. See *Lovelace*, 111 N.M. at 346, 805 P.2d at 613.

100. *Id.*

101. *Id.*

102. See *id.*

103. *Id.*; see also *supra* note 34 and accompanying text.

104. *Id.* at 346, 805 P.2d at 613. In effect, it is impossible to mitigate types of damages which the court will not allow.

105. *Id.* (emotional burdens and benefits are results of the injury to family planning, not economic stability). Courts that allow offsetting of damages inadvertently mix theories by allowing damages under one theory and then offsetting them under another theory. The court discussed *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984).

106. See *supra* text accompanying notes 49-52.

107. See *supra* text accompanying notes 53-62.

wrongful acts caused harm to an interest which the law will protect. Only then can the plaintiff's harm be defined as an injury at law.¹⁰⁸ Finally, the plaintiff must support the assertion that damages should be allowed to compensate for the injury. Damages should be allowed when precedent would support an award, when the amount of damages can be calculated with reasonable certainty, and when awarding damages would not constitute bad public policy.¹⁰⁹ Just as the plaintiff can use these steps to bring a claim, the defendant and court can use them as a checklist of the validity of claims.

The court mentioned but did not address the recoverability of a number of harmed interests that the Mendezes did not allege.¹¹⁰ These interests have been raised in other cases, but the courts deciding them did not use formulas similar to *Lovelace's* to aid their decisions. The remainder of this section will apply the *Lovelace* formula to a hypothetical, as a test of its usefulness and workability.

Assume that a couple seeks sterilization to prevent genetic birth defects. As a result of negligent sterilization, they have a child with birth defects. This hypothetical presents damage recoverability issues that were not present in *Lovelace*. Like *Lovelace*, however, the interests injured would be the same as the actual injuries that resulted from the negligence. As in *Lovelace*, the defendant's wrongful acts would be performing the sterilization improperly and not telling the mother she was still fertile. This would give the parents a viable cause of action for negligence.¹¹¹

It is clear that the wrongful acts also caused harm to the hypothetical parents. Using *Lovelace's* analysis, it would be necessary to ask the parents which of their interests had been invaded. The losses asserted by the parents would serve as a basis for defining their harmed interests.¹¹² Following the *Lovelace* opinion, the parents would assert losses to their interests in family planning, economic stability, and physical and emotional well-being. The loss of one's right to plan a family is a harm, as is the loss of one's economic stability.¹¹³ The loss of physical and emotional well-being during the pregnancy and birth is also a definable harm.¹¹⁴ Distinct from losses during the pregnancy would be the loss of emotional

108. See *supra* text accompanying notes 63-70.

109. See *supra* text accompanying notes 71-105.

110. These include the mother's interest in not having a child when doing so would endanger her health, *Lovelace*, 111 N.M. at 345, 805 P.2d at 612, and the parents' interest in not having a child when genetic deformities would clearly result. *Id.* The court reserved judgment on whether it would allow recovery for emotional distress if the child were born with birth defects. *Id.* at 347, 805 P.2d at 614 n.9.

111. In addition, it could give rise to a cause of action for wrongful life brought by the deformed child. See, e.g., *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987); *Johnston v. Elkins*, 736 P.2d 935 (Kan. 1987); *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987).

112. See *Lovelace*, 111 N.M. at 343, 805 P.2d at 610. The court's conclusion that the Mendezes' harmed interests included economic stability and right to family planning were based on the Mendezes' complaints. The court also dealt with emotional distress and pain and suffering because the Mendezes had asserted those harms. *Id.*

113. *Id.*

114. *Id.* at 347, 805 P.2d at 614; see also RESTATEMENT (SECOND) OF TORTS § 7(2) cmt. b (1965) (harm is defined to include the impairment of physical, emotional and aesthetic well-being).

well-being resulting from having and raising a child with birth defects.¹¹⁵ This hypothetical loss is consistent with the *Lovelace* court's categorization of harm.¹¹⁶

The next step would be to determine whether each of these harmed interests is one which the law recognizes as legally compensable. The harms to economic stability and right to family planning are clearly injuries.¹¹⁷ Courts also find the interests in physical and emotional well-being to be worthy of legal protection.¹¹⁸ Thus, the hypothetical parents' physical pain and suffering and emotional distress would also be injuries at law.

If it follows *Lovelace*, a court deciding this hypothetical would analyze the recoverability of damages for the parents' injuries separately.¹¹⁹ If their complaint correctly alleged that their economic stability had been injured, they would be entitled to compensation for this injury.¹²⁰ To award damages, the court should define the results of this injury and should decide what would put the parents in a pre-injury position.¹²¹ The parents of a child born with birth defects would probably have to pay greater costs to raise him to adulthood than the parents of a healthy child would. However, the court would likely award damages only in an amount that could be calculated with reasonable certainty.¹²² The certainty of such damages would depend upon how much the parents knew about the extent of the child's condition.

If it were apparent that the child would not be capable of caring for himself as an adult, a court might also consider allowing damages to compensate the parents for the cost of paying for such care. Such an award could be based on the theory that the doctor who performed the operation should have been aware that such costs were a probable consequence of his negligence.¹²³ The propriety of allowing such damages hinges on their foreseeability.¹²⁴ Since "reasonable foreseeability" is a jury issue,¹²⁵ this question is best answered by a jury.

115. *Id.* at 347, 805 P.2d at 614 n.9 (court did not decide whether it would allow recovery for emotional distress resulting from a child born with birth defects).

116. *See supra* notes 55-57 (citing the RESTATEMENT (SECOND) OF TORTS § 7(2) cmt. b) (harm is defined to include the impairment of physical, emotional and aesthetic well-being as the result of any cause).

117. *See supra* notes 68-70 and accompanying text. The court relied on New Mexico and U.S. Supreme Court precedent as well as case law from other jurisdictions.

118. New Mexico allows recovery for pain and suffering and emotional distress. *See, e.g.*, N.M. UNIF. JURY INSTRUCTION CIV. 13-1628, 13-1807 (Repl. Pamp. 1992).

119. *See supra* notes 71-105 and accompanying text.

120. *See Lovelace*, 111 N.M. at 344, 805 P.2d at 611; *see also supra* note 113 and accompanying text. Presumably, if the parents had failed to allege this injury in their complaint, they would not have been entitled to recover for it. If it found such an allegation of harm to be untrue, for example, because the plaintiffs were so wealthy that their economic interests were not harmed by the pregnancy or birth, the court would presumably find that no actual harm had resulted and that no compensation should be due.

121. *See supra* 76-78 and 94-97 and accompanying text.

122. An expert economist can present an estimate of the special costs of raising a child with this type of defect to adulthood. *See Lovelace*, 111 N.M. at 345, 805 P.2d at 612.

123. *Lovelace*, 111 N.M. at 342, 805 P.2d at 609.

124. *Id.*

125. *Id.*

On the one hand, if a jury believed that the doctor merely thought he had been performing a normal sterilization procedure for normal reasons, rather than to prevent serious genetic defects, it could find that imposing damages to cover such special costs would be unfair.¹²⁶ On the other hand, "taking the plaintiff as you find him" is a fundamental principle applied in negligence lawsuits.

The court, following *Lovelace*, would likely preclude compensation for the injury to the parents' right to plan the size of their family.¹²⁷ Also, it would likely compensate the mother for her pain and suffering during the pregnancy and birth.¹²⁸ Whether the parents could recover for the injury manifested by their emotional distress would depend upon how the court deciding their case analyzes this issue. Although *Lovelace* provided no direct guidance on this particular issue,¹²⁹ it did provide a framework for a court to use in deciding whether to allow these damages.

Emotional distress is the result of the injury to the parent's interest in emotional well-being. The law in New Mexico allows compensation for the injury to the parents' emotional well-being when that injury is caused by another's negligence.¹³⁰ Thus, the only other considerations would be whether it is good policy to allow compensation for hypothetical injury when it results in an unplanned birth, and whether an amount of damages to compensate for it can be concluded with reasonable certainty.

The policy considerations relevant to awarding damages for emotional distress would be likely to give the court deciding this hypothetical a difficult time. Its analysis would likely hinge on the fact that the negligence in this case caused an arguably tragic, yet wonderful result — a new and unplanned life. Had the negligence resulted in loss of limb or life, no greater harm would result from compensating for the victims' concurrent emotional distress. In this instance, however, losses would not be the sole result of the negligence. Whether tragic or wonderful, a new life would have been created. A greater harm to the child or to the parents' sense of duty in caring for it might very well result from compensating the parents for the emotional damages that accompanied the birth of their new child. Even if such harm did not result, it would be bad public policy to ignore its potential. The *Lovelace* court avoided this dilemma by allowing damages only for that emotional distress which resulted from the events surrounding the negligent operation itself.¹³¹

Whether the court deciding this hypothetical would reach the same conclusion depends on its willingness to rely on or to reject public policy precedent. It is important to note that just as the *Lovelace* court rejected

126. Assume that a fact question exists regarding whether the doctor in this hypothetical knew the mother's reasons for seeking the sterilization.

127. *Lovelace*, 111 N.M. at 346-47, 805 P.2d at 613-14.

128. *Id.* at 346, 805 P.2d at 613.

129. *Id.* at 347, 805 P.2d at 614 n.9.

130. Emotional distress is "an additional element of damages recoverable under the measure of damages for a compensable personal injury." N.M. UNIF. JURY INSTRUCTION CIV. 13-1628 (Repl. Pamp. 1992).

131. See *supra* note 6 and accompanying text.

public policy precedent from other jurisdictions in allowing damages for injured economic interests, a court deciding this hypothetical might choose to reject public policy arguments which it believed to be unsound, and might allow damages for emotional distress to the extent that it could justify the results as constituting sound public policy. The "public policy" analysis should not be a mere precedent checkpoint for the court deciding whether to allow damages. Rather, it should involve the court in an active analysis of the effects of its decision, and should serve as a "dragnet" for bad public policy.

Finally, there is not a set method for calculating damages for emotional distress; it is normally the jury's role to decide what amount would reasonably compensate the plaintiff.¹³² Of course, if the court concludes that it would be bad policy to allow compensation for the parents' injured interest in emotional well-being, the jury would not even be instructed to award damages for this injury, and would not have to decide what constituted a reasonable amount.

V. CONCLUSION

The *Lovelace* opinion provides a workable formula for practitioners and courts to use when they are involved in complex litigation issues, and especially in assessing damages recoverability. The formula requires litigants to find a causal connection between wrongful acts and harms, and then to define injuries and analyze their results. When precedent does not clearly allow compensation, or when the case presents other countervailing concerns, it provides litigants with arguments and courts with guidelines for allowing or precluding damages. Most important, the formula requires litigants to match wrongful acts with causes of action, harms with injuries, and results of injuries with the compensation that is sought. The theories underlying each of these steps must match. The formula leaves little room for awards based merely on the fact that a wrong has occurred. At the same time, it provides the litigant who has a viable cause of action with a powerful tool of logic in which to frame his claims. Finally, it protects against "mixing" of theories, an activity that, at least in *Jones v. Malinowski*, led the court to award damages for one injured interest (economic stability) and then to offset those damages under another theory (emotional burdens and benefits) although the court would not allow any damages based on that theory.¹³³

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132. See *supra* note 130 and accompanying text.

133. See *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984); see also *supra* notes 103-105 and accompanying text.