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RESOLVING THE CONFLICT IN WRONGFUL BIRTH ACTIONS: *COCKRUM v. BAUMGARTNER*

In recent years, contraceptives, sterilizations, and abortions have become accepted methods of birth control.¹ Occasionally, an individual's birth control efforts are thwarted due to a third party's negligence.² Such negligent interference with these contraceptive methods³ has resulted in the birth of unplanned children.⁴ Because unplanned children result in unexpected financial

1. Statistical studies reveal a widespread use of contraceptive methods in the United States. One in five married women now use oral contraceptives. In addition, more than 1,409,600 legal abortions were performed in the United States in 1978. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1980. Moreover, 3.5 million men received vasectomies between 1970 and 1975. *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 n.9 (Minn. 1977). From 1969 to 1977, the number of male and female sterilizations increased by 210%. Shaw, *Procreation and the Population Problem*, 55 N.C.L. REV. 1165, 1170 n.33 (1977). See generally Westoff & Jones, *Contraception & Sterilization in the United States, 1965-1975*, 9 FAM. PLAN. PERSP. 153 (1977).

Recent United States Supreme Court decisions also reflect an acceptance of an individual's right to limit procreation. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (decision whether or not to bear a child is a constitutionally protected choice); *Roe v. Wade*, 410 U.S. 113 (1973) (the Constitution protects an individual's right to have an abortion during the first trimester of pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (constitutional right of privacy includes the freedom of unmarried persons to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Constitution protects married couples' rights to use contraceptives to limit family size).

2. See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (birth of a child due to negligently performed bilateral tubal ligation); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1st Dist. 1979) (negligently performed abortion resulted in birth of normal child); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (negligent dispensement of oral contraceptives resulted in birth of unplanned child); *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (misdiagnosis of pregnancy precluded plaintiff from choosing whether or not to abort).

3. There are a variety of procedures used to prevent birth. Oral contraceptives (the "pill"), the intra-uterine device, diaphragms, and spermicides are temporary contraceptive methods used to avoid conception. Sterilization is a permanent contraceptive procedure. A therapeutic sterilization is performed to prevent pregnancy or childbirth from aggravating any existing physical or mental health problem. In contrast, an elective sterilization is performed for various personal reasons, such as limiting family size or avoiding financial burdens. The male sterilization procedure, known as a vasectomy, prevents passage of the sperm by surgical severance of the vas deferens, the sperm passageway. There are two types of female sterilization procedures. A bilateral salpingectomy involves the removal of the fallopian tubes. A tubal ligation involves the cutting and tying of the fallopian tubes. Both of these operations prevent the union of the sperm with the egg. For a discussion of the medical aspects of sterilization, see Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 419-21 (1965). Another type of birth control, employed after conception, is an abortion whereby pregnancy is terminated through expulsion of the fetus. See generally Note, *Recovery for Wrongful Conception: Who Gets the Benefit—the Parents or the Public*, 14 NEW ENGLAND L. REV. 784 (1979)[hereinafter cited as *Wrongful Conception*].

4. Negligence in contraceptive methods has resulted in the unplanned birth of both

and emotional burdens, parents of these children have begun to institute suit⁵ for wrongful birth.⁶ In a wrongful birth action, the parents generally

healthy and unhealthy children. Because recovery is more often denied for the birth of healthy children than for children with defects, however, this Note focuses on damages resulting from the unplanned birth of a healthy child. Recovery has been denied to the parents of a healthy child because the birth of a normal, healthy child generally has not been viewed as an injury. This view has also operated to reduce recovery for the wrongful birth of defective children. Accordingly, courts have deducted the costs of raising a healthy child from the costs of raising a child with impairments. See, e.g., *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (recovery for wrongful birth of a mentally or physically impaired child limited to expenses related to defective condition); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 3772 (1978) (damages limited to those attributable to deformities). But see *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 428 A.2d 1366 (1981) (physical condition of unplanned child is irrelevant in determining whether cause of action for wrongful birth is permissible).

5. Parents have been most successful in recovering damages when predicating their cause of action on a tort theory. See, e.g., *Bishop v. Byrne*, 265 F. Supp. 460 (S.D.W. Va. 1967) (negligent performance of sterilization); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (lack of informed consent due to physician's negligent failure to explain various types of sterilization procedures); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1st Dist. 1979) (negligence for failure to successfully perform an abortion); *Troppi v. Scarf*, 21 Mich. App. 240, 187 N.W.2d 511 (1971) (negligence in dispensement of contraceptive prescription); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (negligence in post-operative testing to insure sterility); *Ziembra v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (negligence in failure to diagnose pregnancy).

Wrongful birth actions based on a tort theory are, however, sometimes difficult to substantiate. Allegations of negligence in the performance of a sterilization operation are not necessarily proven by the subsequent birth of a child. Recanalization, whereby a ligated fallopian or a severed vas deferens spontaneously regenerates and reconnects, is possible in 1% of vasectomies and 2% of tubal ligations. See Lombard, *Vasectomy*, 10 SUFFOLK U.L. REV. 25, 33 (1975); Note, *Wrongful Conception as a Cause of Action and Damages Recoverable: Sherlock v. Stillwater Clinic*, 44 MO. L. REV. 589, 597 (1979) [hereinafter cited as *Damages Recoverable*]. Because the sterilization operation is performed on internal organs, it is difficult to prove that the defendant's negligent performance of the operation, rather than recanalization, proximately caused the birth of the child. In these instances, some courts have inferred causation because of the low rate of recanalization. See, e.g., *Vaughn v. Shelton*, 514 S.W.2d 870 (Tenn. Ct. App. 1974).

The difficulties in proving negligence in wrongful birth actions have sometimes been circumvented by proceeding under the contract theory of breach of warranty. Under this theory, if a physician warrants that the contraceptive treatment or sterilization will be effective, the birth of a child may render the physician liable for breach of warranty. Because the physician generally does not impliedly warrant success of an operation, however, the plaintiff must prove that the physician expressly warranted that the contraceptive treatment would be effective. Furthermore, most courts require that an express warranty be supported by a separate consideration. See, e.g., *Rogala v. Silva*, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1st Dist. 1973) (contract claims for unsuccessful abortion dismissed because of failure to allege separate consideration). For a general discussion of theories upon which wrongful birth suits may proceed, see Moore, *Wrongful Birth—The Problem of Damage Computation*, 48 UMKC L. REV. 1, 2-3 (1979) [hereinafter cited as Moore]; Note, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 FORDHAM L. REV. 418, 422-28 (1978) [hereinafter cited as *Bringing Up Baby*]; *Damages Recoverable*, *supra*, at 597-99.

6. Although courts and commentators have often used the terms wrongful birth and wrongful life interchangeably, the two causes of action should be distinguished. Wrongful life actions are brought on behalf of a child against a physician who fails to detect either pregnancy or disease in a pregnant mother. The child usually asserts that his or her very life is wrongful and

seek recovery for the expenses incident to childbirth and the costs of raising and educating the unplanned child.⁷

should have been prevented. Courts generally do not recognize a course of action for wrongful life because of the difficulty in comparing life in an "impaired" state with non-life and because life is not a compensable damage. *See, e.g.,* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (child's claim dismissed because of impossibility of measuring difference between life with defects against non-existence); Speck v. Finegold, 268 Pa. Super. Ct. 342, 408 A.2d 496 (1979) (denied child's cause of action because damages for life impossible to determine). *But see* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (because infant both exists and suffers it deserves compensation for wrongful life).

Wrongful life claims have also been brought by children against parents to recover damages for their illegitimate status. Recovery, however, has uniformly been denied. *See, e.g.,* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1st Dist. 1963) (child unsuccessfully brought suit against father for tort of "bastardy"); *cert. denied*, 379 U.S. 945 (1964); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (cause of action by child against parent for wrongful life denied due to vast social ramifications). For a detailed discussion of wrongful life actions, see Comment, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 WM. & MARY L. REV. 125 (1978); Note, *Wrongful Birth and Wrongful Life: Park v. Chessin*, 44 MO. L. REV. 167 (1979).

Wrongful birth actions are brought by parents against medical practitioners for negligence in performing proper contraceptive procedures. The damages generally sought in wrongful birth actions are the costs associated with childbirth and child rearing. *See, e.g.,* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (compensation for birth of child sought due to negligently performed bilateral tubal ligation); Wilczynski v. Goodman, 73 Ill. App. 2d 51, 391 N.W.2d 479 (1st Dist. 1979) (recovery sought for hospital and medical costs resulting from childbirth due to negligently performed abortion); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1979) (compensation sought for mother's lost wages for medical expenses, pain, anxiety, and rearing costs resulting from negligent dispensement of oral contraceptives); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (medical costs sought where misdiagnosis of pregnancy precluded plaintiff from choosing to abort). *See generally* Moore, *supra* note 5.

Wrongful birth actions have also been brought, although unsuccessfully, by siblings of a child born as a result of a defendant's negligence. *See, e.g.,* Aronoff v. Snider, 292 So. 2d 418 (Fla. Dist. Ct. App. 1974) (wrongful birth cause of action by siblings found to be without foundation or logic); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (N.Y. Sup. Ct. 1974) (action brought by siblings seeking recovery for deprivation of parental care, affection, and financial support dismissed). *See generally* Comment, *Busting the Blessing Balloon: Liability for the Birth of the Unplanned Child*, 39 ALB. L. REV. 221 (1975) [hereinafter cited as *Busting the Blessing*].

Furthermore, there is a cause of action for wrongful conception. This action refers to negligence in contraceptive procedures prior to conception. For purposes of this Note, wrongful conception need not be distinguished from the more general term wrongful birth. Because the same issues exist in both actions, the discussion of damages is the same regardless of the terminology used. *See Wrongful Conception, supra* note 3, at 787-91.

7. Parents in wrongful birth actions typically seek to recover doctor's fees, hospital charges, damages for pain and suffering of pregnancy, costs of a second sterilization operation, costs of clothing, feeding and educating the child during its minority, loss of consortium, and loss of services. The amount of recoverable damages, however, may vary depending upon which damage theory is employed in the particular jurisdiction. *See* Note, *Cause of Action on Behalf of Parents for the Negligent Sterilization of Mother Resulting in the Birth of an Unwanted Child Held Sufficiently Supported by Case Law to Warrant Denial of Motion for Summary Judgment and to Allow Claimant-Parents to Prove All Items of Damage, Including the Anticipated Cost of Rearing the Child, Less Any Benefit Conferred by the Birth—Rivera v. State*, 28 DRAKE L. REV. 503, 510 (1978) [hereinafter cited as *Negligent Sterilization*].

In *Cockrum v. Baumgartner*,⁸ an Illinois appellate court held that a physician may be liable in a wrongful birth action for the cost of raising and educating a normal, healthy child born as a result of a negligently performed sterilization operation.⁹ Although the *Cockrum* judges awarded damages to the parents for the unplanned birth of a healthy child, they disagreed as to the extent of those damages.¹⁰ The dissention among the judges arose from the conflicting theories of recovery that are currently recognized in wrongful birth actions.¹¹ To understand the conflicting Illinois views, an examination of wrongful birth actions in other jurisdictions is necessary. Close analysis of these theories reveals the most preferable alternative, and it is suggested that the Illinois Supreme Court resolve this issue by adopting the proffered approach.

BACKGROUND

The Illinois courts have recognized three of four distinct views on the extent of recoverable damages in wrongful birth actions. The traditional and most restrictive view, known as the blessings doctrine, denies recovery on the basis that the birth of a child always constitutes a blessing and, therefore, cannot result in any compensable damage to the parents.¹² The second view, the wrongful pregnancy approach, recognizes a cause of action for wrongful pregnancy but limits recovery to pregnancy and birth related costs.¹³ A third less restrictive view, the *Troppi* benefit rule, permits recovery for child rearing expenses but offsets these damages by any and all benefits of parenthood.¹⁴ Finally, the least restrictive of the theories on the

8. 99 Ill. App. 3d 271, 425 N.E.2d 968 (1st Dist. 1981).

9. *Cockrum* was not the first decision in which a cause of action for wrongful birth was acknowledged by an Illinois court. See *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1st Dist. 1979) (cause of action for wrongful birth due to unsuccessful abortion); *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (2d Dist. 1966) (recognized a cause of action for an unsuccessful sterilization). *Cockrum* was the first Illinois decision, however, to include the costs of raising and educating a child as permissible elements of recovery in wrongful birth actions.

10. 99 Ill. App. 3d 271, 273, 425 N.E.2d 968, 970 (1st Dist. 1981) (Romiti & Linn, JJ., concurring). The *Cockrum* decision consisted of three separate opinions. Judge Jiganti wrote the plurality opinion and will herein be referred to as "the plurality." Judges Romiti and Linn both wrote separate concurring opinions.

11. The Illinois appellate courts have recognized three conflicting damage theories in wrongful birth action. Two of the theories were established in the *Cockrum* court's opinion and the concurring opinions, respectively. The third Illinois view was set forth in *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1st Dist. 1979). See *supra* notes 46-52 & 53-84 and accompanying text.

12. See, e.g., *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957) (under the blessings doctrine recovery of expenses for the rearing and educating a child are against public policy). See *infra* notes 16-24 and accompanying text.

13. See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974) (wrongful pregnancy approach allows recovery for only those costs that result from the unexpected pregnancy itself), *aff'd*, 349 A.2d 8 (Del. 1975). See *infra* notes 25-29 and accompanying text.

14. See, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (essential to the analysis is the ability of the trier of fact to evaluate damages in terms of all benefits incurred and all the circumstances of the case). See *infra* notes 30-37 and accompanying text.

measure of damages, the same interest benefit rule, permits recovery for child rearing expenses and offsets damages only when there is a benefit to the same interest that the parents sought to protect through contraception.¹⁵

The blessings doctrine originated in the 1934 Minnesota Supreme Court case of *Christensen v. Thornby*.¹⁶ In *Christensen*, the plaintiff husband sought damages for the birth of a normal, healthy child resulting from an unsuccessfully performed vasectomy.¹⁷ The vasectomy was performed to spare the plaintiff's wife from the potential medical complications of childbirth.¹⁸ Concluding that the plaintiff had not suffered any compensable damages because his wife was not harmed during childbirth,¹⁹ the *Christensen* court stated that the "plaintiff had been blessed with the fatherhood of another child."²⁰ This dicta became the basis of the blessings doctrine.

Under the blessings doctrine, recovery is denied in wrongful birth actions.²¹ In *Shaheen v. Knight*,²² for example, the court concluded that permitting recovery for the birth of a normal, healthy child would be contrary to public policy because it would enable the parents to enjoy the benefits of parenthood at the expense of the defendant physician.²³ Thus, the court rejected the possibility that the birth of an unplanned child could be detrimental to the parents.²⁴

The second view, the wrongful pregnancy approach, which limits recovery in wrongful birth actions to pregnancy and birth related costs, has been adopted in a few jurisdictions.²⁵ In *Coleman v. Garrison*,²⁶ the court

15. See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (damages mitigated only where the interest plaintiff seeks to protect is ultimately benefitted). See *infra* notes 38-45 and accompanying text.

16. 192 Minn. 123, 255 N.W. 620 (1934).

17. *Id.* at 126, 255 N.W. at 622.

18. *Id.*

19. *Id.* The court did not address the issue of whether recovery would have been permitted if the purpose of the vasectomy had been to spare the expenses of birth and child rearing. The plaintiff also alleged that the defendant had falsely represented the efficacy of the operation. Recovery for this claim was denied, however, because the plaintiff failed to allege the defendant's fraudulent intent. *Id.* at 126, 255 N.W. at 622.

20. *Id.*

21. See, e.g., *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973) (economic loss disregarded in view of joy and companionship normal parents have in rearing children), *cert. denied*, 415 U.S. 927 (1974); *Ball v. Mudge*, 64 Wash. 2d 247, 250, 391 P.2d 201, 204 (1964) (costs incidental to childbirth outweighed by the blessing of a cherished child). See *infra* note 23 and accompanying text.

22. 11 Pa. D. & C.2d 41 (1957).

23. *Id.* at 45-46. The *Shaheen* court noted that "[t]o allow damages . . . would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this, [plaintiff's] fifth child. . . . He wants to have the child and wants the doctor to support it." *Id.*

24. *Id.* at 45. The court stated that "to allow damages for the normal birth of a normal child is foreign to the universal sentiment of the people." *Id.*

25. See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct.), *aff'd*, 349 A.2d 8 (Del. 1975). *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1st Dist. 1979).

26. 327 A.2d 757 (Del. Super. Ct.), *aff'd*, 349 A.2d 8 (Del. 1975).

denied recovery for the costs of raising and educating the child because ascertainment of such damages would be speculative.²⁷ Moreover, the court found that recovery of full rearing costs would unduly burden the physician because he would bear the expenses of the child, while the parents, who chose to keep the child, would retain all the benefits.²⁸ Accordingly, the court limited recovery to expenses related to the unexpected pregnancy itself.²⁹

The third view of recovery in wrongful birth actions was promulgated in *Troppi v. Scarf*.³⁰ In *Troppi*, the parents of a normal, healthy child born as a result of a negligently filled oral contraceptive prescription sought to recover damages for Mrs. Troppi's lost wages, medical and hospital expenses, the pain and anxiety of pregnancy and childbirth, and the costs of raising the child.³¹ The court concluded that damages for the child's wrongful birth should be determined according to traditional negligence standards.³² Thus, an appropriate determination of damages, the *Troppi* court explained, involves the application of the *Restatement (Second) of Torts* Benefit Rule. This rule provides that where an individual has been harmed by another's tortious conduct, but has received a benefit to the harmed interest, the value of the benefit received mitigates the amount of damages.³³ In liberally interpreting the *Restatement's* Benefit Rule, the *Troppi* court maintained that *all* benefits derived from the birth of an unplanned child should be weighed against all elements of claimed damages.³⁴

27. *Id.* at 12. The *Coleman* court explained that damages could not be calculated within the ambit of legal predictability. The court's discussion, however, did not focus upon the difficulty in determining the costs of raising and educating a child, but rather focused upon the difficulty in placing a value on human life.

28. *Id.*

29. *Id.* at 13-14. The Delaware Supreme Court affirmed the lower court's decision to "view the action as one for 'wrongful pregnancy' . . . thereby limiting the scope of the injury to the very real expenses . . . attending the unexpected pregnancy . . ." *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct.), *aff'd*, 349 A.2d 8 (Del. 1975).

30. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

31. *Id.* at 244, 187 N.W.2d at 514. Mrs. Troppi, a mother of seven, used oral contraceptives to limit the size of her family. The Troppi's brought a cause of action for negligence against a pharmacist who supplied the wrong drug. The lower court, dismissed the complaint and declared that whatever damages the plaintiffs had suffered were more than offset by the benefits they received in having another healthy child. *Id.* The *Troppi* court's rationale provides a clear example of the blessings doctrine. See *supra* notes 16-24 and accompanying text.

32. 31 Mich. App. 240, 252, 187 N.W.2d 511, 525. See *infra* notes 62-65 and accompanying text.

33. See RESTATEMENT (SECOND) OF TORTS § 920 (1939). The *Second Restatement of Torts* Benefit Rule states: "Where 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." *Id.*

34. 31 Mich. App. 240, 255, 187 N.W.2d 511, 518. If *Troppi* had strictly interpreted the *Restatement's* Benefit Rule, damages would have been offset only to the extent that Mrs. Troppi received a special benefit to her interest in limiting the size of her family. Instead, the

In balancing these interests, the *Troppi* court recognized that an individual's injuries may vary according to the specific circumstances involved.³⁵ The court distinguished, for example, between injuries suffered by young newlyweds who had planned to use contraceptives only for the duration of a honeymoon and the injuries suffered by unwed college students.³⁶ Under the *Troppi* benefit rule, therefore, a court analyzes all the surrounding circumstances and the amount of damage varies accordingly.³⁷

The least restrictive theory of recovery in wrongful birth actions, the same interest benefit rule, was developed by a California court in *Custodio v. Bauer*.³⁸ In *Custodio*, the plaintiffs brought suit after an unsuccessful sterilization operation to recover damages for child rearing costs and medical expenses, as well as for the wife's pain and suffering.³⁹ The court expressly rejected the policy grounds underlying the blessings doctrine and its corresponding denial of recovery. In so doing, the court reasoned that if the defendant's negligence was proven, the plaintiffs should be permitted to recover for medical expenses, pain and suffering, and child rearing costs.⁴⁰ In addition, the *Custodio* court concluded that the mother of an unplanned

Troppi court liberally interpreted the *Restatement's* Benefit Rule by broadly defining the "interest which was harmed." In rejecting a narrow construction of the *Restatement's* Benefit Rule, the court reasoned that "[s]ince pregnancy and its attendant anxiety, incapacity, pain and suffering are inextricably related to childbearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the same 'interest' rule." *Id.* See *infra* notes 42-45 and accompanying text.

35. 31 Mich. App. at 256, 187 N.W.2d at 518.

36. *Id.* at 256-57, 187 N.W.2d at 518. The *Troppi* court noted that, under this theory of recovery, the unmarried coed's net damage award would be higher than the young newlywed's award because the coed's "family interests" would have been scarcely enhanced. *Id.*

37. The *Troppi* court maintained that a rational legal system must award damages that correspond to the varying injuries resulting in wrongful birth actions. The *Troppi* benefit rule accomplishes this objective by allowing a flexible, case-by-case analysis of differing wrongful birth claims. In specifically enumerating the calculation of damages under the benefits rule, the court stated that:

[the] essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, of the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents.

Id. at 256, 187 N.W.2d at 519.

38. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

39. *Id.* at 308-09, 59 Cal. Rptr. at 467.

40. *Id.* at 323-24, 59 Cal. Rptr. at 476. Rejecting the blessings doctrine used in *Christensen* and *Shaheen*, the *Custodio* court stated:

To say, as in *Christensen*, that the expenses of bearing a child are remote from the avowed purpose of an operation undertaken for the purpose of avoiding childbearing is a *non-sequitur*. *Shaheen* begs the question by referring to the compensation sought as "damages for the normal birth of a normal child". . . . [T]he compensation is not for the so-called unwanted child . . . but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income.

Id. at 324, 59 Cal. Rptr. at 476-77 (citations omitted).

child may be able to recover damages for the need to spread her society and care over a larger group if such damages proved economically measurable.⁴¹

In calculating the amount of damages, the *Custodio* court applied the *Restatement's* Benefit Rule.⁴² In contrast to *Troppe*, however, the *Custodio* court strictly interpreted the rule. Instead of offsetting damages by all benefits the parents received, the court offset damages only to the extent that the parents received a benefit to the same interest which they had sought to protect through contraception.⁴³ Because the purpose of the sterilization in *Custodio* was to prevent health complications, the plaintiff's damages were mitigated only to the extent that the birth of the child benefitted the mother's health.⁴⁴ Consequently, *Custodio's* same interest benefit rule allows substantial recovery with minimal mitigation of damages.⁴⁵

The first wrongful birth damage theory to be adopted in Illinois was the wrongful pregnancy approach. In *Wilczynski v. Goodman*,⁴⁶ the plaintiff sought damages for medical and hospital expenses, and the costs of raising and educating a normal, healthy child born after a negligently performed abortion.⁴⁷ The *Wilczynski* court examined the public policy enunciated in the Illinois Abortion Act⁴⁸ which favors the unborn child's right to life

41. *Id.*

42. See *supra* note 33 and accompanying text.

43. 251 Cal. App. 2d at 323, 59 Cal. Rptr. at 476. In *Custodio*, the purpose of the sterilization was to prevent kidney and bladder complications as well as to prevent aggravation of Mrs. Custodio's emotional and nervous disposition. *Id.*

44. *Id.*

45. *Id.* Because the case was reversed and remanded for further proceedings, the court did not calculate damages. *Id.* at 326, 59 Cal. Rptr. at 478.

46. 73 Ill. App. 3d 51, 391 N.E.2d 479 (1st Dist. 1979).

47. *Id.* at 53, 391 N.E.2d at 481. In *Wilczynski*, the abortion had been performed for therapeutic reasons. The plaintiff, Mrs. Wilczynski, charged the defendant physician with negligence, breach of contract, and breach of warranty as a result of the unsuccessful abortion. The court, however, dismissed the contract and warranty counts because the plaintiff failed to plead a separate consideration for the physician's promise to terminate the pregnancy or for the physician's warranty that the abortion had been successful. *Id.* at 64-65, 391 N.E.2d at 488-89.

48. ILL. REV. STAT. ch. 38, § 81-21 (1981). The *Wilczynski* court relied on § 1 of the Illinois Abortion Act of 1975, which provides:

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States

rather than the woman's right to an abortion. The court concluded that this policy did not support recovery for the costs of raising and educating a child after a successful birth.⁴⁹ According to the *Wilczynski* court, birth of a normal, healthy child was an "esteemed right" rather than a compensable wrong.⁵⁰ Because hospital and medical costs were not related to a child's right to life, however, the court reasoned that recovery for these expenses was permitted to compensate the plaintiff for the physician's tortious conduct.⁵¹

Despite the *Wilczynski* court's adoption of the wrongful pregnancy approach, this view, limiting recovery to pregnancy and birth related costs in wrongful birth actions, recently was rejected by another Illinois appellate court in *Cockrum v. Baumgartner*.⁵² In rejecting the *Wilczynski* approach, the *Cockrum* plurality embraced the same interest benefit rule. On the other hand, two concurring judges in *Cockrum* endorsed the *Troppi* benefit rule. Thus, there are currently three damage theories that have been adopted by the Illinois appellate courts.

THE COCKRUM DECISION

In *Cockrum v. Baumgartner*, the defendant, Dr. Baumgartner, performed a vasectomy upon Leon Cockrum.⁵³ One month later, the physician informed Mr. Cockrum that the vasectomy had been successful.⁵⁴ Two and one half months after the vasectomy, however, Donna Cockrum was informed that she was three weeks pregnant.⁵⁵ A subsequent test revealed that Mr. Cockrum's vasectomy had not been successful.⁵⁶ After Mrs. Cockrum gave birth to a healthy child, the parents brought suit against Dr. Baumgartner

Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

Id.

49. 73 Ill. App. 3d 51, 62, 391 N.E.2d 479, 487. The court stated: "In our judgment, a public policy which deems precious even potential life while yet in the womb . . . does not countenance as compensable damage to its parent or parents those additional costs and expenses necessary to sustain and nurture that life once it comes to fruition upon and after successful birth." *Id.*

50. *Id.*

51. *Id.* at 63, 391 N.E.2d at 488. The *Wilczynski* court noted that to deny the plaintiff recovery altogether would be tantamount to granting the medical profession an unwarranted immunity from liability for improper medical treatment. *Id.* For an in depth discussion of the *Wilczynski* case, see Comment, *Wrongful Life: Birth Control Spawns a Tort*, 13 J. MAR. L. REV. 401 (1980) [hereinafter cited as *Wrongful Life*].

52. 99 Ill. App. 3d 271, 425 N.E.2d 968 (1st Dist. 1981).

53. *Id.* at 272, 425 N.E.2d at 969.

54. *Id.*

55. *Id.* Donna Cockrum had consulted a doctor complaining of stomach cramps only to then learn of the pregnancy. *Id.*

56. *Id.*

seeking recovery of expenses incident to the pregnancy and childbirth and the costs of raising and educating the child.⁵⁷

The trial court dismissed the plaintiff's counts seeking recovery for the costs of raising and educating the child⁵⁸ holding that an action to recover such costs was against public policy and, therefore, not cognizable under Illinois law.⁵⁹ The Illinois Appellate Court for the First District, however, reversed and remanded, and held that the parents of a healthy child, born as a result of a negligently performed sterilization operation, may recover the expenses of raising and educating the unplanned child.⁶⁰

After explicitly setting aside moral and ethical considerations,⁶¹ the *Cockrum* court concluded that recovery for negligently performed sterilizations was analytically indistinguishable from ordinary medical malpractice actions.⁶² Accordingly, the court found that a determination of damages should follow traditional tort principles.⁶³ Once the elements of negligence

57. *Id.* The *Cockrum* decision involved two cases which were consolidated on appeal, *Cockrum v. Baumgartner and Raja v. Tulsy*, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1st Dist. 1981). In *Raja*, Dr. Tulsy attempted to perform a sterilization upon Edna Raja after she was advised that another pregnancy would endanger her health. Approximately five years after the sterilization, Mrs. Raja experienced signs of pregnancy. After an examination at a gynecological clinic, she was informed that she was not pregnant. Upon returning to the clinic two months later, Mrs. Raja was informed that she was in the advanced stages of pregnancy and that it was no longer medically safe to terminate her pregnancy. Following an uncomplicated birth of a normal, healthy girl, the Rajas brought suit against the physician and the clinic for negligence. The action against the physician was dismissed because the statute of limitations had run. In the action against the clinic, however, based upon the negligent diagnosis of Mrs. Raja's pregnancy, the plaintiff sought damages for the costs of raising and educating the child. *Id.* at 272, 425 N.E.2d 969.

58. *Id.*

59. *Id.* The dismissal of the counts which sought recovery for the costs of raising and educating the child was based on *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1st Dist. 1979). 99 Ill. App. 3d at 272, 425 N.E.2d at 969. See *supra* notes 46-52 and accompanying text. While the other counts seeking medical expenses and pain and suffering were still pending in the lower court, the plaintiffs appealed the dismissal of the counts that sought compensation for rearing costs. *Id.*

60. *Id.* at 274, 425 N.E.2d at 971.

61. *Id.* at 272, 425 N.E.2d at 969. The court did not expound on these moral and ethical considerations. Other courts have noted, however, that to allow damages for the birth of a child is offensive to some individuals' moral and ethical beliefs. For example, the court in *Rivera v. State*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978), stated that underlying the opposition to wrongful birth actions is the idea that birth or life, whether wanted or unwanted, is an ultimate good rather than a compensable wrong. The *Rivera* court further stated that while this Pro-life sentiment holds a place of importance in many people's religious and philosophical beliefs, it is not a universally accepted doctrine. *Id.* at 260, 404 N.Y.S.2d at 953. Similarly, other jurisdictions have refused to consider moral concerns. See, e.g., *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (resolution of damages does not require intrusion into domain of moral philosophy); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 174 (Minn. 1977) (moral and theological concerns are beyond consideration in awarding damages). See also *infra* note 89 and accompanying text.

62. 99 Ill. App. 3d at 273, 425 N.E.2d at 970.

63. *Id.* For a discussion of the traditional tort principles, see generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30, at 143-44 (4th ed. 1971) [hereinafter cited as PROSSER]; *RESTATEMENT (SECOND) OF TORTS* § 281 (1965).

were proven—duty, breach of duty, and proximate cause—the defendant would be held liable for all damages ordinarily and naturally flowing from the commission of the tort.⁶⁴ The proper measure of damages should seek to restore the plaintiffs to the position in which they would have been but for the negligent sterilization procedure.⁶⁵ The *Cockrum* court reasoned that because the costs of raising and educating a child naturally flow from the birth of an unplanned child, these costs should be included in compensating plaintiffs for defendant's negligence.

Although the *Cockrum* court accepted traditional negligence principles as the appropriate basis for liability, the court did not completely ignore the blessings doctrine.⁶⁶ Nonetheless, recognizing that the birth of a child does not always confer a benefit upon the parents, the court refused to deny recovery as a matter of public policy.⁶⁷ The court explained that a couple has a fundamental right under the constitutionally protected zone of privacy⁶⁸ to determine the size of their family. Recovery of rearing costs in a wrongful birth action, according to the court, was merely a recognition of the parents' fundamental right to control their reproductiveness.⁶⁹ Thus, the *Cockrum* court rejected the arguments that the public policy considerations underlying the blessings doctrine should be used to deny parents full recovery in wrongful birth actions.⁷⁰

The view that parents of an unplanned child should mitigate damages through abortion or adoption⁷¹ was also rejected by the *Cockrum* court.

64. 99 Ill. App. 3d at 273, 425 N.E.2d at 969. See *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 413 N.E.2d 47 (1st Dist. 1980) (one who commits wrongful act is liable for all ordinary and natural consequences of that act).

65. 99 Ill. App. 3d at 273, 425 N.E.2d at 969. See *Myers v. Arnold*, 83 Ill. App. 3d 1, 403 N.E.2d 316 (4th Dist. 1980) (law of torts attempts primarily to restore injured party to position held prior to tort).

66. 99 Ill. App. 3d at 273, 425 N.E.2d at 970. See *supra* notes 18-24 and accompanying text.

67. 99 Ill. App. 3d at 273, 425 N.E.2d at 970. The court stated that:

While we agree that most parents hold the sentiment that the birth of a healthy albeit unplanned child is always a benefit, we are not inclined to raise this sentiment to the level of public policy. . . . We are not persuaded that public policy considerations can be properly used to deny recovery to parents of an unplanned child. . . .

Id.

68. For the United States Supreme Court cases discussing this right, see *supra* note 1.

69. 99 Ill. App. 3d at 273, 425 N.E.2d at 970. The court maintained that if rearing costs were denied, an individual's right to control reproductivity would be nullified because the individual would not be able to recover damages for a violation of this right. *Id.*

70. *Id.* The court stated that the issue presented in both *Cockrum v. Baumgartner* and *Raja v. Tulskey*, see *supra* note 57, was whether rearing costs could be recovered for a normal, healthy child born as a result of a negligently performed sterilization. Although the court framed the issue in these terms, these decisions are applicable to all actions concerning the negligent interference with the right to limit procreation. Because *Cockrum* and *Raja* were both wrongful birth actions in which defendants' negligence contravened plaintiffs' right to limit procreation, the manner in which the negligence occurred was irrelevant. See *supra* notes 67-68 and accompanying text.

71. 99 Ill. App. 3d at 274, 425 N.E.2d at 971.

The court stated that it would be unreasonable to require the parents of an unplanned child to take such measures.⁷² The decision to abort or place a child up for adoption is a uniquely personal choice, and therefore, the court held that such a decision could not be forced upon the parents as a means of mitigating damages.⁷³

Although the *Cockrum* court allowed the parents to recover the costs of rearing the unplanned child,⁷⁴ two concurring judges disagreed with the plurality regarding the extent of recoverable damages.⁷⁵ By adopting the same interest benefit rule as the appropriate measure of damages in wrongful birth actions,⁷⁶ the plurality permitted mitigation of damages only where there was a benefit to the same interest that was harmed.⁷⁷ Thus, if the parents' interest in practicing contraception was to avoid the financial expenses of raising a child, the plurality explained that recovery of damages for the financial costs of raising and educating a child could not be offset by any nonfinancial benefit to the parents.⁷⁸ Consequently, the plurality concluded that the rewards of parenthood would not be considered in calculating damages.⁷⁹

The two concurring judges agreed that the parents of unplanned children should be allowed to recover rearing costs, but both disagreed with the plurality's adoption of the same interest benefit rule. The concurring judges determined that the interest harmed in wrongful birth cases is the parents' overall family interests.⁸⁰ Because the injury to these interests may vary according to the parent's particular reasons for practicing contraception, the concurring judges maintained that the court's same interest benefit rule could create inequitable results.⁸¹ The concurrences reasoned that because the plurality's approach presumes that the injury to the parents' interests

72. *Id.* The doctrine of mitigation requires only that reasonable measures be taken. One authority explained:

If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages.

C. McCORMICK, DAMAGES § 35, at 133 (1935).

73. 99 Ill. App. 3d at 274, 425 N.E.2d at 971.

74. *Id.* at 272, 425 N.E.2d at 969. See *supra* note 11.

75. 99 Ill. App. 3d at 275, 277, 425 N.E.2d at 971, 972 (Linn & Romiti, JJ., concurring).

76. *Id.* at 273-74, 425 N.E.2d at 970. See *supra* notes 38-45 and accompanying text.

77. 99 Ill. App. 3d at 273-74, 425 N.E.2d at 970.

78. *Id.* The plurality rejected the *Troppi* court's application of the benefit rule. See *supra* notes 30-37 and accompanying text. In so doing, the plurality stated that "to the extent that [section 920 of the Restatement of Torts] has been used to permit the emotional rewards of parenthood to offset its financial costs, we believe it has been misapplied." 99 Ill. App. 3d at 274, 425 N.E.2d at 970.

79. *Id.* See generally Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1415 (1977) [hereinafter cited as Kashi].

80. 99 Ill. App. 3d 275-77, 425 N.E.2d at 971-73 (Linn & Romiti, JJ., concurring).

81. *Id.*

are the same in all cases,⁸² it fails to properly recognize that the injury caused by the birth of an unplanned child would affect each family differently.⁸³ The more appropriate test, according to the concurring judges, is the *Troppi* benefit rule, which balances all benefits derived from the birth of a child against the injury to the parents overall interests.⁸⁴

A SUGGESTED ANALYSIS

After the *Cockrum* decision, Illinois courts will be confronted with resolving the three conflicting views on recovery in wrongful birth actions. The court in *Wilczynski* adopted the wrongful pregnancy view and limited recovery to pregnancy and birth related costs.⁸⁵ The *Cockrum* plurality employed the same interest benefit rule whereby recovery rarely would be offset by any benefits.⁸⁶ Finally, the two concurring judges in *Cockrum* embraced the *Troppi* benefit rule under which all elements of damages are offset by all benefits of parenthood.⁸⁷

Because all three views have been proposed by the Illinois Appellate Court for the First District, no one view carries greater judicial weight than the others.⁸⁸ As a result, Illinois courts may continue to adopt varying approaches to the calculation of damages in wrongful birth actions. It is sug-

82. *Id.* at 276, 425 N.E.2d at 972. In elaborating on the various interests harmed, Justice Linn queried:

Can it be said that parents in their twenties who merely wanted to postpone having a child will suffer the same degree of injury from a physician's negligence in causing a child to be born as will parents in their forties who already have grown children and have decided not to undergo the burden of raising any more children?

Id.

83. *Id.*

84. *Id.* at 275-77, 425 N.E.2d at 972-73. See *supra* notes 30-36 and accompanying text. Judge Linn gave the example that "[o]lder parents who have chosen not to have any more children may not be expected to derive the same degree of benefit from having an additional child as younger parents who have chosen merely to postpone having a child." 99 Ill. App. 3d at 276, 425 N.E.2d at 972 (Linn, J., concurring). Thus, in determining the value of any potential benefits, many factors should be considered including family size, family income, the age of the parents, the marital status, future companionship, and the possibility of future financial support. *Id.*

85. *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 63, 391 N.E.2d 479, 488 (1st Dist. 1979). See *supra* notes 46-52 and accompanying text.

86. 99 Ill. App. 3d 271, 273-74, 425 N.E.2d 968, 970-71 (1st Dist. 1981). See *supra* notes 74-78 and accompanying text.

87. 99 Ill. App. 3d at 275, 277, 425 N.E.2d at 971, 972 (Linn & Romiti, JJ., concurring). See *supra* notes 80-84 and accompanying text.

88. Rarely will a court oppose precedent established in the same court. All three views on recovery in wrongful birth, however, have been promulgated by the Illinois Appellate Court's First District. Judge Linn, in his concurring opinion in *Cockrum*, explained the departure from precedent by stating that "[t]hrough normally [he] would feel compelled to follow recent decisions from other divisions of this court, [he could not] in good conscience accept either the reasoning or the result of the opinion in *Wilczynski v. Goodman*. . . ." 99 Ill. App. 3d at 275, 425 N.E.2d at 971 (Linn, J., concurring).

gested, therefore, that the Illinois Supreme Court examine this controversy and set forth a consistent approach. An analysis of the three prevailing views reveals that the *Troppe* benefit rule is the preferable approach.

Wrongful birth actions are often susceptible to emotional overtones at the expense of sound legal analysis.⁸⁹ Because wrongful birth is essentially a medical malpractice action,⁹⁰ the issues of liability and recovery are capable of resolution using a traditional tort analysis.⁹¹ Damages, therefore, should be calculated in the same manner as other medical malpractice actions.

In medical malpractice actions, damages are recoverable if the plaintiff's injuries are sustained as the result of a physician's failure to exercise ordinary and reasonable care in diagnosis or treatment.⁹² Once malpractice is established,⁹³ the tortfeasor is held liable for all damages that ordinarily flow from the commission of the tort.⁹⁴ Damages for medical malpractice may include compensation for medical expenses incurred as a result of the malpractice, loss of past and future earnings or profits, pain and suffering, and loss of consortium.⁹⁵

89. See note 61 and accompanying text *supra*. One author noted that the emotional connotations of family planning rather than sound legal principles have often been the major bar to wrongful birth actions. Note, *Wrongful Birth and Wrongful Life: Park v. Chessin*, 44 Mo. L. REV. 167, 176 (1979).

The United States Supreme Court discussed the emotional overtones surrounding the controversial abortion issue in *Roe v. Wade*, 410 U.S. 113 (1973). Specifically, the Court stated:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. . . . *Our task, of course, is to resolve the issue by [resort to legal principles] free of emotion and of predilection.*

Id. at 117 (emphasis added).

90. See *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (malpractice action for failure to diagnose pregnancy); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (negligent vasectomy basis for malpractice suit); *Ziamba v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (failure to diagnose pregnancy basis for malpractice action); *Rivera v. New York*, 94 Misc. 2d 257, 404 N.Y.S.2d 950 (1973) (malpractice action for unsuccessful tubal ligation); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (malpractice cause of action for negligently performed sterilization); *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 428 A.2d 1366 (1981) (unsuccessful tubal ligation resulted in malpractice suit).

91. See *supra* notes 61-65 and accompanying text.

92. See *Gault v. Sideman*, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1st Dist. 1963).

93. See *supra* note 5.

94. 99 Ill. App. 3d at 272, 425 N.E.2d at 969 (citing *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 413 N.E.2d 47 (1st Dist. 1980)). See *Robak v. United States*, 658 F.2d 471, 478 (7th Cir. 1981) (under tort law a negligent tortfeasor is liable for *all* damages that are the proximate result of his negligence); *Ziamba v. Sternberg*, 45 A.D.2d 230, 231, 357 N.Y.S.2d 265, 268 (1974) (negligent person must be responsible for all damages resulting directly from and as a natural consequence of the wrongful act).

95. ILLINOIS PATTERN JURY INSTRUCTIONS §§ 30.00-.09 (2d ed. 1971). See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (recovery awarded for physical com-

Although the *Wilczynski* court recognized the propriety of a tort analysis in wrongful birth actions, it refused to apply this analysis. Instead, the court relied on the pro-life policy statement enunciated in the Illinois Abortion Act⁹⁶ to limit recovery.⁹⁷ As a result, the *Wilczynski* court concluded that life is an esteemed right rather than a compensable wrong.⁹⁸ In so concluding, however, the court failed to recognize that contraception is widely used in order to avoid that esteemed right.⁹⁹ The initial issue in wrongful birth actions is not the value of the child's life but whether the parents have been injured by someone's negligence.¹⁰⁰ The focus of the *Wilczynski* analysis, therefore, was misplaced.

Even assuming that the *Wilczynski* court correctly stated Illinois' pro-life policy, such a policy should not have been the basis for limiting recovery in wrongful birth actions.¹⁰¹ Inherent in the *Wilczynski* pro-life rationale is the sentiment that all nontherapeutic abortions are wrong as a matter of public policy.¹⁰² This rationale, however, disregards the constitutional guarantee of

lications, pain, and suffering); *Green v. Sudakin*, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (recovery permitted for pain and suffering resulting from birth of an unplanned child); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (plaintiff compensated for lost wages, medical expenses, pain, and suffering). *But see* *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (1979) (emotional anguish suffered is normal, uncompensable price one pays for parenthood).

96. ILL. REV. STAT. ch. 38, § 81-21 (1981). *See supra* note 48.

97. *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 62-63, 391 N.E.2d 479, 487-88 (1st Dist. 1979). The *Wilczynski* court denied plaintiffs the right to offer proof of damages which unquestionably flowed from the physician's alleged malpractice. In so doing, the *Wilczynski* court departed from the accepted rule of damages in malpractice actions. *Id.* *See supra* notes 61-65 and accompanying text.

98. 73 Ill. App. 3d 51, 62, 391 N.E.2d 479, 487 (1979).

99. The *Troppi* court recognized this fact stating:

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

Troppi v. Scarf, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517 (1971). *Accord* *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977).

100. *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (1979). The *Wilczynski* court's rationale, which advocates the value of life, may be appropriate in a wrongful life case in determining whether a healthy child, on his own behalf, could state a cause of action against the physician. This rationale, however, is not applicable in determining whether parents have been injured. *See* *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 275, 425 N.E.2d 968, 971 (1st Dist. 1981) (Linn, J., concurring).

101. As one commentator noted, the inappropriateness of the *Wilczynski* court's reliance on the Illinois Abortion Act becomes apparent when the court's rationale is applied to other wrongful birth fact situations. If, for example, the physician had negligently performed a therapeutic sterilization, which resulted in pregnancy and birth, the court's discussion of the world public policy against abortion would not be relevant. *See* *Wrongful Life*, *supra* note 51, at 413.

102. *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 275, 425 N.E.2d 968, 971 (1st Dist. 1981) (Linn, J., concurring).

the right to privacy.¹⁰³ This right, as determined by the United States Supreme Court, includes the freedom to terminate a pregnancy through abortion as well as the freedom to utilize contraceptive methods.¹⁰⁴

The *Wilczynski* court's reliance upon the Illinois Abortion Act is further unfounded because the Act itself *admits* that Illinois' long-standing pro-life policy is impermissible in view of United States Supreme Court decisions.¹⁰⁵ Moreover, application of the *Wilczynski* rationale effectively penalizes individuals who attempt to exercise their right to practice contraception.¹⁰⁶ When this fundamental right is denied by a physician's negligence, the plaintiff, under the *Wilczynski* theory, is denied recovery for all but the comparatively minor birth related damages.¹⁰⁷ Because *Wilczynski's* pro-life

103. See Brief for Appellant Raja at 11-14, *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1st Dist. 1981); Brief for Appellant Cockrum at 9-13, *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1st Dist. 1981). In *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (1979), the court rejected the pro-life public policy argument against damages in a wrongful birth case. The *Speck* court stated:

The last vestige of this public policy view was eliminated in two cases decided by the Supreme Court of the United States. In *Griswold v. Connecticut*, the court held that a state statute proscribing the use of contraceptives was an unconstitutional intrusion upon the right of privacy and violated the Fourth and Fifth Amendments to the United States Constitution. In *Roe v. Wade*, the Supreme Court held that the constitutional right to privacy includes the woman's decision whether or not to terminate her pregnancy (absolute during first trimester, qualified during last two trimesters).

Id. at 356, 408 A.2d at 503 (citation omitted).

104. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *supra* note 1.

105. The Illinois Abortion Act provides, in pertinent part:

[T]he General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion, unless necessary to preserve the life of the mother, is impermissible only because of the decisions of the United States Supreme Court.

ILL. REV. STAT. ch. 38, § 81-21 (1981) (emphasis added). The statute further provides that if the United States Supreme Court decisions were ever reversed or modified, the pro-life policy would be reinstated to allow protection of the unborn. *Id.* See *supra* note 48. Cf. *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978) (§ 1 of the Illinois Abortion Act permitted to stand because merely states intent of the General Assembly to regulate abortions in conformity with Supreme Court precedent); *People of the State of Illinois v. Geer*, 79 Ill. 2d 103, 402 N.E.2d 303 (1980) (construed Illinois Abortion Act so as not to contravene Supreme Court's decision in *Roe v. Wade*).

106. Brief for Appellant Cockrum at 11, *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1st Dist. 1981). When an individual's right to practice contraception is contravened, the *Wilczynski* approach denies recovery for the substantial costs of raising and educating a child. Consequently, the wronged individual is burdened with these substantial costs. In effect, the individual is penalized rather than compensated for the tortfeasor's wrongful interference with the right to practice contraception. *Id.*

107. To avoid this inequitable approach, many courts have refused to follow either the blessings doctrine or the wrongful pregnancy approach. See, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (state may not constitutionally denigrate the right to practice contraception by denying protection); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (in light of woman's right to control her bodily functions, plaintiff entitled to normal measure of damages awarded in tort actions); *Rivera v. New York*, 94 Misc. 2d 157, 404

policy considerations conflict with United States Supreme Court precedent and traditional tort principles, *Wilczynski* should not be followed in determining damages in wrongful birth actions.

In contrast to *Wilczynski*, the *Cockrum* court appropriately focused its analysis on the pertinent United States Supreme Court decisions. The *Cockrum* court noted that permitting recovery of rearing costs for an unplanned child merely was a recognition of the importance of the parents' fundamental right to control their reproductivity.¹⁰⁸ To exonerate the medical profession from liability by carving out an exception for negligence in contraceptive procedures would impermissibly infringe upon an individual's fundamental right to control reproductivity.¹⁰⁹ Relying on a traditional tort analysis, the court concluded that an injury to this fundamental right should be compensable by the full measure of all damages proximately caused by a defendant's negligence in contraceptive procedures.¹¹⁰ Thus, the *Cockrum* court refused to deny full protection of the right to control reproduction by limiting recovery.¹¹¹

The *Cockrum* court also relied on tort principles in determining that one does not have a duty to mitigate damages in wrongful birth actions through abortion or adoption.¹¹² Although one has the right to abort or place a child up for adoption, it certainly would be unreasonable to obligate a plaintiff to do so.¹¹³ Because the decision to abort or adopt is an individual

N.Y.S.2d 950 (1978) (law must provide a remedy where a fundamental right to practice contraception has been violated); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (physician liable for all foreseeable consequences of negligent interference with choice not to procreate). See also, *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App. 1973) (Cadena, J., dissenting) (no valid reason for allowing recovery of only minor damages and denying recovery of substantial rearing costs), *cert. denied*, 412 U.S. 927 (1974).

108. 99 Ill. App. 3d at 273, 425 N.E.2d at 970.

109. *Id.* See *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). In *Bowman*, the court stated that "to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilizations would constitute an impermissible infringement of a fundamental right." *Id.* at 46, 356 N.E.2d at 499 (emphasis in original). Likewise, the *Troppi* court explained that to relieve the medical profession of liability for the foreseeable consequences of their negligence would thwart the general societal interest in proper medical care. Imposition of civil liability for all foreseeable costs, the court noted, rather than for merely minor pregnancy and birth related costs, would encourage physicians to exercise more care in the performance of their duties. *Troppi v. Scarf*, 31 Mich. App. 240, 254, 187 N.W.2d 511, 517 (1971). See generally, Moore, *supra* note 5, at 12-13; *Bringing Up Baby*, *supra* note 5, at 420-21.

110. 99 Ill. App. 3d at 273-74, 425 N.E.2d at 970-71.

111. *Id.*

112. *Id.* at 273, 425 N.E.2d at 970. The view that one does have a duty to mitigate damages through abortion or adoption was expressed as early as 1957 in *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957). In *Shaheen*, the court stated that the parents should either support the child or place the child up for adoption. *Id.* at 46. Cf. *Sorkin v. Lee*, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980) (defendant's liability should not depend upon plaintiff's decision to abort).

113. 99 Ill. App. 3d at 273-74, 425 N.E.2d at 970-71. In a well reasoned dissent, Judge Hancock in *Sorkin v. Lee*, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980), stated that the decision to conceive a child should be distinguished from the decision to abort or place a child up for

decision based upon the parent's religious, philosophical, or moral principles, it would be unreasonable to require the parents to choose between the child and the cause of action.¹¹⁴ *Cockrum* correctly identified wrongful birth as a medical malpractice action, recognized the fundamental rights protected by United States Supreme Court decisions, and awarded damages according to established tort principles. Thus, the well reasoned *Cockrum* analysis is preferable to the *Wilczynski* court's pro-life policy analysis.

Assuming that the *Cockrum* approach is determined to be the more appropriate legal analysis, Illinois courts must still choose between the *Cockrum* plurality's same interest benefit rule and the concurring judges' *Troppi* benefit rule to calculate the extent of recoverable damages. The *Cockrum* plurality permitted mitigation of damages only when the benefit to the parents was to the same interest which was harmed by defendant's tortious conduct.¹¹⁵ Thus, if the injured parents only sought to avoid financial expenses through practicing contraception, only the economic benefit derived from the child would mitigate damages. The theory underlying this rule is that the tortfeasor should not be able to force a general benefit upon the plaintiff against his will and then utilize this forced benefit to mitigate damages.¹¹⁶

The *Cockrum* plurality's same interest benefit rule limits the benefits that

adoption. *Id.* (Hancock, J., dissenting). "Indeed, it may have been precisely because [the parents] wished to avoid what to them would be the agonizing quandaries posed by these alternatives to parenthood that plaintiffs here and countless other couples have resorted to sterilization." *Id.* at 185, 434 N.Y.S.2d at 305.

As the *Troppi* court explained, a defendant should not be allowed to assert that the medical and emotional makeup of the parents were inconsistent with aborting or placing the child up for adoption. *Troppi v. Scarf*, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (1971). Established tort principles dictate that the tortfeasor take his victim as he finds him. *Id.*

114. 99 Ill. App. 3d at 273-74, 425 N.E.2d at 970-71. One court noted that there are a substantial number of people, such as the Jehovah's Witnesses, who believe that sterilization is an appropriate method of family planning but that abortion is not. To require such an individual to have an abortion would constitute a gross invasion of privacy. *Rivera v. New York*, 94 Misc. 2d 157, 161 n.6, 404 N.Y.S.2d 950, 954 n.6 (1978). Another court noted that many parents feel a moral obligation to love and raise the child rather than to place the child up for adoption. *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 428 A.2d 1366 (1981) (Brosky, J., concurring). Judge Brosky asserted that "[i]f the forced parent is willing to shoulder the enormous responsibility of parenthood, the law should not throw obstacles in his path but rather should endeavor to do everything in its power to assist him." *Id.* at 1374. For a discussion of the issues involved in utilizing abortion and adoption to mitigate damages, see Kashi, *supra* note 81, at 1414-15; Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions For a Consistent Analysis*, 63 MARQ. L. REV. 611, 635-38 (1980) [hereinafter cited as *Suggestions*].

115. See *supra* notes 76-79 and accompanying text.

116. See RESTATEMENT (SECOND) OF TORTS § 920 comment f (1979). Commentators have explained that if the parents chose not to have a child, the benefits of parenthood should not offset recovery because such unwanted benefits were forced upon them against their will. See Kashi, *supra* note 79, at 1416-17; Note, *Wrongful Conception, Measuring the Damages Incurred by the Parents of an Unplanned Child*, *Sherlock v. Stillwater Clinic*, 28 DEPAUL L. REV. 249, 255-56 (1978) [hereinafter cited as *Measuring the Damages*].

a court should consider when calculating damages in a wrongful birth action.¹¹⁷ The difficulty with this approach, however, is that it does not logically assess the impact of the unplanned child upon the family. Under a traditional tort analysis, courts seek to redress the injury by restoring the injured party to as close a position as he held prior to the commission of the tort.¹¹⁸ Because the birth of an unplanned child may cause both injury and benefit to the parents, both should be fully considered in determining the impact of the unplanned child.¹¹⁹ Rather than considering only those isolated inflexible factors which relate to the interest the parents seek to protect through contraception and which often cause a distorted view of the impact of the child upon the family,¹²⁰ the trier of fact should consider all detriments and all benefits to accurately redress the injury.¹²¹ The *Cockrum* plurality's application of the same interest benefit rule does not accurately redress the injury to the parents caused by the birth of an unplanned child because it limits the benefits to be considered.

Although some benefits are evidenced by the very fact that the parents have chosen to keep the child,¹²² the *Cockrum* plurality's approach con-

117. Damages calculated under the same interest benefit rule are rarely offset by any benefits because the interest that was harmed will rarely be benefitted by the birth of a child. For example, if one seeks to avoid financial injury through family planning, it is unlikely that the birth of a child will also benefit the parent's financial interests. In this instance, no mitigation would be required. See *Wrongful Life*, *supra* note 51, at 417; *Bringing Up Baby*, *supra* note 5, at 431; *Wrongful Conception*, *supra* note 3 at 806.

118. See, e.g., *Myers v. Arnold*, 83 Ill. App. 3d 1, 403 N.E.2d 316 (4th Dist. 1980) (law of torts attempts to restore the injured party to the same position he held prior to the tort). See also C. MCCORMICK, DAMAGES § 137, at 560-61 (1935); RESTATEMENT (SECOND) OF TORTS § 901 (1965); J. STEIN, DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS 1-6 (1972) [hereinafter cited as STEIN].

119. See *Wrongful Life*, *supra* note 51, at 418-19; *Negligent Sterilization*, *supra* note 7, at 510-12; *Bringing Up Baby*, *supra* note 5, at 431-32. Cf. Note, *Redressing a Blessing: The Question of Damages for Negligently Performed Sterilization Operations*, 33 U. PITT. L. REV. 886, 897-98 (1972) (determination of damages plotted on graph using socio-economic status and urgency for limiting family size) [hereinafter cited as *Redressing*].

120. See *Myers v. Arnold*, 83 Ill. App. 3d 1, 403 N.E.2d 316 (4th Dist. 1980). In *Myers*, the court stressed that when compensating an injured party, courts should recognize that "rules governing the proper measure of damages in a particular case are guides only and should not be applied in an arbitrary, formulaic, or inflexible manner, particularly where to do so would not do substantial justice." *Id.* at 7, 403 N.E.2d at 321.

121. The *Cockrum* concurrence explained that each case depends upon its own facts. Family size, family income, the age of the parents, marital status, the possibility of companionship, and future support are all relevant factors to be considered in calculating damages. 99 Ill. App. 3d at 275-77, 425 N.E.2d at 971-73 (Linn & Romiti, JJ., concurring). See *Troppi v. Scarf*, 31 Mich. App. 240, 256, 187 N.W.2d 511, 519 (1971) (the diversity and circumstances of the plaintiffs must be considered in determining damages); *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 428 A.2d 1366 (1981) (damages and benefits must be balanced in order to return plaintiff to original position). Cf. *Redressing*, *supra* note 119, at 892 (reason for using contraceptives and socio-economic status are the two relevant factors in determining amount of damages). *But cf.* *Kashi*, *supra* note 79, at 1430-31 (noneconomic benefits should not be considered in offsetting damages).

122. Regardless of the reason for keeping the child, albeit moral, ethical, or psychological,

siders only one narrow aspect of the benefits derived by the parents. It is unlikely, however, that the parents chose to keep the child because of this isolated benefit. By narrowly defining the benefit to be considered in calculating damages, the *Cockrum* plurality's analysis permits a windfall recovery to the parents at the physician's expense.¹²³ The tortfeasor's liability will be, in most instances, out of proportion to the actual injury incurred by the parents.¹²⁴

The *Troppi* benefit rule, proposed by the concurring judges in *Cockrum*, is a more equitable and well balanced approach for determining damages in wrongful birth actions.¹²⁵ Because this rule permits recovery of all damages proximately caused by defendant's negligence, offset by the amount of all benefits that the parents may derive from raising the child, it appropriately recognizes that the relative benefits and losses may vary according to the family's socio-economic status and existing family patterns.¹²⁶ Thus, under the *Troppi* benefit rule, the trier of fact considers the family's circumstances in order to accurately measure the impact and corresponding injury caused by the birth of an unplanned child.¹²⁷ This approach fosters a more realistic assessment of damages sustained.

the parents would not keep the child if they were not receiving some degree of benefit. See *Wrongful Life*, *supra* note 51, at 419 n.92 (most parents admit to some reward from the parent-child relationship); *Suggestions*, *supra* note 114, at 638 (one might reasonably infer some benefit from parent's refusal to place child up for adoption). See, e.g., *Public Health Trust v. Brown*, 388 So. 2d 1084, 1087 (Fla. Dist. Ct. App. 1980) (Pearson, J., dissenting) (sentiment that leads to a parent keeping the child does not always exceed cost of raising the child); *Jackson v. Anderson*, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970) (unplanned child is not always unwanted or unloved).

123. A few courts have denied recovery to avoid a windfall recovery by the parents. See, e.g., *Hays v. Hall*, 477 S.W.2d 402, 406 (Tex. Civ. App. 1972) (to allow damages for normal child would mean that doctor pays for parents' joy and satisfaction); *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 518, 219 N.W.2d 242, 244 (1974) (parents would enjoy all benefits derived from the child at the expense of doctor).

124. *Compare Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (recovery by parents denied because damages would be out of proportion to culpability involved) with *Jackson v. Anderson*, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970) (benefits would mitigate damages rather than expose defendant to excessive liability).

125. The flexible *Troppi* benefit rule is favored in a majority of jurisdictions that have considered wrongful birth actions. See, e.g., *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (all damages offset by all benefits in wrongful birth action); *Anonymous v. Hospital*, 33 Conn. Supp. 125, 366 A.2d 204 (1976) (defendant permitted to offset damages in view of the resulting benefits of the birth of a child); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (reasonable costs of rearing subject to offset by child's aid, comfort, and companionship); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (compensatory tort damages for wrongful birth offset by benefits); *Rivera v. New York*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978) (defendant may offset damages by providing benefits of parent-hood); *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 428 A.2d 1366 (1981) (rearing costs offset by value of child's aid and comfort). See generally, *Wrongful Life*, *supra* note 51, at 418; *Suggestions*, *supra* note 114, at 639-41; *Bringing Up Baby*, *supra* note 5, at 430-35.

126. *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 275-77, 425 N.E.2d 968, 971-73 (1981) (Linn & Romiti, JJ., concurring). See *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 428 A.2d 1366 (1981).

127. 99 Ill. App. 3d at 275-77, 425 N.E.2d at 971-73. For discussion of the factors to be considered in wrongful birth actions, including standard of living, family history, and educa-

Assume for example, a plaintiff undergoes a tubal ligation to avoid jeopardizing her health through childbirth. Subsequently, due to the physician's negligent performance of the sterilization, plaintiff gives birth to a normal, healthy child and suffers no health complications. Plaintiff brings suit seeking compensation for the birth of the unplanned child. Under the application of the *Troppi* benefit rule, the trier of fact would consider all family circumstances in order to calculate the damages to the parents caused by the birth of an unplanned child. The birth of the child would probably have a greater impact on an unwed mother in a low income bracket than on a married woman in a high income bracket who had planned to adopt a child. Under the concurrence's approach, the amount necessary to redress the injury would be higher in the case of the unmarried mother with little income than in the case of the financially secure married woman because of the relatively different impact on the families. Conversely, under the *Cockrum* plurality's same interest benefit approach, if neither woman received a benefit to her health, both would recover the same amount of damages. This latter approach does not consider that one mother actually wanted and planned to adopt a child while the unwed mother did not want a child nor could she financially afford the child. Thus, the flexible, case-by-case approach proffered by the *Cockrum* concurring judges, in contrast to the rigid approach set forth by the *Cockrum* plurality, permits determination of the true injury, thereby providing just compensation in wrongful birth actions.¹²⁸

In addition to providing an equitable apportionment of damages, the defendant physician or clinic would not be unduly burdened under the *Troppi* benefit rule.¹²⁹ Under this approach, the defendant is given the opportunity to mitigate damages by demonstrating that although he caused an injury to the parents, the parents of the unplanned child received some degree of benefit.¹³⁰ The tortfeasor is not, moreover, forcing a benefit upon the parents because they have chosen to keep the child.¹³¹ Fairness requires that this benefit be considered to prevent a windfall recovery to those parents who have not been greatly injured by the unplanned birth and are merely seeking to capitalize on the defendant's negligence.

tional and medical expenses, see *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 371-72, 428 A.2d 1366, 1375-76 (Pa. Super. Ct. 1981) (Brosky, J., concurring).

128. Cf. *Redressing*, *supra* note 118, at 894-99 (court should consider reasons for birth control and socio-economic status in apportioning damages according to the relative impact of the child upon the parents).

129. See *supra* notes 125-27 and accompanying text.

130. One author remarked that the *Troppi* benefit rule strikes a near perfect balance between the principle that a tortfeasor should be liable for all damages flowing from his negligence and the notion that a child provides joy to its parents. Thus, to hold the negligent tortfeasor liable for rearing costs reduced by the benefits received by the parents is neither unreasonably burdensome nor disproportionate to the physician's culpability. *Suggestions*, *supra* note 114, at 639.

131. Because the unplanned child would confer some benefit, the fact that the parents chose to keep the child would be one of many factors which would be considered by the trier of fact. See *supra* note 122.

The *Troppi* benefit rule should not be rejected because a determination of the benefits to the parents may be somewhat speculative.¹³² It is necessary to distinguish between proof of the existence of the benefit and the proof of the extent of the benefit.¹³³ If the defendant can demonstrate the existence of the benefit, the difficulty in proving the extent of the benefit should not bar consideration of this element. Trial courts often consider intangible elements in calculating damages.¹³⁴ Moreover, the "difficulty in determining the amount [of the benefit] to be subtracted from the gross damages does not justify throwing up our hands" and denying consideration of this element altogether.¹³⁵

The difficulty in calculating damages in accordance with the *Cockrum* concurring judges' approach can be alleviated through the use of special jury instructions.¹³⁶ These instructions should include consideration of such factors as the purpose for practicing contraception, the family size, family income, the age of the parents, marital status, and other relevant factors in a given case. In addition, a special verdict form can be instituted, requiring the jury to specify the various factors used and the various amounts awarded in determining damages.¹³⁷ Use of a special verdict will permit examination of

132. In denying recovery for wrongful birth, the court in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), stated that the weighing of the benefits of parenthood against the injuries was an impossible task. *Id.* at 29-30, 227 A.2d at 693. Although often cited, *Gleitman* was later distinguished on the basis that the specific defects of the *Gleitman* child made the calculation of damages impossible. See *Betancourt v. Gaylor*, 136 N.J. Super. 69, 34 A.2d 336 (1975).

133. Distinguishing between the existence of damages and the extent of damages was mandated by the United States Supreme Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). The *Story Court* stated:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person. . . . The wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Id. at 563. See STEIN, *supra* note 118, at 5-6 (1972).

134. Justice Linn, in advocating the *Troppi* benefit rule, concluded that the degree of speculation would not bar the rule. He reasoned that determination of the benefits is no more speculative than a determination of the value of pain and suffering in personal injury cases, of severe emotional distress in cases of intentional infliction of emotional distress, or of companionship in loss of consortium cases. 99 Ill. App. 3d at 276, 425 N.E.2d at 972 (Linn, J., concurring).

135. *Troppi v. Scarf*, 31 Mich. App. 240, 261, 187 N.W.2d 511, 520 (1971). See, e.g., *Anonymous v. Hospital*, 33 Conn. Supp. 125, 366 A.2d 204 (1976) (although specific ascertainment of benefits is difficult, it should not prevent their consideration); *Rivera v. New York*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978) (intangible benefits of parenthood may be difficult to prove in monetary terms, but this is for the defendants to contend with). Cf. *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (benefits and losses resulting from negligent sterilization are relatively tangible and measurable factors).

136. See, e.g., *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977) (future wrongful birth actions required to use special verdict form with explanatory instructions).

137. See *Id.*

the different damage amounts apportioned to the injuries incurred and the benefits received and will aid in preventing either excessive or nominal damage awards in a wrongful birth action.¹³⁸

CONCLUSION

In permitting recovery of the costs of raising and educating an unplanned child, *Cockrum v. Baumgartner* exemplifies the current conflict surrounding the calculation of damages in wrongful birth actions. Because this conflict exists among the Illinois appellate courts, it should be resolved by the Illinois Supreme Court. Wrongful birth actions essentially are medical malpractice actions and, therefore, should be evaluated in a similar manner. Thus, once the plaintiff has demonstrated a duty, breach of duty, and proximate cause, he or she should be able to recover the damages flowing from that injury. The measure of damages set forth by the concurring judges in *Cockrum*, the *Troppe* benefit rule, recognizes the varying injuries sustained by parents of an unplanned child. Because this analysis examines wrongful birth actions on a case by case basis, balancing the costs with the benefits received, it provides the most appropriate calculation for damages in wrongful birth actions. Accordingly, it is suggested that the approach of the *Cockrum* concurring judges be adopted by the Illinois Supreme Court.

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138. See *Wrongful Life*, *supra* note 51 at 419; *Measuring the Damages*, *supra* note 116, at 257; *Bringing Up Baby*, *supra* note 5, at 435.

