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Casenotes: Torts — Negligence — Physicians Are Liable for the Expenses of Raising a Child When the Child's Birth Is the Result of a Negligently Performed Sterilization Procedure. Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984)

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TORTS — NEGLIGENCE — PHYSICIANS ARE LIABLE FOR THE EXPENSES OF RAISING A CHILD WHEN THE CHILD'S BIRTH IS THE RESULT OF A NEGLIGENTLY PERFORMED STERILIZATION PROCEDURE. *Jones v. Malinowski*, 299 Md. 257, 473 A.2d 429 (1984).

One year after a physician had performed a sterilization procedure on her, a Maryland woman gave birth to a healthy child. The woman and her husband sued the physician for malpractice. A jury determined the physician had negligently performed the sterilization procedure[1] and awarded lump sum damages to the woman and her husband; however, the jury did not disclose the extent to which the damages included the costs of raising the unplanned child through the age of majority.[2] The physician appealed the award of damages for child rearing expenses.[3] Prior to the court of special appeals's consideration of the case, the Maryland court of appeals granted certiorari.[4] The court of appeals held that under traditional negligence and damages standards, the parents of an unplanned but healthy child may recover the expenses of raising that child to majority when the child's birth was the result of a negligently performed sterilization procedure.[5]

The majority of jurisdictions that have decided whether the costs of raising an unplanned child are recoverable have denied the award of such damages, expressing a variety of rationales.[6] In the first reported case[7]

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1. Jones v. Malinowski, 299 Md. 257, 262, 473 A.2d 429, 431 (1984).
2. *Id.* The jury also did not disclose the extent to which it considered the benefit to the parents of having a healthy child. *Id.* The trial judge had instructed the jury to consider both the costs of raising the unplanned child and the benefits of the birth of a healthy child. *Id.*
3. *Id.*
4. *Id.* at 259 n.1, 473 A.2d at 430 n.1 (joint petition of the parties for the court of appeals to consider an issue of first impression).
5. *Id.* at 274, 473 A.2d at 438. The term wrongful conception or wrongful pregnancy is generally used to refer to the cause of action brought by the parents of an unplanned child against the physician who negligently performed the sterilization procedure or abortion. This term is distinguished from wrongful birth, which is the action brought by the parents of a child with birth defects, and from wrongful life, which is the action brought by the child born with the defects. University of Ariz. v. Superior Court, 136 Ariz. 579, 581 n.1, 667 P.2d 1294, 1296 n.1 (1983). In *Jones*, the above terminology is not used. *See* Comment, *Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167, 1176 (1983) (remarking on terminology); Recent Decisions, Boone v. Mullendore: *Confusion of Actions in Wrongful Life, Wrongful Birth and Wrongful Pregnancy*, 35 ALA. L. REV. 179 (1984).
6. Jones v. Malinowski, 299 Md. at 263-65, 473 A.2d at 432-33; *see generally* Annot., 83 A.L.R.3D 15 (1978) (liability for the birth of an infant who allegedly would not have been born "but for" the defendant's acts or omissions).
7. Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934); Miller & Dean, *Liability of Physicians for Sterilization Operations*, 16 A.B.A. J. 158, 160 (1930) (no reported cases "in which a person who has consented to a sterilization operation has brought suit against the physician"); *see also*, Robertson, *Damages for the Birth of a Child - Some Possible Policy Barriers*, 23 MED. SCI. LAW 2, 3 (1983) (indicating absence of case law on negligently performed sterilization procedures in Great Britain).

involving the birth of an unplanned child following a negligently performed sterilization procedure, the Supreme Court of Minnesota stated, in dictum, that the costs of raising the child could not be recovered because such costs were too remote from the "avowed purpose" of the sterilization.[8] In subsequent cases, some courts have concluded that child rearing costs are too speculative in nature to support a damages award.[9] One court indicated that a jury would be unable to assess the benefits and losses associated with such a claim.[10]

Other jurisdictions denying damages for prospective child rearing costs have found that such an award would place an unreasonable burden upon the physician.[11] Those courts have reasoned that the physician would become a "surrogate parent,"[12] or that the financial burden would be borne by the physician while the parents enjoyed the benefits of parenthood.[13] The child's emotional and psychological well-being has also been a concern.[14] Some courts have expressed a fear that the unplanned child would become an "emotional bastard,"[15] recognizing that the child may be adversely affected if he learns another person provided the funds for his support, inferring that his parents did not want him.[16]

The majority view expresses the opinion that the birth of a healthy child is not a cognizable injury.[17] One court rejected a claim for full recovery of damages, reasoning that no other tort results in the creation

8. Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934) (expenses incident to the birth of the unplanned child are too remote from the vasectomy which was designed to render the plaintiff infertile); *accord* Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).
9. *E.g.*, Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).
10. Boone v. Mullendore, 416 So. 2d 718, 721 (Ala. 1982).
11. *E.g.*, Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); P. v. Portadin, 179 N.J. Super. 465, 470-71, 432 A.2d 556, 558 (1981); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518-19, 219 N.W.2d 242, 245 (1974); *see also* Recent Decisions, *Malpractice/Wrongful Birth/Damages*, ILL. B.J., March 1984, at 374.
12. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518, 219 N.W.2d 242, 245 (1974).
13. Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).
14. Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 241, 628 S.W.2d 568, 571 (1982).
15. Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982).
16. Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 241, 628 S.W.2d 568, 571 (1982); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981) (concern for child's welfare illustrated by court's refusal to use surname in opinion); *see also* Recent Decisions, *One More Mouth to Feed: A Look at Physicians' Liability for the Negligent Performance of Sterilization Operations*, 25 ARIZ. L. REV. 1069, 1073-74 (1983); Case Note, *Wilbur v. Kerr: The Tort of Wrongful Birth in Arkansas*, 36 ARK. L. REV. 413, 443-45 (1982).
17. *E.g.*, Wilbur v. Kerr, 275 Ark. 239, 243, 628 S.W.2d 568, 571 (1982); Cockrum v. Baumgartner, 95 Ill. 2d 193, 201, 447 N.E.2d 385, 389, *cert. denied*, 104 S. Ct. 149 (1983); Weintraub v. Brown, 98 A.D.2d 339, 470 N.Y.S.2d 634, 641 (1983); Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D. & C.2d 41, 45 (1957); Case Note, *supra* note 16, at 440-41; Recent Decisions, *supra* note 11, at 377; *see also* Robertson, *supra* note 7, at 3 (Canadian case described claim as "grotesque").

of a healthy new life.[18] Similarly, some jurisdictions have evaluated the benefits of the child's birth and determined a damages award to be improper, holding that the benefits derived from the child's birth outweigh the financial burdens of raising the child.[19] The words of one judge exemplify this policy argument: "In a proper hierarchy of values, the benefit of life should not be outweighed by the expense of supporting it."[20] One court indicated that the parents' failure to decide to have an abortion or to give the child up for adoption demonstrated that the benefits derived from the child outweighed any hardships.[21]

The minority view jurisdictions have rejected the assertions of the majority and have permitted the recovery of damages for prospective child rearing expenses.[22] Within the minority, California courts permit full recovery of all costs of raising the child.[23] Other minority jurisdictions apply the "benefits rule"[24] in the computation of recoverable damages.[25] Under the "benefits rule," the costs associated with raising the child are reduced by the value of the benefits the child confers upon the plaintiff-parents.[26] In evaluating the value of the benefit, all the circumstances surrounding the child's birth are considered.[27] Critics of the "benefits rule" argue that the benefits to the parents resulting from the child's birth, which are non-pecuniary, may not be properly offset against

18. Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).
19. Several days after *Jones* was decided, the Iowa supreme court stated, "a parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child because the invaluable benefits of parenthood outweigh the mere monetary burdens as a matter of law." Nanke v. Napier, 346 N.W.2d 520, 522-23 (1984); *accord* Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980).
20. Cockrum v. Baumgartner, 95 Ill. 2d 193, 201, 447 N.E.2d 385, 389, *cert. denied*, 104 S. Ct. 149 (1983).
21. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).
22. Jones v. Malinowski, 299 Md. 257, 265, 473 A.2d 429, 433 (1984); *see* Annot., 83 A.L.R.3D 15 (1978).
23. Custodio v. Bauer, 251 Cal. App. 2d 303, 325-26, 59 Cal. Rptr. 463, 477 (1967).
24. RESTATEMENT (SECOND) OF TORTS § 920 (1977) contains the definition of the benefits rule:

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

25. *E.g.*, University of Ariz. v. Superior Court, 136 Ariz. 579, 584, 667 P.2d 1294, 1299 (1983); Ochs v. Borrelli, 187 Conn. 253, 260-61, 445 A.2d 883, 886 (1982); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977); *see also*, Recent Decisions, *supra* note 16, at 1070.
26. Ochs v. Borrelli, 187 Conn. 253, 260-61, 445 A.2d 883, 886 (1982); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).
27. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 519 (1971) (family size, family income, age of parents, and marital status are some but not all of the factors to be considered in determining the extent to which the birth of a child represents a benefit to the parents).

the pecuniary interests impaired.[28] Nevertheless, some courts have reasoned that a broad reading of the benefits rule permits the non-pecuniary benefits to mitigate damages awarded for all of the interests impaired, regardless of whether such interests are of a pecuniary or of a non-pecuniary nature. [29]

The minority's decisions reject the majority's contention that the damages are too speculative. As one judge stated, "juries in tort cases are often required to assess just such intangible factors, both emotional and pecuniary, and we see no reason why a new rule should be adopted for wrongful pregnancy cases."[30] Furthermore, more than one court has recognized that, contrary to the majority view, the benefits of the birth of an unplanned child may not always override the associated financial responsibility.[31]

The courts advocating recovery of damages for prospective child rearing expenses assert that a wrongful conception action is comparable to any other tort action.[32] Accordingly, the measure of damages recovered should correspond to all the injuries proximately caused by the tortfeasor's act.[33]

Before *Jones v. Malinowski*,[34] no Maryland court had determined what damages are recoverable in a suit for negligent performance of a sterilization procedure.[35] In *Sard v. Hardy*,[36] however, the court of ap-

28. Nanke v. Napier, 346 N.W.2d 520, 523 (Iowa 1984) ("awkwardness" of applying benefits rule); Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982) (recognizing a benefit may not be calculated from the total failure of medical service giving rise to the action); Comment, *supra* note 5, at 1182; Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1324 (1982) ("same interest" rule in applying § 920 of the Restatement does not apply to recovery of child rearing costs because different interests are involved).

29. *E.g.*, University of Ariz. v. Superior Court, 136 Ariz. 579, 584-85, 667 P.2d 1294, 1299 (1983); Ochs v. Borrelli, 187 Conn. 253, 259-60, 445 A.2d 883, 886 (1982); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977). *But cf.* Boone v. Mullendore, 416 So. 2d 718, 721 (Ala. 1982) (court rejected benefits rule but allowed claims for mother's pain and suffering and father's loss of consortium); Wilbur v. Kerr, 275 Ark. 239, 244, 628 S.W.2d 568, 571 (1982) (public policy prohibits use of benefits rule; however, expenses of the sterilization and pregnancy were permitted); Case Note, *supra* note 16, at 448-50 (partial recovery of damages notwithstanding the benefits the child bestows upon the parents).

30. University of Ariz. v. Superior Court, 136 Ariz. 579, 582, 667 P.2d 1294, 1297-98 (1983).

31. *E.g.*, Hartke v. McKelway, 707 F.2d 1544, 1552-55 (D.C. Cir.), *cert. denied*, 104 S. Ct. 425 (1983); Ochs v. Borrelli, 187 Conn. 253, 259, 445 A.2d 883, 885-86 (1982); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 517 (1971).

32. *E.g.*, Hartke v. McKelway, 707 F.2d 1544, 1552-55 (D.C. Cir.), *cert. denied*, 104 S. Ct. 425 (1983); University of Ariz. v. Superior Court, 136 Ariz. 579, 585-86, 667 P.2d 1294, 1301 (1983); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174 (Minn. 1977).

33. Custodio v. Bauer, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300, 303 (1980) (Hancock, J., dissenting).

34. 299 Md. 257, 473 A.2d 429 (1984).

35. *Id.* at 259, 473 A.2d at 430.

36. 281 Md. 432, 379 A.2d 1014 (1977).

peals decided that injuries resulting from a physician's negligence in performing a sterilization operation are actionable. *Sard* involved informed consent to a sterilization operation,[37] and the court did not consider whether child rearing costs are available as damages.[38]

The court of appeals in *Jones* rejected the absolute bar against recovery of child rearing expenses followed in the majority of jurisdictions as contrary to traditional principles followed in Maryland for the award of damages in negligence cases.[39] Recognizing that established standards for recovery permit an award of damages for injuries that are "affirmatively proved with reasonable certainty to have resulted in the natural, proximate and direct effect of the tortious misconduct,"[40] the court reasoned that negligently performed sterilization procedures should not be excepted from these standards.[41] Commentators[42] and other courts[43] have noted the importance of applying the same negligence damages standards applied in other tort actions.

The *Jones* court refuted[44] the physician's assertions[45] that the specu-

37. *Id.* at 434, 379 A.2d at 1017.
38. Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (1977); Brief for Appellant at 13, Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984).
39. Jones v. Malinowski, 299 Md. 257, 269-70, 473 A.2d 429, 435 (1984); *see supra* notes 6-22 and accompanying text.
40. *Jones*, 299 Md. at 269, 473 A.2d at 435 (citing Empire Realty Co. v. Fleisher, 269 Md. 278, 305 A.2d 144 (1973); McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964); Plank v. Summers, 205 Md. 598, 109 A.2d 914 (1954)). In computing recoverable damages, Maryland recognizes the duty to mitigate damages and applies the benefits rule. *Jones*, 299 Md. at 269, 473 A.2d at 435 (citing Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970); Hendler Creamery Co. v. Miller, 153 Md. 264, 138 A. 1 (1927); Groh v. South, 119 Md. 297, 86 A. 1036 (1913) (benefits rule recognized)).
41. *Jones*, 299 Md. at 269-70, 473 A.2d at 435.
42. *E.g.*, Recent Decisions, *supra* note 16, at 1079 (application of tort principles provides adequate compensation to injured plaintiffs, deters negligent medical practices and avoids unjust enrichment); Comment, *supra* note 5 (advocating analysis utilizing negligence standards); Note, *supra* note 28, at 1331 (same principles used in other tort actions necessary to provide proper compensation).
43. Custodio v. Bauer, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967) (physician liable for all detriment proximately caused); Ochs v. Borrelli, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982) (exception to tort liability would impair parents' constitutionally protected right to practice family planning); Nanke v. Napier, 346 N.W.2d 520, 523-24 (Iowa 1984) (Wolle, J., dissenting) (traditional principles of tort law are adequate to arrive at fair decision on damages; rejected prohibiting damages as a matter of law); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 517 (1971) (denial of recovery would leave void in medical malpractice); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174-75 (Minn. 1977) (physician should be held responsible for the consequences that have in fact resulted from the physician's actions; imposition of liability will serve as a deterrent to negligently performed sterilization); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300, 303 (1980) (Hancock, J., dissenting) (majority departs from the accepted rule of damages in malpractice actions).
44. *Jones*, 299 Md. at 272-73, 473 A.2d at 436-37.
45. Brief for Appellant at 26-31, Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984).

lative and unquantifiable nature of the damages precluded their recovery without express legislative authority. The physician analogized the damages claim for child rearing costs to the solatium damages in a wrongful death action:[46] because Maryland courts refused to award solatium damages pursuant to the Wrongful Death Act[47] until such an award was specifically authorized in a statute, the physician claimed that the same statutory authority is a prerequisite to the damages award for child rearing costs.[48] In response to this argument, the court stated that costs to maintain, support, and educate a child are quantifiable and reasonably foreseeable.[49] The necessary calculations are similar to the computations required in a domestic support proceeding and by the routine forecasts of an actuary.[50] Furthermore, the average citizen is aware of the expenses incurred in raising a family.[51] Finally, the court refuted the contention that legislative action is a prerequisite to the requested damages.[52]

The court required that, as in other negligence actions, the jury's analysis of damages properly includes an application of the "benefits rule."[53] While the court did not specifically discuss the criticisms directed at utilizing the "benefits rule"[54] in computing recoverable child rearing costs, it prescribed an analysis that eases the claimed improprieties. The court made the interest that the parents wished to protect by undergoing the sterilization operation an integral part of the damages calculation.[55]

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46. *Id.*; *see also Jones*, 299 Md. at 262, 473 A.2d at 431.
47. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-901 to -904 (1984); Wittel v. Baker, 10 Md. App. 531, 536-37, 272 A.2d 57, 59 (1971) (refusal to allow solatium damages where death occurred prior to the effective date of the Wrongful Death Act). Solatium damages are "[d]amages allowed for injury to the feelings," in contrast to pecuniary damages. BLACK'S LAW DICTIONARY 1248 (rev. 5th ed. 1979).
48. Brief for Appellant at 26-31, Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984); *Jones*, 299 Md. at 262, 473 A.2d at 431.
49. *Jones*, 299 Md. at 272, 473 A.2d at 436. An economist demographer had calculated and testified as to the costs to raise the child to the age of majority. *Id.* at 261, 473 A.2d at 431.
50. *Id.* at 272, 473 A.2d at 436; *accord* Boone v. Mullendore, 416 So. 2d 718, 727 (Ala. 1982) (Faulkner, J., concurring specially) (rejecting speculative nature of damages and finding them similar to other tort actions); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883, 886 (1982) (assessment of damages similar to loss of consortium case).
51. *Jones*, 299 Md. at 272, 473 A.2d at 436.
52. The court stated:

> That these items of damage were not originally recoverable in wrongful death actions, but were only made so by statute, does not mean that similar items, calculated as offsetting benefits in determining the ultimate award of consequential damages, are not, absent a statute, appropriately measurable and recoverable in a common law malpractice action based on negligence.

Id. at 272-73, 473 A.2d at 437.
53. *Id.* at 269, 473 A.2d at 435 (acknowledging recognition of benefits rule in Maryland). For a definition of the "benefits rule," see *supra* note 24.
54. *See supra* notes 28-29 and accompanying text.
55. *Jones*, 299 Md. at 270-71, 473 A.2d at 435-36 (adopting motivational analysis); *see*

With regard to the principle of mitigating damages,[56] the *Jones* court rejected the physician's assertion that mitigation in the present case required undergoing an abortion or placing the child for adoption.[57] Similar to the holdings of numerous jurisdictions,[58] the court held adoption and abortion to be unreasonable measures of mitigation.[59]

In *Jones v. Malinowski*,[60] the court adopted the best approach to computing the damages recoverable for a negligent sterilization procedure. The rule protects the interests of the injured parents while not subjecting the negligent physician to damages beyond those recognized under traditional negligence standards.

The court in *Jones*[61] advocated that the trier of fact examine all the circumstances surrounding the sterilization procedure,[62] placing emphasis on an inquiry into the parents' motivation for undergoing the sterilization procedure (that is, whether their reasons were genetic, therapeutic, or economic).[63] This motivational analysis suggests that as a prerequisite to recovery, the interest harmed by the negligent conduct must correspond to the interest the sterilization was to protect.[64] This

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generally infra notes 61-65 and accompanying text (explaining this damages calculation).

56. RESTATEMENT (SECOND) OF TORTS § 918 (1977) states, in pertinent part: "One injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."

57. *Jones*, 299 Md. at 274, 473 A.2d at 437-38.

58. *E.g.*, University of Ariz. v. Superior Court, 136 Ariz. 579, 586 n.5, 667 P.2d 1294, 1301 n.5 (1983); Cockrum v. Baumgartner, 95 Ill. 2d 193, 203-04, 447 N.E. 385, 390-91, *cert. denied*, 104 S. Ct. 149 (1983); Clapham v. Yanga, 102 Mich. App. 47, 57-58, 300 N.W.2d 727, 732-33 (1981) (damages awarded to child's grandparents where court determined adoption of child by a third party would be against the child's best interest); *see also* 3 M. MINZER, J. NATES, C. KIMBALL, D. ALEXROD & R. GOLDSTEIN, DAMAGES IN TORT ACTIONS § 18.14(1)(a) (1982) (mitigation through abortion or adoption is unreasonable; it is in the best interest of the child to have the child raised by his natural parents).

59. *Jones*, 299 Md. at 273, 473 A.2d at 437-38.

60. 299 Md. 257, 473 A.2d 429 (1984).

61. *Id.*

62. *Id.* at 272, 473 A.2d at 436-37. This approach is similar to the standard applied in Troppi v. Scarf, 31 Mich. App. 240, 257, 187 N.W.2d 511, 519 (1971) (family size, family income, age of parents, and marital status are some but not all of the factors to be considered in determining the extent to which the birth of a child represents a benefit to the parents).

63. *Jones*, 299 Md. at 272, 473 A.2d at 437. *See generally* Hartke v. McKelway, 707 F.2d 1544, 1552-55 (D.C. Cir.) (importance of a couple's reasons for choosing not to have children in determining damages), *cert. denied*, 104 S. Ct. 425 (1983); Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934) (courts look at purpose of sterilization); Comment, *supra* note 5 (explanation of relevance of why a sterilization was pursued).

64. *Jones*, 299 Md. at 272, 473 A.2d at 436. *See* Hartke v. McKelway, 707 F.2d 1544, 1551-55 (D.C. Cir.), *cert. denied*, 104 S. Ct. 425 (1983); Comment, *supra* note 5, at 1189-90; Recent Decisions, *supra* note 16, at 1076. For example, a jury may find that parents who pursue sterilization solely to prevent the birth of a child that would suffer from a genetic disease are not injured by the birth of a healthy child.

analysis protects the physician from onerous liability, because recovery of child rearing costs is limited to instances when the ineffective sterilization actually damaged the parents. Yet, at the same time, parents are not denied recovery for impairment of interests they had actually sought to protect. In contrast, states that prohibit recovery of child rearing expenses shield physicians from liability and bar parents from a remedy that would be available in other malpractice actions.[65]

Physicians are liable for the child rearing costs only if they are found guilty of negligence and if the fact finder determines that an economic interest of the parents was injured.[66] Hence, liability is not present every time a child is born subsequent to a sterilization operation on one of the parents. Contrary to criticisms,[67] the physician's liability is indistinguishable from that of a tortfeasor in other tort actions.[68]

Courts[69] and commentators[70] have acknowledged the importance of according parents in a negligent sterilization procedure action the same standards of recovery that are applied in other malpractice actions. Costs of rearing a child are determinable, and a jury is competent to weigh the claimed damages and any benefits resulting from the negligent act.[71] The *Jones* court, however, did not consider the potential inequity of a windfall to the parents that may arise after the award of damages.[72] The imposition of a constructive trust on the damages award is a possible solution to the problem.

The position of the court of appeals is, as expressed in its own words, an "attempt to do justice in an imperfect world."[73] The opinion limits the recovery of child rearing costs to instances when the parents are actually injured by the ineffective sterilization. It also does not shield physicians from liability by cloaking negligent sterilization procedures with judicial protections distinct from other malpractice actions.

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65. Note, *supra* note 28, at 1320.
66. *Jones*, 299 Md. at 272, 473 A.2d at 436.
67. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 517-18, 219 N.W.2d 242, 244 (1974) (award of damages to parents would allow parents all the emotional benefits of childrearing while placing the entire financial burden of the child upon the doctor); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982) (award of childrearing expenses would open the way for fraudulent claims).
68. Ochs v. Borrelli, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174 (Minn. 1977). *See* Recent Development, *Medical Malpractice*, 6 AMER. J. TRIAL ADV. 511 (1983) (discussion of cases deciding when the statutory period for negligently performed sterilization procedure commences).
69. *See supra* note 43.
70. Robertson, *supra* note 7, at 4 (English commentator recognizes importance of allowing recovery of full damages in order to reach equitable solution); Recent Decisions, *supra* note 5, at 189 (criticizing denial of recovery); Recent Decisions, *supra* note 16, at 1079; Recent Decisions, *supra* note 11, at 378 (conceding that denial of damage claims creates "an umbrella of invulnerability for doctors and hospitals negligent in performing or testing the effectiveness of sterilization operations").
71. *See supra* notes 50-52 and accompanying text.
72. A windfall would result, for example, if the parents were awarded damages for the costs of rearing the child and the child died before attaining the age of majority.
73. Jones v. Malinowski, 299 Md. 257, 275, 473 A.2d 429, 438 (1984).

The decision has an immediate effect upon the potential liability of physicians performing sterilization operations. While the standard of care remains unchanged, the potential liability in the event of negligence has increased. The *Jones* decision does not examine how its principles might be applied to the situation in which a defective child's birth is caused by a physician's negligence. In such a case, however, the court would be likely to evaluate the parents' claims under the same principles. In comparison, the defective child's claim would not be evaluated under the principles set forth in *Jones*.[74]

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74. *See generally supra* note 5 (discussing the difference between the child's action and the parents' action); *see also* Comment, *supra* note 5; Recent Decisions, *supra* note 5.