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NOTE

WRONGFUL BIRTH IN THE ABORTION CONTEXT—CRITIQUE OF EXISTING CASE LAW AND PROPOSAL FOR FUTURE ACTIONS

INTRODUCTION

With increased recognition of the need for and desirability of family planning, couples are attempting to limit the size of their own families not only through preventing conception by sterilization and use of birth control pills, but also by terminating pregnancy through abortion. As birth control devices were becoming more popular there developed a new area of the law, referred to as wrongful birth actions, in which parents sued third persons in contract or negligence for unwanted births. Typically these actions have been against birth control manufacturers[1] and druggists[2] for producing or dispensing ineffective birth control pills, or against doctors for performing unsuccessful sterilizations.[3]

Recently, with the increased public approval of abortion, the phenomenon of wrongful birth suits is appearing in that context as well. The purpose of this article is to examine the development of the wrongful birth concept in the abortion area. It should be stressed that the subject of this note, wrongful birth actions, is not the same as so-called wrongful life actions. Wrongful life actions differ from those for wrongful birth in that the former are brought by individuals for the wrong of their very own existence. They present unique legal and philosophical problems which are not found in wrongful birth actions, problems which will not be discussed in this note.[4]

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[1] Whittington v. Eli Lilly & Co., 333 F. Supp. 98 (S.D.W. Va. 1971).

[2] Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

[3] *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. 1957). Among the more recent sterilization cases are Herrera v. Roessing, 533 P.2d 60 (Colo. App. 1975); Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974); Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973).

[4] *See* note 56 *infra* and accompanying text. For a discussion of the problem of assess-

In the abortion context, wrongful birth actions have arisen where the doctor has failed to diagnose pregnancy in time for the woman to seek an abortion.[5] They have also arisen where the doctor has failed to diagnose rubella in the mother during pregnancy or has failed to inform her of the high risk that rubella may cause the child to be deformed. Unaware of the attendant risks, the mother did not terminate the pregnancy, and the baby was born with a defect.[6]

This article will concentrate on these types of factual settings. The abortion type of wrongful birth actions will be analyzed against the background of other wrongful birth actions in the past few years. As will be seen, there has been little consistency in this area. Therefore, a suggested approach which would lead to more continuity in future decisions will be presented.

I. THE ILLUSORY TURNING POINT

Until 1971 plaintiffs had little success in wrongful birth actions. Courts were unwilling to grant recovery and dismissed such actions on the grounds that public policy prohibited recovery for the "blessing" of a child. The courts made a basic assumption that every child is such a joy to his or her parents that any recovery for the birth of that unexpected child is precluded.[7]

In 1971 in *Troppi v. Scarf*,[8] the Michigan Supreme Court held that a plaintiff may recover the expenses of rearing an unplanned child. The defendant in *Troppi* was a druggist who had negligently dispensed tranquilizers instead of birth control pills to the plaintiff. The court rejected the blessing doctrine.[9] It held that damages for wrongful birth are not so speculative as to pre-

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ing damages in wrongful life actions see Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513 (1966).

[5] Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

[6] Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

[7] Two cases which set forth this argument, and which have been frequently cited therefor, are Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934) and Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. 1957).

[8] 31 Mich. App. 240, 187 N.W.2d 511 (1971).

[9] *Id.* at 253, 187 N.W.2d at 517. The court also noted that, where the state so strongly advocated family planning as to include payments for contraceptives in its welfare program, it could not be said that public policy disfavored contraception. *Id.*

clude recovery, setting forth the benefit doctrine. This doctrine recognizes that a child brings certain benefits which should be subtracted from any detriment to determine the plaintiff's damages.[10]

Because this was the first instance in which a court had rejected the theories which had prevented recovery, *Troppi* was heralded by many as the turning point in the area of wrongful birth cases.[11] The case certainly seemed to indicate a complete reversal in the trend. The court made special note of the fact that contraception is within the constitutionally protected "zone of privacy" described in *Griswold v. Connecticut*,[12] and that the state cannot infringe on a right within that zone. "Since the State may not infringe upon this right," the court reasoned, "it may not constitutionally denigrate the right by completely denying protection provided as a matter of course to like rights."[13]

Troppi seemed to indicate that courts, in deciding wrongful birth cases, were at last recognizing that family planning deserved encouragement and protection. Since the *Troppi* decision,

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[10] The so-called 'benefit rule' is pertinent. The Restatement declares: '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.'

Id. at 254, 187 N.W.2d at 517-18, *quoting* RESTATEMENT OF TORTS, § 920 at 616 (1966).

[11] For a discussion of *Troppi*, its history, and its predicted impact on future wrongful birth cases see Thayer, *Liability to a Family for Negligence Resulting in the Conception and Birth of a Child*, 14 ARIZ. L. REV. 181 (1972); Note, *Busting, the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221 (1975); Note, *Misfeasance in the Pharmacy: A Bundle of "Fun, Joy and Affection?"*, 8 CAL. W.L. REV. 341 (1972); Note, *Birth of Healthy But Unplanned Child Due to Pharmacist's Negligence Held a Compensable Injury*, 3 SET. HALL L. REV. 492 (1972); Note, *Recovery of Child Support for "Wrongful Birth"*, 47 TUL. L. REV. 225 (1972), Note, *Negligently Filled Prescription for Birth Control Pill Results in Recovery for Birth of Normal Child*, 40 U.M.K.C.L. REV. 264 (1971-72); Comment, *A Married Couple Can Recover Damages for the Birth of a Healthy Child Which Resulted From a Pharmacist's Negligent Filling of the Couple's Prescription for Oral Contraceptives*, 38 BROOK. L. REV. 531 (1971); Comment, *Parents Allowed Recovery of Expenses in Having and Rearing an Unwanted Child Where Pharmacist Negligently Dispensed Birth Control Pills*, 3 CUMBER. SAM. L. REV. 220 (1972); Comment, *Cause of Action for Birth of Unwanted Child Due to Negligent Dispensing of Oral Contraceptives*, 76 DICK. L. REV. 402 (1972); Comment, *Damage Suits Against Pharmacists and Physicians Based on Negligence in Birth Control Treatments*, 13 WM. & MARY L. REV. 666 (1972).

[12] 31 Mich. App. at 253, 187 N.W.2d at 517, *citing* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[13] 31 Mich. App. at 253-54, 187 N.W.2d at 517 (footnote omitted).

abortion has also gained more general acceptance as a legitimate family planning method. *Roe v. Wade*[14] clearly established the constitutional right of a woman to terminate her pregnancy,[15] and thereby discredited the argument that public policy does not support abortions.

Not only has the public policy argument been stripped of its validity, but also the damages issue has been resolved in a logical manner; *Troppi* met the problem by applying the benefits rule and weighing the injury against the benefits conferred on the parents by the child.[16] Thus, when one looks at *Troppi* and *Roe* one can see that the two hurdles which had prevented recovery in earlier wrongful birth actions have been met. After those decisions, one would logically have expected an extension of wrongful birth recoveries to abortion cases. However, subsequent cases have cast some doubt on that expectation.

II. POST-*Troppi* DEVELOPMENTS

In cases decided after *Troppi* which involved sterilization, plaintiffs generally have not fared well. In *Terrell v. Garcia*[17] the defendant physician unsuccessfully performed a tubal ligation to sterilize the mother. Thereafter she gave birth to a normal healthy child and sued for the cost of rearing and educating the child. In denying recovery the court impliedly rejected *Troppi*, holding that public policy precluded recovery because the expense of a child is offset by the joy and companionship a child brings.

Coleman v. Garrison[18] was based on a factual situation similar to that in *Terrell*. Once again the court held for the defendant,

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[14] 410 U.S. 113 (1973). *Roe* struck down the Texas abortion statute, which excepted from criminality only those abortions performed to save the life of the mother, holding such statutes to be violative of the due process clause of the fourteenth amendment. The Court established that, during the first trimester of pregnancy, the abortion decision should be left to the medical judgment of the woman's attending physician; in the second trimester, the State may regulate the abortion procedure to promote its interest in the mother's health; and, in the third trimester, the State may regulate and even proscribe abortion except where necessary for the preservation of the mother's health. *Id.* at 164-65.

[15] *Id.* at 153.

[16] Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971). *See* note 10 *supra* and accompanying text.

[17] 496 S.W.2d 124 (Tex. Civ. App. 1973).

[18] 327 A.2d 757 (Del. Super. 1974).

and stated that there can be no cause of action for wrongful birth because to hold otherwise would be to rule as a matter of law that under certain circumstances a child is not worth the trouble and expense necessary to bring him into the world. The court also relied on the notion that damages would be too speculative.[19]

One sterilization case where the plaintiffs prevailed is *Betancourt v. Gaylor.*[20] The New Jersey Superior Court held that any loss or damage proximately resulting from a negligent sterilization operation, including the costs, emotional distress, and inconvenience of rearing the child, may be recovered. The opinion stated, "mere uncertainty as to the amount of damage should not preclude the right of recovery."[21] "In light of the law's recent recognition of a woman's right to control her bodily functions," the court reasoned, "the trier of the facts should be permitted to evaluate whatever damages plaintiffs are entitled to."[22]

Since 1971 there have been four major wrongful birth cases based on a third person's negligence after conception. In *Ziemba v. Sternberg*[23] the New York Supreme Court held that an action does lie against a doctor for his negligence in failing to diagnose a woman's pregnancy soon enough for her to terminate it. *Rieck v. Medical Protective Co.,*[24] a Wisconsin case based on facts similar to those in *Ziemba,* held that to allow recovery would violate public policy and encourage fraudulent claims. The cause of action was recognized in *Jacobs v. Theimer*[25] and *Dumer v. St. Michael's Hospital*[26] wherein parents sued their physicians for failing to diagnose that the wife had contracted rubella while pregnant. Although the two courts recognized a tort, both limited

[19] The court did go so far as to develop a new type of action called "wrongful pregnancy," in which damages would be limited to those incident to the unplanned pregnancy. *Id.* at 761. However, it found nothing to indicate the operation was performed negligently, and denied any recovery. It does not seem that any subsequent cases have adopted this idea of an action limited to the expenses and damages attendant to an unexpected pregnancy.

[20] 136 N.J. Super. 69, 344 A.2d 336 (1975).

[21] *Id.* at 73, 344 A.2d at 340.

[22] *Id.* at 72, 344 A.2d at 339, *citing* Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1967).

[23] 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974).

[24] 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

[25] 519 S.W.2d 846 (Tex. 1975).

[26] 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

damages to compensation for the burden related to the child's defects.

Given the expectations raised by the decisions in *Troppi* and *Roe*, why are the courts not permitting a plaintiff to receive the cost of rearing the child if the burden of proving the doctor's negligence in failing to diagnose the pregnancy or failing to diagnose rubella during the pregnancy has been met? To answer this question, the four cases described above will be analyzed closely to develop an understanding of the reasoning courts have heretofore followed. Some other meritorious approaches that have been propounded in dissenting as well as majority opinions will also be examined to formulate a model approach which could lead to more stability in this area of the law.

III. THE ABORTION CASES ANALYZED

A. *Rieck v. Medical Protective Co.*[27]

In *Rieck* the plaintiff mother sued her doctor for failing to diagnose her pregnancy in time for her to seek an abortion. The court held that to allow recovery would contravene public policy,[28] would award damages out of proportion to the defendant's culpability, and would encourage fraudulent claims.[29] The court noted that the parents did not attempt to place the baby for adoption to mitigate damages, and that no evidence had been presented that the child would be unwelcome.

Rieck represents a return to the blessing doctrine, emphasizing the intangible benefits the plaintiffs would receive from their unplanned child.[30]

> It is such retention of benefits—the parents keeping their child, and seeking to transfer only the financial costs of its upbringing to the doctor—that is a relevant factor in evaluating the public policy considerations involved.[31]

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[27] 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

[28] *Id.* at 518, 219 N.W.2d at 245. In support of its public policy argument the court cited Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973) and Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. 1957).

[29] 64 Wis. 2d 514, 519, 219 N.W.2d 242, 245 (1974).

[30] 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.

Id. at 518, 219 N.W.2d at 244.

[31] *Id.* at 519, 219 N.W.2d at 245.

The case reached the Wisconsin Supreme Court when the defendant appealed an overruling of its demurrer. Although at this point no factual resolution had been made, the court decided, as a matter of law, that every child brings happiness to his or her parents. Thus a physician cannot be held liable for the costs of raising such child, even though his negligence was the direct and proximate cause of the child's birth. On what basis can such an assumption be made? First, one must question the notion that every parent receives joy and happiness from his or her offspring. The number of child abuse cases in this country is an indicator that such an "axiom" may be an overstatement. Secondly, even where a parent does reap certain joys from the child, it is not necessarily true that those delights totally offset the burden, both emotional and economic, of the unplanned addition to the family. The Wisconsin Supreme Court did not mention the possibility of allowing the case to go to trial so that benefits and damages could be weighed in the particular family setting. Instead the court pointed out that the parents could have placed the child for adoption and avoided any injury.[32] The problem with this argument is that the decision to bear a child and the decision to give up one's own baby after it is born involve different emotional and philosophical problems. The decision to keep the child may be an indication of the satisfaction the parents are receiving, and thereby lessen the total damages figure, but it does not vitiate the action.

The second concern of the court in *Rieck* was that the amount of damages sought would be totally out of proportion to the culpability of the defendant doctor.[33] One need only consider the types of recovery granted in personal injury cases to see the emptiness of this argument. Plaintiffs in a wrongful birth action seek damages for a period of 18 to 21 years, the time during which the child would be a minor. In a personal injury case damages are frequently sought for injuries that will last the rest of a plaintiff's

[32] *Id.*

[33] 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.

Id. at 518, 219 N.W.2d at 244. "[T]he 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 245.

life. If a 20-year-old loses a limb due to a defendant's negligence his recovery may include pain and suffering and lost wages for a period of over 50 years. This would be no more out of proportion to culpability than in the *Rieck* situation.

Perhaps one reason behind the court's determination that any damages would be out of proportion to the physician's degree of fault is the fact that the court did not offset any of the economic injuries by the benefits. Had this been done, the court could have said the physician must bear all of the "hard money damages" while the parents enjoyed all of the intangible benefits.[34]

The third point set forth in *Rieck* is that, if the plaintiffs were granted recovery, the door would be opened to fraudulent claims. This fear was based on the importance in such an action of subjective testimony as to the parents' intent not to have any more children and as to their decision that, had they known of the pregnancy, they would have taken steps to terminate it.[35] Undoubtedly there are persons who will attempt to receive a windfall by asserting a fraudulent claim. However, should this be a basis for denying relief to the deserving plaintiff? This fear of facilitating fraudulent actions has arisen in other areas of the law, particularly regarding the tort of intentional infliction of emotional distress. In that area one court has held that administrative difficulties cannot justify denial of relief for serious invasion of mental tranquility.[36] *Battalla v. State*[37] emphasized that "[a]lthough fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction."[38] Whether or not a particular claim is valid is a matter to be assessed by the court and jury in each case. Here, as in the area of emotional distress, much evidence must be directed toward the plaintiff's state of mind. However, in both instances objective evidence can be used to prove the subjective elements. The plaintiff's actions, doctors' testimony, and the testimony of others who associate with the plaintiff often

[34] *Id.* at 518, 219 N.W.2d at 244-45.
[35] *Id.* at 519, 219 N.W.2d at 245.
[36] State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282, 286 (1952).
[37] 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).
[38] *Id.* at 240-41, 219 N.Y.S.2d at 37, 176 N.E.2d at 731.

reveal the necessary information about the plaintiff's state of mind. The court should not refuse to perform its function or to allow the jury to perform its duties merely because the task may be difficult. If recovery could be denied whenever fear of fraudulent complaints existed, plaintiffs' claims in many areas of the law would be refused without being heard by a jury.[39]

B. *Ziemba v. Sternberg*[40]

Ziemba also presented the issue of whether a woman could recover where the defendant doctor negligently failed to diagnose her pregnancy in time for her to obtain a safe abortion. The plaintiffs, husband and wife, sought not only damages incident to the pregnancy but also the cost of raising the child. Although the court did not deal with the issue of determining damages, it held that plaintiffs did have a cause of action and cited *Roe v. Wade*[41] in recognition of the courts' changing attitudes toward abortion.[42]

Ziemba offers a more constructive approach than does *Rieck*. While the latter ignored the implications of *Roe v. Wade*,[43] *Ziemba* recognized "that the United States Supreme Court has articulated the constitutional right of a woman to seek such a

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[39] If the right to recover for injury resulting from the wrongful conduct could be defeated whenever such dangers exist, many of the grievances the law deals with would be eliminated. That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of courts and juries to determine whether claims are valid or false.

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344, 347 (1961).

[40] 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974). For a discussion of *Ziemba* within the New York legal setting see Note, *Busting the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221, 229 (1975).

[41] 410 U.S. 113 (1973).

[42] 45 App. Div. 2d at 232-33, 357 N.Y.S.2d at 268-69. The court distinguished Stewart v. Long Island College Hospital, 35 App. Div. 2d 531, 313 N.Y.S.2d 502, *aff'd*, 30 N.Y.2d 695, 332 N.Y.S.2d 640, 283 N.E.2d 616 (1972), a previous wrongful birth case in which recovery was denied where defendant hospital refused to perform an abortion and plaintiff mother bore a deformed child. Here, the court noted, a different legal environment existed; abortions at the time of *Stewart* were illegal, whereas not only were they now legal, but a woman's constitutional right to obtain an abortion in the first trimester of pregnancy had been recognized by the Court in *Roe*. 45 App. Div. 2d at 232-33, 357 N.Y.S.2d at 268-69.

[43] 410 U.S. 113 (1973). *Roe* was decided on January 22, 1973, 5 months before Mrs. Rieck was informed erroneously by the defendant that she was not pregnant. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

medical procedure [as abortion] in the first trimester of pregnancy."[44] The entire *Ziemba* opinion is one addressed to the public policy arguments against allowing such a suit. It is an attempt to view the action in its current milieu.[45]

The *Ziemba* case reached the Appellate Division of the New York Supreme Court on defendant's appeal of a lower court ruling denying his motion to dismiss. Thus, the opinion was directed to the sufficiency of the complaint, and not to the damages issue. The court held only that damages sustained by the plaintiffs may flow from the physician's malpractice, and that the plaintiffs should be compensated. No suggestion was given concerning what damages might be considered proper. Thus, *Ziemba* has resolved only half of the problems raised by a wrongful birth abortion action, and provides no guidance as to the damages issue.

C. *Jacobs v. Theimer*[46]

In February 1975 the Texas Supreme Court decided *Jacobs*, a suit by a husband and wife against their physician for failing to diagnose that the wife had contracted rubella while pregnant and to advise them of the risks that the child might be deformed. They sought medical expenses for treatment and care of their child, who was born with defective major organs, and alleged that, had they been informed, the pregnancy would have been terminated. At the time of the wife's pregnancy, abortions other than for the safety of the mother were still illegal in Texas.[47] Nevertheless, the court held that, at the time the action arose, the question of whether to terminate the pregnancy was one for the parents to resolve.[48] The court saw no problem with finding

[44] 45 App. Div. 2d at 232-33, 357 N.Y.S.2d at 269, *citing* Roe v. Wade, 410 U.S. 113 (1973).

[45] *See* note 42 *supra*.

[46] 519 S.W.2d 846 (Tex. 1975).

[47] The plaintiff contracted rubella in July 1968 and the child was born in March 1969. *Id.* at 847.

[48] The trial court and the civil court of appeals granted summary judgment for the defendant on the ground that such an abortion as plaintiffs contended they would have sought was prohibited under the state's penal code. The Texas Supreme Court pointed out that the doctor would have suffered no criminal liability unless he actually advised the plaintiffs to terminate the pregnancy, and unless they did so upon such advice. Here plaintiffs did not complain that the doctor failed to tell Mrs. Jacobs to obtain an abortion but rather

that the doctor was under a duty to disclose the diagnosis of rubella and the risks attendant to continuing the pregnancy, and thus held that if a jury were to find he failed to meet that duty, plaintiffs would be entitled to the damages proximately caused by that failure.

The damages issue here differed from that of *Rieck* because the parents sought only those expenses necessary to treat the child's deformity and the damages for their own emotional suffering. This distinction played a crucial role in the court's decision. In *Gleitman v. Cosgrove,*[49] the court had denied recovery of child-rearing expenses on similar facts. The court in *Jacobs* agreed with the *Gleitman* holding, but distinguished it on the damages issue, stating that the public policy obstacles where an award would be based on "speculation as to the quality of life and as to the pluses and minuses of parental mind and emotion" do not exist where only the costs related to the physical defects of the child are sought.[50] However, what the court did in effect was to allow plaintiffs the value of the difference between a healthy child and a deformed child. The doctor was not responsible for the child's deformity; he could have done nothing to make that child healthy. The defendant's assumed negligence precluded the choice between seeking an abortion and risking the birth of a deformed child. Admittedly, the parents here were not seeking expenses for raising and educating their child, but the court made clear that, if they had, their claim would not have been sustained.

D. *Dumer v. St. Michael's Hospital*[51]

The Wisconsin Supreme Court in September 1975 held that a doctor who fails to diagnose rubella in a pregnant woman and to advise her of the possible effects of the disease on the fetus is liable for injuries sustained because of any deformity. The court required the parents to show that they would have sought an abortion for the wife had they been informed of her illness and its effects.

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only that the defendant should have given them information as to Mrs. Jacobs' condition and then, with the information she had a right to expect from her doctor, the decision would have been made by the plaintiffs themselves to terminate the pregnancy.

Id. at 848.

[49] 49 N.J. 22, 227 A.2d 689 (1967).

[50] 519 S.W.2d 846, 849 (Tex. 1975).

[51] 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

As in *Jacobs*,[52] the facts of *Dumer* occurred prior to the United States Supreme Court's decision in *Roe v. Wade*.[53] Nevertheless, the court opined that the choice of whether or not to submit to an abortion is for the parents to make. *Dumer* limited damages to those expenses reasonably suffered by reason of the child's deformities. In this regard the court expressly distinguished *Rieck*, noting that in the latter case the parents sought the expenses of raising a normal, healthy child.[54]

IV. OTHER VIEWPOINTS

Justice Weintraub's dissent in *Gleitman v. Cosgrove*[55] offers a constructive approach to wrongful birth actions where defendant's negligence was the cause of a mother's not obtaining an abortion. There both the parents and the child were suing. Weintraub agreed with the majority that the child's action must fail because the court was asked to recognize a right not to be born.[56] However, he emphasized that the parents do have a maintainable action. His opinion noted that ordinarily a parent's claim is derivative of the child's claim, and if in the instant case the parents' claim were viewed as derivative, it would not be allowable because the defendants did not injure the child.[57] The dissent stated, however, that the mother was personally injured by the denial of her right to choose whether or not to bear the child, and

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[52] Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

[53] Dumer v. St. Michael's Hosp., 69 Wis. 2d at 770 n.6, 233 N.W. 2d at 377 n.6 (1975). The child was born November 19, 1972, 2 months before the Supreme Court decided Roe v. Wade, 410 U.S. 113 (1973).

[54] *Id.* at 769, 233 N.W.2d at 376, *citing* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

[55] 49 N.J. 22, 227 A.2d 689 (1967).

[56] [T]he choice is between a worldly existence and none at all. Implicit, beyond this claim against a physician for faulty advice, is the proposition that a pregnant woman who, duly informed, does not seek an abortion, and all who urge her to see the pregnancy through, are guilty of wrongful injury to the fetus, and indeed that every day in which the infant is sustained after birth is a day of wrong. To recognize a right not to be born is to enter an area in which no one could find his way.

Id. at 63, 227 A.2d at 711.

[57] [I]t seems to me that the parent's claim for the infant's cure and care must ultimately presuppose it would have been to the child's own interest not to have been born. The claim for cure and care is the child's, whether it is asserted on the child's behalf against a wrongdoer or against the mother or father or anyone else who in law must furnish it . . . .

Id. at 64, 227 A.2d at 711.

that the father was also injured, because he was so directly involved in the mother's decision. Weintraub believed that the trier of fact should be allowed to measure the cost of losing that right. His opinion suggested trying to balance in some way the injury caused by having a deformed child with the pluses in the parent/child relationship and stressed that "[t]he pain of the parents must be measured against the joy they find in him [the child] as he is."[58] While Weintraub recognized the difficulty in placing a price on the loss of the choice whether or not to risk bearing a deformed child, he believed the law should compensate in some way.

There is much merit to this approach, which can be applied in the *Ziemba/Rieck* type of factual situation as well, because the key is that the parent was injured through loss of the right to choose whether or not to enter into a parent/child relationship. The result does not have to turn on whether or not the child was healthy.

Although *Terrell v. Garcia*[59] is a sterilization case, the dissenting opinion by Justice Cadena offers some arguments useful in formulating an approach to the abortion cases. While rejecting the social policy arguments of the majority, the dissent pointed out that *Griswold* and *Roe* have established the right of persons to prevent conception and terminate an existing pregnancy.

> It is, therefore, impermissible to say that social policy requires that a husband and wife be denied the right to limit the number of children which they will bring into the world, or that a person shall be allowed, by his negligent conduct, to frustrate the realization of the married couple's aim to limit the size of their family.[60]

The dissent criticized the majority for arguing that damages would be too difficult to prove. Analogies were drawn to actions by parents for loss of companionship and comfort upon the wrongful death of their children,[61] as well as to alienation of affection suits for loss of consortium.[62] If courts can place a price tag

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[58] *Id.* at 65, 227 A.2d at 712.

[59] 496 S.W.2d 124 (Tex. Civ. App. 1973).

[60] *Id.* at 128.

[61] *Id.* at 129, *citing* Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971); Lockhart v. Besel, 71 Wash. 2d 112, 426 P.2d 605 (1967); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1962); PROSSER, THE LAW OF TORTS § 121 at 930 (3d. ed. 1964).

[62] 496 S.W.2d at 129, *citing* Smith v. Smith, 225 S.W.2d 1001, 1006 (Tex. Civ. App. 1950).

on these losses, certainly they can do so in wrongful birth cases as well. As Justice Cadena emphasized, the fact that damages are difficult to ascertain is no reason for a court to refuse to even try to compensate the plaintiff.

The third point raised by Justice Cadena is that those factors which may mitigate damages do not defeat the action. He rejected the blessing doctrine, finding no basis for the assumption that the plaintiffs experience any joy and satisfaction from raising an unwanted child.[63] In his opinion, the birth of that child may be a catastrophe for the entire family.

> The doctor whose negligence brings about such an undesired birth should not be allowed to say, "I did you a favor," secure in the knowledge that the courts will give to this claim the effect of an irrebuttable presumption.[64]

In *Jackson v. Anderson*,[65] a sterilization wrongful birth case in which the action was upheld, the defendant contended that the normal birth of a healthy child precludes recovery on public policy grounds. There the plaintiff had been sterilized upon a doctor's advice because of difficulty with previous deliveries. The court stated that it is well established that prior to normal delivery of the child an action would lie. Thus defendant's contention would result in an anomalous situation, wherein the same plaintiff would be able to recover if the final hearing occurred before delivery. "[T]he fallacy in appellee's argument is clear: he suggests as vitiating liability a fact which mitigates damages."[66] In assessing damages the court pointed out that the child is to be looked upon as unplanned rather than as unwanted. Although at first glance this may seem a matter of semantics, the statement emphasizes that the damages the plaintiffs are entitled to are the expenses of raising this child that they did not plan, offset by the benefits that the child brings them. The court seems to be underlining the fact that the plaintiffs are *not* trying to argue that the

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[63] Perhaps these parents, in deciding that they did not want to pay the price for the enjoyment and pleasures which "normal" parents would derive from the birth of an unwanted child, were not acting as "normal" persons. But it is hornbook law that a tort feasor must take his victim as he finds him and has no right to insist on a "normal" victim.

Id. at 129-30.

[64] *Id.* at 131.

[65] 230 So. 2d 503 (Fla. Dist. Ct. App. 1970).

[66] *Id.*

child is unloved, but that nevertheless they suffered injury by the unexpected addition to the family.

V. A Viable Framework of Analysis

Various approaches to these actions have been examined to find some guidance in formulating a framework of analysis which will recognize the direction in which courts are going and overcome the weak points of past decisions. The two key issues are public policy and damages. Although they are interrelated, the simplest way to clarify the problems is to treat each separately, resolving one at a time.

A. *Public Policy*

With respect to the public policy arguments, the courts must view these cases in the current social setting. When the blessing doctrine was first propounded in 1934,[67] family planning was practically unheard of. Contraceptives were not yet accepted, and abortions were performed in secret by disreputable doctors or quacks in unsanitary surroundings. The average family was larger than today's family.[68] The woman's role was to bear and raise children. Today, in contrast, there is a major concern with the population explosion, and parents are realizing what an economic and emotional burden a large family can be. Many couples plan how many children they will have and how far apart in age they will be. Abortions, although still controversial, are no longer shrouded in secrecy, and are performed by respected members of the medical profession on women of all ages and life styles. The public recognizes that for some people a child is not a blessing.

Not only has the social setting changed radically since 1934, but the legal setting has also. *Roe v. Wade* made clear that abortions in the first trimester are legal, and recognized that a woman has a constitutional right to choose whether or not to terminate her pregnancy during that period.[69] In a number of states it has been held that if Medicaid programs reimburse for life-saving abortions, they must also bear the cost of any nontherapeutic

[67] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), is the case in which the blessing doctrine gained its popularity.

[68] In 1910 the average family size was 5 children per married woman; in 1940 that average was 3.2 children and between 1957 and 1959 the average was only 2.8 children. L. Dublin, Factbook on Man 22 (2d ed. 1965).

[69] 410 U.S. 113, 153 (1973).

abortions performed on women eligible for Medicaid.[70] These developments indicate that today public policy favors non-therapeutic abortions.

The other portion of the public policy argument is that by allowing the action, a court would, in effect, be deciding that no life is better than life.[71] This may be very true in a wrongful life action where the damage to plaintiff is his very existence.[72] However, this is not the case in wrongful birth actions. In the latter situation, the parent is not bringing a derivative action for the child but rather is suing in his or her own right. There is no issue of whether or not a person would have been better off had he never been born. The allegation is that due to the doctor's negligence the plaintiff was unable to make an informed choice whether or not to take on the parent/child relationship. It is the mother's right to decide if she wants the child to be born. If someone deprives her of that right she has been wronged. The father has also been wronged due to the important part he plays in that decision. If a doctor breaches his duty of reasonable care, and as a result of such breach the mother is unable to make an informed choice to continue or terminate her pregnancy, she should be compensated for the damages proximately caused by such negligence. Public policy and *Roe v. Wade* mandate that every protection be given that right to choose.

B. *Damages*

Recognizing that denial of the right to choose to have an abortion is an injury, one must next determine how that injury is to be compensated. In evaluating the extent of the damages

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[70] *See, e.g.*, Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974).

[71] *See* Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974); Gleitman v. Cosgrove, 49 N.J. 22, 29-30, 227 A.2d 689, 693 (1967).

[72] Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513 (1966), points out that the traditional measure of damages is a comparison of the plaintiff's position before the damage and the worsened position in which he finds himself as a result of the tort-feasor's act. The article sets out the crucial problem in a wrongful life case:

> In our case, however, no comparison is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage.

Id. at 529.

three situations must be considered. The first is where the parent wanted to have a child and the doctor negligently failed to diagnose the pregnancy. Here the parents were not given an opportunity to choose whether or not to terminate the pregnancy, but there have been no damages. They would have chosen to bear the child anyway.

The second category is where the parent wanted a child and knew of the pregnancy, but the doctor negligently failed to diagnose rubella or some other occurrence which is likely to cause birth defects. Had the parents been fully informed, they might have terminated the pregnancy to avoid the risk of deformity. Here the damages turn on whether or not the baby is born deformed. If the child is normal, the parents have nothing to be compensated for. However, if the child is deformed, they have a compensable injury. In both instances the parents were denied the right to make an informed choice whether or not to have the baby and take the attendant risks. In the first there was nothing for which to compensate them, because they had wanted a child and the child was healthy. In the second they were injured by the birth of the deformed child when they could have avoided the birth had the doctor used reasonable care. The measure of the damages here is not the difference between a healthy child and one that is deformed. The option open to the parents involved either the risk of a deformed child or no child at all. Thus, the correct measure of damages is the full cost of raising this child offset by the benefits the child brings.

The third category is that of the woman who would have aborted had the doctor informed her she was pregnant. Here the injury does not turn on whether or not the baby is healthy. She has been damaged by being denied the opportunity to terminate the pregnancy. The child, regardless of the fact that it is healthy, was not wanted or planned for. Although unplanned, that child will probably be loved and bring happiness to the parents. However, it will also bring all the hardships that the parents had wanted to avoid. For these, offset by the benefits, the parents are entitled to compensation. But for the doctor's negligence, damage could have been prevented.

In wrongful birth actions determining the cost of the parents' injuries involves a weighing of the pluses and minuses caused by the unplanned addition to the family (or, in the rubella cases, by

the deformed child). The circumstances of the individual family cannot be ignored. If the plaintiffs made no effort to terminate their parental rights so that someone could adopt the child, that may indicate that they will receive joy and satisfaction from the child. Thus, it would reduce the damages recoverable. However, such failure to place the child for adoption may also be because the plaintiffs could not face the emotional trauma of giving up their own child after its birth. In such case the damages would not necessarily be greatly reduced as a result. In measuring the injury the court must look to the size of the family and its financial situation. Some pertinent questions may be: Did the mother have a career; had the plaintiffs determined for philosophical or emotional reasons that they did not want any (or any more) children; what age are the plaintiffs? All of these considerations must be a part of the process of measuring damages. It is admittedly a difficult task to view the full picture, examining not only the economic factors but also such intangible aspects as emotions. Nevertheless, it is not an impossible task, and is not any more difficult than determining such injuries as pain and suffering[73] or loss of consortium.[74] No amount of money can place the plaintiffs in the position of not having that child, but some effort must be made to compensate them.

CONCLUSION

This article has examined wrongful birth actions in the abortion area against the background of earlier wrongful birth cases. The early cases, which arose in the context of contraception and sterilization, denied recovery on the grounds that to allow the action would violate public policy and would require speculation and conjecture in the assessment of damages. *Troppi*[75] rejected those theories, allowing recovery of the expenses incident to raising a healthy but unplanned child. Thereafter, many predicted an increased willingness of the courts to uphold wrongful birth actions not only in the area of contraceptives but also in steriliza-

[73] Justice Jacobs' dissent in Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967), was addressed to the argument that damages would be too speculative. He pointed out that if a judicial system can grant damages for pain and suffering it should be able to evaluate the injury to the plaintiffs in a wrongful birth case. *Id.* at 50, 227 A.2d at 704.

[74] *See* note 62 *supra* and accompanying text.

[75] Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

tion and abortion cases. *Roe v. Wade*[76] seemed to open the door further in the abortion cases by invalidating the public policy argument. However, the past four years have not produced the expected trend. As this article has discussed, the courts have acted with little predictability in wrongful birth actions. They have confused issues, ignored important cases, and isolated themselves from current social and philosophical attitudes.

The article has analyzed the four post-*Troppi* wrongful birth cases dealing with abortions. As has been discussed, only *Ziemba*[77] recognized the impact of *Roe*. *Rieck*[78] was written as if the case were being decided in the 1930's. The policy arguments and fear of speculative damages so prevalent in early cases were the foundation of the opinion. *Jacobs*[79] and *Dumer*[80] recognized the right of a woman to choose whether or not to bear a child, even though each was based on facts arising before *Roe*. However, the damages in each case were limited to those incident to the baby's deformity.

Having examined these four cases, as well as other opinions in wrongful birth actions, this article has developed an approach for handling an action where the doctor's alleged negligence precluded any opportunity for the parent to seek an abortion. The basic premise is that the wrong to the parent has been denial of the right to choose whether or not to continue the pregnancy. If the parent can prove that a third person breached his duty of reasonable care and in so doing denied the parent that choice, he should be allowed to present the issue of damages to the trier of fact. *Roe* signified the importance of that right to choose; to then deny recovery against an individual whose negligence prevents exercise of that option would be to vitiate that right. Furthermore, the finding of law that a child confers pure bliss on its parents has been shown to be an unwarranted presumption. Any benefits the plaintiffs' child may confer on them are mitigating factors; they should not destroy the cause of action.

In approaching the damages issue the above discussion has propounded balancing benefits and injuries as first suggested in

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[76] 410 U.S. 113 (1973).

[77] Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974).

[78] Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

[79] Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

[80] Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

Troppi. Before any decision can be reached, however, the case must be placed into one of three categories. Where the parents wanted a child but were not informed of the pregnancy, they probably have no actual damages; where they wanted a child but were not informed of the likely possibility that the child would be deformed, damages turn on whether the child is healthy; where they did not want a child, damages do not depend on the baby's being abnormal. Having determined whether the plaintiffs have any actual damages, one then can apply the method of weighing the pluses and minuses the child has brought the parents. In so doing, the circumstances of that particular family must be considered, and both the emotional and the more tangible factors must be weighed.

What will happen in future abortion wrongful birth cases remaims to be seen. If the cases look to *Roe, Troppi*, and *Ziemba* for guidance, and follow an approach similar to that set forth above, plaintiffs will have a chance to prove their cases. However, if the courts continue to ignore those cases, and to rely on the antiquated arguments that originated in an entirely different social and legal setting, plaintiffs will have little success.

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