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TORTS, Wrongful Conception, Measuring the Damages Incurred by the Parents of an Unplanned Child; Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. Sup. Ct. 1977)

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RECENT CASE

Torts, Wrongful Conception, Measuring the Damages Incurred by the Parents of an Unplanned Child; *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. Sup. Ct. 1977).

In *Sherlock v. Stillwater Clinic*[1] the Supreme Court of Minnesota recently held that parents could recover the costs of raising a child whose conception followed a negligently performed sterilization. The court further held that the future value of the child's aid, comfort and society should be calculated and used as an offset to this award.[2] By recognizing this cause of action, the *Sherlock* court joined a growing number of courts[3] that have shown similar respect for the right of the individual to limit procreation and to be compensated for the birth of an unplanned child.

Plaintiff Eugene Sherlock underwent a vasectomy following the birth of his seventh child. After being informed that the results of a post-operative semen test were negative, the Sherlocks resumed sexual relations. Fourteen months later Mrs. Sherlock gave birth to a healthy baby boy. Thereafter, the Sherlocks initiated the present negligence action seeking damages for the medical expenses incident to the birth, the pain and suffering caused to Mrs. Sherlock during her pregnancy and delivery, the loss of consortium resulting to Mr. Sherlock, and the costs of supporting and educating the child to the age of majority.[4] The case was submitted upon general negligence instructions, and the jury returned an award of $19,500 for the plaintiffs.[5] The Minnesota Supreme Court[6] affirmed but remanded the case with instructions that the award be reduced by the future value of the child's aid, comfort and society.[7]

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1. 260 N.W.2d 169 (Minn. Sup. Ct. 1977).

2. *Id.* at 176.

3. *See, e.g.*, cases cited, notes 22-24 and accompanying text *infra*.

4. 260 N.W.2d at 171. Vasectomy involves the cutting and ligation of the vas deferens tubes that carry sperm from the testicles. *See* BLACK'S LAW DICTIONARY 1723 (rev. 4th ed. 1968). Since a small percentage of vasectomies will fail because of spontaneous recanalization of these tubes, this action and most actions for unsuccessful vasectomies allege negligence in post-operative care. *See* Bravenec, *Voluntary Sterilization as a Crime: Applicability of Assault and Battery and of Mayhem*, 6 J. FAM. L. 94, 106-07 (1966); Lombard, *Vasectomy*, 10 SUFFOLK U.L. REV. 25, 32-33 (1975).

5. 260 N.W.2d at 171. The general negligence instruction allows recovery for all damages proximately resulting from the defendant's negligence. *See, e.g.*, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL §§ 30.01-30.16 (2d ed. 1971). In contrast, the *Sherlock* court limited recovery by remanding the case so that a special verdict form with explanatory instructions could be used. 260 N.W.2d at 176.

6. The case was tried in district court. Therefore, under Minnesota law it was appealable directly to the Supreme Court of Minnesota. *See* MINN. R. CIV. APP. P. 103.03(a).

7. 260 N.W.2d at 176.

This Note will trace the history of the cause of action for "wrongful conception"[8] and discuss the rationale employed by the *Sherlock* court in recognizing this cause of action and in affirming the award of damages for the costs of raising the child. Further, the Note will criticize the court's instruction that benefits be determined and used as an offset to this award and will propose alternative methods for awarding damages in such an action.

The rationale of the courts that have denied recovery for negligent sterilization (wrongful conception) first was expressed in the dicta of *Christensen v. Thornby*.[9] In noting that "the plaintiff has been blessed with the fatherhood of another child,"[10] the court voiced the public policy argument that a parent should not be awarded damages for the birth of a healthy child. This theme was expressed next in *Shaheen v. Knight*,[11] where the court held that to recognize a cause of action for the normal birth of a healthy child would be "foreign to the universal public sense of the people."[12]

The first cases to challenge the *Shaheen* precedent recognized a cause of action for negligent sterilization but limited damages to the immediate costs of the operation and childbirth.[13] The possibility of further recovery was

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8. The *Sherlock* court was the first to use this term to describe a cause of action arising from the negligence of a physician or pharmacist in sterilization or administration of contraceptives. *Id.* at 174-75. In labelling the present case a wrongful conception action, the court attempted to distinguish these facts from those of cases given the similar titles, "wrongful life" and "wrongful birth."

A wrongful life action is brought by an illegitimate child against a parent or by a deformed child against a doctor who failed to detect either pregnancy or disease in the expectant mother. The courts have refused to allow recovery, noting the impossibility of measuring the damages suffered by being born against the alternative of non-existence. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (a deformed child seeking damages from a physician who had failed to inform his mother of the possible adverse effects of German measles during pregnancy); Slawek v. Stroh, 62 Wis.2d 295, 215 N.W.2d 9 (1974) (an illegitimate son suing his father).

A wrongful birth action is brought by a parent against a physician whose negligence occurred during a post-conception examination. The plaintiff usually will contend that she would have had an abortion had she been informed of the pregnancy or of the disease that endangered the health of the fetus. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (recovery denied for costs of raising a deformed child); Jacobs v. Thiemer, 519 S.W.2d 846 (Tex. Sup. Ct. 1975) (recovery allowed for medical expenses incident to raising a deformed child).

9. 192 Minn. 123, 255 N.W. 620 (1934). The *Christensen* case is not analogous to *Sherlock* nor with the cases that cite to its influential dicta. The suit was brought for misrepresentation rather than negligence. The plaintiff was seeking damages for his anxiety over the health of his pregnant wife and for the expenses of delivery. In sustaining a demurrer to the plaintiff's complaint, the court was not confronted with the issue of damages.

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

11. 6 Lyc. 19, 11 Pa. D. & C.2d 41 (1957).

12. *Id.* at 23, 11 Pa. D. & C.2d at 45.

13. In Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947), the court held that a husband had a cause of action for loss of consortium and costs of childbirth after a negligently performed sterilization of his wife. Likewise, in West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945), it was held that a husband was entitled to recover for physical and mental pain and suffering as well as for loss of services proximately resulting from his wife's need of a second operation after a first sterilization had failed.

extended in a 1966 Illinois case that allowed damages for the medical expenses and special care of a retarded child.[14] One year later, the California Court of Appeals in *Custodio v. Bauer*[15] rejected the policy barriers imposed by *Christensen* and *Shaheen*. The *Custodio* court recognized a cause of action for negligent sterilization and the possibility of recovering the costs of raising the child[16] by employing a standard negligence formula for the assessment of damages.[17]

The issue of damages was refined in *Troppi v. Scarf*,[18] in which a Michigan court allowed compensation for the costs of raising the child but limited this recovery by applying the "benefits rule" of section 920 of the *Restatement of Torts*.[19] According to this rule, a defendant can mitigate damages by introducing evidence of the benefits which will result from the tortious act. As applied to an action for negligent sterilization, the value of the child's companionship and service is to be computed and deducted from the gross award of the costs of raising the child.[20]

The impact of *Custodio* and *Troppi* is evidenced by the holdings of courts that subsequently have addressed claims for negligent sterilization. Although a small number of these courts have denied recovery out of respect for the policy arguments established in *Shaheen* and *Christensen*,[21] a majority have

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14. Doerr v. Villate, 74 Ill. App.2d 332, 220 N.E.2d 767 (2d Dist. 1966). The sterilization followed the birth of two retarded children. This action was brought when a third retarded child was born. The court did not specifically address the policy arguments of courts which had denied recovery. However, by holding that the five year statute of limitations for an oral contract applied rather than the two year personal injury limitation period, the court acknowledged that the plaintiff's complaint went beyond personal injuries suffered by her and that her claim for the special care and medical expenses of the retarded child was actionable.

15. 251 Cal. App.2d 303, 59 Cal. Rptr. 463 (1967).

16. *Id.* at 324-25, 59 Cal. Rptr. at 477. Although the court was not confronted with the issue of damages, it did state that the plaintiffs were entitled to more than nominal damages and that compensation was appropriate to replenish the family wealth depleted by the new member.

17. *Id.* at 325, 59 Cal. Rptr. at 477. The court noted "[t]hat if tortious conduct is established, the law provides: 'For the breach of an obligation . . . the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.' " *Id. quoting* CAL. CIVIL CODE § 3333 (West 1970).

18. 31 Mich. App. 240, 187 N.W.2d 511 (1971). The conception followed from a pharmacist's negligent administration of tranquilizers in a prescription for oral contraceptives.

19. The "benefits rule" as defined in the RESTATEMENT OF TORTS § 920 (1939), provides: "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." *See also* C. MCCORMICK, DAMAGES 146 (1935).

20. The *Sherlock* court instructed that "the trier of fact will then be required to reduce these costs by the value of the child's aid, comfort, and society which will benefit the parents for the duration of their lives." 260 N.W.2d at 176.

21. *See, e.g.*, Clegg v. Chase, 89 Misc.2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977) (recovery denied for public policy reasons); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973) (recovery denied for public policy reasons and due to insurmountable problems of proof in computing the expenses and benefits of raising a child).

recognized this cause of action.[22] A number of these courts allowed recovery for the costs of raising the child,[23] while several also followed the *Troppi*

The *Terrell* decision has been limited by Garwood v. Locke, 552 S.W.2d 892 (Tex. Civ. App. 1977), a recent Texas case that interpreted *Terrell* as recognizing a cause of action for negligent sterilization but limiting recovery to the immediate damages incident to pregnancy and birth. The *Clegg* decision has limited significance because of confusion among various New York holdings. The decision criticized two earlier New York cases that allowed recovery for all damages provable by the plaintiff. *See* Cox v. Stretton, 77 Misc.2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (a negligent sterilization); Ziemba v. Sternberg, 45 App. Div.2d 230, 357 N.Y.S.2d 265 (1974) (failure to detect pregnancy).

The *Cox* and *Ziemba* courts had distinguished an earlier New York case, Stewart v. Long Island College Hosp., 58 Misc.2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified and aff'd as modified*, 35 App. Div.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 332 N.Y.S.2d 640, 283 N.E.2d 616 (1972) (recovery denied in an action for negligent failure to recommend an abortion for a mother who had contracted a disease while pregnant) as having been decided while abortions were illegal in the state. Accordingly, the plaintiff could not have legally terminated her pregnancy even if the physician had properly detected it. The *Clegg* court cited two recent decisions that held *Stewart* to be good law, thus rejecting the basis of the *Cox* and *Ziemba* decisions. Greenberg v. Kliot, 47 App. Div.2d 765, 367 N.Y.S.2d 966, *appeal denied*, 37 N.Y.2d 707, 375 N.Y.S.2d 1026, 337 N.E.2d 618 (1975) and Johnson v. Yeshiva Univ., 53 App. Div.2d 523, 384 N.Y.S.2d 455 (1976). The most recent New York decision, however, has recognized a cause of action for negligent sterilization and allowed recovery for the costs of raising the child. Rivera v. New York, 46 U.S.L.W. 2586 (N.Y. Ct. Cls. April 28, 1978).

See also Coleman v. Garrison, 349 A.2d 8 (Del. Sup. Ct. 1975) (the court recognized a cause of action for negligent sterilization but held that a person's value precluded recovery of the costs of support); Ball v. Mudge, 64 Wash.2d 247, 391 P.2d 201 (1964) (the court affirmed a jury's finding that benefits outweighed costs).

Courts denying recovery in wrongful birth cases involving the failure of a physician to detect either pregnancy or disease in a post-conception examination of an expectant mother have also relied on the *Christensen* and *Shaheen* logic. *See* Gleitman v. Cosgrove, 49 N.J. 22, 31, 227 A.2d 689, 693 (1967) ("the right of their child to live is greater than and precludes their right not to endure emotional and financial injury"); Rieck v. Medical Protective Co., 64 Wis.2d 514, 518, 219 N.W.2d 242, 244 (1974) ("every contribution by the child . . . is to remain with the mother and father").

22. The *Sherlock* court noted that the courts recognizing this cause of action presently represent a majority position. 260 N.W.2d at 174. Included in this majority are courts that did not discuss the issue of damages but nevertheless recognized the plaintiff's cause of action for negligent sterilization. *See, e.g.*, Bishop v. Byrne, 265 F.Supp 460 (S.D. W.Va. 1967) (the court awarded the plaintiff's claim for minimal damages); Hackworth v. Hart, 474 S.W.2d 377 (Ky. Sup. Ct. 1971) (the trial court's directed verdict for defendant was held to be reversible error); Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (1977) (by denying an informed consent defense the court recognized the plaintiff's cause of action); Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App. 1974) (the trial court's directed verdict for defendant was held to be reversible error). *See also* cases cited note 23 and accompanying text *infra*.

23. Courts impliedly or expressly permitting recovery of the costs of raising the wrongfully conceived child include: Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (Super. Ct. 1976) (allowing recovery for all provable damages stemming from negligent sterilization); Jackson v. Anderson, 230 So.2d 503 (Fla. Dist. Ct. App. 1970) (same); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (adhering strictly to the state's *Troppi* precedent); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975) (allowing recovery for all provable damages stemming from negligent sterilization); Rivera v. New York, 46 U.S.L.W. 2586 (N.Y. Ct. Cls. April 28, 1978) (noting United States Supreme Court protection of the right to limit family size); Cox v. Stretton, 77 Misc.2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (allowing recovery for all

holding by applying the benefits rule to offset this award.[24] The *Sherlock* decision is in keeping with this trend.

In reaching its decision, the *Sherlock* court first had to refute the policy arguments advanced by past courts in denying recovery.[25] These courts held that the award of damages for the normal birth of a healthy child was inappropriate for two reasons: the primary purpose of marriage was to have children,[26] and the benefits to be derived from a child necessarily would outweigh the costs of its support.[27] The *Sherlock* court noted a modern attitude toward parenthood that had rendered these policy arguments obsolete. Responding to the notion that it was the marital province to "be fruitful and multiply,"[28] the court noted recent legislative,[29] judicial,[30] and social[31] recognition of the right of a married couple to limit reproduction. Addressing the argument that the benefits of parenthood were necessarily greater than the costs, the court held that in light of modern social attitudes toward procreation,[32] it would be inappropriate to declare that benefits exceed costs as a matter of law.[33]

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provable damages); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (allowing recovery of $450,000 for the birth of a deformed child following an unsuccessful sterilization).

24. *See, e.g.*, Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (Super. Ct. 1976); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (the court was not confronted with application of the benefits rule, but it affirmed the use of the *Troppi* court's damage formula); Rivera v. New York, 46 U.S.L.W. 2586 (N.Y. Ct. Cls. April 28, 1978).

25. *See generally* cases cited notes 9-12 & 21 and accompanying text *supra*.

26. For example, in *Shaheen* the court noted that "[t]he great end of matrimony is not the comfort and convenience of the immediate parties . . . but the procreation of a progeny having a legal title to maintenance by the father." Shaheen v. Knight, 6 Lyc. 19, 23, 11 Pa. D. & C.2d 41, 45 (1957) *quoting* Matchin v. Matchin, 6 Pa. 332, 337 (1847).

27. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8, 13 (Del. Sup. Ct. 1975) ("the value of a human life outweighs any 'damage' which might be said to follow from the fact of birth"); Ball v. Mudge, 64 Wash.2d 247, 250, 391 P.2d 201, 204 (1964) ("the cost incidental to such birth was far outweighed by the blessing of a cherished child").

28. 260 N.W.2d at 175, *quoting Genesis* 1:28.

29. The court noted Minnesota statutes legalizing the sale of contraceptives and providing subsidies for community family planning services. 260 N.W.2d at 175 n.10. *See also* 42 U.S.C. § 300 (1970) (The Family Planning Services and Population Research Act of 1970).

30. The court noted United States Supreme Court holdings protecting the right of the individual to limit procreation. Roe v. Wade, 410 U.S. 113 (1973) (the state may not infringe on an individual's right to have an abortion during the first trimester of pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (the state may not infringe on a married couple's right to use contraceptives in order to limit family size); 260 N.W.2d at 175.

In Brodie, *Marital Procreation*, 49 ORE. L. REV. 245 (1970), the *Griswold* decision was interpreted as constitutionally protecting a married couple's right to a sexual relationship as an end in itself. *Id.* at 254. This attitude is in stark contrast to that expressed in *Shaheen*. *See* note 26 *supra*.

31. The court cited statistics indicating that 3,566,000 men chose to be sterilized in the United States during the first five years of this decade. 260 N.W.2d at 175 n.9. *See also* Shaw, *Procreation and the Population Problem*, 55 N.C. L. REV. 1165, 1170 n.33 (1977), where the author noted a 210% increase in the number of sterilizations since 1969.

32. *See* notes 29-31 *supra*.

33. 260 N.W.2d at 175. The generalization that benefits will exceed costs is especially inappropriate in an action for negligent sterilization where the plaintiff has made a conscious deci-

In light of the foregoing considerations, the court recognized the plaintiff's cause of action for negligent sterilization.[34] However, by holding that this action was indistinguishable from other medical negligence actions, the court found itself bound by the rules of negligence to extend recovery beyond the minimal costs of pregnancy and childbirth and to allow recovery for the costs of raising the child.[35] Due to the court's reluctance in allowing this generous recovery,[36] and perhaps in sympathy with the policy reasons advanced by courts in denying recovery, the case was remanded with instructions that the award be reduced by the value of the child's aid, comfort, and society.[37]

This instructed use of the benefits rule, though precedented,[38] seems inappropriate in an action for negligent sterilization. A close reading of the rule indicates that the defendant must have conferred upon the plaintiff a benefit *to the interest which was harmed.*[39] Case law has placed further

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sion not to bear a child and has undergone surgical procedure to insure against it. As stated in Note, *Elective Sterilization*, 113 U. PA. L. REV. 415 (1964), "[t]he difficulty with using the benefits of parenthood to offset the financial costs is the failure to recognize that, for the segment of the community which resorts to sterilization, the values of having a child do not outweigh financial or other considerations." *Id.* at 435.

34. 260 N.W.2d at 174.

35. *Id. citing* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 41-42 (4th ed. 1971) (a discussion of causation in fact and proximate cause) [hereinafter cited as PROSSER]. If the defendant's negligence is the proximate cause of the injury, he is legally responsible for all consequences which follow in an unbroken sequence from the negligent act. Christianson v. Chicago, St.P., M.&O. Ry. 67 Minn. 94, 97, 69 N.W. 640, 641 (1896).

36. The court noted that it was "compelled" to do so "in obedience to the rule of law." 260 N.W.2d at 176. The court further expressed its reluctance by noting that it was "pretermitting moral and theological considerations" in allowing the recovery of all costs resulting from the negligence. *Id.* at 174.

37. 260 N.W.2d at 176.

38. The Sherlock court cited *Troppi* for its refinement of the damage formula and its application of the benefits rule in a case involving negligent sterilization. 260 N.W.2d at 173-74. *Troppi*, however, has been criticized for misapplying the rule. *See* Note, *Misfeasance in the Pharmacy: A Bundle of "Fun, Joy and Affection?"*, 8 CALIF. W. L. REV. 341, 343-46 (1972) (the benefit should not be determined from defendant's allegations, for the child may not be a benefit to the plaintiff); Note, *Determination of Damages for the Negligent Dispensing of an Oral Contraceptive Resulting in the Birth of an Unwanted Child*, 18 WAYNE L. REV. 1221, 1231-34 (1972) (benefits of companionship should not be an element of computing loss for economic damages).

Further, facts peculiar to the *Troppi* case were cited by the court as justifying its use of the benefits rule. The negligent act was a pharmacist's error in filling a prescription for oral contraceptives. The court heralded the flexibility provided by the benefits rule, noting that "[w]hat must be appreciated is the diversity of purposes and circumstances of the women who use oral contraceptives." 31 Mich. App. 240, 256, 187 N.W.2d 511, 518. The court's examples included unmarried women seeking to presently remain childless, married women seeking to delay childbearing, and women seeking to remain permanently childless. *Id.* In contrast, all persons seeking sterilization do so with the intention of permanently ceasing reproduction.

39. *See* note 19 *supra*. This limitation on the application of the benefits rule is explained in the comments to section 920: *"Limitation to Same Interest.* Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited." RESTATE-

restrictions on application of the rule by requiring that the tort produce immediate, material benefits.[40] In the present case, the negligent act caused harm to the pecuniary interests of the plaintiff, and the defendant was allowed to offset these damages by alleging speculative future benefits to a different interest: the emotional and psychological rewards of parenthood.[41]

It appears that the drafters of the *Restatement (Second) of Torts* section 920 intended to emphasize these limitations on application of the benefits rule. The tentative draft makes one addition to the first Restatement: "The rule stated in this section . . . is intended primarily to restrict the injured person's recovery to the harm which he actually incurred and not to permit

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MENT OF TORTS, § 920, comment b (1939). To illustrate this principle, the authors note that where *A* charges *B* with murder, and *B* sues for defamation and claims no special damages, the defendant, *A*, cannot show in mitigation that the business of *B*, a seller of soft drinks, has been increased as the result of A's false charge through publicity. Damages for harm to reputation are not diminished by a showing that the earning capacity of the plaintiff was increased by the defendant's tortious act. *Id.* at Illustration 4.

40. *See* Thompson v. Town of Ft. Branch, 204 Ind. 152, 178 N.E. 440 (1931) in which the defendant attempted to show that future expenses saved by the decedent's parents were greater than the value of lost services. The court noted that "the [benefits] rule . . . has been carefully restricted to situations in which the wrongful act is in itself an advantage to the plaintiff or results in an actual, present material benefit." *Id.* at 165, 178 N.E. at 444-45; Samples v. Kansas City Rys., 232 S.W. 1049 (Mo. Ct. App. 1921) in which the court rejected the defendant's attempted use of the benefits rule to reduce the award of a newspaper boy whose leg was severed. The benefits of a crippled person's increased paper sales were held to be speculative future benefits.

See also Sheppard, *Negligent Interference With Birth Control Practices*, 11 S. TEX. L.J. 229, 239 (1969) where the author interprets this limitation on use of the benefits rule as requiring that "[t]here must be such a direct connection between the benefit and the injury that they constitute the constituent components which are compared in arriving at the net damages . . . ." *Id.*

41. In the RESTATEMENT OF TORTS, § 920, comment a, Illustrations 1 & 2 (1939) the authors give examples of proper application of the benefits rule. If a surgeon performs an unauthorized operation resulting in pain, it may be shown that other pain was averted; if the operation has destroyed a bodily organ, it may be shown that other bodily functions were improved. *Id.* In these examples, the plaintiff has received a simultaneous, material benefit to the interest which was harmed.

Although *Sherlock* relied on the *Custodio* holding in allowing recovery, it failed to recognize that *Custodio* had observed that the benefits rule contemplated a benefit to the interest that was harmed. That court held that the plaintiff could recover for the mental or physical pain incident to her pregnancy (the legal action was initiated while the plaintiff was still pregnant) and that the recovery could be limited only if the pregnancy produced corresponding benefits to her emotional make-up or to any infirmities in her physical well being. Custodio v. Bauer, 251 Cal. App.2d 303, 322-23, 59 Cal. Rptr. 463, 476 (1967).

There were possibilities for proper application of the "same interest" test in *Sherlock*. The value of the child's comfort could have been used to offset damages for alleged emotional injuries. Or, to offset the Sherlocks' recovery for the costs of raising the child, the defendant could have introduced evidence of the future pecuniary value of the child's services. However, the value of this comfort and service would still not be the immediate, material benefit contemplated by case law. *See* note 40 and accompanying text *supra*.

the tortfeasor *to force a benefit upon him against his will*"[42] (emphasis added). The Sherlocks wanted no more children. By having their recovery for the costs of raising their wrongfully conceived child reduced by the value of the rewards to be derived from the child, they were having a benefit forced upon them against their will.

The original award should not have been offset, not only because of these limitations on the use of the benefits rule, but also because of insurmountable problems in proving prospective benefits to the required degree of certainty.[43] The *Sherlock* court dismissed the notion that benefits would be difficult to assess, noting that such assessment routinely is made in wrongful death actions.[44] There exist, however, problems of proof in a wrongful conception action that make this analogy inappropriate. In proving a wrongful death case, the plaintiff can and should introduce evidence of the companionship and services provided by the child during its life so that an approximation of the future value of those lost benefits can be made.[45] In contrast, the jury's estimate of future benefits in an action for negligent sterilization lacks the necessary basis for reasonable approximation of damages because there is no evidence of the child's moral and intellectual character. Furthermore, the skeletal jury instruction that the *Sherlock* court approved for use in computing benefits enhances this legal fiction in that it provides no guidelines to assist the jury in its determination of future benefits.[46]

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42. RESTATEMENT (SECOND) OF TORTS, § 920, comment f (Tent. Draft No. 19, 1973). Case law further supports the notion that no person should be forced to accept benefits against his will. *See, e.g.*, Tillotson v. Smith, 32 N.H. 90, 96 (1855) ("no infringement of rights can be justified on the ground that the act is a benefit to the owner, if it is done against his will"); Merritt v. Parker, 1 N.J.L. 526, 533 (1795) ("it is as illegal to force him to receive a benefit as to submit him to an injury").

43. It is a basic rule of recovery that prospective damages must be proven with a reasonable degree of certainty. Watt v. Nevada Cent. Ry., 23 Nev. 154, 44 P. 423 (1896). Accordingly, prospective benefits must also be capable of reasonable approximation, for in a case applying the benefits rule the value of these future benefits is an essential element in determining net recovery.

44. 260 N.W.2d at 176.

45. *See* 4 AM. JUR. PROOF OF FACTS 71, *Death, Action for*, Proof 7 (1960) where factors for determining the value of the child's companionship are noted: "Harmonious . . . family relations between the parties involved should be shown, as well as common interest in hobbies, scholarship . . . and the like." *Id.* This is followed by a checklist of traits relating to the child's relationship with his family and his disposition toward rendering aid and comfort.

Factors for determining the value of the child's services are also listed. "*Essential* also is proof of the physical and mental condition of the minor just prior to death" (emphasis added). *Id.* at Proof 9. This is followed by a checklist of traits relating to the intelligence, moral character and tractability of the child. *See generally* 1 SPEISER, RECOVERY FOR WRONGFUL DEATH 530-36 (1975); Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW 197 (1971).

46. In requiring use of a special verdict form, the *Sherlock* court cited Martineau v. Nelson, 247 N.W.2d 409, 417 n.18 (Minn. Sup. Ct. 1977) which approved the trial court's use of a special form. 260 N.W.2d at 176 n.14. This form reads in relevant part: "What is the value of the affection, love, care and services of David to Jean Martineau $————, to Larry Martineau? $————." Martineau v. Nelson, 247 N.W.2d 409, 414 (Minn. Sup. Ct. 1977).

In view of the apparent misapplication of the benefits rule in the present case, the most logical alternative for awarding damages would be to allow blanket recovery for the costs of raising the child. This recovery would leave the plaintiffs whole by replenishing depleted family wealth.[47] Further, such awards would be consistent since the total would not be subject to a case by case jury approximation of offsetting benefits.

A second alternative would be to employ a special negligence instruction that considered the purpose of the sterilization and family circumstances in determining the actual damage caused by the negligent act. This instruction would allow the jury to distinguish the jobless father of six who elects sterilization in an effort to extend family resources, from the mother who seeks sterilization out of distaste for the phyical complications suffered in a previous pregnancy and childbirth. In such cases the father would be entitled to recover the costs of raising the child; while the mother, whose motivations were primarily related to physical discomfort, would be able to recover only for her pain and suffering.

In keeping with modern attitudes toward parenthood and the individual's right to limit procreation, the *Sherlock* court appropriately recognized a cause of action for negligent sterilization. Two notable social effects of such recognition are foreseeable. The community should benefit from improved medical care due to the fear of liability imposed by the decision, for judicial recognition of liability for medical negligence will promote stricter adherence to professional standards of care in future sterilization operations.[48] The decision, however, could produce a detrimental effect of equal significance. Given the opportunity, greedy parents and lawyers could pursue this cause of action without considering the silent interests of the child.[49] Hopefully,

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47. The birth of the unplanned child could impose a substantial financial burden on its parents. *See, e.g.*, PROSSER, *supra* note 35, at 909 n.11 and accompanying text. Accordingly, the *Custodio* court noted that the purpose of this cause of action was to "replenish the family exchequer." Custodio v. Bauer, 251 Cal. App.2d 303, 324, 59 Cal. Rptr. 463, 477 (1967) *citing* Doerr v. Villate, 74 Ill. App.2d 332, 220 N.E.2d 767 (2d Dist. 1966). *See generally* Baerwald, *The Family as an Economic Unit*, 24 FORDHAM L. REV. 116 (1955).

48. *See, e.g.*, PROSSER, *supra* note 35, at 23, where it is noted that "[w]hen the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm."

49. It is possible that the child would be rendered an "emotional bastard" upon learning of the circumstances surrounding its conception and birth. *See, e.g.*, Note, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L.REV. 808, 811-12 (1965). *But see* Custodio v. Bauer, 251 Cal. App.2d 303, 59 Cal. Rptr. 463 (1967) where the court noted that this child would have no greater emotional injury that the child who learned that his existence was the result of his parents' ineptitude at birth control. *Id.* at 324-25, 59 Cal. Rptr. at 477. The court further noted that "one cannot . . . say whether the [child] will be more emotionally upset if he arrives . . . where [others] must contribute to his support, or whether he will have a happier and more well-adjusted life if he brings with him the wherewithal to make it possible." *Id.* at 325, 59 Cal. Rptr. at 477.

potential litigants would consider all such repurcussions before initiating an action for negligent sterilization.

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In Jackson v. Anderson, 230 So.2d 503 (Fla. Dist. Ct. App. 1970), the court noted that the action stemmed from the birth of an "unplanned child," not an "unwanted child." *Id.* The possibility of emotional injury would be reduced if all parties maintained a similar perspective and litigation was concentrated on the plaintiff's economic injury. *See* note 47 *supra*.