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Damages for the Wrongful Birth of Healthy Babies

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Comments

Damages for the Wrongful Birth of Healthy Babies

I. Introduction

A portion of our society today has reached a deliberate determination to avoid parenthood, and has consciously sought to prevent childbirth through various methods. For example, contraceptives, abortions, tubal ligations, and vasectomies have provided many people with reliable childbirth prevention. However, efforts to prevent conception or childbirth have been unsuccessful when frustrated through another's negligence. While most jurisdictions have recognized a cause of action for "wrongful birth,"[1] a serious question exists in determining how courts should measure the recovery of damages when parents, who never wanted to conceive a child and who actively sought to prevent parenthood, give birth to normal, healthy babies.[2]

The frustration of parental choice can be illustrated in situations in which a surgeon negligently performs an abortion or sterilization

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1. This comment will use the term "wrongful birth" although various other terms have been used to refer to the same cause of action. Wrongful birth actions are distinguishable from "wrongful life" actions, which are brought on behalf of the children themselves, seeking damages respecting the relative advantages of being born versus never having been born. Courts have resisted recognition of a wrongful life cause of action on the basis that there is no legal right not to be born. *See, e.g.*, Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

Wrongful birth refers to an action brought by the parent or parents of an unwanted, unplanned baby, for damages resulting from the pregnancy, delivery, and birth. The terms "wrongful conception" and "wrongful pregnancy" have also been employed. *See* Hartke v. McKelway, 526 F. Supp. 97 (D.D.C. 1981); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Holt, *Wrongful Pregnancy*, 33 S. Cal. L. Rev. 759, 759 n.6 (1982) ("In a rapidly expanding field of liability, one cannot expect terminology to be used with precision while the courts and commentators are still grappling with the theoretical basis for the consequences of imposing that liability").

2. This comment deals exclusively with the birth of healthy, normal babies; many courts have addressed the issue of awardable damages for the wrongful birth of deformed or diseased babies. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

procedure,[3] a physician fails to timely diagnose a pregnancy,[4] or a pharmacist negligently fills a birth control prescription.[5] Wrongful birth complaints have frequently alleged negligence,[6] although they have also asserted breach of contract,[7] breach of express or implied warranties,[8] misrepresentation,[9] or fraud and deceit.[10] While courts have not denied the negligence of defendants and plaintiff-parents have successfully established negligence and causation in fact, recovery of damages is not ensured; although the chain of recovery is complete, recovery may be denied based upon public policy considerations.[11]

The formulations of awards for damages for wrongful birth are as diverse as the rationales allowing or denying recovery. Case law

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3. *See, e.g.*, Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982) (vasectomy); Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1976) (tubal ligation); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979) (abortion); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (vasectomy); Martineau v. Nelson, 311 Minn. 92, 247 N.W.2d 409 (1976) (tubal ligation); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl., 1978) (tubal ligation); Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947) (abortion).

4. *See, e.g.*, Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

5. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

6. *See, e.g.*, Custodia v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978); Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

7. *See, e.g.*, Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978); Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

8. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978); Martineau v. Nelson, 311 Minn. 92, 247 N.W.2d 409 (1976); Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982); Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App. 1974).

9. *See, e.g.*, Sutkin v. Beck, 629 S.W.2d 131 (Tex. App. 1982).

10. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

11. *See* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974), in which the Wisconsin Supreme Court explained:

> Even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because: (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden (in the case before us, upon physicians and obstetricians); or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Id. at 517-18, 219 N.W.2d at 244 (citation omitted).

has developed varying positions concerning the scope of recovery for the wrongful birth of healthy babies. Recovery has been entirely denied in some cases; these decisions have, in effect, strictly applied the "benefits rule." The benefits rule 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."[12] Jurisdictions denying any recovery have concluded that no damages are sustained because the benefits derived from a healthy baby clearly outweigh as a matter of law any costs incurred by the parents.[13]

A substantial number of courts have determined that parents are entitled to recover only costs associated with the pregnancy and delivery, i.e., childbearing costs.[14] Other courts have allowed a more complete range of damages, which may be termed child raising costs, by also permitting parental recovery of the expenses to be incurred in raising, educating, and maintaining the unwanted child.[15] The benefits rule has been applied by courts allowing both types of recovery to reduce damages for tortious conduct by any "benefits" which such conduct has bestowed upon the plaintiffs.[16] The benefits rule has been expressly rejected by some courts because of the impossibility of its application; these courts do not allow full recovery, but rather deny child raising damages altogether.[17] A minority position permits recovery in full, without any application of the benefits rule.[18]

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12. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

13. *See infra* note 27.

14. *See* Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980); Maggard v. McKelvey, 627 S.W.2d 44 (Ky. Ct. App. 1982); Kingsbury v. Smith, 442 A.2d 1003 (N.H. 1982); Sala v. Tomlinson, 87 A.D.2d 670, 448 N.Y.S.2d 830 (1982); Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

15. *See* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978).

16. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975).

17. *See* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

18. *See* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981).

This comment will review the various judicial approaches to wrongful birth damages. Courts first approached these cases by entirely refusing recovery.[19] With the developing recognition that parents who sustained their burden of proof have in fact sustained compensable injuries, three basic approaches have been formulated. Some courts allow partial recovery by permitting childbearing damages, and denying child raising expenses.[20] Ironically, child raising costs have been denied through both strict acceptance and rejection of the benefits rule. Partial recovery has also been obtained in cases in which parents are awarded the costs of childbearing and child raising, but the costs of chiid raising are offset by the application of the benefits rule.[21] Recovery in full, without the application of the benefits rule, has also been awarded to other litigant-parents.[22]

This comment will advocate that the unplanned pregnancy and resulting birth of a healthy baby constitutes a compensable injury. Tortfeasors should not be immunized from full accountability for their tortious conduct solely because their negligence results in human life — this conduct remains negligent. In discussing the various judicial approaches, this comment will suggest that the public policy considerations articulated by some courts do not justify a denial of complete parental compensation. In addition, parents should not be limited to recoup merely their outlay of medical costs and pregnancy and delivery expenses; these plaintiffs should also be able to successfully seek damages for pain and suffering, wage loss, loss of consortium, and the high costs of educating, raising, and maintaining the unintended child.

This comment will also examine the benefits rule and conclude that damages which litigant-parents must incur are very tangible economic expenses, capable of actuarial calculation.[23] Alleged intangible and personal benefits to parents cannot be properly offset

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19. *See infra* pt. II.

20. *See infra* pt. III.

21. *See infra* pt. IV.

22. *See infra* pt. V.

23. According to Lawrence Olson, an economics analyst, "a reasonably successful business family" will spend $323,000 to raise a firstborn son to age 23 or $344,000 to bring up a daughter, and the average family spends $226,000 to raise a son and $247,000 to raise a daughter. *See* BUS. WK., Aug. 30, 1982, at 80. *See generally* L. OLSON, COSTS OF CHILDREN (1982). Realistically, although "[t]he smile of a child may be priceless . . . the braces that may be needed to keep that smile perfect carry a very concrete price tag." *See* Holt, *supra* note 1, at 787.

against hard, tangible, financial expenditures.[24] Therefore, damages recoverable for the costs of food, clothing, and education cannot be properly reduced by such conjectural benefits as "the satisfaction, love, joy and pride which an unplanned child may provide his [or her] parents."[25] By employing this type of subjective standard in weighing the intangible costs and benefits of child raising, courts will ensure that the benefits rule is applied so that the benefits are measured as they affect the individuals injured, and not society. The purely emotional benefits of child raising can only be properly offset against the emotional costs incident to child raising costs. Affirmative answers to the following issues will be urged: "Should parents in this sophisticated day and time . . . have a right to plan their family and avoid the economic hardship of raising a child they choose not to have? Should a doctor . . . pay for all the damages occasioned by his [or her] negligent acts?"[26]

II. Recovery Refused

The early cases[27] which approached this issue denied all parental recovery for the birth of a healthy baby born as a result of a tortfeasor's negligence. Ethical, religious, and public policy[28] considerations prevented the courts from awarding these "fortunate" parents money damages as compensation for bearing and raising a child for whom they should feel "blessed."[29] This early approach

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24. The *Restatement* definition of the benefits rule, *see supra* text accompanying note 12, clearly states that the benefit conferred must be to the *same interest* that was harmed by the defendant's tortious conduct. In the wrongful birth context, it is difficult to specify whether financial, social or emotional interests fostered the plaintiff-parents' desire to avoid childbirth. However, those courts that observe that the plaintiffs are about to enjoy a lifetime of companionship and fulfillment are mistaken if they believe that these are benefits to the same injured interests that had motivated the plaintiffs' desire to avoid parenthood.

25. Mason v. Western Pa. Hosp., 453 A.2d 974, 981 (Pa. 1982) (Larsen, J., concurring and dissenting).

26. Wilbur v. Kerr, 275 Ark. 239, 241, 628 S.W.2d 568, 570 (1982).

27. *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Shaheen v. Knight, 6 Lycoming Rptr. 19, 11 Pa. D. & C.2d 41 (1957); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

28. "Public policy" has been defined as:

> [T]he community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. . . . [T]hat general and well-settled public opinion relating to man's plain, palpable duty to his fellow-men, having due regard to all the circumstances of each particular relation and situation.

Pittsburgh, C., C & St. L. Ry. v. Kinney, 95 Ohio St. 64, 68, 115 N.E. 505, 507 (1916).

29. *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). The plaintiff had been sterilized after receiving a warning that his wife might not survive the birth of another child; he subsequently sued the surgeon when his wife became pregnant and gave

overlooked the fact that these particular individuals consciously and actively sought to prevent childbirth, and that negligently performed sterilization surgery inadvertently brought about the very event which the surgery was intended to prevent.[30] Recovery was disallowed on the theory that the parents had experienced a "blessed event"[31] and not a compensable injury. The courts were hesitant to recognize the fact that the births in controversy did by no means constitute blessings to the litigant parents.

In *Ball v. Mudge*,[32] the Washington Supreme Court affirmed a jury verdict for the defendant-physicians.[33] The plaintiff-parents had sought damages for the expenses of delivery, care, maintenance, and support of the child; pain, suffering, and mental anguish of the plaintiffs; and for the loss of the services, society, companionship, and consortium of the wife.[34] Judge Denney explained that:

> As reasonable persons, the jury may well have concluded that appellants suffered no damage in the birth of a normal, healthy child, whom they dearly love, would not consider placing for adoption, and 'would not sell for $50,000,' and that the cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of

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birth to a healthy baby. Because the wife survived childbirth, the court rejected the plaintiff's allegations that he had experienced great anxiety and was subjected to considerable expense before and after the baby's birth. *Id.* at 124, 255 N.W. at 621. The court thus found that no damages were sustained:

> [T]he plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority.

Id. at 126, 255 N.W. at 622. The Minnesota Supreme Court's dicta thus seemed to preclude parents from recovering damages for the economic costs of unplanned children. The *Christensen* decision looked at the *purpose* for which the sterilization was sought, and the purpose was to protect the health of the plaintiff's wife and not to save expenses resulting from the birth of another child. *See* Note, *Wrongful Birth Damages: Mandate & Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127, 134 (1978).

30. *See* Betancourt v. Gaylor, 136 N.J. Super. 69, 74, 344 A.2d 336, 339 (1975) (plaintiffs' complaint alleged denial of the opportunity to be free from the added expense of another child through the defendants' negligence in performing an operation which was designed to produce that exact result).

31. Custodio v. Bauer, 251 Cal. App. 2d 303, 321, 59 Cal. Rptr. 463, 475 (1976).

32. 64 Wash. 2d 247, 391 P.2d 201 (1964).

33. Judge Denney did not believe that the plaintiffs were entitled to a directed verdict against the physicians for breach of warranty and negligence in their failure to successfully sterilize the plaintiff-husband, in light of disputes as to the standard of practice in post-operative testing, proximate cause, fraud and deceit, and lack of damages from the birth of a healthy child. *Id.* at 249-50, 391 P.2d at 203-04.

34. *Id.* at 248, 391 P.2d at 203.

conception and birth.[35]

The Common Pleas Court in Lycoming County, Pennsylvania, in *Shaheen v. Knight*,[36] expressed its reluctance to award the only damages sought by the plaintiffs, child raising and education expenses, observing that:

> We are of the opinion that to allow damages for the normal birth of a normal child is foreign to the universal sentiment of the people.
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> . . . .
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> To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which the plaintiff Shaheen will have in the rearing and education of [his] fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, the plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion to allow such damages would be *against public policy*.[37]

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35. *Id.* at 250, 391 P.2d at 204.

36. 6 Lycoming Rptr. 19, 11 Pa. D. & C.2d 41 (1957). Due to economic reasons, the plaintiff-husband underwent a sterilization operation; however, his wife became pregnant and subsequently gave birth to a healthy child. The plaintiff's complaint alleged:

> That the Plaintiff, as a result, despite his love and affection for his fifth (5th) child, as he would have for any other child, now has the additional expense of supporting, educating and maintaining said child, and that such expense will continue until the maturity of said child, none of which expense would have been incurred, had the Defendant, Dr. John E. Knight, fulfilled the contract and undertaking entered into by him, or fulfilled the representations made by him.

Id. at 20, 11 Pa. D. & C.2d at 41-42.

37. *Id.* at 23, 11 Pa. D & C.2d at 45-46 (emphasis added). Judge Williams did note that a contract to sterilize a man was not "void and against public policy and public morals." Id. at 20, 11 Pa. D. & C.2d at 43.

Mitigation is currently a non-issue. Although tortfeasors have argued that parents must attempt to mitigate their damages by obtaining an abortion or placing the child for adoption, this contention has been consistently rejected by the courts. Failure to seek abortion or refusal to place the healthy infant for adoption is not considered to be a failure to mitigate damages. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977). Professor McCormick has summarized the rule on mitigation as follows:

> 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 (1935). Judicial refusal to require parental mitigation through the use of abortion clinics or adoption agencies is based upon the asserted unreasonableness of forcing such alternatives upon parents. *See* Troppi v. Scarf, 31 Mich. App. 240, 258, 187 N.W.2d 511, 520 (1971) (plaintiffs were only required to take reasonable measures to minimize the defendant's financial liability and "no mother could reasonably be required to abort or place her child for adoption"); Rivera v. State, 94 Misc. 2d 157, 163, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1973) (requirement to obtain an abortion in order to mitigate parental damages was denounced as "an invasion of privacy of the grossest and most pernicious kind. The decision to have an abortion or not is for the individual to make, based on whatever religious, philosophical, or moral principles the individual may adhere to, or upon considera-

Public policy is, of course, a recognized part of the fiber of our judicial system, and is often a most necessary logical cornerstone in the judiciary's ability to create decisions which serve the interests of society. However, public policy is subject to changes that occur in society. Outdated public policy considerations do not justify the denial of parental recovery. Society's attitude toward the family unit, contraception and childbirth has drastically changed; "attitude[s] toward birth control and the family, as well as the protection accorded family planning rights by the United States Supreme Court support the position that a child is not always a 'blessing' to the family."[38] In addition, denial of recovery upon policy grounds ignores economic reality — parenthood and its accompanying expenses have been forced upon those who consciously sought to avoid it. Producing and raising children is an expensive endeavor, and the expense will continue at least until the child reaches majority.[39] There is obviously an adverse effect on the entire family unit's economic status when parents are compelled to disperse care, comfort, and protection to a larger family.[40] As the California Court of Appeals wisely observed in *Custodio v. Bauer*,[41] the plaintiff-parents sought compensation "to replenish the family exchequer so that the new arrival . . . [would] not deprive the other members of the family of what was planned as their just share of the family income."[42]

Courts are now awarding damages in recent wrongful birth cases even if parents are realizing only partial recovery. Public policy considerations do not justify a denial of recovery when tortfeasors are thereby permitted to escape liability for the financial conse-

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tion of the medical risks involved").

In Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974), the defendant-physician argued that because there was no statutory ban to abortion at that stage of pregnancy when conception was discovered, the plaintiff-wife's failure to pursue this legal alternative barred her claim for damages. Judge Del Vecchio of the New York Supreme Court, Appellate Division, rejected this contention:

> The right to have an abortion may not be automatically converted to an obligation to have one. The decision whether or not to undertake that medical procedure must rest on a number of factors, including the stage to which pregnancy has progressed, the health and condition of the woman at that time and the professional judgment and counsel received.

Id. at 233, 357 N.Y.S.2d at 269.

38. Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 628 (1980).

39. *See supra* note 23.

40. *See, e.g.*, Sutkin v. Beck, 629 S.W.2d 131 (Tex. Ct. App. 1982).

41. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

42. *Id.* at 324, 59 Cal. Rptr. at 477.

quences of their wrongdoing. One court has stated, "[a] ruling denying any damages . . . would render the medical profession immune from liability for negligent treatment of patients seeking to limit the size of their families."[43] The application of public policy has been perceived as too vague to be considered useful.[44] In *Sherlock v. Stillwater Clinic*,[45] the Minnesota Supreme Court justified an award of child raising expenses in spite of its awareness of public policy:

> Ethical and religious considerations aside, it must be recognized that such costs are a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child. Although public sentiment may recognize that to the vast majority of parents the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law.[46]

III. Partial Recovery—Childbearing Expenses Allowed, Child Raising Costs Denied

Rejection and Strict Application of the Benefits Rule

Many courts have awarded damages sustained in connection with pregnancy and delivery, but have rejected the contention that the child can in any way constitute a detriment after birth. Upon what reasons have such denials been based? Public policy is frequently cited as a basis upon which to deny recovery of the costs of care, maintenance, support, and education, although the courts articulate public policy in various ways.[47] Public policy has been in-

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43. Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

44. Justice Dudley of the Arkansas Supreme Court renounced the invocation of public policy to avoid the application of common law because of "the lack of a standard by which [to] determine when to apply public policy and the lack of a meaningful definition by which [to] discover what constitutes public policy." Wilbur v. Kerr, 275 Ark. 239, 244, 628 S.W.2d 568, 572 (1982) (Dudley, J., dissenting). At common law, tortfeasors were liable for their negligence, and for all damages flowing from it. Justice Dudley stated that he "would not invoke public policy in order to deny a cause of action against the common law rules of tort damages when there is no logical sense of conscience." *Id.* at 245, 628 S.W.2d at 572 (Dudley, J., dissenting). This comment will further evaluate public policy considerations with regard to the denial of child raising expenses. *See infra* pt. III.

45. 260 N.W.2d 169 (Minn. 1977).

46. *Id.* at 175.

47. *See, e.g.*, Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979); Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); Hays v. Hall, 477 S.W.2d 402 (Tex. Civ. App. 1972), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1973); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242

voked to prevent recovery because of the sentiment that the birth of a normal, healthy infant fails to constitute a compensable injury.[48]

In *Terrell v. Garcia*,[49] one reason for the Texas Court of Civil Appeals' denial of recovery for child raising expenses was that such damages were too speculative and uncertain.[50] The Terrells had waived all other items of damages, such as medical expenses and the pain and anguish of Mrs. Terrell incident to childbirth.[51] Judge Barrow disagreed with the offsetting nature of the benefits rule[52] and instead denied recovery for child raising damages based on public policy considerations, holding that children confer tangible economic benefits upon their parents which outweigh losses:

> [A] strong case can be made that, at least in an urban society, the rearing of a child would not be a profitable undertaking if considered from the economics alone. Nevertheless . . . the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement? Even if we consider only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child. We see no compelling reason

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(1974).

48. In Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979), the plaintiff sued her physician for failure to perform a proper abortion. The Illinois Abortion Act of 1975, in effect at that time, prohibited abortions unless necessary to preserve the mother's life. ILL. REV. STAT. ch. 38, § 81-21 (1977) (repealed 1979). Justice Hartman of the Appellate Court of Illinois denied the plaintiff-mother child raising costs:

> In our judgment, a public policy which deems precious even potential life while yet in the womb, at such cost and expense that condition may entail, 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. The existence of a normal, healthy life is an esteemed right under our laws, rather than a compensable wrong.

73 Ill. App. 3d at 62, 391 N.E.2d at 487. Note that this public policy view, while similar in nature, is not an application of the benefits rule.

49. 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

50. *Id.* at 127.

51. *Id.*

52. *Id.* Judge Barrow explained that:

> [A]doption of the "benefits rule" . . . would present insurmountable problems of proof under our present standards for proof of damages. Proof could undoubtedly be offered regarding the cost of care and maintenance for a hypothetical child, although the standard of living and extent of education to be provided such child would undoubtedly require considerable conjecture and speculation by the trier of facts.

Id.

to change such rule at this time.[53]

The Wisconsin Supreme Court, in *Rieck v. Medical Protective Co.*,[54] found that public policy prohibited recovery of child rearing costs because parents would unreasonably shift the financial costs of raising the child to the tortfeasor, while they continued to retain custody; the court expressed concern that this would in effect create a new category of surrogate parent.[55] The benefits rule was expressly rejected by the Wyoming Supreme Court in *Beardsley v. Wierdsma*,[56] and various reasons were offered for its rejection of the parental claim for damages after childbirth:

> [T]hese . . . expenses are too speculative . . . the injury is too remote from the negligence . . . the injury is out of proportion to the culpability of the

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53. *Id.* at 128. It is speculative and factually unsupportable to expect that children generally take care of their elderly parents. *See* Troppi v. Scarf, 31 Mich. App. 240, 255, 187 N.W.2d 511, 518 (1971). It is arguably the exception, rather than the rule, when parents receive more economic support from their children in their old age than the parents provided to the children as they grew up. The *Terrell* court was correct in not applying the benefits rule, because any alleged benefits conferred upon parents through unwanted births are either highly speculative from an economic viewpoint or are intangible, personal awards which should not be offset against hard money costs; however, costs of child raising should have been awarded in full.

54. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

55. Justice Hansen explained that:

> To permit the parents to keep their child and shift the entire cost of its upbringing to a physician who failed to determine or inform them of the fact of pregnancy would be to create a new category of surrogate parent. Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real. On the other hand, every financial cost or detriment—what the complaint terms "hard money damages"—including the cost of food, clothing and education, would be shifted to the physician who allegedly failed to timely diagnose the fact of pregnancy. We hold that such result would be wholly out of proportion to the culpability involved, and that the allowance of recovery would place too unreasonable a burden upon physicians, under the facts and circumstances here alleged.

Id. at 518-19, 219 N.W.2d at 244-45 (footnote omitted).

56. 650 P.2d 288 (Wyo. 1982). Justice Brown specifically rejected the benefits rule, *id.* at 292, and observed that:

> The benefit or offset concept smacks of condemnation law, where the trier of fact determines the value of the land taken by the condemnor. The trier of fact then determines the benefit that results to the land owner, which benefit is deducted from the original value to determine the proper award. If the concept of benefit or offset were applied to "wrongful birth" actions, we can conceive of the ridiculous result that benefits could be greater than damages, in which event someone could argue that the parents would owe something to the tortfeasor. We think that a child should not be viewed as a piece of property, with fact finders first assessing the expense and damage incurred because of that child's life, then deducting the value of that child's life.

Id. at 293.

> tortfeasors; and . . . the allowance of recovery would place too unreasonable a burden on [the tortfeasors], since it would likely open the way for fraudulent claims, and since it would enter a field that has no sensible or just stopping point.[57]

The *Beardsley* court provided a definite demarcation of what damages could be recovered, including the medical expenses associated with the unsuccessful sterilization operation, surgical, and hospital expenses, physicians' fees, medication costs, medical and hospital expenses for the birth of the unplanned child, wage loss, the mother's pain and suffering in connection with the pregnancy, the cost of abortion, plus the pain and suffering of women who elected to undergo abortions. However, any claim for damages of child raising expenses, incurred *after* childbirth, was rejected.[58]

The Pennsylvania Supreme Court also denied child raising expenses in *Mason v. Western Pennsylvania Hospital.*[59] Justice Roberts enunciated the Commonwealth's public policy as the recognition of the "paramount importance of the family to society" and then held, as a matter of law, "that the benefits of joy, companionship, and affection which a normal, healthy child can provide must be deemed . . . to outweigh the costs of raising that child."[60]

Courts have also justified denial by emphasizing the unwanted child who discovers in the future that the costs of his or her upbringing were paid for by another. The Arkansas Supreme Court, in *Wilbur v. Kerr,*[61] described the issue of parental recovery of child rearing costs:

> [It] is a question which meddles with the concept of life and the stability of the family unit. Litigation cannot answer every question; every question cannot be answered in terms of dollars and cents. We are also convinced that the damage to the child will be significant; that being an unwanted or "emotional bastard," who will some day learn that its parents did not want

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57. *Id.* at 292. The type of fraudulent claims to which the court referred might be claims for failure to timely diagnose pregnancy situations in which the parents allege that they would have aborted had they been timely informed of the pregnancy. The court's fear of fraudulent claims would apparently not extend into the negligently performed sterilization and abortion cases. Further, the court's position ignores the realities of medical malpractice insurance and the fact that the negligent physician or surgeon is burdened only to the extent of premium and deductible payments. For example, Pennsylvania limits a physician's liability to $100,000 and provides a contributory "Catastrophe Loss Fund" to supplement awards in excess of that amount. 40 PA. CONS. STAT. ANN. § 1301.701(a)(1)(i), (d) (Purdon Supp. 1982-1983).

58. 650 P.2d at 292.

59. 453 A.2d 974 (Pa. 1982).

60. *Id.* at 976.

61. 275 Ark. 239, 628 S.W.2d 568 (1982).

> it and, in fact, went to court to force someone else to pay for its raising, will be harmful to that child. It will undermine society's need for a strong and healthy family relationship. We have not become so sophisticated a society to dismiss that emotional trauma as nonsense.[62]

The court derived the "emotional bastard" label from several commentaries[63] defining the term as an unwanted child who discovers some day that he or she was unwanted, and whose costs of raising were paid by another.[64] The Minnesota Supreme Court noted the impact which the award of child raising expenses could have on the family unit in *Sherlock v. Stillwater Clinic*,[65] but stressed the necessity for such compensation under ordinary tort law principles:

> The result we reach today is at best a mortal attempt to do justice in an imperfect world. In this endeavor we are not unmindful of the deep and often times painful ethical problems that cases of this nature will continue to pose for both courts and litigants. It is therefore our hope that future parents and attorneys would give serious reflection to the silent interests of the child and, in particular, the parent-child relationship that must be sustained long after legal controversies have been laid to rest.[66]

The award of child rearing expenses has also been avoided through the determination that such matters should be resolved by the legislature, and not by the judiciary.[67]

The provision of child raising damages is the most difficult area of consideration because the negligence of the defendants must be weighed against the social questions at stake. Proven child raising expenses should be awarded in all wrongful birth actions, so that unwanted children may receive adequate financial support in situations in which parents may not have otherwise been able to provide it. Although the child was originally unplanned, any emotional injury to the child upon discovery of this fact should be no greater "than that to be found in many families where 'planned parenthood' has not followed the blueprint."[68]

In those states which allow child raising damages if the un-

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62. *Id.* at 241, 628 S.W.2d at 570.

63. Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J.L. & MED., 131, 153 (1978-79); Bryan, *Damages—The Not So "Blessed Event,"* 46 N.C.L. REV. 948, 952 (1968).

64. 275 Ark. at 241, 628 S.W.2d at 570.

65. 260 N.W.2d 169 (Minn. 1977).

66. *Id.* at 176-77 (footnotes omitted).

67. *See* Christensen v. Thornby, 192 Minn. 123, 125, 255 N.W. 620, 621 (1934); Ziemba v. Sternberg, 45 A.D.2d 230, 234, 357 N.Y.S.2d 265, 270 (1974) (Cardamone, J., dissenting); Stewart v. Long Island College Hosp., 35 A.D.2d 531, 532, 313 N.Y.S.2d 502, 503 (App. Div. 1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

68. Custodio v. Bauer, 251 Cal. App. 2d 303, 318, 59 Cal. Rptr. 463, 477 (1967).

wanted child is born defective, public policy considerations for the denial of these damages for a healthy baby have been criticized when "the same public policy allows [the courts] to hold that the parents of a deformed or diseased child are able to recover."[69] In his concurring and dissenting opinion in *Mason v. Western Pennsylvania Hospital*,[70] Chief Justice O'Brien of the Pennsylvania Supreme Court could find no justifiable reason for differentiating between the birth of a healthy child and the birth of a genetically defective child.[71] The result is inconsistent because "[i]t is not the relative health of the child, but is instead the alleged negligence of the physician, that gives rise to all damages that are foreseeable."[72]

IV. Partial Recovery—Childbearing and Child Raising Expenses Allowed — the Benefits Rule Applied

Denial of all recovery is, in effect, a strict application of the benefits rule. Courts which have denied all recovery have ruled as a matter of law that intangible benefits of parenthood outweigh economic costs and losses in rearing and educating a normal child.[73] On the other hand, courts which have awarded partial recovery do not find that benefits strictly outweigh all expenses. This approach does take account of the benefits conferred upon the parents through the birth of a healthy child, and offsets these benefits against parental recovery.

The benefits rule is utilized to reduce recoverable damages by any benefits conferred upon the parents through the tortfeasor's negligent conduct.[74] Courts which apply the benefits rule have determined that "the defendant who simultaneously injures and confers a benefit to the same interest of the plaintiff is entitled to have the benefit considered in mitigation of damages."[75]

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69. Wilbur v. Kerr, 275 Ark. 239, 244, 628 S.W.2d 568, 572 (1982) (Dudley, J., dissenting).

70. 453 A.2d 974 (Pa. 1982).

71. *Id.* at 976 (O'Brien, C.J., concurring and dissenting). Pennsylvania allows parents to recover for the child raising costs of a defective child. *See* Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981).

72. 453 A.2d at 977 (O'Brien, C.J., concurring and dissenting).

73. *See* Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

74. *See supra* text accompanying note 12.

75. Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 St. Mary's L.J. 140, 152 (1976). Therefore, "[w]hen a defendant's tortious actions benefit as well as injure plaintiff, a computation of damages [requires] that the award for the injury be reduced by the value of the benefit." Comment, *Liability for Failure of Birth Control Methods*, 76 Colum. L. Rev. 1187, 1197-98 (1976). *See* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal.

The Court of Appeals of Michigan, in *Troppi v. Scarf*,[76] recognized that the benefits of parenthood do not always exceed the incident costs, and refused to state as a matter of law that a healthy child always confers so substantial a benefit as to outweigh expenses of birth and support.[77] Presiding Judge Levine repudiated the reasoning of those cases in which parental recovery was entirely denied because the benefits eradicated costs, because those opinions in essence declared that "as a matter of law, the services and companionship of a child have a dollar equivalent greater than the economic costs of his support, to say nothing of the inhibitions, the restrictions, and the pain and suffering caused by pregnancy and the obligation to rear the child."[78]

The Troppis' complaint alleged four separate items of damages: Mrs. Troppi's lost wages, medical and hospital expenses, the pain and anxiety incident to childbirth, and the economic costs of raising their eighth child.[79] The court rejected the trial court's finding that an award of damages would contravene public policy,[80] and found that in light of the great number of oral contraceptive users, a recovery by the plaintiff-parents would further the public policy of encouraging pharmacists to exercise great care while filling birth control prescriptions.[81]

Rptr. 652 (1976); Anonymous v. State, 33 Conn. Supp. 126, 366 A.2d 204 (1976); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

76. 31 Mich. App. 240, 187 N.W.2d 511 (1971). The defendant-pharmacist negligently supplied the wrong drug, a mild tranquilizer, to a married woman who had ordered birth control pills; she subsequently became pregnant and delivered a normal, healthy baby. *Id.* at 243, 187 N.W.2d at 512-13.

77. *Id.* at 254, 187 N.W.2d at 517.

78. *Id.* at 255, 187 N.W.2d at 518.

79. *Id.* at 244, 187 N.W.2d at 513. The lower court had dismissed the complaint, because "whatever damage plaintiffs suffered was more than offset by the benefit to them of having a healthy child." *Id.* On appeal, the First Division of the Michigan Court of Appeals determined that there was no valid reason why the trier of fact should not be free to assess damages as it would in other negligence cases. *Id.* at 252, 187 N.W.2d at 516. Judge Levine found the presence of basic tort liability: "The defendant's conduct constituted a clear breach of duty. A pharmacist is held to a very high standard of care in filling birth control prescriptions. When he negligently supplies a drug other than the drug requested, he is liable for resulting harm to the purchaser." *Id.* at 245, 187 N.W.2d at 513.

80. As the court explained:

> Contraceptives 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.

Id. at 253, 187 N.W.2d at 517.

81. "To absolve defendant of all liability here would be to remove one deterrent

Although all of the elements of damages alleged by the plaintiffs were found to be recoverable,[82] Judge Levine held that the benefits rule was pertinent,[83] and thus the benefits resulting from the birth of the unplanned child would be weighed against all of the claimed damages. The trier of fact could evaluate the benefits in light of the particular circumstances presented in each case, such as "family size, family income, age of the parents, and marital status."[84] The *Troppi* court rejected the defendant's contention that damages could not be properly calculated because of uncertainty or difficulty in their assessment: "[D]ifficulty in determining the amount to be subtracted from the gross damages does not justify throwing up our hands and denying recovery altogether."[85]

In *Betancourt v. Gaylor*,[86] the New Jersey Superior Court also accepted the application of the benefits rule to parental recovery. Although, as a matter of law, any damages proximately resulting from the defendants' negligence could be recovered, including the costs, emotional distress and physical inconvenience of rearing a child,[87] these damages must be offset by any benefits accrued.[88]

The Minnesota Supreme Court also applied the benefits rule in

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against the negligent dispensing of drugs. Given the great numbers of women who currently use oral contraceptives, such absolution cannot be defended on public policy grounds." *Id.* at 254, 187 N.W.2d at 517. The court also considered that contraceptive use falls within the constitutionally protected zone of privacy developed in Griswold v. Connecticut, 381 U.S. 479 (1965). *Id.* at 253-54, 187 N.W.2d at 517.

82. *See supra* text accompanying note 78.

83. "Thus, if the defendant's tortious conduct conferred a benefit to the same interest which was harmed by his conduct, the dollar value of the benefit is to be subtracted from the dollar value of the injury in arriving at the amount of the damages properly awardable." 31 Mich. App. at 255, 187 N.W.2d at 518.

84. *Id.* at 257, 187 N.W.2d at 519.

85. *Id.* at 261, 187 N.W.2d at 521. All four claimed items of damages could be assessed competently by the trier of fact and any alleged uncertainty in computation did not render damages unduly speculative. *Id.* at 262, 187 N.W.2d at 521.

86. 136 N.J. Super. 69, 344 A.2d 336 (1975). After an unsuccessful bilateral tubal ligation resulted in the birth of an unplanned, healthy child, the parents brought suit against the surgeon, the pathologist, and the family planning clinic, alleging their medical costs, emotional distress, and physical inconvenience in raising the healthy child as a measure of their damages sustained. *Id.* at 71, 344 A.2d at 337.

87. *Id.* at 77, 344 A.2d at 340. Damages were to be measured, as normally calculated in tort actions, by comparing the plaintiff's impaired condition as a result of the defendant's negligence with the condition the plaintiff would have been in without such negligence occurring. *Id.* at 75, 344 A.2d at 339-40.

88. "[T]he elements of benefit and loss are separate. The loss is the financial expense which plaintiffs sought to obviate by submitting to surgery. The benefit is whatever benefit a jury may reasonably conclude has accrued to plaintiffs as a result of the newborn child. These are relatively tangible and measurable factors for a jury to consider separate from each other . . . ." *Id.* at 75, 344 A.2d at 339.

Sherlock v. Stillwater Clinic.[89] The parents were permitted to recover all of the reasonably foreseeable costs, including prenatal and postnatal medical expenses, the mother's pain and suffering during pregnancy and delivery, loss of consortium, and child rearing expenses, offset by the value of the child's aid, comfort, and society during the parents' life expectancy.[90] Judge Rogacheski was unconvinced that public policy justifies a denial of recovery because such actions should be treated as negligence cases.[91] Child raising costs were awarded by the court:

> [We are] unconvinced that a physician should be held harmless for the economic costs of supporting an unplanned child. Thus, in obedience to the rule of law, we feel compelled to conclude that where the parents of an unplanned, healthy child choose to include this item of damages in their claim, hopefully after being advised of the psychological consequences which could result from litigating such claim, we will permit them to recover the reasonably foreseeable costs of rearing, subject to an offset for the value of the benefits conferred to them by the child.[92]

The benefits rule is misapplied in wrongful birth cases because the defendants at bar cause injury to *tangible* economic interests. Any alleged benefits simultaneously conferred upon litigant-parents are intangible, personal benefits. It would therefore be improper to award damages for the financial costs of child raising, and then reduce the award by non-economically speculative benefits. Financial injury to the plaintiffs, which is a direct result when parents must pay for the costs of pregnancy, delivery and upbringing, are hard tangible expenses, readily capable of ascertainment actuarially: "[s]uch calculations are made by estate planners, insurance companies and sometimes by private parties as incident to

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89. 260 N.W.2d 169 (Minn. 1977). The court added to the existing confusion in terminology by referring to the cause of action as one for "wrongful conception." *Id.* at 170. *See supra* note 1.

90. 260 N.W.2d at 170-71.

91. *Id.* at 174. The court stated:

> Pretermitting moral and theological considerations, we are not persuaded that public policy considerations can properly be used to deny recovery to parents of an unplanned, healthy child of all damages proximately caused by a negligently performed sterilization operation. Analytically, such an action is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physician has breached a duty of care owed to him with resulting injurious consequences. Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred.

Id. (footnote omitted).

92. *Id.* at 176.

support proceedings or matrimonial settlements."[93] It is arguably improper to award damages for expenses and then reduce them by the value which a court or jury places upon the child's smiles, hugs, and kisses. Further, the benefits rule fails to consider the significant intangible costs and detriments which accompany parenthood, such as meal preparation, baby-sitting and the psychological concerns all parents experience when raising a child.

There is no question that even unplanned, unwanted children do confer benefits of some sort upon their parents.[94] However, these benefits are speculative and incapable of dollar evaluation. Further, if the courts choose to consider these intangible benefits when calculating damage awards, they should also be cognizant of intangible costs and detriments necessarily incident to parenthood when the child to be raised was unplanned. The benefits rule, as traditionally applied, is improper when courts adjudicate wrongful birth damage awards.

V. All Damages Recoverable in Full

Public policy should not preclude parents from seeking and recovering child raising expenses, in addition to the clearly recoverable childbearing expenses, such as medical and hospital expenses, wage loss, and pain and suffering.[95] Further, the benefits rule should not be applicable to offset the financial costs of parenthood by its emotional rewards. In his concurring and dissenting opinion in *Mason v. Western Pennsylvania Hospital*,[96] Justice Larsen of the Pennsylvania Supreme Court succinctly recognized that the applicability of the benefits rule would undermine the principles of making the plaintiff whole, deterring future negligence, and encouraging desirable conduct. He observed that:

> Feeding, clothing and educating an unplanned child entails a certain amount of expense, and it is this expense for which parents must be compensated in order to be made whole. Whatever those expenses are determined to be, they are simply not reduced by the satisfaction, love, joy and pride which an unplanned child may provide his parents. The "benefit rule" would reduce the damages awarded to parents of children who possess these endearing abilities, thus preventing the parents from being fully compen-

93. Rivera v. State, 94 Misc. 2d 157, 161, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978).

94. *But see* D. Dobbs, Handbook on the Law of Remedies, § 3.6 (1973) (a person cannot be forced to accept a benefit that he or she does not want).

95. *See* Troppi v. Scarf, 31 Mich. App. 240, 254, 187 N.W.2d 511, 517 (1971).

96. 453 A.2d 974 (Pa. 1982).

sated and made whole.[97]

The benefits rule has also been criticized because it encourages parents to deny their love for the child or to deny that they are benefited from the birth in order to receive greater compensaton. The absurdity becomes apparent with the recognition that if parents "admit that the child is a welcome addition that will be loved, cherished, and properly raised, they may get nothing."[98] Justice Larsen has noted that:

> Society is disserved by a rule which "punishes" those parents who make the effort to raise an unplanned child and who give that child the love and emotional, social and economic support which will help that child become a person capable of returning love and care to his [or her] parents, while "rewarding" those parents who can prove to a jury that they cannot or do not provide their children with the love and emotional, social and economic support they need, thus producing children who themselves cannot or do not return any of these intangible benefits to their parents. Society favors and supports those families in which children—including those whose births were unplanned—receive from their parents the love and support they need to grow and develop into loving and supportive adults, yet with the application of the "benefit rule," 'a great anomaly becomes apparent; the more loving the parent, the smaller the damage award and the more the entire family will suffer as scarce economic resources are spread over a greater number of family members.'[99]

Although Justice Larsen believed that the emotional benefits of child raising should be deducted from the emotional trauma, he disagreed that the benefits rule should be applied so that defendants could deduct benefits twice, first from damages for child raising trauma and second from the actual expenses of raising the child, because this would in effect give windfalls to defendants.[100]

The best approach to the issue of damages in wrongful birth-cases was expounded by Justice Jiganti of the Appellate Court of Illinois in *Cockrum v. Baumgartner*.[101] Justice Jiganti refused to limit damages to pregnancy and birth related costs, because he did not believe that public policy justified a denial of full recovery for

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97. *Id.* at 981 (Larsen, J., concurring and dissenting).

98. Wilbur v. Kerr, 275 Ark. 239, 242, 628 S.W.2d 568, 571 (1982).

99. 453 A.2d at 981 (Larsen, J., concurring and dissenting) (quoting Kashi, *The Case of the Unwanted Blessing: Wrongful Birth*, 31 U. MIAMI L. REV. 1409, 1417 (1977)).

100. 453 A.2d at 981 n.1.

101. 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981). *Cockrum* involved two cases, one alleging a negligently performed sterilization operation and the other asserting negligent misdiagnosis of pregnancy, which were consolidated on appeal. In both cases, the trial court dismissed the counts which sought child raising expenses upon the holding in Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979). *See supra* note 48.

damages caused by the tortfeasors' negligence:

> 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. The uniqueness of life is in no way denigrated by a couple's choice not to have a child. Neither the individual nor society as a whole is harmed by the exercise of this choice. Recognizing this, the right to limit procreation through contraception and, to a limited extent abortion, has been held to come within a constitutionally protected "zone of privacy." . . . Regardless of motivation, a couple has the right to determine whether they will have a child. That right is legally protectible and need not be justified or explained. The allowance of rearing costs is not an aspersion upon the value of the child's life. It is instead a recognition of the importance of the parent's fundamental right to control their reproductivity. . . . We cannot endorse a view that effectively nullifies this right by providing that its violation results in no injury. For these reasons, we are not persuaded that public policy considerations can properly be used to deny recovery to parents of an unplanned child of the full measure of all damages proximately caused by a physician's negligence.[102]

The court also determined that the benefits rule has been misapplied in wrongful birth cases because the application permitted the emotional rewards of having a child to offset financial costs; therefore, benefits were not conferred upon the same interest which was harmed.[103] Thus, the emotional rewards of parenthood could not offset financial child rearing costs.[104]

VI. Conclusion

All proven economic losses, including the financial expenses of child raising, education and maintenance, should be recoverable in wrongful birth actions. Total recovery will fully compensate those parents who consciously and deliberately attempted to prevent the occurrence of childbirth. Tortfeasors must bear the full responsibility for the natural, probable consequences and all foreseeable damages directly resulting from their negligence.[105] Damages, as compensation to plaintiffs for injuries caused by a tortfeasor's breach of duty, are awarded to repair plaintiffs' injuries and to make them whole.[106] Courts must recognize that all expenses for

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102. 99 Ill. App. 3d at 273, 425 N.E.2d at 970 (citations omitted).

103. *Id.* at 274, 425 N.E.2d at 970. *See supra* text accompanying notes 12, 26.

104. 99 Ill. App. 3d at 274, 425 N.E.2d at 970 ("rewards [of parenthood] are emotional in nature and, great though they may be, do nothing whatever to benefit the plaintiff's injured financial interest"). *See* Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. Miami L. Rev. 1409, 1415 (1977).

105. W. Prosser, Handbook of the Law of Torts § 43 (4th ed. 1971).

106. F.V. Harper & F. James, Jr., The Law of Torts 1299-1301 (1956).

raising an unplanned, unwanted child are foreseeable damages which result directly from the tortfeasor's proven and established negligence. Partial recovery will encourage negligence and protect tortfeasors from full accountability for their wrongs.

Unlike the early decisions which first addressed the issue, recent adjudication of wrongful birth claims has resulted in parental recovery. However, not all parents have been awarded the same items of damages. Child raising expenses have been denied through both strict application and express rejection of the benefits rule. Both rationales misinterpret the benefits rule. The benefits rule can only be properly applied to offset the emotional trauma of child rearing by the emotional, intangible benefits inherent in raising a child. Obviously, this approach maintains that emotional distress damages are also within the natural and probable consequences of the tortfeasor's negligent acts. The intangible personal benefits of having a child cannot be properly applied to offset damages for tangible financial injuries to the parents; emotional and financial interests are entirely distinct.

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