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Johnson v. University Hospitals of Cleveland: Public Policy Over Traditional Principles

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JOHNSON v. UNIVERSITY HOSPITALS OF CLEVELAND: PUBLIC POLICY OVER TRADITIONAL PRINCIPLES

INTRODUCTION

In *Bowman v. Davis*,[1] the Ohio Supreme Court recognized wrongful pregnancy as a valid cause of action.[2] The Court stated:

> For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right.[3]

A number of justices and commentators have interpreted *Bowman* as support for the recovery of child rearing expenses in wrongful pregnancy actions.[4] However, the *Bowman* court did not conclusively settle the issue of recoverable damages.[5] In *Johnson v. University Hospitals of Cleveland*,[6] the Ohio Supreme Court limited its holding in *Bowman v. Davis*[7] to damages from the pregnancy itself[8] and denied the

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[1] Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

[2] A wrongful pregnancy or wrongful conception claim results when parents seek damages stemming from a doctor's negligent performance of a sterilization procedure followed by a subsequent birth. *See* Johnson v. University Hosp., 44 Ohio St. 3d 49, 540 N.E.2d 1370 (1989) (This cause of action should be characterized as one for wrongful conception because the physician's negligence occurred before conception.) *See also infra* note 10 (discussing the difference between wrongful pregnancy and wrongful conception).

Wrongful birth "refers to a cause of action whereby parents, on their own behalf, seek to recover damages for the birth of an impaired child when the impairment was caused by the defendant's failure to diagnose or discover a genetic defect in the parents or the infant through prenatal testing or counseling in time for the parents to obrain a eugenic abortion or to prevent pregnancy altogether." *Johnson*, 44 Ohio St. 3d at 51, 540 N.E.2d at 1372.

Wrongful life is an action brought on behalf of the child, "claiming damages due to the negligent failure of physicians to sterilize [his] parents." *Bowman*, 48 Ohio St. 2d at 45 n.3, 356 N.E.2d at 499 n.3.

[3] *Id.* at 45, 356 N.E.2d at 499. *See generally* Note, *Wrongful Conception: North Carolina's Newest Prenatal Tort Claim: Jackson v. Bumgardner*, 65 N.C.L. REV. 1077, 1096 (1987) [hereinafter *Prenatal Tort*] (discussing the fundamental right to practice contraception).

[4] *See* Macomber v. Dillman, 505 A.2d 810, 815 n.1 (Me. 1986) (Scolnik, J., concurring in part and dissenting in part) ("A minority of courts have not departed from common law principles and allowed the recovery of child rearing expenses offset by the beneficial value the parents will receive from having a normal, healthy child.") *See also* Mason v. Western Pa. Hosp., 499 Pa. 484, 488 n.2, 453 A.2d 974, 978 n.2 (1982) (O'Brien, C.J., concurring and dissenting) (citing *Bowman* as support for the proposition that child rearing expenses are not against public policy); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (Leibson, J., dissenting) (same); and *Prenatal Tort*, *supra* note 3, at 1086 n.82 (interpreting Bowman as support for the full recovery rule).

[5] *Bowman*, 48 Ohio St. 2d at 44, 356 N.E.2d at 498. The court declined to settle the issue of recoverable damages because it was not raised at the appellate level. *Id.* at 44 n.1, 356 N.E.2d at 498 n.1. The court did state that this is "a traditional negligence action" and is "not barred by notions of public policy." *Id.* at 45, 356 N.E.2d at 499.

[6] 44 Ohio St. 3d 49, 540 N.E.2d 1370.

[7] 48 Ohio St. 2d 41, 356 N.E.2d 496.

[8] "These damages may include, but are not limited to, medical expenses and loss of consortium during the pregnancy and birth, emotional distress during that time, the mother's lost wages during a reasonable length

foreseeable child rearing expenses.[9]

This Note will examine the policies and principles relating to the recovery of child rearing expenses in wrongful pregnancy or wrongful conception[10] actions. This Note contends that the *Johnson* majority overemphasized certain policy considerations and was mistaken in allowing these policies to override traditional legal principles.

FACTS AND HOLDING

On March 4, 1982, Ruth Johnson underwent a tubal ligation operation[11] for sterilization purposes at the University Hospitals of Cleveland.[12] Johnson alleged the operation was negligently performed.[13] Johnson became pregnant in July 1982, and delivered a healthy baby girl on April 27, 1983.[14] On July 27, 1983, Johnson filed suit against the University Hospitals of Cleveland and three physicians employed by the hospital.[15]

In her complaint, Johnson requested damages for prenatal and postnatal care; specifically the additional cost and expense required to care of and raise a child to majority age.[16] The damages were an estimated three hundred thousand dollars ($300,000.00).[17]

The trial court submitted the claim to a medical arbitration panel.[18] The panel

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of time, and the mother's pain and suffering during the pregnancy and childbirth." *Johnson*, 44 Ohio St. 3d at 58 n.8, 540 N.E.2d at 1378 n.8.

[9] *Id.* at 58, 540 N.E.2d at 1378.

[10] Some courts and commentators have drawn a distinction between wrongful pregnancy and wrongful conception arguing the proximate cause relationship is stronger in wrongful conception cases. *See, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (1977) (Referring to the cause of action as wrongful conception because "it is at the point of conception that the injury claimed by the parents originates.") *See generally* Note, *Wrongful Conception: Who Pays For Bringing Up Baby?*, 47 FORDHAM L. REV. 418, 418-19 n.7, 430 n.86 (1978) [hereinafter *Who Pays*] (discussing the close proximate cause relationship between preconception negligence and the birth of a child); and *Prenatal Tort*, *supra* note 3, at 1094 (distinguishing proximate cause in wrongful pregnancy and conception).

Wrongful pregnancy relates to post-conception negligence such as the physician's failure to diagnose pregnancy in time for an abortion. *See, e.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (unsuccessful abortion) and Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 273, 425 N.E.2d 968, 970, *rev'd* 95 Ill. 2d 193, 447 N.E.2d 385 (1981), *cert. denied*, 464 U.S. 846 (1983) (failure to diagnose). For the purposes of this Note the term wrongful pregnancy will refer to both preconception and post-conception negligence. The term wrongful conception will refer exclusively to preconception negligence.

[11] A tubal ligation is a permanent sterilization procedure in which the fallopian tubes are tied and cut to prevent the union of egg and sperm which results in conception. *See Prenatal Tort*, *supra* note 3, at 1082.

[12] *Johnson*, 44 Ohio St. 3d at 49, 540 N.E.2d at 1370.

[13] *Id.*

[14] *Id.* at 49-50, 540 N.E.2d at 1370-71.

[15] *Id.* at 49, 540 N.E.2d at 1370.

[16] *Id.* at 50, 540 N.E.2d at 1371.

[17] *Id.*

[18] *Id.*

recommended a finding against the University Hospitals and one of the physicians.[19] The panel found that Johnson was not entitled to child rearing expenses on the grounds that the value of the child's love, aid and society would substantially outweigh the monetary expense.[20] Johnson contested the arbitration award and appealed for a trial de novo.[21] Subsequently, Johnson settled all claims except the claim for child rearing expenses.[22]

At trial, the defendants moved to dismiss the claim for child rearing expenses.[23] The trial court granted the motion on the ground that "under Ohio law there is no legally cognizable claim for wrongful birth or wrongful pregnancy."[24]

Johnson appealed to the Cuyahoga County Court of Appeals.[25] In a two-to-one decision, the court of appeals recognized the claim of wrongful pregnancy, but limited the recoverable damages to those arising from the pregnancy itself.[26] The Ohio Supreme Court granted Johnson's motion to certify the record.[27]

In a six-to-one decision,[28] the Court adopted the limited damages rule, allowing recovery for damages from the "pregnancy itself,"[29] but no recovery for child rearing expenses.[30]

The Court rejected the no recovery rule on the ground that it was "clearly in conflict with the traditional concepts of tort law."[31] Likewise the Court rejected the full recovery rule on the ground that "the strict rules of tort should not be applied to an action to which they are not suited, such as a wrongful pregnancy case, in which a doctor's tortious conduct permits to occur the birth of a child rather than the causing of an injury."[32]

The Ohio Supreme Court opposed the benefits rule "because of the impossibility of a jury placing a price tag on a child's benefits to her parents."[33] The Court

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Johnson v. University Hosp., No. 53192 (Ohio Ct. App. June 14, 1988), *aff'd*, 44 Ohio St. 3d 49, 540 N.E.2d 1370 (1989).
[26] The appellate court held that recovery of child rearing expenses would be a windfall to the parents. Also, that the benefit of child rearing is too speculative and therefore impossible to weigh against the cost of child rearing. The court also relied on the theory that the child could be emotionally harmed upon learning that she was unwanted. *Johnson*, 44 Ohio St. 3d at 51, 540 N.E.2d at 1371.
[27] Johnson v. University Hosp., 37 Ohio St. 3d 701, 531 N.E.2d 1319 (1988).
[28] *Johnson*, 44 Ohio St. 3d 49, 540 N.E.2d 1370 (H. Brown, J., dissenting).
[29] *See supra* note 8.
[30] *Johnson*, 44 Ohio St. 3d at 58, 540 N.E.2d at 1378.
[31] *Id.*
[32] *Id.*
[33] *Id.*

adopted the limited damages rule as most persuasive. Citing *Day v. Gulley*,[34] the Court stated: "In Ohio, a tort recovery may not be had for damages which are speculative."[35] The Court reasoned that allowing child rearing expenses would invite undue speculation and "ethically questionable assessments" of the psychological ramifications of the birth on the siblings and parents, and the emotional and pecuniary expense of rearing an unplanned child.[36]

The Court pointed out that child rearing expenses were not recognized at common law in an action for wrongful pregnancy, "just as damages were not recognized in an action for wrongful death."[37] Therefore, the court reasoned that child rearing expenses will not be recognized until the General Assembly establishes guidelines.[38] The Court concluded that "the extent of recoverable damages is limited by Ohio's public policy that the birth of a normal, healthy child cannot be an injury to her parents."[39]

BACKGROUND: RECOVERABLE DAMAGES IN WRONGFUL PREGNANCY

There are four competing damage theories in wrongful pregnancy actions: no recovery, full recovery, limited damages and the benefits rule. Only the last two are generally accepted.[40]

I. *Limited Damages*

The majority of courts have adopted the limited damages rule, which does not allow recovery for child rearing expenses.[41] Generally, recoverable damages include costs associated with future sterilization, prenatal and postnatal care, pain and suffering, lost wages, and loss of consortium.[42]

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[34] 175 Ohio St. 83, 191 N.E.2d 732 (1963).

[35] *Johnson*, 44 Ohio St. 3d at 58, 540 N.E.2d at 1378.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 58-59, 540 N.E.2d at 1378.

[40] Early cases held that the birth of a normal, healthy child was not a compensable injury, thus known as the "no recovery" rule. *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). The "full recovery" rule is based on the principle that a child is a foreseeable consequence of a negligent sterilization and "if this change in the family status can be measured economically it should be as compensable as the . . . [other] losses." Custodio v. Bauer, 251 Cal. App. 2d 303, 323-24, 59 Cal. Rptr. 463, 476 (1967). *See also* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (acknowledged the full recovery rule but applied the benefits rule).

[41] *See, e.g.*, Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So.2d 1084 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 399 So. 2d 1140 (Fla. 1981); Byrd v. Wesley Medical Center, 237 Kan. 215, 699 P.2d 459 (1985); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Macomber v. Dillman, 505 A.2d 810 (Me. 1986); Weintraub v. Brown, 98 A.D. 2d 339, 470 N.Y.S.2d 634 (1983); Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986); Mason v. Western Pa. Hosp., 499 Pa. 484, 453 A.2d 974 (1982); C.S. v. Nielson, 767 P.2d 504 (Utah 1988); Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986); McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984); James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

[42] *See* cases cited *supra* note 41.

The denial of child rearing expenses is based on a number of considerations. Many courts have expressed the idea that parents cannot be damaged by the birth of a normal, healthy child.[43] The benefits of the child's love, aid, joy, and companionship far outweigh any costs the parents will incur raising the child.[44] "Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child."[45]

Another policy consideration in support of the limited damages rule is that successful recovery of child rearing expenses will have an adverse effect on the child.[46] Courts citing this proposition contend that recovery of child rearing expenses "will undermine society's need for a strong and healthy family relationship."[47] They fear that the child will become an "emotional bastard" upon learning that he was unwanted and reared with funds forcibly obtained from another.[48]

Some jurisdictions have adopted the view that the nature of child rearing damages is speculative and recovery may not be had for damages which are uncertain.[49] In *Coleman v. Garrison*,[50] the court stated that this principle applied to any attempt to measure the value of human life against the costs.[51] "How can it be said within the ambit of legal predictability that the monetary cost of that life is worth more than its value?"[52]

Additionally, some courts have expressed the opinion that recognizing child rearing expenses as an element of damages is the equivalent of recognizing the nonexistence of the child as a benefit.[53]

With the foregoing policy considerations in mind, many courts express the concern that recovery of child rearing expenses is a windfall to the parents, who receive all the benefits without any corresponding liabilities.[54] Some argue that recovery is "out of proportion to the culpability of the tortfeasor" and would encourage fraudulent claims.[55]

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[43] *Johnson*, 44 Ohio St. 3d at 58-59, 540 N.E.2d at 1378. *See* cases cited *supra* note 41.
[44] *See* cases cited *supra* note 41.
[45] Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Ct. App. 1973), *cert. denied*, 415 U.S. 927 (1974).
[46] *See, e.g.*, Wilbur v. Kerr, 275 Ark. 239, 243-44, 628 S.W.2d 568, 571 (1982).
[47] *Id.*
[48] *Id.*
[49] *E.g.*, Miller v. Johnson, 231 Va. at 187, 343 S.E.2d at 307; Coleman v. Garrison, 349 A.2d at 12; Johnson v. University Hosp., 44 Ohio St. 3d at 58, 540 N.E.2d at 1378.
[50] Coleman v. Garrison, 349 A.2d 8 (Del. 1975).
[51] *Id.* at 12.
[52] *Id.*
[53] *See* Jackson v. Bumgardner, 318 N.C. 172, 181-182, 347 S.E.2d 743, 748-749 (1986). *But see Johnson*, 44 Ohio St. 3d at 56, 540 N.E.2d at 1376 (refusing to recognize any attempt to characterize a wrongful pregnancy action as a wrongful life action.)
[54] *See* cases cited *supra* note 41.
[55] Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

Lastly, some limited damage jurisdictions[56] reject the benefits rule as a misapplication of the *Restatement (Second) of Torts*. [57] These courts contend that the benefits rule only applies "when the harm and benefit occur to the same interest."[58] Simply stated, they contend that the financial injury to the parents cannot be offset by the intangible emotional benefits of a child.[59]

II. *Benefits Rule*

A significant minority of jurisdictions[60] have adopted the benefits rule derived from the *Restatement (Second) of Torts*.

> When the defendant's tortious conduct has caused harm to the plaintiff or his property and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[61]

These courts recognize the costs of raising an unplanned child as a foreseeable consequence of a physician's negligence.[62] "The physician's negligence has forced upon them burdens which they sought and had a right to avoid by submitting to sterilization."[63]

University of Arizona Health Sciences Center v. Superior Court [64] is a leading case supporting the benefits rule. The Supreme Court of Arizona found it preferable to permit the jury "to consider both the pecuniary and non-pecuniary elements of damage which pertain to the rearing and education of the child," offset by the "pecuniary and non-pecuniary benefits which the parents will receive from the relationship with the child."[65]

According to the benefits rule, the extent of recoverable damages will vary

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[56] *See, e.g.*, Johnson, 44 Ohio St. 3d at 53-54, 540 N.E.2d at 1374.

[57] RESTATEMENT (SECOND) OF TORTS § 920 (1979). *See infra* note 61 and accompanying text.

[58] *Johnson*, 44 Ohio St. 3d at 53, 540 N.E.2d at 1374.

[59] *Id.* "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 920 comment b (1979)). *But see* University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579 n.4, 667 P.2d 1294, 1299 n.4 (1983) (noting that the benefits rule is based on unjust enrichment and that a strict interpretation of the rule in wrongful pregnancy cases would result in unjust enrichment).

[60] *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 983 (1983); *University of Ariz. Health Sciences Center*, 136 Ariz. 579, 667 P.2d 1294, (1983); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Jones v. Malinowksi, 299 Md. 257, 473 A.2d 429 (1984); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).

[61] RESTATEMENT (SECOND) OF TORTS § 920 (1979).

[62] *See Jones*, 299 Md. at 270, 473 A.2d at 436.

[63] *Id.*

[64] 136 Ariz. 579, 667 P.2d 1294.

[65] *Id.* at 584, 667 P.2d at 1299.

depending on the circumstances of the individual parents.[66] Under this approach, great weight will be given to the plaintiff's reason for submitting to the sterilization.[67] Thus, the jury would consider whether sterilization was sought for therapeutic reasons--to prevent injury to the mother; eugenic--to prevent birth defects or; economic--to avoid the additional cost of raising a child.[68] In addition, the jury would consider family size, family income, the age of the parents, and marital status.[69]

The benefits rule rejects the policy considerations at the heart of the limited damages rule.[70] Adherents of the benefits rule reject the proposition that the nature of child rearing expenses is too speculative.[71] *Jones* stated that calculating the cost of raising a child is commonplace and based on established economic principles.[72] The primary area of complexity in assessing damages is determining the extent of the offsetting benefit to the parents.[73] The Supreme Court of Arizona felt that juries routinely assess such intangible factors, both emotional and pecuniary, and new rules were not necessary to assess damages in wrongful pregnancy cases.[74]

Another proposition rejected by the minority view is that the benefits the parents receive from raising a healthy child far outweigh any costs associated with child rearing.[75] The Arizona Supreme Court recognized that this would be true in most cases, but thought it unrealistic to assume in all cases.[76] In *Hartke v. McKelway*,[77] the United States Court of Appeals for the District of Columbia agreed with this proposition, and stated: "When a couple has chosen not to have children, or not to have any more children, the suggestion arises for them, at least, the birth of a child would not be a net benefit."[78]

ANALYSIS

I. *The Birth of a Child as an Injury*

Prior to *Johnson*, some courts and commentators interpreted the *Bowman*

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[66] *Id.* at 585, 667 P.2d at 1300.
[67] *Id.* at 585, 667 P.2d at 1300. *See, e.g., Jones*, 299 Md. at 270-71, 473 A.2d at 436.
[68] *Jones*, 299 Md. at 270-71, 473 A.2d at 436.
[69] Troppi v. Scarf, 31 Mich. App. at 257, 187 N.W.2d at 519. *But see* Rinard v. Biczak, 177 Mich. App. 287, 441 N.W.2d 441 (1989) (denying application of the benefits rule and calling on the Michigan Supreme Court to resolve the conflict).
[70] *See* cases cited *supra* note 60.
[71] *Jones*, 299 Md. at 272, 473 A.2d at 436.
[72] *Id.*
[73] *Id.*
[74] University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. at 582-83, 667 P.2d at 1297-98.
[75] *Id.* at 583-84, 667 P.2d at 1298-99.
[76] *Id.*
[77] Hartke v. McKelway, 707 F.2d 1544.
[78] *Id.* at 1552.

decision as support for the full recovery rule.[79] Following traditional tort principles, this interpretation is preferable to the value laden limited damages rule adopted in *Johnson*.[80]

The limited damages rule is largely based on public policy considerations.[81] Most of the considerations supporting the limited damages rule stem from the belief that the birth of a normal, healthy child cannot constitute an injury to the parents because the benefits of having a child outweigh any economic loss which the parents might incur in rearing and educating a healthy child.[82] This stance is inconsistent with the holding in *Bowman*.[83] The birth of a child is clearly a foreseeable consequence of a negligently performed sterilization operation.[84] When a couple seeks legal sterilization to avoid the birth of a child, and the physician's negligence subverts this choice, how can it be said there is no injury as a matter of public policy?[85] Undoubtedly raising a child carries an intrinsic benefit.[86] However, as a matter of public policy, this proposition ignores the reality of individual circumstances.[87]

Courts adopting the limited damages rule imply that the benefits rule casts an aspersion on the value of human life.[88] These jurisdictions interpret the benefits rule as saying the child is an injury to the parents.[89] The injury complained of occurs at the point of conception.[90] The harm is the direct physical and financial injury resulting from conception and deprivation of the right to limit procreation.[91] "That right is legally protectable and need not be justified or explained."[92]

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[79] *See supra* note 4.

[80] In most cases we could join in the 'universally shared emotion and sentiment' expressed by the majority . . . but we do not hold office to impose our views of morality by deciding cases on the basis of personal emotion and sentiment." *University of Ariz. Health Sciences Center*, 136 Ariz. at 583, 667 P.2d at 1298.

[81] *See Prenatal Tort*, supra note 3 at 1094-95 n.166.

[82] *See, e.g.*, cases cited *supra* note 41.

[83] *See supra* note 3 and accompanying text.

[84] *See, e.g.*, Macomber v. Dillman, 505 A.2d at 813 (Scolnik, J., concurring in part and dissenting in part).

[85] "Public policy. That principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).

[86] *See supra* note 80.

[87] *See generally* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (parents already had seven children); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (same); University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (parents with three children seek to limit the size of the family); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (limited finances, family of three children, one with brain disease, one with heart disease); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (four children followed by birth of twins, one with birth defects).

[88] *See* cases cited *supra* note 41.

[89] *Id.*

[90] *See Sherlock*, 260 N.W.2d at 175. *See also* Hickman v. Group Health Plan, 396 N.W.2d 10 (Minn. 1986) (equal protection claim questioning the validity of MINN. STAT. § 145.424 (1), (2), & (3) (1984), which allow wrongful pregnancy actions but disallow wrongful life and birth actions).

[91] *Id.*

[92] Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 273, 425 N.E.2d 968, 970 (1981), *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied sub. nom.* Raja v. Michael Reese Hosp., 464 U.S. 846 (1983).

The policy behind the limited damages rule is inconsistent because it does not avert placing a value on the benefits of a child.[93] This inconsistency becomes apparent once it is recognized that if the conception and birth of a child cannot be an injury to the parents then there is absolutely no basis for any recovery whatsoever.[94] Justice Brown succinctly stated, "[t]here is no rational difference between the damages caused by the [wrongful] pregnancy itself[95] and the child rearing expenses."[96] Would the courts adopting the limited damage rule have us believe that children are worth the costs of raising but not worth the costs associated with pregnancy and birth?

A. Psychological Damage

In *Wilbur v. Kerr*,[97] it was feared that the child would suffer an emotional injury upon learning that he was unwanted and raised on the funds of another.[98] Disallowing child rearing expenses will not protect against this possibility.[99] The child is likely to get the same impression upon learning the parents sued for the costs of the pregnancy itself.[100]

One court adopted the practice of using only the initials of the plaintiff's name to protect against any possible psychological damage to the child.[101] If the courts are so concerned about possible emotional damage to the child, they can adopt similar practices. The fear of psychological damage should not be elevated to a public policy consideration militating against the benefits rule.

II. *Negligence*

The Ohio Supreme Court's comparison of wrongful pregnancy and wrongful death is misplaced.[102] Wrongful death statutes became necessary because the common law did not recognize wrongful death as a cause of action.[103] However, wrongful pregnancy claims are medical malpractice actions based on the traditional principles of negligence,[104] and "negligence is almost as old as the common law."[105]

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[93] *See, e.g.*, Macomber v. Dillman, 505 A.2d at 813 (Scolnik, J., concurring in part and dissenting in part).

[94] *Id.* at 814.

[95] *See supra* note 8 (referring to recoverable damages in limited damage jurisdictions).

[96] Johnson v. University Hosp., 44 Ohio St. 3d at 61, 540 N.E.2d at 1380 (Brown, J., dissenting).

[97] 275 Ark. 239, 628 S.W.2d 568 (1982)

[98] *Id.* at 243-44, 628 S.W.2d at 571.

[99] *See Johnson*, 44 Ohio St. 3d at 61, 540 N.E.2d at 1380 (Brown, J., dissenting).

[100] *Id.*

[101] C.S. v. Nielson, 767 P.2d 504.

[102] "We believe that if such expenses are to be recognized, it is the role of the General Assembly to establish guidelines in a `wrongful pregnancy' action as the legislature has done in `wrongful death' actions." *Johnson*, 44 Ohio St. 3d at 58, 540 N.E.2d at 1378.

[103] *See, e.g.*, W.P. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984); Schork v. Huber, 648 S.W.2d at 865 (Leibson, J., dissenting).

[104] *See* Jones v. Malinowski, 299 Md. at 272-73, 473 A.2d at 437; *Johnson*, 44 Ohio St. 3d at 59, 540 N.E.2d at 1379 (Brown, J., dissenting).

[105] *Schork*, 648 S.W.2d at 865 (Leibson, J., dissenting).

The Ohio Supreme Court, as most other state courts, has recognized a cause of action for wrongful pregnancy.[106] Therefore, in the absence of legislative action to the contrary, wrongful pregnancy claims should be judged in light of the traditional principles of negligence.[107] "The fact that this particular claim involves some moralistic and social overtones having to do with contraception and childbirth should not be permitted to become the handmaiden for the destruction of our established notions of tort law."[108] The Ohio Supreme Court illustrated its questionable authority to make this policy decision when it stated, "the General Assembly is the proper forum in which the *competing* social philosophies involved in 'wrongful pregnancy' actions should be considered in establishing the law."[109] This departure from the established principles of tort law is the equivalent of judicial legislation.

When a physician breaches his duty to a patient, resulting in injury, he is liable for the foreseeable consequences of his actions.[110] "Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred."[111]

III. *Speculative Damages*

A number of limited damage jurisdictions state that the nature of child rearing damages cannot be established with reasonable certainty and are too speculative.[112] Citing *Day v. Gulley*,[113] the Ohio Supreme court stated, "a tort recovery may not be had for damages which are speculative."[114] But *Day* is clearly distinguishable from the case at hand. In *Day*, the issue was whether the plaintiff needed objective evidence of her injury[115] to prove damages with reasonable certainty.[116] The Ohio Supreme Court held that absent objective evidence of the injury, the plaintiff's subjective testimony left the jury to pure speculation as to assessing the damages.[117] In other words, the plaintiff did not meet the burden of production in proving the existence of any damages.

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[106] *See, e.g.*, Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496.

[107] "Recovery for negligence is grounded upon four elements: (1) a duty by the defendant to the plaintiff, (2) a breach of that duty (failure to act with due care), (3) a proximate cause relationship between the breach of duty and the resulting damages, and (4) provable damages." *Johnson*, 44 Ohio St. 3d at 59, 540 N.E.2d at 1379 (Brown, J., dissenting).

[108] Beardsley v. Wierdsma, 650 P.2d at 293 (Rose, J., dissenting).

[109] *Johnson*, 44 Ohio St. 3d at 59, 540 N.E.2d at 1378 (emphasis added).

[110] *See supra* note 10.

[111] Sherlock v. Stillwater Clinic, 260 N.W.2d at 174.

[112] *See, e.g.*, Miller v. Johnson, 231 Va. at 187, 343 S.E.2d at 307.

[113] 175 Ohio St. 83, 191 N.E.2d 732 (1963).

[114] *Johnson*, 44 Ohio St. 3d at 58, 540 N.E.2d at 1378.

[115] Plaintiff claimed to suffer a permanent back injury due to the defendant's negligent driving. *Day*, 175 Ohio St. at 84, 191 N.E.2d at 733.

[116] *Id.* at 88-89, 191 N.E.2d at 735-36.

[117] *See id.* at 89, 191 N.E.2d at 736 (plaintiff failed to present objective medical evidence confirming the existence of the alleged injury).

It is common knowledge that raising a child is a financial burden.[118] Therefore, when a child is born as the result of a negligently performed sterilization operation, a direct financial injury is reasonably certain. The only speculative activity is determining to what degree the child is a benefit to the parents.[119] The United States Supreme Court addressed the issue of speculative damages and stated: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."[120] The Court also stated that "the risk of uncertainty should be thrown upon the wrongdoer instead of upon the injured party."[121]

Finally, the Restatement of the Law of Torts[122] supplies the traditional rule in relation to the certainty of damages:

> It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.[123]

Ascertaining the cost of child rearing expenses can be done with reasonable certainty.[124] It is undisputed that physical and financial injury results from negligent sterilization procedures. It seems patently unjust that recovery of all child rearing expenses should be denied on the ground that there is some unquantifiable benefit in raising a child.

CONCLUSION

Family planning is not against public policy.[125] The use of contraception and sterilization to prevent conception is commonplace in the United States and the rest of the world.[126] It is estimated that eighty-three percent of women vulnerable to unplanned pregnancy exercise some type of birth control to avoid pregnancy.[127]

The case for birth control has been sold to the American people and is

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[118] *See* Jones v. Malinowski, 299 Md. at 272, 473 A.2d at 436.
[119] *Id.*
[120] Story Parchment Co. v. Patterson Co., 282 U.S. 555, 562 (1930). *See generally Who Pays*, *supra* note 10, at 429-30 (discussing the measurement of damages).
[121] *Story Parchment Co.*, 282 U.S. at 563 (citing Allison v. Chandler, 11 Mich. 542, 550-56).
[122] RESTATEMENT (SECOND) OF TORTS § 912 comment a (1979).
[123] *Id.*
[124] Jones v. Malinowski, 299 Md. at 272, 473 A.2d at 436.
[125] *See supra* note 85; *see infra* note 128 and accompanying text.
[126] *See, e.g.*, Troppi v. Scarf, 31 Mich. App. at 245, 187 N.W.2d at 516-17; Sherlock v. Stillwater Clinic, 260 N.W.2d at 175 n.9.
[127] L. HARRIS, INSIDE AMERICA 178 (1987).

> well beyond major contention. For example, by a nearly unanimous 87% to 12%, most people are convinced that the best way to avoid the need for abortion is to have better contraception in the first place so that no pregnancy occurs.[128]

The use of contraception and sterilization is a responsible choice made long before the wrongful conception occurs.[129] The limited damage rule punishes the unwary plaintiff and releases the tortfeasor from the foreseeable consequences of his own negligence. Compensatory damages for the cost of rearing a child would place the plaintiffs in the position they would have been in had no wrong occurred.[130] In addition, the prospect of child rearing expenses would serve as a deterrent to the negligent performance of sterilization operations.[131]

A wrongful pregnancy claim is simply a medical malpractice or negligence action. It is a well known principle that when a physician is negligent, liability is imposed for the foreseeable consequences of his acts. However, in wrongful pregnancy cases, many jurisdictions have mistakenly confused value judgments with traditional tort principles. A wrongful pregnancy action is based on the principle that the parents had a lawful choice to determine whether or not to have children. In wrongful conception cases, the decision not to procreate was made long before conception. Irrespective of the reasons behind this choice, the physician's negligence has subverted the plaintiff's lawful decision and cast a great financial burden on the plaintiff. The wrongdoer should not be able to invoke the shield of public policy as a defense for his own negligence.

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[128] *Id.* at 182.
[129] *See* Johnson v. University Hosp., 44 Ohio St. 3d at 60, 540 N.E.2d at 1380 (Brown, J., dissenting).
[130] *See Sherlock*, 260 N.W.2d at 175.
[131] *Id.*