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Notes and Comments

Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Consideration

I. Introduction

Over the last twenty years, parents wishing to avoid giving birth to children for any number of reasons, have made increasing use of the technique of voluntary sterilization.[1] With the decline in the popularity of "the pill,"[2] voluntary sterilization has become the most widely used method of contraception in the United States.[3] This is even more common among couples who have completed their families and are permanently opting for no more children.[4]

Along with the increasing use of sterilization has come a new cause of action which has become known as wrongful pregnancy or wrongful conception.[5] Typically, the wrongful preg-

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1. N.Y. Times, Dec. 9, 1984, at 29, col. 1-6.

2. *Id.* at col. 5. "Birth control pills were used by 23.9 percent of married couples in 1965, 36.1 percent in 1973 and 19.8 percent in 1982, the report showed." *Id.*

3. *Id.* at col. 1-2. Based on interviews with 7,969 women in 1982, the National Center for Health Statistics found, "18 percent of couples with partners 15 to 44 years old avoided pregnancy through sterilization of either partner, while 16 percent chose birth control pills. Condoms were used by 7 percent, diaphragms by 5 percent and intrauterine devices by 4 percent." *Id.*

4. *Id.* at col. 4. *See also* Comment, *By What Measure?: The Issue of Damages for Wrongful Pregnancy*, 16 N.C. CENT. L.J. 59, 59 (1986).

5. Cheslik, *Wrongful Conception*, 35 FED'N INS. COUNS. Q. 289, 289 (Spring 1985): American courts have long recognized a legal cause of action when negligence causes death. It seemed contrary to law and public policy, however, to recognize a cause of action when negligence causes pregnancy and life. Nevertheless, American society has changed from an agricultural to an urban society and a rural to an urban lifestyle. Family planning and population control have been emphasized, and women have had an increased role working in jobs other than those associated with the home. With these changes in attitude, the addition of an unplanned and unwanted child has come to be viewed by many as an injury for which compensa-

nancy cause of action arises when a husband and wife request that a sterilization procedure, a tubal ligation in the female or a vasectomy in the male,[6] be performed so that no future children will be born to the couple; the procedure is performed, and the wife later becomes pregnant.[7] A healthy child is born, and the couple then sues the physician,[8] the hospital,[9] or both.[10]

In deciding such cases, the court must first decide whether or not the law of the state recognizes the wrongful pregnancy cause of action.[11] If so, the plaintiffs must prove that the necessary elements of the tort of negligence are present including a

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tion ought to be available. Courts have accommodated this "modern" attitude by using tort law to provide a cause of action. Persons who sought to avoid conception have been allowed to bring actions against negligent doctors or providers of medical services whose misfeasance resulted in pregnancy and birth of unwanted, unplanned children.

Id.

6. Strausberg, *The Failed Tubal Ligation*, 21 TRIAL 30 (May 1985). Sterilization in the female is accomplished by a procedure known as a tubal ligation. There are a number of techniques used to accomplish this procedure, the ultimate goal of which is to block the Fallopian tubes and prevent the sperm from uniting with the egg. Such a procedure may fail as a result of physician negligence by the physician missing a tube, cauterizing or ringing the wrong structure, or by inadequate burning or banding of the tube.

[O]n the average, there is a 'natural' failure rate of four to eight per thousand for all techniques. The reason is either a process called recanalization or one called fistule formation. In both, a channel forms in the gap or defect created in the tube that allows sperm and egg to unite.

Id.

See also Lombardi, *Vasectomy*, 10 SUFFOLK U.L. REV. 25, 32 (1975), in which the author describes the male sterilization procedure. Since some sperm can remain stored in the seminal vesicle and prostate for several weeks following a vasectomy, a negative semen analysis must be accomplished before the patient may be declared surgically sterile. *Id.* at 33. Spontaneous recanalization, where the vas rejoin, occurs in .5 to 1.0% of the cases. *Id.* at 33 n.60. Since this has been determined to be as likely a possibility as physician negligence, it has been suggested that res ipsa loquitur should not apply to these procedures. *Id.* at 44 n.132.

7. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (request for tubal ligation); University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983) (request for vasectomy).

8. *See, e.g.*, Wilber v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982).

9. *See, e.g.*, Fulton-DeKalb Hosp. Auth. v. Graves, 252 Ga. 441, 314 S.E.2d 653 (1984).

10. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8 (Del. 1975).

11. *Compare* Byrd v. Wesley Medical Center, 237 Kan. 215, 225, 699 P.2d 459, 468 (1985) ("As a matter of public policy, the birth of a normal and healthy child does not constitute a legal harm for which damages are recoverable.") *with* Macomber v. Dillman, 505 A.2d 810, 813 (Me. 1986) ("[I]t is clear that the necessary elements of a cause of action in negligence have been set forth against the defendants.").

duty owed, breach of that duty, proximate cause, and damages.[12]

This Comment concerns itself with the element of damages and, specifically, with the damages related to the costs to the parents of raising a healthy child born as a result of facts similar to those outlined above. Part II of this Comment explores the development of the wrongful pregnancy cause of action. Part III considers the majority and minority views regarding the cause of action and the issue of child rearing damages. Part IV discusses the public policy rationale which underlies the majority view and suggests an alternative approach. Finally, Part V concludes that child rearing damages should be approved by all jurisdictions because logic and adherence to fundamental tort principles are preferable to vague reference to public policy. An Appendix, following Part V, details the leading cases from each state on these issues as of this writing.

II. Background

A. *Development of the Cause of Action for Wrongful Pregnancy*

The new cause of action for wrongful pregnancy, which is based upon medical malpractice, traces its roots to a 1934 case decided by the Minnesota Supreme Court. In *Christensen v. Thornby*,[13] the plaintiff's wife had been advised by the defendant physician that it would be dangerous to her health for her to bear children. Consequently, the defendant performed a vasectomy on the plaintiff, and sometime thereafter, the plaintiff and his wife, relying on the defendant's advice, resumed sexual relations. The plaintiff's wife then became pregnant. The plaintiff did not allege negligence in this early case, but he relied solely on the defendant's failure to fulfill his promise regarding the outcome of the operation.[14]

The court decided that the operation was not illegal or

12. W. PROSSER & W. KEETON, THE LAW OF TORTS § 30, at 164-65 (1984). *See also* Strausberg, *supra* note 6, at 32 (author explains that plaintiffs must prove the non-damage elements through often complex showings requiring expert witnesses). The explanation of sterilization procedures will not be discussed in this Comment.

13. 192 Minn. 123, 255 N.W. 620 (1934).

14. *Id.* at 124, 255 N.W. at 621.

against public policy.[15] However, the court sustained the defendant's demurrer because the plaintiff's complaint was based upon deceit. Such an action requires the plaintiff to prove not only that there was a false representation, but also fraudulent intent on the defendant's part — and this the plaintiff was unable to prove.[16] Since the plaintiff did not allege negligence, his action failed.[17]

The court noted that the purpose of the sterilization procedure was to prevent injury to the mother and not to prevent the expense of childbirth: "The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child."[18] Thus, this early decision was based partly upon a theory that would have profound impact on courts deciding this issue in the 1970's and 1980's: that a child is a blessing and not a detriment to its parents. The *Christensen* court completed its opinion by stating, "[a]s well might the plaintiff charge the defendant with the cost of nurture and education of the child during its minority."[19] These words were especially prophetic because this issue has become the one with which courts have had the most difficulty in the modern cases.

After *Christensen,* several other cases arose with similar issues. In *West v. Underwood,*[20] Mrs. West gave birth by Caesarian section to a child and, as a result of this operation, suffered an abdominal rupture and a toxic condition. When she again became pregnant four years later, she consulted the defendant physician who decided that she should have a second Caesarian section followed by a tubal ligation. The physician delivered the child but neglected to perform the tubal ligation. The plaintiff was subjected to another operation because of complications which the plaintiff attributed to the defendant's negligence. The plaintiffs, Mr. and Mrs. West, urged that the defendant's failure to sterilize the plaintiff in the second Caesarian section was the proximate cause of the need for the third operation. The New Jersey Court of Errors and Appeals held that such negligence, if

15. *Id.* at 125, 255 N.W. at 621.
16. *Id.* at 126, 255 N.W. at 622.
17. *Id.*
18. *Id.*
19. *Id.*
20. 132 N.J.L. 325, 40 A.2d 610 (1945).

found by the jury, would entitle the plaintiffs "to recover for all pain and suffering, mental and physical, together with loss of services and any other loss or damage proximately resulting from such negligence."[21]

The first case to base the damages on family planning rather than physical injury to the mother was *Shaheen v. Knight.*[22] Plaintiff, the husband, contracted with the defendant physician for a vasectomy but the procedure failed, and the plaintiff's wife gave birth to their fifth child. The plaintiff did not allege negligence but, like the plaintiff in *Christensen,* sued the defendant on the basis of breach of contract. The case, decided in 1957, turned on the court's opinion that the plaintiff had suffered no damages. The court said:

> The only damages asked are the expenses of rearing and educating the unwanted child. We are of the opinion that to allow damages for the normal birth of a normal child is foreign to the universal public 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 plaintiff Shaheen will have in the rearing and educating of this, [plaintiff's] 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, 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.[23]

Thus, from a county court in Pennsylvania came the genesis of another theory with which modern courts have struggled — whether it was reasonable to hold that plaintiffs in certain circumstances may have mitigated their damages by adoption or abortion.

In *Ball v. Mudge,*[24] Mrs. Ball had previously given birth to three children, all by Caesarian section. The defendant physician had counselled this couple that a fourth such procedure

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21. *Id.* at 326, 40 A.2d at 611.
22. 11 Pa. D. & C. 2d 41 (C.P., Lycoming County 1957).
23. *Id.* at 45-46.
24. 64 Wash. 2d 247, 391 P.2d 201 (1964).

would be inadvisable. In addition, the couple did not want the expense of a fourth child. The case, therefore, involved both the health of the mother and the family planning aspect.

The physician performed a vasectomy on the plaintiff which failed, and a fourth child was delivered by Caesarian section. Fortunately, there were no adverse complications for the mother. The plaintiffs' suit was based both on contract and negligence, with the plaintiffs contending that the lack of post-sterilization testing of the husband had led to the fourth pregnancy. The defendant cited both *Christensen* and *Shaheen* and asked the court to rule for him "because the birth of a normal child without extraordinary pain, suffering or abnormal discomfort to the mother during pregnancy, delivery and recuperation, cannot be damage compensable in law."[25]

The court declined to so rule, but sustained the verdict for the defendant physician for several reasons. First, the court found that it was questionable whether post-operative testing was the recognized standard of practice in the medical community.[26] Second, the plaintiffs had not established that negligence or breach of contract had been the proximate cause of the pregnancy because recanalization could have occurred.[27] Third, the jury could have reasonably concluded that there were no damages in the birth of a normal child, whom the plaintiffs refused to put up for adoption, because the benefits or blessings of having such a child would far outweigh the cost of such a birth.[28]

Finally, in 1967, the cause of action came of age. In *Custodio v. Bauer*,[29] Mr. and Mrs. Custodio sued the defendant

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25. *Id.* at 248-49, 391 P.2d at 203.

26. *Id.* at 249, 391 P.2d at 203.

> The contention that the standard of practice in Seattle made post-operative testing mandatory was in dispute. Respondent testified, "[s]ome doctors do and some don't." Dr. Jack N. Nelson, a genitourinary surgeon with extensive experience in the performance of vasectomies, testified that he knew of no standard of practice in the community in that regard. The absence of an accepted standard of practice is due partially to the fact that the operation is usually performed in the physician's office rather than a hospital.

Id.

27. *Id.* at 249, 391 P.2d at 203-04. For a discussion of "recanalization," see *supra* note 6.

28. *Id.* at 250, 391 P.2d at 204. There were several other factors in the court's decision but they are not applicable to this discussion.

29. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

physicians for damages when a negligently performed sterilization procedure on Mrs. Custodio resulted in the birth of the couple's tenth child.[30] The court, after a lengthy discussion of the earlier cases,[31] allowed damages for the costs of the unsuccessful operation,[32] physical complications,[33] mental, physical, and nervous pain and suffering,[34] measurable economic changes in the status of other family members,[35] and child rearing costs offset by any benefit received by the parents "to the interest to be protected."[36]

With remarkable forethought, the *Custodio* court became not only the first court to truly recognize the cause of action for wrongful pregnancy, but also applied one of the most liberal definitions of damages.[37] Unfortunately, as Parts III and IV of this Comment will show, this definition has become the minority view of the American courts which have grappled with this question.

B. *The Law of Torts as Applied to Wrongful Pregnancy*

Wrongful pregnancy or wrongful conception has been defined as "an action brought by the parents of a healthy, but unplanned, child against a physician who negligently performed a sterilization or abortion."[38] Once the plaintiffs have proved this negligence on the part of the physician, the court must decide what types of damages will be allowed. Such damages ought to be determined by the recognized standards of tort law.

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30. *Id.* at 312 n.6, 59 Cal. Rptr. at 469 n.6.

31. *Id.* at 318-22, 59 Cal. Rptr. at 473-75.

32. *Id.* at 322, 59 Cal. Rptr. at 475.

33. *Id.* at 323, 59 Cal. Rptr. at 476.

34. *Id.*

35. *Id.* at 323-24, 59 Cal. Rptr. at 476.

36. *Id.* at 324, 59 Cal. Rptr. at 476. *See also infra* notes 185-195 and accompanying text.

37. *See* Comment, *supra* note 4, at 65.

38. Nanke v. Napier, 346 N.W.2d 520, 521 (Iowa 1984) (citing Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 581, 667 P.2d 1294, 1296 n.1 (1983); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 465, 656 P.2d 483, 487 (1983)). Wrongful pregnancy or wrongful conception should not be confused with two similar but different causes of action: " 'wrongful birth' [is] a claim brought by parents of a child born with birth defects; and . . . 'wrongful life' [is] a claim brought by the child suffering from such birth defects." *Nanke*, 346 N.W.2d at 521.

Section 901(a) of the Restatement (Second) of Torts provides that the purpose of damages in tort is "to give compensation, indemnity or restitution for harms."[39] This involves placing the injured party as nearly as possible in the position he occupied prior to the tort.[40] When physical or mental harm is proved, money damages are given as compensation.[41] Other damages, such as lost earnings, are compensated through the principle of indemnity by approximating "the pecuniary harm the injured person has suffered or is likely to suffer in the future."[42]

A second purpose of tort damages is the deterrence of wrongful conduct.[43] This purpose has distinct relationships to criminal law and was formulated to prevent injured parties from taking the law into their own hands via self-help.[44] Punitive damages, designed to serve this purpose, encourage the use of the court system, thereby promoting a more orderly society.

The Restatement also provides that, in the overwhelming majority of instances, an injured party should be able to recover damages for all[45] the harm legally caused[46] by the tortious conduct. Therefore, if negligence has been proved by the plaintiff, one would expect redress for any consequences of the defendant's actions which the court has found harmful to the plaintiff.

In applying these standard damage rules to the fact patterns before them, the courts from *Custodio* to the present have allowed the plaintiffs to recover any or all of the following:

1) hospital and medical expenses incurred for the sterilization procedure;[47]

2) cost of a properly performed (redone) sterilization procedure;[48]

3) hospital and medical expenses incurred for the unwanted

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39. RESTATEMENT (SECOND) OF TORTS § 901(a) (1977).

40. RESTATEMENT (SECOND) OF TORTS § 901 comment a (1977).

41. *Id.*

42. *Id.*

43. RESTATEMENT (SECOND) OF TORTS § 901(c) (1977).

44. RESTATEMENT (SECOND) OF TORTS § 901 comment c (1977).

45. RESTATEMENT (SECOND) OF TORTS, Introductory Note to Title B of Chapter 16 (1965).

46. RESTATEMENT (SECOND) OF TORTS § 917 (1977).

47. Custodio v. Bauer, 251 Cal. App. 2d 303, 322, 59 Cal. Rptr. 463, 475 (1967).

48. Flowers v. District of Columbia, 478 A.2d 1073, 1074 (D.C. 1984).

pregnancy and birth;[49]

4) pain and suffering connected with the pregnancy and birth;[50]

5) loss of earnings by the mother during pregnancy;[51]

6) loss of consortium;[52]

7) mental anguish and emotional distress;[53] and/or

8) cost of rearing and educating the child.[54]

C. *Three Views Toward Child Rearing Damages*

Damages for child rearing costs have occupied much of the courts' attention recently. The courts have taken three views toward this category of damages.

> "The first view is that the parents may recover only those damages which occur as a result of pregnancy and birth, and may not recover the costs of rearing the child.
>
> "A second view allows the parents to recover all damages and expenses mentioned above, but also includes the costs of [rearing] a child. This is often called the 'full damage rule'. . . .
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> "A third view, sometimes called the ordinary 'tort-benefit rule' allows the recovery of all damages covered in the above two views, but requires a deduction for the benefits that the parents will receive by virtue of having a normal, healthy child."[55]

This third view has been the source of some controversy.[56] It is based upon section 920 of the Restatement (Second) of Torts,[57] which contemplates that damages to a particular interest of the plaintiff will only be reduced to the extent that the same interest of the plaintiff has been benefited by the defend-

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49. Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984).

50. Hartke v. McKelway, 526 F. Supp. 97, 104 (D.C. 1981).

51. Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).

52. Macomber v. Dillman, 505 A.2d 810, 813 (Me. 1986).

53. Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982).

54. Ochs v. Borrelli, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982).

55. Byrd v. Wesley Medical Center, 237 Kan. 215, 216, 699 P.2d 459, 461 (1985) (quoting the trial judge) (citations omitted).

56. *See, e.g.*, Comment, *One More Mouth to Feed: A Look at Physicians' Liability for the Negligent Performance of Sterilization Operations*, 25 ARIZ. L. REV. 1069, 1074-76 (Fall 1983); Comment, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1323-26 (1982).

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

ant's tort.[58] Some judges have argued that the comments following section 920 illustrate that the emotional interest which has been benefited (the joys of raising the child) should be considered as separate from the financial interest which has been damaged (the expense of raising the child) and that the benefit should not offset and lessen the damages for which the defendant is liable in this instance.[59] This was the position adopted in *Custodio,* the original wrongful pregnancy case.[60]

Other courts argue for a broader interpretation of the "interest"[61] where the financial burdens and the emotional benefits are merely parts of one larger "family interest"[62] and require that all the circumstances, such as family size, income, and age of the parents, be considered in order to determine whether the child is a benefit to its parents.[63] Still other courts have simply decided to ignore the Restatement's "same interest" limitation and weigh the pecuniary damages against the noneconomic

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58. RESTATEMENT (SECOND) OF TORTS § 920 comment b (1977). "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited." *Id.*

59. *See, e.g.,* University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 589, 667 P.2d 1294, 1304 (1983) (Gordon, Vice Chief Justice, concurring in part and dissenting in part):

> A proper application of the "same interest" requirement in a wrongful pregnancy case would require that pecuniary harm of raising the child be offset only by corresponding pecuniary benefit, and emotional benefits of the parent-child relationship be applied as an offset only to corresponding emotional harm.

Id. (citations omitted).

60. 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 476 (1967):

> [T]he examples given in the Restatement contemplate a benefit to the interest to be protected. If the failure of the sterilization operation and the ensuing pregnancy benefited the wife's emotional and nervous makeup, and any infirmities in her kidney and bladder organs, the defendants should be able to offset it.

Id.

61. *See* Comment, *supra* note 56, at 1075 (citing several cases including Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982) and Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977)).

62. *See, e.g.,* Troppi v. Scarf, 31 Mich. App. 240, 256-57, 187 N.W.2d 511, 518-19 (1971).

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

> The essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. . . . That the benefits so conferred and calculated will vary widely from case to case is inevitable.

Id.

benefits.[64]

In any event, most of the courts which have considered this issue have subscribed to the first view and have simply refused to consider awarding child rearing damages at all.[65] The following reasons have been given for this refusal:

1) a child is a blessing, not a detriment, and parents are not damaged by the birth of a healthy child;[66]

2) the child will be harmed emotionally when he finds out that he was not wanted and was reared with another's funds;[67]

3) the state should not meddle with the integrity of the family unit;[68]

4) child rearing damages are too speculative and uncertain, necessitating prophecy and difficult burdens of proof;[69]

5) such a damage award will be unfair to the physician and out of proportion to his negligent act;[70]

6) child rearing damages will promote fraudulent claims;[71]

7) the cause of action relates only to the pregnancy;[72]

8) the issue is one for the legislatures, not the courts, to decide;[73] and

9) the reluctance of courts to apply principles of mitigation of damages which would require abortion or adoption.[74]

Courts adhering to this majority position rely heavily on public policy.[75] Trends on this issue are discussed in the next section, while the specific policy arguments listed above will be addressed in Part IV.

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64. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 260, 445 A.2d 883, 886 (1982): "we recognize that this balancing test requires the jury to mitigate economic damages by weighing them against noneconomic factors . . . ." *Id.*

65. *See* Comment, *Wrongful Life and Wrongful Pregnancy*, 9 J. Juv. L. 159, 161-62 (Wtr. 1985).

66. Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984).

67. Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982).

68. Wilber v. Kerr, 275 Ark. 239, 243, 628 S.W.2d 568, 571 (1982).

69. Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975).

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

71. *Id.*

72. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974).

73. Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983).

74. Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).

75. *See infra* notes 220, 239, 251, 257, 263, 272, 275, 287, 300, 335, 339, 343, 363, 386, and accompanying text.

III. Trends

As of this writing, thirty-three states and the District of Columbia have ruled on this issue. One state[76] has held that no damages are recoverable. Twenty-six jurisdictions[77] have allowed most normal tort damages, but have disallowed child rearing costs. Six jurisdictions[78] have allowed child rearing damages with an offset for the benefits gained from parenthood. One state[79] has allowed child rearing damages with no offset.

Clearly, therefore, the majority trend in the United States has been to allow most normal tort damages to be recovered, with the exception of child rearing costs. Furthermore, of the eleven jurisdictions[80] to rule on this matter as an issue of first impression since 1984, only one has failed to follow the majority trend. The one exception, Nevada, has ruled that no damages are recoverable.[81]

From a purely statistical viewpoint, therefore, the hopes of a

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76. Nevada, *see infra* notes 328-331 and accompanying text.

77. Alabama, *see infra* notes 204-208 and accompanying text; Arkansas, *see infra* notes 217-221 and accompanying text; Delaware, *see infra* notes 235-239 and accompanying text; District of Columbia, *see infra* notes 240-247 and accompanying text; Florida, *see infra* notes 248-252 and accompanying text; Georgia, *see infra* notes 253-259 and accompanying text; Illinois, *see infra* notes 260-267 and accompanying text; Indiana, *see infra* notes 268-272 and accompanying text; Iowa, *see infra* notes 273-276 and accompanying text; Kansas, *see infra* notes 277-281 and accompanying text; Kentucky, *see infra* notes 282-291 and accompanying text; Louisiana, *see infra* notes 292-297 and accompanying text; Maine, *see infra* notes 298-303 and accompanying text; Missouri, *see infra* notes 322-327 and accompanying text; New Hampshire, *see infra* notes 332-335 and accompanying text; New Jersey, *see infra* notes 336-339 and accompanying text; New York, *see infra* notes 340-343 and accompanying text; North Carolina, *see infra* notes 344-350 and accompanying text; Oklahoma, *see infra* notes 355-359 and accompanying text; Pennsylvania, *see infra* notes 360-369 and accompanying text; Tennessee, *see infra* notes 370-372 and accompanying text; Texas, *see infra* notes 373-376 and accompanying text; Virginia, *see infra* notes 377-382 and accompanying text; Washington, *see infra* notes 383-386 and accompanying text; West Virginia, *see infra* notes 387-390 and accompanying text; and Wyoming, *see infra* notes 392-398 and accompanying text.

78. Arizona, *see infra* notes 209-216 and accompanying text; California, *see infra* notes 222-228 and accompanying text; Connecticut, *see infra* notes 229-234 and accompanying text; Maryland, *see infra* notes 303-307 and accompanying text; Michigan, *see infra* notes 308-314 and accompanying text; and Minnesota, *see infra* notes 315-321 and accompanying text.

79. Ohio, *see infra* notes 351-354 and accompanying text.

80. Indiana, Kansas, Louisiana, Maine, New York, North Carolina, Oklahoma, Tennessee, Virginia, and West Virginia, *see supra* note 77, and Nevada, *see supra* note 76.

81. *See supra* note 76.

plaintiff to collect child rearing damages in a wrongful pregnancy/conception action would appear to be slim at best. It should be noted, however, that strong concurring and dissenting opinions advocating the allowance of these damages were filed in fourteen, or fifty-four percent, of the majority rule jurisdictions.[82]

Justice Faulkner of the Supreme Court of Alabama, concurring specially in *Boone v. Mullendore*,[83] disagreed with the majority's arguments for limiting damages. The majority argued that public policy demanded that the value of human life precluded a damage award for child rearing expenses.[84] Justice Faulkner called this argument a "smokescreen hiding the true issue" of whether a physician should be liable for the results of his negligence.[85] The purpose of the wrongful pregnancy cause of action should not be viewed as a recovery for the child's life, but rather as a recovery for the economic loss that the extra child translates into with regard to the rest of the family unit.[86] Such an award will permit the parents to concentrate on their love for this new addition.[87] Denial of these damages cuts against the constitutional right of parents to determine the size of their families.[88]

Therefore, Justice Faulkner stated that he would allow child rearing damages to be assessed, with an offset for the benefits which accrue to the parents.[89] Such damages are not too speculative, and the Alabama courts have always permitted damages which are not precisely measurable to be within the jury's

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82. Alabama, Arkansas, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, North Carolina, Oklahoma, Pennsylvania, and Wyoming, *see supra* note 77.

83. 416 So. 2d 718, 724-27 (Ala. 1982) (Faulkner, J., concurring).

84. *Boone*, 416 So. 2d at 722.

85. *Id.* at 724 (Faulkner, J., concurring).

86. *Id.*

87. *Id.* at 725.

88. *Id.* Here, Justice Faulkner cited Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); and Griswold v. Connecticut, 381 U.S. 479 (1965):

> [T]he Supreme Court of the United States recognized that the right to privacy protects a husband and wife from unwarranted intrusions into the fundamental decisions of a family concerning contraception and abortion.

Id.

89. *Id.* at 725-26.

discretion.[90]

A very similar opinion was written in dissent by Justice Dudley of the Supreme Court of Arkansas, joined by Chief Justice Adkisson. In *Wilbur v. Kerr*,[91] this dissent pointed out that a well-tested principle of tort law had gradually evolved which states that a tortfeasor should be held liable for all the damages caused by his negligence.[92] Justice Dudley complained that the majority opinion ignored this time-tested principle in favor of an undefined public policy. Understanding neither its origin, nor its application,[93] he preferred to allow instead, the full range of damages — including child rearing — with an offset for "the value of the child's aid, comfort and society."[94]

Judge Ferren, writing in dissent for the District of Columbia Court of Appeals in *Flowers v. District of Columbia*,[95] argued in a particularly well reasoned and acerbic opinion that the award of child rearing damages should depend on why the couple sought the sterilization procedure in the first place.[96] In *Flowers*, the couple opted for sterilization because they could not afford the financial burden of a fourth child.[97] In such a situation, the damages of a negligently performed sterilization should be allowed because the family stability would be undermined by the birth. In contrast, where the sterilization is seen as necessary to prevent a genetic abnormality in the child or a medical danger to the mother, Judge Ferren would not allow damages for the normal, uneventful birth of a healthy child because the feared circumstances did not occur.[98] He would allow an offset for the benefit of parenthood, but would not allow emotional benefits to be offset against financial injury.[99]

The dissent in *Cockrum v. Baumgartner*,[100] written by Jus-

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90. *Id.* at 726-27.
91. 275 Ark. 239, 628 S.W.2d 568 (1982).
92. *Id.* at 244, 628 S.W.2d at 571 (Dudley, J., dissenting).
93. *Id.* at 245, 628 S.W.2d at 572.
94. *Id.* at 246, 628 S.W.2d at 572-73.
95. 478 A.2d 1073, 1078-83 (D.C. 1984) (Ferren, J., dissenting).
96. *Id.* at 1079 n.3.
97. *Id.* at 1079.
98. *Id.* at 1079 n.3.
99. *Id.* at 1080-81.
100. 95 Ill. 2d 193, 205-11, 447 N.E.2d 385, 391-94 (Clark & Simon, JJ., dissenting), *cert. denied*, Raja v. Michael Reese Hosp., 464 U.S. 846 (1983).

tice Clark, and joined by Justice Simon, of the Supreme Court of Illinois, pointed out a very basic inconsistency in the reasoning of the majority opinion. The majority began with the assumption that there can be no injury in the birth of a normal, healthy child. This formed the basis for a denial of child rearing damages. As the dissent explained, this decision was inconsistent because other damages were allowed, such as pain of childbirth, time lost due to childbirth, and medical expenses.[101] If the birth is not an injury, the dissent asked, then why should the parents be compensated for the associated "pain"?[102] The obvious contradiction continued, wrote Justice Clark, as the majority allowed the medical expenses and espoused a public policy in "the preservation and development of family relations."[103] Thus, only the "first installment in an investment in the preservation and development of family relations"[104] would be allowed by the majority, whereas the dissenters would allow the other installments as well — child rearing damages offset by any benefits which accrue to the parents from the birth.[105]

This same criticism was articulated by Justice Scolnik, concurring in part and dissenting in part in *Macomber v. Dillman*,[106] a case decided by the Supreme Judicial Court of Maine. He argued with particularly strong logic that it is inconsistent to award the parent damages for the loss of wages due to the inability to work during the pregnancy, while denying the same damages after the birth of the child.[107] He also complained, like Justice Dudley of Arkansas[108] in *Wilber v. Kerr*, that the majority relied on public policy to reach its result, but never explained "the source from which it was derived or the foundation on which it rest[ed]."[109]

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101. *Id.* at 205, 447 N.E.2d at 391.

102. *Id.* at 205, 447 N.E.2d at 392.

103. *Id.* at 205-06, 447 N.E.2d at 392.

104. *Id.*

105. *Id.* at 208-09, 447 N.E.2d at 393-94.

106. 505 A.2d 810, 813-18 (Me. 1986) (Scolnik, J., concurring in part and dissenting in part).

107. *Id.* at 814.

108. *See supra* note 93 and accompanying text.

109. *Macomber*, 505 A.2d at 814-15 (Scolnik, J., concurring in part and dissenting in part).

Justice Wolle, dissenting in *Nanke v. Napier*,[110] complained that the majority opinion which declared, as a matter of law, that the benefits of parenthood will always outweigh the "mere monetary burdens,"[111] ignored the basic premise that assessing damages is one of the jury's traditional roles.[112] In other words, he considered such a calculation to be a question of fact, not law, and disagreed with the majority's decision which denied the plaintiff the opportunity to prove facts concerning "her own unique socio-economic circumstances and the reasons why she wished to delay her raising of a child."[113]

Schork v. Huber,[114] from the Supreme Court of Kentucky, produced two dissents. The first, by Justice Leibson, argued that the majority was making public policy, not following public policy.[115] He stated that "[p]ublic policy should not extend to making a judgment, as a matter of law, that persons have suffered no damages from the foreseeable consequences of a medical procedure . . . ."[116] Justice Leibson would allow child rearing damages, but would only allow emotional damages in regard to the actual child bearing, which has the physical injury and pain aspects required for an emotional distress award.[117] In the second dissent,[118] Justice Vance agreed with Justice Liebson in all but the last point. Instead, he would have allowed additional emotional distress damages related to the child rearing because they flow directly from the physical contact present in the operation.[119]

Two dissents were also present in *Mason v. Western Pennsylvania Hospital*,[120] decided by the Supreme Court of Pennsylvania. Chief Justice O'Brien, joined by Justice Flaherty, noted that the Pennsylvania courts would award child rearing damages to the parents of a child who is born with genetic defects, and he

110. 346 N.W.2d 520, 523-24 (Iowa 1984) (Wolle, J., dissenting).

111. *Id.* at 523.

112. *Id.* at 524 (citing Pagitt v. City of Keokuk, 206 N.W.2d 700, 703-04 (Iowa 1973)).

113. *Id.* at 524.

114. 648 S.W.2d 861 (Ky. 1983).

115. *Id.* at 864 (Leibson, J., dissenting).

116. *Id.*

117. *Id.* at 866.

118. *Id.* at 867-68 (Vance, J., dissenting).

119. *Id.* at 867.

120. 499 Pa. 484, 453 A.2d 974 (1982).

believed that they should also be awarded to the parents of a normal child.[121] He further noted that the controlling issue giving rise to foreseeable damages was the physician's negligence, not the child's medical condition:[122] " 'The law of liability should not turn on . . . fortuitous considerations.' "[123] In a second dissent, Justice Larsen amplified the previous dissent's view on child rearing damages by reasoning that the emotional benefits of rearing a child should only be offset against the emotional trauma of child rearing and not against the actual financial costs of child rearing.[124] In Justice Larsen's opinion, any other computation would produce a windfall for the tortfeasor.[125]

Finally, Chief Justice Rose of the Supreme Court of Wyoming concurred specially in *Beardsley v. Wierdsma*.[126] He disagreed with the majority's contention that Wyoming had a public policy preventing child rearing damages and noted that the state program providing assistance for family planning evidenced exactly the opposite public policy.[127] He, therefore, preferred to allow child rearing damages with an appropriate offset for the benefits associated with the addition of the particular child to the family. Such benefits, he stated, would vary "depending upon the circumstances of the parents."[128]

All of these dissenting and concurring opinions were written since 1982, and practitioners representing plaintiffs in those states would probably be wise to check the current composition of the courts involved before despairing on this issue: the dissenters could now be in the majority.[129]

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121. *Id.* at 488, 453 A.2d at 977 (O'Brien, C.J. & Flaherty, J., dissenting).

122. *Id.*

123. *Id.* (quoting Howard v. Lecher, 42 N.Y.2d 109, 113, 397 N.Y.S.2d 363, 365, 366 N.E.2d 64, 66 (1977)).

124. *Id.* at 496 n.1, 453 A.2d at 981 n.1 (Larsen, J., dissenting).

125. *Id.*

126. 650 P.2d 288, 293-97 (Wyo. 1982) (Rose, C.J., concurring).

127. *Id.* at 296.

128. *Id.*

129. As an example, Judge Kern, who wrote the majority opinion denying child rearing damages in Flowers v. District of Columbia, 478 A.2d 1073 (D.C. 1984), has since retired. *Id.* at 1074.

IV. Child Rearing Damages

A. *The Public Policy Debate*

Most of the jurisdictions disallowing child rearing damages employ a rationale based upon public policy.[130] Occasionally, a court will simply cite public policy considerations with little or no justification.[131] One court stated, somewhat obliquely, that public policy encourages "the development and the preservation of family relations," and to permit damages with the accompanying "transfer" of the costs of child rearing to a tortfeasor would somehow negate that goal.[132] Most of the courts include one or more of the following arguments either to explain or to buttress their public policy stance.[133]

1. *The Birth of a Healthy Child Is Not an Injury*

A frequently used argument is that the parents have not been damaged by the birth of a normal child.[134] And yet, invariably, the same courts will allow other damages flowing from the same negligent act to be recovered.[135] This apparently illogical position was most obviously stated in *Macomber v. Dillman*,[136] where the Supreme Court of Maine held:

> [A] parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child. Accordingly, we limit the recovery of damages, where applicable, to the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during that time.[137]

Even a justice who voted to deny damages for this tort has recognized the illogical nature of this position.[138] Another court

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130. *See infra* notes 220, 239, 251, 257, 263, 272, 275, 287, 300, 335, 339, 343, 363, 386, and accompanying text.

131. *See, e.g.*, Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983).

132. Cockrum v. Baumgartner, 95 Ill. 2d 193, 201, 447 N.E.2d 385, 390 (1983).

133. Counter arguments favoring child rearing damages are also presented. *See, e.g., infra* notes 145, 161, 183, and accompanying text.

134. *See, e.g.*, Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984) (citation omitted).

135. *Id.*

136. 585 A.2d 810 (Me. 1986).

137. *Id.* at 813.

138. *See infra* note 382.

explicitly admitted that child rearing damages were the result of the tort, but disallowed them anyway.[139]

2. *The Benefits of the Birth Always Outweigh the Damages*

Closely allied with the argument that there are no damages from the birth of a healthy child, is the argument that the benefits always outweigh the costs of child rearing.[140] This argument implies that child rearing damages are recoverable when offset by the benefits of parenthood, but there is no reason to put such a question to the jury because there cannot possibly be a recovery. This thinking exhibits an apparent distrust, or perhaps fear, of our jury system. First of all, even opponents of child rearing damages have admitted that the benefits do not always outweigh the costs.[141] Secondly, the better rule would be simply to let the jury, properly instructed in the applicable tort principles, make the decision as with any other tort action.[142]

3. *The Child Will Become an Emotional Bastard*

Some courts argue that the child will be harmed emotionally when he eventually discovers that he was unwanted and was reared with another's funds.[143] Most of these courts, however, would allow *some* damages to be recovered, and it is difficult to fathom how such a recovery will make the child feel less like an emotional bastard than if full damages were allowed.[144] Many children, born before the general societal acceptance of family planning, were totally or vaguely aware that they were mistakes. Has that had such a terribly deleterious effect on their psyches?

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139. Kingsbury v. Smith, 122 N.H. 237, 244, 442 A.2d 1003, 1006 (1982): "The elements of damages that may be recovered are those that are a direct and probable result of the defendant's negligence, except that recovery for the costs of raising a child are not permitted." *Id.*

140. *See, e.g., infra* note 363.

141. *See, e.g.*, McKernan v. Aasheim, 102 Wash. 2d 411, 418, 687 P.2d 850, 854 (1984) ("If such were the case, presumably no sterilization operations would be performed.").

142. Nanke v. Napier, 346 N.W.2d 520, 524 (Iowa 1984) (Wolle, J., dissenting). "[T]raditional principles of tort law are adequate to the task of instructing a jury on how to reach a fair verdict on the damage issue here presented . . . ." *Id.*

143. *See, e.g., infra* note 220.

144. Boone v. Mullendore, 416 So. 2d 718, 724-25 (Ala. 1982) (Faulkner, J., concurring specially).

Full damages would relieve some of the pressure on the family unit caused by such births and contribute to family love rather than deter it.[145]

The seminal case in the wrongful pregnancy area recognized the truth of that proposition in 1967. The California Court of Appeal, in *Custodio v. Bauer*,[146] held that the tenth child in the Custodio family might well feel more loved "if he brings with him the wherewithal to make it possible."[147] Furthermore, this problem could be substantially eliminated by using only the plaintiff's initials in the report of the case or by some other method of assuring the plaintiff's anonymity.[148]

4. *Child Rearing Damages Are Too Speculative*

Some courts justify the denial of child rearing damages on the basis that they are too speculative and uncertain, requiring prophecy on the part of the fact-finder.[149] But, as noted in *Troppi v. Scarf*,[150] such a calculation is routinely performed in countless other situations.[151] On this same subject, the Maryland Court of Appeals in *Jones v. Malinowski*[152] noted that such a computation is based upon foreseeable factors relating to the maintenance, support, and educational expenses which the parents will incur until the child reaches majority.[153] Thus there is a more definite, *less* speculative time period involved than in many malpractice actions, and such damages can be calculated in accordance with economic factors which are in ordinary use by actuaries for estate planners and insurance companies.[154] These expenses should also be very familiar, and therefore more susceptible of estimation, to the average juror who may have similar expenses of his own.[155]

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145. *Id.* at 725.
146. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).
147. *Id.* at 325, 59 Cal. Rptr. at 477.
148. *See, e.g.*, James G. v. Caserta, 332 S.E.2d 872, 874 n.1 (W. Va. 1985).
149. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975).
150. 31 Mich. App. 240, 187 N.W.2d 511 (1971).
151. *Id.* at 261, 187 N.W.2d at 520-21.
152. 299 Md. 257, 473 A.2d 429 (1984).
153. *Id.* at 272, 473 A.2d at 436.
154. *Id.*
155. *Id.*

It would seem obvious that the damages associated with loss of use of a hand or leg would be far more difficult to quantify than those associated with child rearing. Even an opponent of child rearing damages has admitted that they are far easier to prove than pain, suffering, and mental anguish, which are routinely allowed.[156] Admittedly, the most difficult calculation involves the offsetting benefits of parenthood. But such a computation is not impossible, particularly if the benefits are only offset against damages to the same interest injured.[157] Indeed, such an offset is similar to items of damage such as loss of society, companionship, parental care, attention, and guidance, which are often calculated and allowed in wrongful death cases.[158]

5. Such Awards Are Out of Proportion to the Negligent Act

A related reason for the denial of child rearing damages has been that such awards are unfair and unduly burdensome to the negligent party because they are out of proportion to his negligent act.[159] This reasoning has been rejected, again even by opponents of these damages, who do not see the court's role as merely the insulator of the medical malpractice tortfeasor.[160] Such defendants should not be immunized from reasonably foreseeable damages, such as the expenses of raising the child, "simply because it may be burdensome."[161] Such a judgment would limit damages to a relatively insignificant portion of the total expense flowing from the negligent act.[162]

Furthermore, in recent wrongful pregnancy cases, when the courts have reported the amount of the child rearing damages either requested by or awarded to the plaintiffs, such amounts

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156. *See infra* note 382.

157. *See infra* notes 185-195 and accompanying text.

158. *See, e.g.*, Jones v. Malinowski, 299 Md. 257, 272, 473 A.2d 429, 437 (1984).

159. *See, e.g.*, McKernan v. Aasheim, 102 Wash. 2d 411, 415, 687 P.2d 850, 852 (1984).

160. *Id.* at 418, 687 P.2d at 854. "It is not our place to deny recovery of certain damages merely in order to insulate health care providers from the shock of big tort judgments." *Id.*

161. Schork v. Huber, 648 S.W.2d 861, 867 (Ky. 1983) (Leibson, J., dissenting).

162. *Id.*

have not approached the awards for other serious tort cases. For example, in *Morris v. Frudenfeld,*[163] a 1982 California case, child rearing and educational damages were reported to be $90,000.[164] In *Ochs v. Borrelli,*[165] a 1982 Connecticut case, they were $56,375.[166] In *Hartke v. McKelway,*[167] a 1981 federal case from the District of Columbia District Court, such damages were $200,000.[168] In *Jones v. Malinowski,*[169] a 1984 Maryland case, the total award was $70,000 with the portion for child rearing included but not specified.[170] In *Clapham v. Yanga,*[171] a 1981 Michigan case, child rearing damages were reported at $57,000.[172] Finally, in *Sherlock v. Stillwater Clinic,*[173] a 1977 Minnesota case, a general verdict including child rearing costs was awarded for $19,500.[174] In contrast to these figures, a 1985 study of damages awarded during 1978 for serious injuries involving permanent change reported an *average* award of more than $349,000.[175]

6. *Such Awards Will Promote Fraudulent Claims*

Courts also write that the fear of fraudulent claims is a reason for disallowing child rearing damages.[176] Once again, the argument betrays a lack of confidence in the efficacy of our court and jury system. Such fear should be and has been rejected by other courts: "We will not presuppose that courts are so ineffectual and the jury system so imperfect that fraudulent claims cannot be distinguished from the legitimate."[177] Such fears

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163. 135 Cal. App. 3d 23, 185 Cal. Rptr. 76 (1982).
164. *Id.* at 37, 185 Cal. Rptr. at 83-84.
165. 187 Conn. 253, 445 A.2d 883 (1982).
166. *Id.* at 255, 445 A.2d at 884.
167. 526 F. Supp. 97 (D.C. Dist. Ct. 1981).
168. *Id.* at 99.
169. 299 Md. 257, 473 A.2d 429 (1984).
170. *Id.* at 262, 473 A.2d at 431.
171. 102 Mich. App. 47, 300 N.W.2d 727 (1980).
172. *Id.* at 50, 300 N.W.2d at 729.
173. 260 N.W.2d 169 (Minn. 1977).
174. *Id.* at 171.
175. *See* P.M. DANZON, MEDICAL MALPRACTICE (1985). Danzon states that injuries involving permanent grave change resulted in an average award of $349,203 in 1978. *Id.* at 152.
176. *See, e.g.,* Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).
177. McKernan v. Aasheim, 102 Wash. 2d 411, 418, 687 P.2d 850, 854 (1984) (citing

should not have a bearing on whether or not a worthy plaintiff received a valid damage award.

7. *The Legislature, Not the Courts, Should Decide*

Some courts would leave this issue to the calm contemplation of the legislature rather than to the fact-finder.[178] That argument might have merit if these damages were being treated as just one more item on the overall agenda for medical malpractice reform. But while we await such legislative reform, there is no reason to single out for denial this one particular element of damage in this one particular medical malpractice cause of action.

In summary, the various public policy arguments present a weak case for withholding child rearing damages in wrongful pregnancy malpractice actions. While specific rebuttals to each point can be readily justified,[179] the important consideration that underlies all of the rebuttals is that there is no good reason to treat *this* malpractice action in a different manner than any other malpractice action.[180]

It is obviously foreseeable that a negligently performed sterilization procedure will result in the birth of a child and that the parents will incur expenses in raising and educating that child.[181] There is no rational justification for singling out this cause of action from the common law rule requiring liability of the tortfeasor for damages that are the foreseeable result of his negligence.[182] Due care should be encouraged in all medical procedures, and by allowing plaintiffs the "prospect of full compensation for negligence,"[183] due care will be further encouraged. Thus, a much stronger public policy argument can be raised in favor of granting child rearing damages than can be raised in

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Freehe v. Freehe, 81 Wash. 2d 183, 189, 500 P.2d 771 (1972)).

178. *See, e.g.*, Schork v. Huber, 648 S.W.2d 861, 863 (Kan. 1983).

179. *See supra* notes 130-178 and accompanying text.

180. Flowers v. District of Columbia, 478 A.2d 1073, 1082-83 (D.C. 1984) (Ferren, J., dissenting).

181. Cockrum v. Baumgartner, 95 Ill. 2d 193, 207, 447 N.E.2d 385, 393 (1983) (Clark, J., dissenting).

182. Macomber v. Dillman, 505 A.2d 810, 814 (Me. 1986) (Scolnik, J., concurring in part and dissenting in part).

183. Flowers v. District of Columbia, 478 A.2d 1073, 1082 (D.C. 1984).

opposition to such damages: full damages are necessary to discourage all forms of negligently performed surgical procedures.[184]

B. *Offset of Benefits: The "Same Interest" Rule of Section 920*

Several courts, in an apparent attempt to lessen what they regard as unduly burdensome damage awards, have developed an unusual application of a standard tort damages rule. Section 920 of the Restatement (Second) of Torts states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[185]

Comment b to this section states:

> *Limitation to same interest.* Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication . . . unless damages are claimed for harm to pecuniary interests. . . . Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act . . . . Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife.[186]

As noted in Part II of this Comment,[187] some courts have argued that there should be a broad interpretation of the interest involved in these actions and that the emotional benefits of parenthood should be used to offset the pecuniary damages present in child rearing.[188] These courts would consider all financial burdens and emotional benefits as part of the same "family interest."[189]

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184. Beardsley v. Wierdsma, 650 P.2d 288, 295 (Wyo. 1982).
185. RESTATEMENT (SECOND) OF TORTS § 920 (1977).
186. RESTATEMENT (SECOND) OF TORTS § 920 comment b (1977).
187. *See supra* notes 61-63 and accompanying text.
188. *See, e.g.*, Comment, *One More Mouth to Feed*, *supra* note 56, at 1075.
189. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 256-57, 187 N.W.2d 511, 518-19

Several commentators have argued against this view,[190] which can produce harsh results for plaintiffs who may get no recovery at all since juries are likely to value the emotional benefits of parenthood very highly. It seems clear from the illustrations in comment b to section 920 that the drafters of this section clearly meant to show that physical, emotional, and economic injuries were harms to separate interests.[191] The better view was adopted in *Custodio*,[192] where the court held that emotional benefits should only offset emotional injuries.[193] Yet the Arizona Supreme Court, in *University of Arizona Health Sciences Center v. Superior Court*,[194] adopted the opposite theory. There, the court argued that a "strict interpretation" of the "same interest" limitation would result in the unjust enrichment of the plaintiff.[195]

But the *Custodio* reading of section 920 should not be regarded as a "strict interpretation." Indeed, a fair reading of that section and the accompanying comments can only lead one to the conclusion that the *Custodio* interpretation is the *normal* interpretation. And, contrary to the Arizona opinion, anything other than such a normal interpretation will lead to the unjust enrichment of the tortfeasor.

C. *Mitigation: The "Avoidance of Consequences" Rule of Section 918*

Finally, some courts have addressed the issue of whether, in accordance with Restatement (Second) of Torts, section 918, the plaintiffs in a wrongful pregnancy action should recover child rearing costs when they could have mitigated those damages either by submitting to an abortion or by putting the child up for adoption.[196] Section 918 states:

(1) Except as stated in Subsection (2), one injured by the tort of

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(1971). *See also supra* notes 62-63 and accompanying text.

190. *See, e.g.*, Cheslik, *supra* note 5; Comment, *supra* note 4; and Comment, *supra* note 56.

191. *See* Comment, *supra* note 56, at 1324.

192. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

193. *Id.* at 323, 59 Cal. Rptr. at 476.

194. 136 Ariz. 579, 667 P.2d 1294 (1983).

195. *Id.* at 584 n.4, 667 P.2d at 1294 n.4.

196. *See, e.g.*, Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).

another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.

(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.[197]

Section 918 suggests only that mitigation be accomplished by the *reasonable* effort of the injured party.[198] Many would argue that it is unreasonable to require a plaintiff in such an emotionally charged situation to make such an onerous choice.[199] The better view, however, is that such a determination of reasonableness is traditionally the role of the fact-finder.[200] The jury should consider such factors as the parents' religious beliefs, the mother's health, and the trimester stage at which the pregnancy was discovered in making its determination on the reasonableness of the application of this doctrine.[201]

V. Conclusion

Although the trend in wrongful pregnancy cases is in the opposite direction, logic and adherence to fundamental tort principles would be preferable to vague reference to public policy. This Comment argues that such principles will eventually find their way back into the common law of this country with regard to this tort. For instance, it would seem inevitable that in

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197. RESTATEMENT (SECOND) OF TORTS § 918 (1977).

198. *Id.*

199. Cockrum v. Baumgartner, 95 Ill. 2d 193, 207, 447 N.W.2d 385, 392 (1983) (Clark, J., dissenting):

> Nor should the parents be forced to mitigate damages by choosing abortion or adoption. They chose not to conceive a child. It is quite a different situation to ask a couple, once a child has been conceived, to abort, or to put the child up for adoption, indicating that if they failed to do either they would assume full responsibility of any and all costs of that child. If parents are confronted in such a situation with choices that they consider to be unenviable alternatives, they should not be precluded from recovering damages because they select the most desirable of these unpalatable choices.

Id. (citations omitted).

200. Comment, *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 FORDHAM L. REV. 1107, 1119 (1985).

201. *Id.*

states that allow child rearing damages for children who are born with various physical or mental disabilities, the courts will eventually be forced to allow the same damages for normal children. Otherwise, where will the courts draw the line when children are born with mild defects?[202]

It is also the view of this Comment that wrongful pregnancy should be treated, for purposes of awarding damages, like any other medical malpractice action. Damages should be awarded for all foreseeable consequences of the negligence, including child rearing. Courts should take into account the reasons why the couple chose sterilization. If the couple chose sterilization to prevent physical injury to the mother or the child, and such injury did not occur, damages should not be allowed. On the other hand, if the reason for the sterilization was the economic consequence of the additional child upon the family finances, the undesired birth will have brought about such consequences and, assuming that negligence has been proven by the plaintiff, the damage should be regarded as the foreseeable result of the tortfeasor's negligent act.

The economic benefits of the addition of the child to the family, rarer in an urban society than was the case when children performed agricultural tasks,[203] would be offset against the economic damages occasioned by child rearing. The emotional benefits of parenthood should be offset against any emotional damages claimed by the parents. Similarly, the physical benefits to the parents of parenthood should be offset against physical injury occasioned by the pregnancy and birth. The jury should be allowed to determine whether the plaintiffs should have mitigated their damages by opting for adoption or abortion, taking into account in their deliberation on the reasonableness of such options any factors that might specifically relate to the parents or the situation in question.

David J. Burke

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202. Mason v. Western Pennsylvania Hosp., 499 Pa. 484, 488-89, 453 A.2d 974, 977 (1982) (O'Brien, C.J., concurring in part and dissenting in part).

203. *See infra* note 290.

Appendix: A State-by-State Guide To Wrongful Pregnancy Damages

Alabama

Leading Case: *Boone v. Mullendore.*[204]
Court: Supreme Court of Alabama (highest court).
Basic Facts: The plaintiff underwent exploratory surgery due to cramps in her abdomen. The defendant physician told her later that he had removed her Fallopian tubes. The plaintiff, therefore, did not use contraceptives, became pregnant, and delivered a healthy child.[205]
Holding on Damages: allowed, including:

1. patient's hospital expenses;
2. physicial pain and suffering;
3. mental anguish of patient;
4. loss to husband of comfort, companionship, services, and consortium;
5. medical expenses incurred by patient and husband.[206]

Opinion by: Chief Justice Torbert; Justices Maddox, Almon, Shores, Embry, Beatty, and Adams concurred.
Concurring specially: Justice Faulkner would have assessed damages under the "benefit" rule whereby child rearing damages would be allowed and would be offset by benefits accruing to the family as a result of the birth.[207]
Concurring specially: Justices Jones and Shores wrote to amplify on the rationale for the rejection of the "benefit" rule.[208]

204. 416 So. 2d 718 (Ala. 1982).
205. *Id.* at 719.
206. *Id.* at 723.
207. *Id.* at 725-26 (Faulkner, J., concurring specially).
208. *Id.* at 728 (Jones & Shores, JJ., concurring specially).

Alaska

No cases on this issue were found.

Arizona

Leading case: *University of Arizona Health Sciences Center v. Superior Court.*[209]
Court: Supreme Court of Arizona (highest court).
Basic Facts: The plaintiffs were the parents of three children and decided they could afford no more. The plaintiff husband underwent a vasectomy procedure but the plaintiff wife became pregnant thereafter. The plaintiffs had a fourth healthy child and sued the physician and his employer (the hospital) for damages for negligence.[210]
Holding on Damages: All damages were permitted including future costs of rearing and educating the child.[211] The offset of the benefits which the parents will receive from the parental relationship must also be considered.[212] The parents' reasons for desiring sterilization are relevant to the issue,[213] as well as family size, income, age of parents, and marital status.[214] Parents need not mitigate damages by adoption or abortion.[215]

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209. 136 Ariz. 579, 667 P.2d 1294 (1983).
210. *Id.* at 581, 667 P.2d at 1296.
211. *Id.* at 584-86, 667 P.2d at 1299-1301.
212. *Id.* at 584-85, 667 P.2d at 1299.
213. *Id.* at 585, 667 P.2d at 1300:

> For example, where the parent sought sterilization in order to avoid the danger of genetic defect, the jury could easily find that the uneventful birth of a healthy, non-defective child was a blessing rather than a "damage". Such evidence should be admissible, and the rule which we adopt will allow the jury to learn all the factors relevant to the determination of whether there has been any real damage and, if so, how much.

Id.

214. *Id.* at 585, 667 P.2d at 1300 (quoting Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 519 (1971), where the court included these factors as those "which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents.").
215. *Id.* at 586 n.5, 667 P.2d at 1301 n.5:

> The rules requiring mitigation of damages require only that reasonable measures be taken. The decision not to conceive a child is quite different from the decision to abort or put the child up for adoption once it has been conceived. "If parents are confronted in such a situation with choices which they consider to be unenviable alternatives, they should not be precluded from recovering damages because they select the most desirable of these unpalatable choices."

Opinion by: Justice Feldman; Chief Justice Holohan and Justice Hays concurred.
Concurring in Part and Dissenting in Part: Vice Chief Justice Gordon would only have allowed child rearing damages in the case of a "seriously retarded, deformed, or chronically ill" child.[216]

Arkansas

Leading Case: *Wilbur v. Kerr.*[217]
Court: Supreme Court of Arkansas (highest court).
Basic Facts: The plaintiff husband sought a vasectomy in order to prevent further children. The two procedures performed by the defendant physician were unsuccessful and the plaintiff wife gave birth to a normal healthy daughter.[218]
Holding on Damages: The physician was held responsible for "any and all proper damages connected with the operation and connected with the pregnancy."[219] The court, however, denied the claim for child rearing damages on the basis of public policy.[220]
Opinion by: Justice Hickman.
Dissenting Opinion by: Justice Dudley, with Chief Justice Adkisson joining, would have allowed the child rearing damages and allowed the jury to offset the value of parenthood by the use of the benefit rule.[221]

Id. (quoting Cockrum v. Baumgartner, 95 Ill. 2d 193, 207, 447 N.E.2d 385, 392 (Clark, J., dissenting)) (citation omitted).

216. *Id.* at 586, 667 P.2d at 1301 (Gordon, V.C.J., concurring in part and dissenting in part). Vice Chief Justice Gordon states: "But here we are dealing with the birth of a normal and healthy, although undesired, child whose life I consider above monetary value." *Id.*

217. 275 Ark. 239, 628 S.W.2d 568 (1982).

218. *Id.* at 239-40, 628 S.W.2d at 569.

219. *Id.* at 244, 628 S.W.2d at 571.

220. *Id.*

> [B]eing an unwanted or "emotional bastard," who will some day learn that its parents did not want 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.

Id.

221. *Id.* at 246, 628 S.W.2d at 572-73 (Dudley, J., dissenting). Justice Dudley wrote: "A public policy which subtly encourages abortion or adoption, as today's holding necessarily does, is inconsistent with the stated goal of family stability and has no logical

California

Leading Case: *Custodio v. Bauer.*[222]
Court: California Court of Appeal, First District, Division 1 (intermediate appellate court).
Basic Facts: The plaintiffs, parents of nine children, agreed with the defendant physicians that the plaintiff wife should have her Fallopian tubes removed. The operation failed, and the plaintiff wife became pregnant.[223]
Holding on Damages: Damages would be allowed for the costs of the unsuccessful operation,[224] physical complications,[225] mental, physical and nervous pain and suffering,[226] measurable economic changes in the status of other family members,[227] and child rearing costs offset by any benefit received.[228]
Opinion by: Associate Justice Sims; Justices Molinari and Elkington concurred.

Colorado

No cases were found.

Connecticut

Leading Case: *Ochs v. Borrelli.*[229]
Court: Supreme Court of Connecticut (highest court).
Basic Facts: The plaintiff was the mother of two children born with orthopedic defects.[230] She arranged with the defendant physician for a tubal ligation. The operation was performed but the plaintiff became pregnant, giving birth to a third child, also with mild orthopedic defects. The plaintiff subsequently under-

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sense of conscience." *Id.* at 246, 628 S.W.2d at 572.

222. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

223. *Id.* at 307-08, 59 Cal. Rptr. at 465-66.

224. *Id.* at 322, 59 Cal. Rptr. at 475.

225. *Id.* at 322-23, 59 Cal. Rptr. at 476.

226. *Id.*

227. *Id.* at 323-24, 59 Cal. Rptr. at 476.

228. *Id.* at 323, 59 Cal. Rptr. at 476. "If the failure of the sterilization operation and the ensuing pregnancy benefited the wife's emotional and nervous makeup . . . the defendants should be able to offset it." *Id.*

229. 187 Conn. 253, 445 A.2d 883 (1982).

230. *Id.* at 254-55, 445 A.2d at 883-84.

went a second successful sterilization.[231]

Holding on Damages: Damages were allowed for medical expenses, pain and suffering due to the failed sterilization, the costs of correcting the orthopedic defects, and the cost of raising the child to majority.[232] The court also decided that $49,985 for the plaintiff's medical expenses, and pain and suffering were not excessive,[233] and that the trial judge had correctly charged the jury.[234]

Opinion by: Associate Justice Peters; Justices Healey, Pankey, Armentano, and Shea concurred.

Delaware

Leading Case: *Coleman v. Garrison.*[235]

Court: Supreme Court of Delaware (highest court).

Basic Facts: The plaintiffs were the husband, wife, and five children of this family. The plaintiff wife had undergone a tubal ligation which failed and she gave birth to a sixth child. The plaintiffs sued the physician and the hospital where the surgery was performed.[236]

Holding on Damages: The supreme court let stand the lower court's ruling which allowed damages for the pain and suffering by the wife resulting from the pregnancy, the medical expenses for the pregnancy and the tubal ligation, and loss of consortium by the husband.[237] No damages were awarded to the newborn's siblings.[238] Child rearing damages were disallowed on the ground of public policy.[239]

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231. Although this case involves the unplanned birth of a slightly deformed child, the court followed the case law from other jurisidictions relative to the birth of healthy, normal children in reaching its decision. *See id.* at 257-58, 445 A.2d at 885. Furthermore, the child's orthopedic problems were almost completely corrected and played no part in the determination regarding what types of damages would be awarded. *See id.* at 255 n.2, 445 A.2d at 884 n.2. Therefore, the case is included here as the leading case in this jurisdiction.

232. *Id.* at 255-61, 445 A.2d at 884-86.

233. *Id.* at 255, 261, 445 A.2d at 884, 886.

234. *Id.* at 259-60, 445 A.2d at 886.

235. 349 A.2d 8 (Del. 1975).

236. *Id.* at 9.

237. *Id.* at 11 n.5.

238. *Id.* at 14 n.10.

239. *Id.* at 12. The court stated:

[I]t is settled Delaware law that recovery may not be had for damages which are

Opinion by: Justice Duffy; Justice McNeilly and Vice Chancellor Brown concurred.

District of Columbia

Leading Case: *Flowers v. District of Columbia.*[240]
Court: District of Columbia Court of Appeals (highest court).
Basic Facts: The plaintiff, after giving birth to her third child, determined that she could afford no more. A tubal cauterization was performed upon the plaintiff by two physicians who were agents of the District of Columbia. The procedure failed, and plaintiff became pregnant. She gave birth to her fourth child and sued the District of Columbia for negligence under the principle of respondeat superior.[241]
Holding on Damages: The court let stand the lower court's ruling which allowed damages for the mother's medical expenses, pain and suffering, and lost wages (both during pregnancy and immediately thereafter until she was able to return to work), as well as the cost of a future tubal ligation.[242] These damages amounted to a total of $11,000.[243] Child rearing damages were denied because the court was reluctant to apply the normal tort benefit rule and avoidance of consequences rule to a situation involving "all highly personal matters that seem particularly unsuited for the traditional adversarial process of a negligence action in a court of law."[244]

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speculative or conjectural. And that applies to any attempt to measure the value of a human life against its costs. . . . We respect the efforts of other Courts to provide a remedy . . . . But, in our view, any attempt to apply it at birth can only be an exercise in prophecy, an undertaking not within the speciality of our fact-finders.

Id. (citations omitted).

240. 478 A.2d 1073 (D.C. 1984).

241. *Id.* at 1074.

242. *Id.*

243. *Id.*

244. *Id.* at 1077. *See also id.* at 1076-77. The court stated that if the benefits rule were applied,

> a parent seeking to recover for an unplanned child will be strongly tempted to denigrate the child's value to the extent possible in order to obtain as large a recovery as possible.
>
> . . . .
>
> Applying . . . [the avoidance of consequences] rule to the wrongful birth case would mean that a plaintiff could recover for damages only if he could demon-

Opinion by: Associate Judge Kern, Retired.[245]
Dissenting Opinion: Associate Judge Ferren would have allowed child rearing damages as the foreseeable consequences of the negligence involved.[246] He also made strong arguments against the majority's fear of the application of the benefit rule and the rule on avoidance of consequences.[247]

Florida

Leading Case: *Fassoulas v. Ramey.*[248]
Court: Supreme Court of Florida (highest court).
Basic Facts: The plaintiffs were the parents of two children who had been born with severe congenital abnormalities. They decided not to have any more children due to their fear of future abnormalities and due to the high cost of medical care that might ensue. The defendant physician performed a vasectomy on the husband but the wife later became pregnant twice, the first time giving birth to an abnormal child and the second time giving birth to a normal child. The plaintiffs then sued the defendant for negligence.[249]
Holding on Damages: The court let stand the lower court's ruling allowing damages for the wife's past and future wages, emotional distress, and loss of consortium, and for the husband's emotional distress, loss of consortium, and medical and hospital

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strate to the court and jury that he could *not* have reasonably avoided the consequences . . . by abortion . . . [or] to place the child for adoption . . . .

Id.

245. *Id.* at 1074 (listing an unnumbered footnote which states that "Judge Kern was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on May 25, 1984.").

246. *Id.* at 1078 (Ferren, J., dissenting). *See also id.* at 1082-83:

> There is no less reason to encourage due care in sterilization operations, through the prospect of full compensation for negligence, than there is in other areas of medical care.
>
> . . . .
>
> In barring recovery of child rearing costs after a negligent sterilization, when a family can prove that economic necessity motivated the operation, this court in effect concludes that all will be well enough for the family, and thus that the persons responsible need not pay for the foreseeable consequences of their tortious conduct.

Id.

247. *Id.* at 1078-83.

248. 450 So. 2d 822 (Fla. 1984).

249. *Id.* at 822-23.

expenses.[250] Child rearing damages were disallowed based upon public policy.[251]
Opinion by: Per curiam opinion concurred in by Chief Justice Alderman, and Justices Boyd, Overton, and McDonald.
Dissenting Opinion by: Justice Ehrlich; Justices Adkins and Shaw concurred. The dissenters would have allowed child rearing damages with an offset for the benefits of parenthood.[252]

Georgia

Leading Case: *Fulton-DeKalb Hospital Authority v. Graves.*[253]
Court: Supreme Court of Georgia (highest court).
Basic Facts: The plaintiff gave birth to a daughter in 1979 and subsequently underwent a sterilization procedure performed by a physician employed at defendant hospital.[254] The procedure failed, and the plaintiff later gave birth to a child with a "club foot." She sued the hospital for negligence.[255]
Holding on Damages: Damages were allowed for the unsuccessful sterilization procedure, pain and suffering, medical complications, cost of delivery, lost wages, and loss of consortium.[256] Damages for child rearing expenses were denied on public policy grounds.[257]
Opinion by: Justice Clark.
Concurring in Part and Dissenting in Part: Justices Marshall and Bell concurred in the denial of child rearing damages, dissented from the decision to recognize the cause of action in

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250. *Id.* at 823.
251. *Id.* at 823-24.
See also id. at 823 (quoting Ramey v. Fassoulas, 414 So. 2d 198, 200 (Fla. 3d DCA 1982) stating, " '[t]he child is still the child of the parents, not the physician, and it is the parents' legal obligation, not the physician's, to support the child.' ").
252. *Id.* at 824-30 (Ehrlich, J., dissenting).
253. 252 Ga. 441, 314 S.E.2d 653 (1984).
254. *Id.* at 442, 314 S.E.2d at 654.
255. As noted with regard to Ochs v. Borrelli, *supra* note 231, this case also involves a slightly deformed child, but the court followed case law from other jurisdictions relative to the birth of normal, healthy children in reaching its decision. *See id.* at 442, 314 S.E.2d at 654. For this reason the case is included here as the leading case in this jurisdiction.
256. 252 Ga. at 443, 314 S.E.2d at 654.
257. *Id.* at 444-45, 314 S.E.2d at 655-56 ("parent cannot be said to have suffered an injury in the birth of a child").

Georgia, and dissented from the decision to grant any damages, without opinion.[258]

Concurring in Part and Dissenting in Part: Justices Smith and Gregory concurred in the recognition of the cause of action and in the granting of damages, but dissented from the denial of child rearing damages, with an opinion by Justice Gregory.[259]

Hawaii

No cases were found.

Idaho

No cases were found.

Illinois

Leading Case: *Cockrum v. Baumgartner.*[260]

Court: Supreme Court of Illinois (highest court).

Basic Facts: Two cases were consolidated on appeal. In both cases, the plaintiffs were married couples who alleged negligence in the performance of sterilization procedures; one case involved a vasectomy and the other a tubal ligation. In both cases, the wives became pregnant and gave birth to healthy children. One couple sued the physician and a laboratory which tested the sperm of the vasectomy patient, while the second couple sued the physician and the hospital where the tubal ligation was performed.[261]

Holding on Damages: Damages were allowed, including pain of childbirth, time lost in having the child, and medical expenses.[262] Child rearing damages were denied on the basis of

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258. *Id.* at 442-45, 314 S.E.2d at 654-56 (Marshall & Bell, JJ., concurring in part and dissenting in part).

259. *Id.* at 445-46, 314 S.E.2d at 656 (Smith & Gregory, JJ., concurring in part and dissenting in part). "Clearly the foreseeable consequences of a wrongful birth include the expenses of raising the child to the age of majority." *Id.* (citations omitted).

260. 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied,* Raja v. Michael Reese Hosp., 464 U.S. 846 (1983).

261. *Id.* at 194-96, 447 N.E.2d at 386-87.

262. *Id.* at 194-95, 447 N.E.2d at 386.

public policy.[263]

Opinion by: Justice Ward.

Dissenting Opinion by: Justice Clark; Justice Simon joining. The dissenters saw the majority position as inconsistent because it stated that the birth of a normal child is not an injury to the parents, but allowed some damages to be recovered.[264] The dissent stated that the right to limit procreation is constitutionally protected.[265] The child rearing expenses are a foreseeable result of the physician's negligence,[266] and such costs should be allowed with an appropriate offset for the benefits of parenthood.[267]

Indiana

Leading Case: *Garrison v. Foy.*[268]

Court: Court of Appeals of Indiana, Third District (intermediate appellate court).

Basic Facts: The plaintiff husband underwent a vasectomy

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263. *Id.* at 201, 447 N.E.2d at 390.

> One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization.
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> . . . .
>
> [I]t is clear that public policy commands the development and the preservation of family relations. . . . To permit parents in effect to transfer the costs of rearing a child would run counter to that policy.

Id. at 200-01, 447 N.E.2d at 389-90 (citation omitted).

264. *Id.* at 205-06, 447 N.E.2d at 391-92 (Clark & Simon, JJ., dissenting). Justice Clark states:

> If, as the court hypothesizes, the birth of a normal child cannot be construed as an injury, how then can the plaintiff recover for the "pain" of childbirth? Should, then, the court characterize the time "lost in having the child" as "lost" time (which in effect is found to be compensable)? Why then allow for the medical costs of childbirth if they represent the first installment in an investment in the preservation and development of family relations? The opinion of the court contradicts itself. Once the court has agreed that the cause of action for wrongful birth can be brought in Illinois, the policy questions that the opinion grapples with are moot.

Id. at 205-06, 447 N.E.2d at 392.

265. *Id.* at 206, 447 N.E.2d at 392 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973)).

266. *Id.* at 207, 447 N.E.2d at 393.

267. *Id.* at 208-09, 447 N.E.2d at 393.

268. 486 N.E.2d 5 (Ind. Ct. App. 1985).

performed by the defendant physician.[269] About one and one-half years later, the plaintiff wife gave birth to a deformed baby (complete bilateral cleft of the lip, jaw, and palate). The plaintiff then sued the defendant physician for negligence.[270]

Holding on Damages: Damages were allowed for the expenses directly related to the pregnancy such as cost of the unsuccessful vasectomy, pain and suffering, medical complications from the pregnancy, cost of delivery, lost wages, and loss of consortium.[271] Child rearing costs were denied because of public policy considerations.[272]

Opinion by: Judge Hoffman; Judge Garrard concurred; Judge Staton concurred in the result.

Iowa

Leading Case: *Nanke v. Napier.*[273]

Court: Supreme Court of Iowa (highest court).

Basic Facts: The plaintiff sued the defendant physician for negligence in the performance of a therapeutic abortion which resulted in the birth of a normal healthy child.[274]

Holding on Damages: The plaintiff sought damages for pain and suffering, medical expenses, lost wages, emotional distress, and child rearing expenses in the lower court. The lower court sustained defendant's pretrial motion to dismiss the action for

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269. *Id.* at 7.

270. Although this case involved the unplanned birth of a deformed child, the court followed the case law from other jurisdictions relative to the birth of healthy, normal children in reaching its decision. *See id.* at 8. *See also* Spoljaric v. Pangan, 466 N.E.2d 37, 38-39, 45-46 (Ind. Ct. App. 1984) where Judge Garrard, writing for the same court in a case which involved a negligent tubal ligation which resulted in the birth of a normal child, said:

> Because the Spoljarics' claim was barred by the statute of limitations we need not consider whether their complaint stated a claim upon which relief could have been granted. However, we see no reason why this action sounding in negligence should not be heard by a court in this state. . . . [C]learly there would be some damage resulting from an ineffectively performed sterilization.

Id. at 45-46.

271. 486 N.E.2d at 8.

272. *Id.*

273. 346 N.W.2d 520 (Iowa 1984).

274. *Id.* at 521. "[T]he factual situation involved in this case would more accurately be depicted as a claim for 'wrongful pregnancy.' We will regard plaintiff's petition in that context." *Id.*

child rearing damages without ruling on the other damages. The plaintiff then sought an interlocutory appeal in the Iowa Supreme Court. The Iowa Supreme Court denied the child rearing damages on the basis of public policy.[275]

Opinion by: Justice McGiverin.

Dissenting Opinion: Justice Wolle would have viewed damages as a question of fact, rather than law, relying on instructions to the jury in traditional tort principles to produce a fair result.[276]

Kansas

Leading Case: *Johnston v. Elkins*.[277]

Court: Supreme Court of Kansas (highest court).

Basic Facts: The plaintiff underwent a vasectomy, but his wife became pregnant and gave birth to a normal, healthy child. They sued the physician and the physician's employer for negligence.[278]

Holding on Damages: Damages were allowed for the costs of the unsuccessful operation, pain and suffering, cost of delivery, and loss of consortium.[279] Child rearing damages had been denied by this court in an earlier case[280] and were not at issue here.[281]

Opinion by: Justice Miller.

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275. *Id.* at 522-23. "[A] parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child because the invaluable benefits of parenthood outweigh the mere monetary burdens as a matter of law." *Id.* (citations omitted).

276. *Id.* at 523-24 (Wolle, J., dissenting).

> The majority opinion of this court forecloses the plaintiff from moving beyond the bare allegations of her petition and proving such relevant facts on this issue of damages as her own unique socio-economic circumstances and the reasons why she wished to delay her raising of a child. We have heretofore recognized the unique character of each parent-child relationship that may be involved in the assessment of damages to a parent . . . .

Id. at 524.

277. 241 Kan. 407, 736 P.2d 935 (1987).

278. *Id.* at 408, 736 P.2d at 937.

279. *Id.* at 413, 736 P.2d at 940.

280. *See* Byrd v. Wesley Medical Center, 237 Kan. 215, 699 P.2d 459 (1985).

281. 241 Kan. 407, 410, 736 P.2d 935, 938.

Kentucky

Leading Case: *Schork v. Huber.*[282]
Court: Supreme Court of Kentucky (highest court).
Basic Facts: The plaintiff wife underwent an unsuccessful sterilization procedure performed by the defendant physician. The plaintiff couple sued the physician for negligence when a healthy baby was born the following year.[283]
Holding on Damages: The Kentucky Court of Appeals had previously held, in *Maggard v. McKelvey*,[284] that damages could be awarded for "the general and special damages incidental to the pregnancy and birth, such as, pain and suffering, loss of consortium, medical and hospital expenses, and loss of wages."[285] In *Schork v. Huber*,[286] the Kentucky Supreme Court agreed with the lower court's assessment of damages, holding that child rearing damages were disallowed as contrary to public policy.[287] Any change in this policy should come from the legislature.[288]
Opinion by: Justice Wintersheimer; Chief Justice Stephens and Justices Aker, Gant, and Stephenson concurred.
Dissenting Opinion: Justice Leibson complained that the majority was making new public policy, not following established public policy.[289] He would have allowed child rearing damages to

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282. 648 S.W.2d 861 (Ky. 1983).
283. *Id.* at 862.
284. Maggard v. McKelvey, 627 S.W.2d 44 (Ky. App. 1981).
285. *Id.* at 48.
286. 648 S.W.2d 861.
287. *Id.* at 863. "Certainly the injured could recover compensation from the negligent, but public policy considerations limit the responsibility of those negligent." *Id.* (citations omitted).
288. *Id.* "The enunciation of public policy is the domain of the General Assembly. . . . The courts interpret the law. They do not enact legislation." *Id.*
289. *Id.* at 864 (Leibson, J., dissenting).

> The duty of this court is to follow public policy, not to formulate it. In *Maggard*, the Kentucky Court of Appeals formulated policy. It reasoned from the *absence* of "a clear expression of public policy (or) some indication from the legislature" to the conclusion "that our public policy prohibits the extension of liability to include these damages." My view is just the opposite; that public policy should not flow from the opinions and beliefs of judges, however well-meaning, absent "a clear expression of public opinion or some indication from the legislature."
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> . . . .
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> Public policy should not extend to making a judgment, as a matter of law, that persons have suffered no damages from the foreseeable consequences of a medical procedure, even though we judges may believe that the emotional benefits

be awarded as a normal negligence recovery.[290]

Dissenting Opinion: Justice Vance would have allowed child rearing damages with an offset for the benefits to the parents and, unlike Justice Leibson, would have allowed mental distress damages because there was the required physical contact during the operation.[291]

Louisiana

Leading Case: *Pitre v. Opelousas General Hospital.*[292]

Court: Court of Appeals of Louisiana, Third Circuit (intermediate appellate court).

Basic Facts: The plaintiffs, husband and wife, decided they could not afford the expense of having a third child. Therefore, the defendant performed a tubal ligation on the plaintiff wife. This procedure failed, however, and a third child was born to the couple. The child was born with the congenital defect of albinism.[293] The plaintiffs sued the physicians who were involved, as well as the hospital.[294]

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of parenting outweigh the economic consequences.

Id.

290. *Id.* at 865, 867.

A cause of action in negligence is almost as old as the common law.

Historically, in an agricultural society and in the early days of the industrial revolution when child labor was the rule rather than the exception, children were recognized as an economic benefit. That once logical proposition has certainly become illogical in our modern society. . . .

The economic loss attendant to bearing and raising children in our time is as foreseeable and reasonably determinable as the economic loss from physical injury that causes impairment or destruction of earning power or the prospect of future medical expenses. . . .

. . . .

We cannot absolve a physician of liability for the expense reasonably foreseeable for the cost of raising the child simply because it may be burdensome. To do so is to limit the action to a relatively insignificant portion of the damages caused by his negligence.

Id.

291. *Id.* at 867 (Vance, J., dissenting).

292. Pitre v. Opelousas Gen. Hosp., No. 87-CC-2360 (La. Sup. Ct. Nov. 30, 1987) (LEXIS, States library, Omni file).

293. *Id.* Although this was a case that involved a child born with a congenital defect, the court noted that its reasoning would have been the same had the child been born in a healthy condition. *See id.* For this reason, the case is included here as the leading case in this jurisdiction.

294. *Id.*

Holding on Damages: Recovery was limited to the expenses of the pregnancy and delivery. Damages for emotional distress and child rearing were denied because prevention of pregnancy was not an issue that the public policy of Louisiana had addressed.[295]
Opinion by: Judge Stoker.
Concurring in Part and Dissenting in Part: Judge King would have allowed both emotional distress and child rearing damages as the reasonably foreseeable consequences of the defendants' actions.[296] He would have used the benefits of parenthood to mitigate the amount awarded.[297]

Maine

Leading Case: *Macomber v. Dillman.*[298]
Court: Supreme Judicial Court of Maine (highest court).
Basic Facts: The plaintiff couple sued the defendants, physician and hospital, for a negligently performed tubal ligation resulting in the birth of a healthy child.[299]
Holding on Damages: Recovery was limited to the hospital and medical expenses for the sterilization and pregnancy, pain and suffering, loss of the wife's earnings, and loss of consortium by the husband. Child rearing damages were disallowed for public policy reasons with no further explanation.[300]
Opinion by: Justice Glassman; Justices McKusick, Nichols, and Roberts concurred.
Concurring in Part and Dissenting in Part: Justice Scolnik would have allowed child rearing damages,[301] leaving any limitations on normal tort damages to the legislative process.[302] Justice Scolnik saw the majority opinion as inconsistent: "If . . .

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295. *Id.*
296. *Id.* (King, J., concurring in part and dissenting in part). "I believe the majority has mistakenly confused the risk which is not protected, the consequences of parenthood, with the risk that is protected, the consequences of a negligent act." *Id.*
297. *Id.*
298. 505 A.2d 810 (Me. 1986).
299. *Id.* at 812.
300. *Id.* at 813. "We hold for reasons of public policy that a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child." *Id.*
301. *Id.* (Scolnik, J., concurring in part and dissenting in part).
302. *Id.* at 816.

the birth of a child does not constitute an injury, no basis exists for any award of damages."[303]

Maryland

Leading Case: *Jones v. Malinowski.*[304]
Court: Court of Appeals of Maryland (highest court).
Basic Facts: The plaintiff couple had three children within the first five years of their marriage, two of whom were born with physical problems. They determined that they could not afford a fourth child, and the wife submitted to a tubal ligation performed by the defendant physician. The wife became pregnant following the operation and gave birth to a healthy fourth child. The plaintiffs then sued the defendant for negligence.[305]
Holding on Damages: All foreseeable damages were allowed including personal injuries and emotional distress, negative effects on the marital relationship, pain and suffering, medical expenses, and loss of earnings.[306] Child rearing damages were allowed as offset by the benefits derived by the parent.[307]
Opinion by: Chief Justice Murphy; Justices Smith, Eldridge, Cole, Davidson, Rodowsky, and Couch concurred.

Massachusetts

No cases were found.

Michigan

Leading Case: *Troppi v. Scarf.*[308]
Court: Michigan Court of Appeals (intermediate appellate court).

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303. *Id.* at 814.
304. 299 Md. 257, 473 A.2d 429 (1984).
305. *Id.* at 260-61, 473 A.2d at 430-31.
306. *Id.* at 261 n.2, 473 A.2d at 431 n.2.
307. *Id.* at 274, 473 A.2d at 438:

> The jury must assess these benefits in light of the circumstances of the particular case under consideration, taking into account, among other things, family size and income, age of the parents and other relevant factors in determining the extent to which the birth of the child represents a benefit to the parents.

Id. at 272, 473 A.2d at 436-37 (citing Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 519 (1971)).
308. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

Basic Facts: The plaintiff couple sued a pharmacist who had negligently supplied the plaintiff wife with a supply of tranquilizers instead of the oral contraceptives that the plaintiff's physician had prescribed. The plaintiff wife became pregnant and delivered her eighth child, a healthy son.[309]

Holding on Damages: The court approved damages for medical and hospital expenses, loss of wages, and pain and suffering.[310] Child rearing expenses were also approved with an offset for benefits[311] to the same interest as the one harmed.[312]

Opinion by: Judge Levin, presiding.

Additional Cases: *Clapham v. Yanga*[313] and *Bushman v.*

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309. *Id.* at 244, 187 N.W.2d at 512-13. Although this case involved a negligently supplied prescription and not a negligently performed sterilization, the court relied upon sterilization cases to determine its damage award.

> [A]s yet, no appellate court has passed upon the liability of a pharmacist for negligently dispensing oral contraceptives. Several cases have, indeed, dealt with the liability of physicians for failure to exercise due care in the therapeutic or elective sterilization of patients. Because the elements of damage in these cases correspond to some of the damages prayed for here, the decisions deserve scrutiny.

Id. at 514.

310. *Id.* at 260-61, 187 N.W.2d at 513, 520-21.

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

> The trial courts evidently believed . . . that application of the benefits rule prevents any recovery for the expenses of rearing an unwanted child. This is unsound. Such a rule would be the equivalent to declaring that in every case, 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.

Id.

312. *Id.* "[I]f 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 damages properly awardable." *Id.* (citing Burtraw v. Clark (Little), 103 Mich. 383, 61 N.W. 552 (1894); 22 AM JUR. 2D *Damages*, § 204 (1965); C.T. MCCORMICK, DAMAGES § 40 (1935)).

313. 102 Mich. App. 47, 300 N.W.2d 727 (1980). In Clapham v. Yanga, a fourteen year old patient and her parents sued a physician for negligently failing to diagnose the patient's pregnancy. The court, in differentiating *Clapham* from a wrongful life action, noted:

> . . . Michigan has recognized that liability may be imposed for the child-rearing costs of a youngster born due to a defendant's negligence. . . . The award did not constitute a judgment directly in the child's favor. . . . The power of disposition rests in the grandparents with the condition that they be used to provide for Joel during his minority — precisely the reason damages for the child-rearing costs of a youngster are ever recoverable.

Id. at 61-62, 300 N.W.2d at 734.

Burns Clinic Medical Center.[314]

Minnesota

Leading Case: *Sherlock v. Stillwater Clinic.*[315]
Court: Supreme Court of Minnesota (highest court).
Basic Facts: The plaintiff husband underwent a vasectomy performed by the defendant physician.[316] The physician negligently told the plaintiff that he was sterile, when in fact testing had revealed that the plaintiff was not sterile. The plaintiff wife later gave birth to the couple's eighth child, and they sued the physician and the facility for negligence.[317]
Holding on Damages: Damages were approved for medical expenses incident to the birth, pain and suffering, loss of consortium,[318] and the child rearing costs[319] reduced by the benefits

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314. 83 Mich. App. 453, 268 N.W.2d 683 (1978). In Bushman v. Burns Clinic Medical Center, the plaintiff couple sued the physician and hospital for a negligently performed vasectomy resulting in the birth of a healthy child. The parents, however, abandoned their claim for child rearing damages prior to trial. The court held that the benefits rule enunciated in Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, should not be applied in cases where child rearing damages are not sought. *Id.* at 457-58, 268 N.W.2d at 685.

315. 260 N.W.2d 169 (Minn. 1977).

316. *Id.* at 171.

317. *Id.* at 171 n.1 ("to a lesser extent, the Sherlocks also alleged that the vasectomy itself had been negligently performed.").

318. *Id.* at 175.

319. *Id.* at 175-76.

> 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. The use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept as an integral aspect of the modern marital relationship . . . . Compensatory damages for the costs of rearing the child to the age of majority would also, in our opinion, serve the useful purpose of an added deterrent to negligent performance of sterilization operations. . . . Lastly, in the absence of a legislatively granted immunity or declared public policy governing sterilization, we remain unconvinced that a physician should be held harmless for the economic costs of supporting an unplanned child.

Id. But see Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 14 n.5 (Minn. 1986) (Supreme Court of Minnesota conjectures that "[i]n light of the legislative intent embodied in section 145.424, subdivisions 1 and 2, our reasoning in *Sherlock* may, perhaps,

received by the parents.[320]
Opinion by: Justice Rogosheske.
Dissenting Opinion by: Chief Justice Sheran; Justice Peterson joined: "[T]he worth of a healthy child to his parents will always exceed these costs."[321]

Mississippi

No cases were found.

Missouri

Leading Case: *Miller v. Duhart.*[322]
Court: Missouri Court of Appeals, Eastern District, Division Three (intermediate appellate court).
Basic Facts: The plaintiff couple had four children and wanted to avoid having any more. The plaintiff wife, therefore, underwent a tubal ligation performed by the defendant osteopaths. She later became pregnant and the couple, their four previous children, and the new child sued the osteopaths and the hospital for negligence.[323] The new child's wrongful life claim was dismissed.[324] The siblings' claim was similarly dismissed as not setting forth a valid cause of action.[325] The parents' claim was ruled to be a valid cause of action for wrongful conception but was barred by the statute of limitations.[326]
Holding on Damages: The court ruled that, if brought within

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have been erroneous").

320. 260 N.W.2d 169, 176 (Minn. 1977).

> In keeping with the "same interest" limitation of Restatement, Torts, § 920, . . . and its underlying purpose to prevent unjust enrichment, the trier of fact will then be required to reduce these costs by the value of the child's aid, comfort, and society which will benefit the parents for the duration of their lives.
>
> . . . .
>
> The jury was . . . not specifically instructed to offset the value of the child's aid, comfort, and society against the projected rearing costs. Because of these errors, we are compelled to reverse and remand for a new trial limited solely to the issue of damages.

Id.

321. *Id.* at 177 (Sheran & Peterson, JJ., dissenting).
322. 637 S.W.2d 183 (Mo. App. 1982).
323. *Id.* at 184.
324. *Id.* at 187.
325. *Id.* (citation omitted).
326. *Id.* at 188.

the statutory period, compensatory damages could include prenatal and postnatal medical expenses, pain and suffering, loss of consortium, and the cost of a second sterilization procedure.[327]
Opinion by: Judge Snyder; Judges Reinhard and Crist concurred.

Montana

No cases were found.

Nebraska

No cases were found.

Nevada

Leading Case: *Szekeres ex rel Szekeres v. Robinson.*[328]
Court: Supreme Court of Nevada (highest court).
Basic Facts: The plaintiffs sued the physicians and the hospital for a negligently performed surgical sterilization procedure which resulted in the wife becoming pregnant and giving birth to a healthy child. The child's siblings also sued for damages.[329]
Holding on Damages: No damages were allowed for this tort claim.[330] The case was remanded, however, so that the parents could pursue a breach of contract claim.[331]
Opinion by: Justice Springer; Chief Justice Mowbray, Justices Gunderson and Steffen, and District Judge Thomas A. Foley concurred.

New Hampshire

Leading Case: *Kingsbury v. Smith.*[332]
Court: Supreme Court of New Hampshire (highest court).
Basic Facts: The plaintiff requested that the defendants perform a tubal ligation on the plaintiff wife during delivery of the

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327. *Id.*
328. 715 P.2d 1076 (Nev. 1986).
329. *Id.* at 1076-77.
330. *Id.* at 1077. "[I]n Nevada the birth of a normal child is not a civil wrong for which the court will provide a remedy in the form of an action for damages." *Id.*
331. *Id.* at 1077, 1079.
332. 122 N.H. 237, 442 A.2d 1003 (1982).

plaintiffs' third child because the plaintiffs did not wish to conceive more children. The procedure was performed, but the plaintiff wife became pregnant again and gave birth to a fourth healthy child. The plaintiff couple instituted a negligence suit against the physicians, the hospital, and the professional association (corporation).[333]

Holding on Damages: Recovery of damages was limited to hospital and medical expenses of the pregnancy, the cost of sterilization, pain and suffering, loss of the mother's wages, and loss of consortium.[334] Child rearing damages were denied for public policy reasons.[335]

Opinion by: Justice Batchelder; all justices concurred.

New Jersey

Leading Case: *P. v. Portadin.*[336]

Court: Superior Court of New Jersey, Appellate Division (intermediate appellate court).

Basic Facts: The defendant physician obtained the plaintiff wife's consent to perform a particular kind of sterilization procedure (tubal ligation), but performed instead a different procedure (Fallopian rings). The procedure was unsuccessful, and the plaintiff wife became pregnant and gave birth to a healthy child. The plaintiffs sued the defendant physician and the professional

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333. *Id.* at 240, 442 A.2d at 1004.

334. *Id.* at 243, 442 A.2d at 1006.

335. *Id.* at 242-43, 442 A.2d at 1006.

> [W]e reject the approach that allows unlimited recovery for the costs of raising the child. The general rationale for unlimited recovery is stated in *Cockrum v. Baumgartner*. "Ethical and moral considerations aside, the cause before us is analytically indistinguishable from an ordinary medical malpractice action." We disagree with the Illinois court, because it is difficult to imagine a malpractice case which is more readily distinguishable. In no other situation is a new human life created.
>
> We also reject the theory which limits recovery by the application of the "benefits" rule . . . . The application of this compensating factor in cases such as this is nothing more nor less than the application of an offset to reduce the magnitude of verdicts and lessen the monetary shock to the medical tortfeasor and his insurer. To say that a benefit can be calculated from the total failure of the medical service or treatment giving rise to the action, based upon its failure, is an illogical extension of an otherwise sound legal proposition.

Id. (citations omitted).

336. 179 N.J. Super. 465, 432 A.2d 556 (1981).

association (corporation) for negligence.[337]
Holding on Damages: The plaintiffs may recover damages for medical expenses, pain and suffering, lost wages, and loss of consortium.[338] Child rearing costs were disallowed on the basis of public policy.[339]
Opinion by: Judge Michels.

New Mexico

No cases were found.

New York

Leading Case: *O'Toole v. Greenberg.*[340]
Court: Court of Appeals of New York (highest court).
Basic Facts: The plaintiff wife underwent a tubal ligation performed by the defendant physician. The procedure, however, was unsuccessful, and the plaintiff gave birth to a healthy child. The plaintiff couple sued the defendant physicians and the clinic on grounds of negligence.[341]
Holding on Damages: During the trial, damages were conceded by the defendants for physical and emotional injuries suffered by the plaintiff wife as a result of the unwanted pregnancy, for medical expenses associated with the pregnancy, and for the loss of services claim brought by the plaintiff husband.[342] Damages for child rearing were not allowed by the court of appeals as a matter of public policy.[343]

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337. *Id.* at 468, 432 A.2d at 557.

338. *Id.* at 471-72, 432 A.2d at 559-60.

339. *Id.* In *Portadin*, the Superior Court of New Jersey relied on the reasoning of the New Jersey Supreme Court in Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), which involved the birth of a defective child after the negligent physicians failed to inform the plaintiffs about prenatal tests for diagnosing genetic defects. The *Berman* decision denied child rearing damages. By relying on *Berman*, the *Portadin* court specifically disapproved a prior case from the New Jersey Superior Court (Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975)) in which child rearing damages had been allowed for the parents of a healthy child, born as a result of an ineffective sterilization procedure. *Id.* at 472, 432 A.2d at 559.

340. 64 N.Y. 2d 427, 477 N.E.2d 445, 488 N.Y.S.2d 143 (1985).

341. *Id.* at 429-30, 477 N.E.2d at 446, 488 N.Y.S.2d at 144.

342. *Id.* at 430 n.2, 477 N.E.2d at 446 n.2, 488 N.Y.S.2d at 144 n.2.

343. *Id.* at 432, 477 N.E.2d at 448, 488 N.Y.S.2d at 146. "[T]he birth of a healthy child, as but one consequence of defendant's tortious conduct, does not constitute a

Opinion by: Judge Jasen; Chief Judge Wachtler and Judges Simons, Kaye, Alexander, and Lynch concurred; Judge Meyer took no part in the decision.

North Carolina

Leading Case: *Jackson v. Bumgardner.*[344]
Court: Supreme Court of North Carolina (highest court).
Basic Facts: The plaintiff couple sued the defendant for negligence in replacement of an I.U.D. The replacement was negligently performed, the plaintiff wife became pregnant and gave birth to a normal child.[345]
Holding on Damages: Damages were allowed for hospital and medical expenses for the pregnancy, pain and suffering, lost wages, and loss of consortium. Expenses for child rearing were denied as being necessarily based on speculation and conjecture.[346] The court noted that any change in these limits should come from legislative action,[347] and that the plaintiff had failed, in addition, to state an adequate claim for breach of contract.[348]
Opinion by: Justice Frye.
Concurring in Part and Dissenting in Part: Justice Martin would have allowed child rearing damages offset by the value of benefits received by the parents in having a healthy child.[349]

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harm cognizable at law." *Id.*

344. 318 N.C. 172, 347 S.E.2d 743 (1986). "[T]he term 'wrongful conception' or 'wrongful pregnancy' has been used to describe cases similar to the instant case." *Id.* at 178, 347 S.E.2d at 747. Since this decision relies on much of the theory from the case law regarding wrongful pregnancy or conception, and, indeed, arrives at the majority viewpoint on the damage issue, it has been included as the leading case from this jurisdiction.

345. *Id.* at 174, 347 S.E.2d at 744-45.

346. *Id.* at 182, 347 S.E.2d at 749-50.

347. *Id.* at 183, 347 S.E.2d at 750.

348. *Id.* at 186, 347 S.E.2d at 752.

349. *Id.* at 189-90, 347 S.E.2d at 753-54. (Martin, J., concurring in part and dissenting in part):

> The better practice would be to allow the trial court in the first instance to address the issue of what damages are recoverable.
>
> . . . .
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> . . . The majority has devised a special rule of damages for the benefit of doctors faced with malpractice claims involving the concept of wrongful pregnancy. Defendant doctors should not have a special rule of damages in this type of medical malpractice case. . . . Under settled common law principles of this state, a defendant is responsible for all damages that proximately result from his negligence. Certainly damages should not be eliminated because of difficulty of proof.

He would also have allowed the plaintiffs to pursue their breach of contract claim.[350]

North Dakota

No cases were found.

Ohio

Leading Case: *Bowman v. Davis.*[351]
Court: Supreme Court of Ohio (highest court).
Basic Facts: Negligently performed tubal ligation caused the plaintiff wife to conceive and give birth to twins, her fifth and sixth children. One of the twins suffered from congenital abnormalities and mental retardation. The other twin was normal and healthy. The plaintiff parents sued the physician for negligence.[352]
Holding on Damages: Damages were allowed for expenses from physical complications, pain and suffering, the value of Mrs. Bowman to her husband (including consortium) and to the other members of the family during her confinement, expenses due to the change in family status, and child rearing costs (including special care required for the abnormal twin).[353] There was no mention by the court of the need to offset parental benefits against the damage award.[354]
Opinion by: Per curiam opinion was concurred in by Chief Jus-

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> If a rule must be formulated at this time, the Court would be well served by sticking with basic common law rules of damages. Such rules allow plaintiffs to recover all damages that proximately flow from defendant's negligence . . . .

Id.

350. *Id.* at 191, 347 S.E.2d at 754.
351. 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).
352. *Id.* at 41-42, 356 N.E.2d at 497.
353. *Id.* at 42-43, 356 N.E.2d at 497.
354. *Id.* at 46, 356 N.E.2d at 499:

> The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee. See Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973). For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilization would constitute an impermissible infringement of a fundamental right.

Id.

tice O'Neill and Justices Herbert, Stern, W. Brown, and P. Brown.

Dissenting: Justices Corrigan and Celebrezze dissented without opinion.

Oklahoma

Leading Case: *Morris v. Sanchez.*[355]

Court: Supreme Court of Oklahoma (highest court).

Basic Facts: This was a consolidation of two cases, each of which involved the failure of a tubal ligation with the resultant birth of a healthy child. The cases were brought in federal district court in Oklahoma. Questions of law were then certified to the Supreme Court of Oklahoma regarding the nature of damages which might be sought in this kind of medical malpractice case.[356]

Holding on Damages: Child rearing damages were not allowed. No other damages were discussed.[357]

Opinion by: Justice Lavender; Chief Justice Dooling, Vice Chief Justice Hargrave, and Justices Wilson and Summers concurred.

Concurring in Part and Dissenting in Part: Justice Hodges, with Justice Simms joining, would not only have denied child rearing damages, but would have denied the tort cause of action altogether. They would, however, have approved of a contract cause of action.[358]

Concurring in Part and Dissenting in Part: Justice Opala, with Justice Kauger joining, would have allowed child rearing damages. They would also have allowed damages for the costs of the failed procedure and the costs of a repeated procedure, pain and suffering, emotional distress, loss of consortium, lost wages, and hospital and medical expenses related to the pregnancy.[359]

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355. Morris v. Sanchez, No. 63,675 (surviving number), No. 63,768 (Consolidated), slip op. (Okla. Sup. Ct. Nov. 10, 1987) (LEXIS, States library, Omni file).

356. *Id.*

357. *Id.*

358. *Id.* (Hodges, J., concurring in part and dissenting in part).

359. *Id.* (Opala, J., concurring in part and dissenting in part).

Oregon

No cases were found.

Pennsylvania

Leading Case: *Mason v. Western Pennsylvania Hospital.*[360]
Court: Supreme Court of Pennsylvania (highest court).
Basic Facts: The plaintiff underwent an unsuccessful tubal ligation performed by the defendant physician. The plaintiff subsequently gave birth to a normal baby and sued the defendant physician and hospital for negligence.[361]
Holding on Damages: Damages were allowed, but were limited to all medical expenses and lost wages related to the pregnancy, and pain and suffering.[362] Child rearing damages were disallowed due to public policy.[363] Emotional distress damages connected to child rearing were also disallowed.[364]
Opinion by: Justice Roberts; Justice Hutchinson concurred.
Concurring in Part and Dissenting in Part: Chief Justice O'Brien, with Justice Flaherty joining, would have allowed child rearing damages offset by the value of the benefits of parenthood.[365] Emotional distress damages should also be recoverable.[366]

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360. 499 Pa. 484, 453 A.2d 974 (1982).

361. *Id.* at 486, 453 A.2d at 975.

362. *Id.* at 486, 453 A.2d at 976.

363. *Id.* at 487, 453 A.2d at 976. "[T]he financial and emotional costs of raising a healthy child are not compensable. . . . [T]he benefits of joy, companionship, and affection which a normal, healthy child can provide must be deemed as a matter of law to outweigh the costs of raising that child." *Id.*

364. *Id.*

365. *Id.* at 488, 453 A.2d at 977 (O'Brien, C.J., concurring in part and dissenting in part):

> I see no justifiable reason to differentiate between the present case and our decision in *Speck v. Finegold,* allowing the plaintiffs to seek damages for the cost of raising their genetically defective child. Any other result is inconsistent. It 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. "The law of liability should not turn on . . . fortuitous considerations."

Id. (quoting Howard v. Lecher, 42 N.Y.2d 109, 113, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365 (1977)) (citations omitted).

366. *Id.* at 492-93, 453 A.2d at 979:

> It is well established in Pennsylvania that an injured party may recover not only for actual physical injury sustained, but also for the concomitant mental and emotional suffering. Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966); Cucinotti

Concurring in Part and Dissenting in Part: Justice Nix, with Justice McDermott joining, would have allowed a cause of action in this case for breach of contract warranties, but would not have allowed damages for emotional distress;[367] they also would not have allowed any action in negligence for the birth of an unwanted child.[368]

Concurring in Part and Dissenting in Part: Justice Larsen would have permitted the parents of such children to recover the full cost of raising their unplanned child to the age of majority.[369]

Rhode Island

No cases were found.

South Carolina

No cases were found.

Tennessee

Leading Case: *Smith v. Gore.*[370]

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v. Ortmann, 399 Pa. 26, 159 A.2d 216 (1960); Ewing v. Pgh. C. & St. L. Ry. Co., 147 Pa. 40, 23 A. 340 (1892). Indeed, an individual may recover for the emotional and mental distress resulting from another's negligence where there has been no physical impact. Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

Id. at 493, 453 A.2d at 979.

367. *Id.* at 493-95, 453 A.2d at 979-80. (Nix & McDermott, JJ., concurring in part and dissenting in part).

368. *Id.* at 494, 453 A.2d at 980:

> I reemphasize that I acknowledge the limited right of privacy recognized in Roe v. Wade, but I do not accept the *ipse dixit* position of the existence of a right to control reproductivity which requires the state to provide civil recourse when a private party fails to intercept the natural process of birth.

Id. (citations omitted).

369. *Id.* at 496 n.1, 453 A.2d at 981 n.1. (Larsen, J., concurring in part and dissenting in part):

> [D]efendants should be able to deduct the emotional benefits of childrearing from the emotional trauma of raising a child. However, I do not agree that the "benefit rule" should be applied so as to allow the deduction of benefits received from the child twice — once from the damages for childrearing trauma, and again from the actual costs of childrearing — because this would provide a windfall to the tortfeasor.

Id.

370. 728 S.W.2d 738 (Tenn. 1987).

Court: Supreme Court of Tennessee (highest court).

Basic Facts: The plaintiff alleged that she underwent a tubal ligation and, because of the defendant's negligence, she gave birth to a normal baby boy. The plaintiff sued the defendant doctors, hospital, and manufacturer of the sterilization technique for negligence.[371]

Holding on Damages: Recoverable damages were limited to medical expenses, pain and suffering, lost wages, loss of consortium, and emotional distress. Child rearing damages were specifically excluded.[372]

Opinion by: Justice Droweta.

Texas

Leading Case: *Hickman v. Myers.*[373]

Court: Court of Appeals of Texas, Fort Worth (intermediate appellate court).

Basic Facts: The plaintiff couple sued the defendant physician for negligence after an unsuccessful tubal ligation resulted in the plaintiff wife becoming pregnant and giving birth to a normal healthy baby.[374]

Holding on Damages: The court was not specific as to which, if any, damages it would uphold in a wrongful pregnancy action. The court specifically denied child rearing damages,[375] however, in any case where the unplanned child is healthy.[376]

Opinion by: Justice Spurlock.

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371. *Id.* at 740.

372. *Id.* at 751.

373. 632 S.W.2d 869 (Tex. 1982).

374. *Id.*

375. *Id.* at 871-72.

> It is in society's best interest to hold physicians to a standard of professional competence and impose liability when they are negligent in treating their patients, but to hold a doctor responsible for the support of a mistakenly conceived child takes him well beyond the scope of his duty to his patient . . . ."

Id.

376. *Id.* at 870. "[T]here can only be an enforceable claim under Texas law if the child is found not to be healthy." *Id.*

Utah

No cases were found.

Vermont

No cases were found.

Virginia

Leading Case: *Miller v. Johnson.*[377]
Court: Supreme Court of Virginia (highest court).
Basic Facts: Two similar cases were consolidated on appeal. In both cases, the mothers sued their physicians for wrongful pregnancy after their abortions failed and they gave birth to healthy children.[378]
Holding on Damages: Damages are recoverable for "medical expenses, pain and suffering, and lost wages for a reasonable period, directly resulting from the negligently performed abortion, the continuing pregnancy, and the ensuing childbirth."[379] Damages for emotional distress may be recovered if related to the tortious physical injury.[380] Child rearing damages are not recoverable because they are too speculative.[381]
Opinion by: Justice Cochran.
Dissenting Opinion: Justice Russell would have denied all damages to the plaintiffs on the basis that they had proved no compensable injury.[382]

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377. 231 Va. 177, 343 S.E.2d 301 (1986).

378. *Id.* at 179-80, 343 S.E.2d at 302-03.

379. *Id.* at 183-84, 343 S.E.2d at 305.

380. *Id.* at 184, 343 S.E.2d at 305.

381. *Id.* at 186, 343 S.E.2d at 307: "We do not . . . base our ruling on public policy [which is] . . . best left to the General Assembly. . . . [A] court or jury is not capable of determining with any reasonable certainty the costs of bringing a child to maturity less the offsetting value of the child's life." *Id.* at 186-87, 343 S.E.2d at 307.

382. *Id.* at 188-89, 343 S.E.2d at 308. (Russell, J., dissenting):

> The majority opinion rejects . . . damages for . . . rearing . . . .
>
> Yet, the majority, illogically it seems to me, permits recovery for medical expenses, pain, suffering, lost wages, and emotional distress arising from the defendant physicians' failure to prevent the birth of healthy, normal children. . . .
>
> . . . [P]ain, suffering, and mental anguish, which the majority permits, are more subjective and less susceptible of precise calculation than the actual expenses of rearing children.

Id.

Washington

Leading Case: *McKernan v. Aasheim.*[383]
Court: Supreme Court of Washington, en banc (highest court).
Basic Facts: The plaintiff parents sued the defendant physician for the negligent performance of a tubal ligation when the procedure was unsuccessful and resulted in the birth of a normal, healthy child.[384]
Holding on Damages: Damages were recoverable for the expense, pain and suffering, and loss of consortium associated with the failed tubal ligation, pregnancy, and childbirth.[385] Child rearing damages were disallowed, as too speculative and contrary to public policy.[386]
Opinion by: Justice Dimmick; Chief Justice Williams, and Justices Rosellini, Utter, Brachtenbach, Dolliver, and Pearson, and Justice Pro. Tem. Cunningham concurred.

West Virginia

Leading Case: *James G. v. Caserta.*[387]
Court: Supreme Court of Appeals of West Virginia (highest court).
Basic Facts: The parents sought to recover damages resulting

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383. 102 Wash. 2d 411, 687 P.2d 850 (1984).

384. *Id.* at 412-13, 687 P.2d at 851.

385. *Id.* at 421-22, 687 P.2d at 856.

386. *Id.* at 419, 687 P.2d at 854. Plaintiff's argument that child rearing damages should be granted without any offset for the benefits of parenthood "goes too far," said the court. On the other hand, calculating such benefits would be "impossible":

> Perhaps the costs of rearing and educating the child could be determined through use of actuarial tables or other similar economic information. But whether these costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated. . . . The child may grow up to be President of the United States, or to be an infamous criminal. In short, it is impossible to tell, at an early stage in the child's life, whether its parents have sustained a net loss or net gain. . . .
>
> . . . .
>
> We base our holding . . . on yet another ground. Under the "benefits" rule, parents would be obliged to prove their child was more trouble than it was worth.
>
> . . . .
>
> We therefore hold that to permit recovery of the child-rearing costs would violate the public policy of this state.

Id. at 419-21, 687 P.2d at 855-56.

387. 332 S.E.2d 872 (W.Va. 1985). Two cases were consolidated on appeal, only one of which is applicable here.

from a negligently performed tubal ligation. The plaintiff wife later became pregnant, and delivered a normal, healthy child.[388]
Holding on Damages: Damages were allowed, including any medical and hospital expenses incurred, pain and suffering (mental and physical), loss of wages, and loss of consortium.[389] Child rearing damages were not allowed because they were too remote and speculative.[390]
Opinion by: Chief Justice Miller.

Wisconsin

No cases were found.[391]

Wyoming

Leading Case: *Beardsley v. Wierdsma.*[392]
Court: Supreme Court of Wyoming (highest court).
Basic Facts: The facts of this consolidated appeal were well summarized by the court as follows:

> Eighteen appellants had tubal ligations so that they would become sterile, but instead became pregnant. They were plaintiffs below. At the time of the suits eleven of these had given birth to healthy, normal children; three of the appellants were pregnant; and four of the appellants had terminated their pregnancies.[393]

The plaintiffs sued the physician, the hospital, and the manufacturer of the cauterization instrument used in the procedure, on

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388. *Id.* at 874.

389. *Id.* at 877.

390. *Id.* at 878 (citing Jordan v. Bero, 158 W.Va. 28, 210 S.E.2d 618 (1974)). *See also id.* at 882-83. In the consolidated case, which involved the failure of the physician to perform an amnioscentesis and the subsequent birth of a child with Down's syndrome, the court held that "parents may in a wrongful birth action recover the extraordinary costs for rearing a child with birth defects not only during his minority, but also after the child reaches the age of majority if the child is unable to support himself because of physical or emotional disabilities." *Id.*

391. *But see* Rieck v. Medical Protective Co. of Fort Wayne, Ind., 64 Wis. 2d 514, 219 N.W.2d 242 (1974), where the parents sued a physician who failed to diagnose the plaintiff wife's pregnancy in a timely fashion, thus preventing the plaintiff from opting for an abortion. Damages were denied. The case is too factually dissimilar for inclusion in the body of this Comment.

392. 650 P.2d 288 (Wyo. 1982).

393. *Id.* at 289.

grounds of negligence.[394]

Holding on Damages: Damages were allowed for the medical expenses for the unsuccessful procedure, medical and hospital expenses for the birth of the unplanned child, wages lost, pain and suffering in connection with the pregnancy, and the costs and pain and suffering in connection with abortions.[395] Child rearing damages were denied for several reasons.[396]

Opinion by: Justice Brown.

Concurring Specially: Chief Justice Rose believed that the court should allow child rearing damages to be recoverable subject to an offset for the parental benefits received from the child.[397]

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394. *Id.*

395. *Id.* at 292.

396. *Id.*

> We believe that these . . . expenses and damages are too speculative; that the injury is too remote from the negligence; that the injury is out of proportion to the culpability of the tortfeasors; and that the allowance of recovery would place too unreasonable a burden on appellees, 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.
>
> We specifically reject the "benefit-rule" or offset concept. . . .
>
> . . . [T]he benefits of the birth of a healthy, normal child outweigh the expense of rearing a child. . . .
>
> . . . [W]e 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 tortfeasors. 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 a child's life, then deducting the value of that child's life.

Id. at 292-93.

397. *Id.* at 293-97 (Rose, C.J., concurring specially). Chief Justice Rose believed that the plaintiffs should be allowed to prove and recover any items of damage which are the proximate result of a defendant's negligence, regardless of "moralistic and social overtones." Wyoming has no public policy which would prevent such damages and, indeed, has provided for state assistance with regard to family planning, indicating an opposite policy. Damages are no more speculative in these cases than in cases for wrongful death, pain and suffering, and loss of enjoyment of life. He also believed that the "benefit rule" is very appropriate to this class of case:

> [T]hrough application of the "benefit rule" the courts give recognition to the philosophy that the costs and benefits associated with the introduction of an unplanned child to the family will vary depending upon the circumstances of the parents. As was stated in *Troppi v. Scarf*, . . . "Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. . . ." By recognizing these considerations, the "benefit rule" encourages and entrusts the trier of fact with the responsibility of weigh-

Concurring in Part and Dissenting in Part: Justice Rooney would have ruled that since the benefits of parenthood are "incalculable because of their magnitude," no damages would be sufficient to offset them. He would, therefore, have denied the existence of the claim.[398]

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ing and considering all of the factors associated with the birth of the unplanned child in a given "wrongful pregnancy" case.

Id. at 296-97 (citation omitted). Finally, Chief Justice Rose would also have allowed damages for loss of enjoyment of life and loss of consortium, two additional elements of damage normally allowed in Wyoming, but omitted by the majority opinion. *Id.* at 297.

398. *Id.* (Rooney, J., concurring in part and dissenting in part).