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CRAWFORD v. KIRK: WRONGFUL PREGNANCY AND TRADITIONAL TORT LAW PRINCIPLES

INTRODUCTION

Sterilization, as a voluntary operation performed for the purpose of preventing undesired pregnancies, has become an effective method of birth control.¹ However, if such a procedure fails to produce the desired sterility, due to negligence on the part of the physician, a healthy, unwanted child may be conceived.² If an unwanted, healthy child is conceived, the parents often bring an action for malpractice against the physician who performed the failed sterilization. This legal cause of action against a negligent doctor has become widely known as a wrongful pregnancy or wrongful conception claim.³ Wrongful pregnancy or wrongful conception, by definition, refers to an action brought by the parents of a healthy, but unwanted, unplanned, and unexpected child for negligence leading to pregnancy.⁴

Thirty-five jurisdictions uniformly recognize the validity of a wrongful pregnancy claim.⁵ Texas, however, is not one of those jurisdictions. The majority of Texas courts recognize the validity of a wrongful pregnancy cause of action and award damages to the parents for an unwanted child, while other Texas courts do not.⁶ This Comment argues

1. See Jeff L. Milsteen, Comment, *Recovery of Child Rearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167, 1167 (1983).

2. See Lynne Wiggins, Comment, *Marciniak v. Lundbrog: Physician as Surrogate Parents? Rolling the Dice for Recovery in Wrongful Conception Cases*, 16 AM. J. TRIAL ADVOC. 839, 839 (1993).

3. See Flax v. McNew, 896 S.W.2d 839, 841 (Tex. App.—Waco 1995, no writ). See also Lisa A. Podewils, Note, *Traditional Tort Principles and Wrongful Conception Child-Rearing Damages*, 73 B.U. L. REV. 407 (1993). This Comment only addresses the issue of wrongful pregnancy, otherwise known as wrongful conception, and does not attempt to explore the areas known as wrongful birth or wrongful life. Wrongful conception or wrongful pregnancy may be distinguished from wrongful birth and wrongful life actions. Wrongful birth refers to “an action brought by parents on behalf of themselves for negligence leading to the birth of an abnormal child, for instance, following a negligently administered or omitted fetal testing. Recovery is based on the premise that the parents would have aborted if they had known that the child was going to be disabled, or that the child’s impairment was caused by the physician’s negligence.” *Flax*, 896 S.W.2d at 841. Wrongful life refers to an action brought by or on behalf of a child with such an impairment for negligence leading to his or her impaired life. See *id.*

4. See *Flax*, 896 S.W.2d at 841.

5. See Bret S. Simmons, Comment, *Zehr v. Haugen and the Oregon Approach to Wrongful Conception: An Occasion for Celebration or Litigation?*, 31 WILLAMETTE L. REV. 121, 122-23 (1995).

6. See *Crawford v. Kirk*, 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied); *Naugle v. Theard*, 917 S.W.2d 287 (Tex. App.—El Paso 1995, writ denied); *Flax v. McNew*, 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ); *Zapata v. Rosenfeld*, 811 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Hickman v. Myers*, 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.); *Sutkin v. Beck*,

that Texas should recognize a wrongful pregnancy cause of action for two reasons: (1) all but one Texas court explicitly recognizes a wrongful pregnancy claim; and (2) a wrongful pregnancy claim is merely a descriptive label for medical malpractice. Moreover, the damages for such a claim should consist of (1) the medical damages associated with the pregnancy and birth, (2) damages in excess of a mother's medical expenses,⁷ and (3) financial expenses for education and maintenance of the normal, healthy child until the age of majority. Therefore, in a wrongful pregnancy cause of action, Texas should follow the Full Recovery Rule⁸ that permits parents to prove all damages proximately resulting from a negligent sterilization including child-rearing costs.

Part I of this Comment will evaluate whether Texas should recognize a wrongful pregnancy cause of action. Part II will evaluate the three common methods of calculating and awarding damages in a wrongful pregnancy claim; Limited Recovery, Full Recovery, and the Benefits Rule. Finally, this Comment concludes that allowing parents to prove and recover child-rearing damages strengthens the family unit, maintains the best interest of the child, and is the best method to advance the goals of tort law and Texas public policy.

I. TEXAS'S APPROACH TO A WRONGFUL PREGNANCY CLAIM

A. *Should Texas Recognize a Wrongful Pregnancy Action?*

The Texas Supreme Court has not directly ruled on the validity of a claim arising from a wrongful pregnancy cause of action. However, the court has issued opinions and rulings on a number of closely-related questions that provide guidance in determining whether the court will recognize the validity of a wrongful pregnancy claim.

The first Texas case to address the issue of wrongful pregnancy was the 1972 decision in *Hays v. Hall*.⁹ An action was brought against a doctor of osteopathy for negligence arising from the performance of a vasectomy operation on the plaintiff husband.¹⁰ The couple desired a vasectomy because Mrs. Hays had previously given birth to two dis-

629 S.W.2d 131 (Tex. App.—Dallas 1982, writ ref'd n.r.e.); *Silva v. Howe*, 608 S.W.2d 840 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); *Garwood v. Locke*, 522 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.); *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.); *Hays v. Hall*, 477 S.W.2d 402 (Tex. Civ. App.—Eastland), *rev'd*, 488 S.W.2d 412 (Tex. 1972).

7. See *Flax*, 896 S.W.2d at 843 (indicating elements of damage may include: (1) prenatal and postnatal medical expenses; (2) the mother's pain and suffering during the pregnancy and delivery; (3) loss of consortium; (4) the cost of a second corrective sterilization procedure; (5) lost wages; (6) pain and suffering associated with the corrective procedure; and (7) any permanent impairment suffered by the parents as a result of the pregnancy, delivery, or the corrective procedure).

8. See discussion *infra* Part II.B.2.

9. 477 S.W.2d 402 (Tex. Civ. App.—Eastland), *rev'd*, 488 S.W.2d 412 (Tex. 1972).

10. See *id.* at 403.

abled children.¹¹ The court concluded that the facts of the case did not justify any recovery of damages for the birth of their healthy child.¹² As a result, the intermediate court was not compelled to compensate the parents for the birth of their undesired child despite the doctor's negligence.

On appeal, however, the Texas Supreme Court reversed in an opinion addressing only the statute of limitations point.¹³ The court, without qualification, reversed and remanded the entire cause for a new trial on the merits.¹⁴ By this action, Texas courts have taken the reversal and remand as a clear indication that the Texas Supreme Court would recognize a wrongful pregnancy claim.¹⁵

In *Jacobs v. Theimer*,¹⁶ the parents of a child born with disabilities brought suit against a doctor for failing to diagnose rubella, an illness that occurred during the wife's pregnancy.¹⁷ The Texas Supreme Court reversed a summary judgment for the doctor and allowed the case to proceed to trial.¹⁸ Citing *Hays*, the court held that recovery would be limited to the expenses reasonably necessary for the care and treatment of the child's physical impairment; even though the parents had also sought damages for their own emotional suffering.¹⁹ Therefore, the Texas Supreme Court—without ruling directly on the issue of wrongful pregnancy—implicitly recognized the validity of a wrongful pregnancy claim and emphasized that damages other than for emotional suffering may be recoverable in medical malpractice actions if properly established.²⁰

In *Nelson v. Krusen*,²¹ the parents of a child born with muscular dystrophy brought suit alleging that the doctor negligently advised the mother that she was not a genetic carrier of Duchenne Muscular Dystrophy.²² Relying on *Jacobs*, the court allowed the parents to collect damages for care and treatment of the child's physical impairment.²³

11. *See id.*

12. *See id.* at 406.

13. *See Hays v. Hall*, 488 S.W.2d 412, 414 (Tex. 1973) (holding that in cases alleging negligent performance of a vasectomy the statutory period for filing suit does not begin until the patient learns that the procedure was ineffective).

14. *See id.*

15. *See Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984); *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975); *Crawford v. Kirk*, 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied); *Naugle v. Theard*, 917 S.W.2d 287 (Tex. App.—El Paso 1995, writ denied); *Flax v. McNew*, 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ); *Hickman v. Myers*, 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); *Garwood v. Locke*, 522 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

16. 519 S.W.2d 846 (Tex. 1975).

17. *See id.* at 848.

18. *See id.* at 847.

19. *See id.* at 850.

20. *See id.*

21. 678 S.W.2d 918 (Tex. 1984).

22. *See id.* at 919.

23. *See id.* at 924.

The court indicated that the basic rule of tort compensation—to put the plaintiff in the position he would have been absent the defendant’s negligence—should apply in malpractice actions.²⁴

Hays, Jacobs, and Nelson thus hold that the parents of an *impaired* child, born as a result of another’s negligence, may recover the economic costs of care and treatment of the child’s impairment. These cases do not directly address the validity of a wrongful pregnancy claim when the pregnancy culminates in the birth of a *healthy* child. However, these cases give a clear indication that a wrongful pregnancy claim should be a viable or maintainable action under Texas law.

B. *Zapata v. Rosenfeld—Out of Step with Texas Jurisprudence by Not Recognizing a Wrongful Pregnancy Claim*

In Texas, ten intermediate courts have directly addressed the viability or maintainability of a wrongful pregnancy claim.²⁵ *Zapata v. Rosenfeld*²⁶ is the only court out of step with other Texas courts. *Zapata* did not recognize a cause of action for wrongful pregnancy. In *Zapata*, the plaintiff gave birth to a healthy, full-term infant after a failed abortion.²⁷ The court noted the plaintiff did not plead an action for wrongful pregnancy and “even if she had properly presented her complaint, Texas does not recognize a cause of action for wrongful pregnancy.”²⁸ *Zapata* cites two Texas appellate cases in arriving at its decision,²⁹ *Silva v. Hall*³⁰ and *Sutkin v. Beck*.³¹ However, the court’s reliance on *Silva* and *Sutkin* may be mistaken since these cases recognized a claim for wrongful pregnancy but limited the types of damages awarded.³²

If the Texas Supreme Court were to rule today on the validity of a wrongful pregnancy claim, the court would likely consider it a viable and maintainable action. Further, only the *Zapata* court does not rec-

24. *See id.* at 924-25.

25. *See Crawford v. Kirk*, 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied); *Naugle v. Theard*, 917 S.W.2d 287 (Tex. App.—El Paso 1995, writ denied); *Flax v. McNew*, 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ); *Zapata v. Rosenfeld*, 811 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Hickman v. Myers*, 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.); *Sutkin v. Beck*, 629 S.W.2d 131 (Tex. App.—Dallas 1982, writ ref’d n.r.e.); *Silva v. Howe*, 608 S.W.2d 840 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.); *Garwood v. Locke*, 552 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.); *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref’d n.r.e.).

26. 811 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Hays v. Hall*, 477 S.W.2d 402 (Tex. Civ. App.—Eastland 1972), *rev’d*, 488 S.W.2d 412 (Tex. 1972).

27. *See id.* at 182-83.

28. *Id.* at 184.

29. *See id.*

30. 608 S.W.2d 840 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.).

31. 629 S.W.2d 131 (Tex. App.—Dallas 1982, writ ref’d n.r.e.).

32. *See Silva*, 608 S.W.2d at 842; *Sutkin*, 629 S.W.2d at 132.

ognize a wrongful pregnancy claim. Since it appears that Texas would recognize a wrongful pregnancy claim, the next question that needs to be answered is: to what extent should Texas award compensatory damages?

II. WRONGFUL PREGNANCY DAMAGES

A. *Conflicts Associated with an Award of Damages*

The Texas intermediate courts are not uniform in characterizing and awarding compensatory damages for a wrongful pregnancy claim. The principal controversy regarding a wrongful pregnancy action involves determining what items of damages are proper. The controversy over damages can be subdivided into two main issues: (1) whether damages in excess of medical expenses should be awarded to the parents after a negligent sterilization, and (2) whether damages for support and maintenance of a healthy child should also be awarded.

B. *Common Rules Used in Determining an Award of Damages*

Texas, like other jurisdictions, has evaluated the three basic rules of recovery in determining an award of damages. These variations include: (1) a Limited Recovery Rule; (2) a Full Recovery Rule; and (3) a Benefits Rule.³³ The Limited Recovery Rule allows parents to recover damages which occur as a direct result of pregnancy and birth, but not child-rearing costs.³⁴ The Full Recovery Rule allows parents to recover damages which occur as a direct result of pregnancy and birth, and includes child-rearing expenses.³⁵ The Benefits Rule allows for the recovery of all damages in the full recovery, but the award is offset by the benefits the parents will receive by having a normal, healthy child.³⁶

1. Limited Recovery Rule

a. *Texas Approach to the Limited Recovery Rule*

Four Texas appellate courts have directly addressed the issue concerning the recovery of damages in excess of medical expenses when a normal, healthy child is born following a failed sterilization.³⁷ All four of the courts concluded that the mother is entitled to reimbursement of medical expenses associated with the pregnancy and birth of the

33. See *Flax*, 896 S.W.2d at 843.

34. See *id.*

35. See *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603 (N.M. 1991).

36. See *Flax*, 896 S.W.2d at 843.

37. See *Crawford v. Kirk*, 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied); *Naugle v. Theard*, 917 S.W.2d 287 (Tex. App.—El Paso 1995, writ denied); *Flax v. McNew*, 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ); *Garwood v. Locke*, 552 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

unwanted child.³⁸ However, as discussed below, only one Texas court expressly approves of recovering damages in excess of medical expenses.³⁹

In *Garwood v. Locke*,⁴⁰ the plaintiff brought suit arising from an unsuccessful sterilization operation. At issue in *Garwood* was whether the plaintiff could recover damages for medical expenses, loss of earnings, and physical pain and mental anguish.⁴¹ The San Antonio Court of Civil Appeals remanded the entire case for a new trial, holding that a cause of action had been stated for recovery of medical damages.⁴² In arriving at its decision, the court distinguished *Garwood* from its previous decision in *Terrell v. Garcia*,⁴³ where the issue was limited to the narrow question of whether damages for monetary expenses for the care and maintenance of an unwanted child could be recovered.⁴⁴ The *Garwood* court noted the plaintiffs sought other damages including medical expenses.⁴⁵ Therefore, the court in *Garwood* recognized the recoverability of medical expenses associated with the birth of the unwanted child but did not rule on the recoverability of a mother's lost wages or physical pain and mental anguish.⁴⁶

The next Texas case to develop and expand the limited damages theory as established in *Garwood* was *Flax v. McNew*.⁴⁷ *Flax* is a leading case in Texas jurisprudence because the court allowed, for the first time, recovery of damages in excess of medical expenses for wrongful pregnancy.⁴⁸ In *Flax*, a mother gave birth to a healthy child after a failed sterilization procedure.⁴⁹ The mother alleged damages based on permanent scars, physical impairment during and immediately after pregnancy, physical and mental pain and suffering, and medical expenses.⁵⁰ The *Flax* court concluded that damages in excess of medical expenses should be allowed if properly proved.⁵¹ The court stated, "In our view, the question is not whether Texas will recognize a new cause of action for 'wrongful pregnancy' or 'wrongful conception.' Texas has long allowed recovery for negligence by medical practition-

38. See *Crawford*, 929 S.W.2d at 637; *Naugle*, 917 S.W.2d at 292; *Flax*, 896 S.W.2d at 845; *Garwood*, 552 S.W.2d at 895.

39. See *Flax*, 896 S.W.2d at 845.

40. 552 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

41. See *id.* at 893.

42. See *id.* at 895.

43. 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.). See also discussion *infra* Part II.B.2.a.

44. See *Garwood*, 552 S.W.2d at 894.

45. See *id.* at 894 (distinguishing and clarifying the San Antonio Court of Appeals position on the validity of a wrongful pregnancy claim and the type of damages recoverable).

46. See *id.* at 895.

47. 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ).

48. See *id.* at 845.

49. See *id.* at 840.

50. See *id.* at 839.

51. See *id.* at 845.

ers. Wrongful pregnancy is ‘merely a descriptive label for a form of malpractice.’”⁵²

The Justices in *Flax* based their reasoning on a 1992 Missouri Supreme Court case, *Girdley v. Coats*.⁵³ In applying the reasoning established in *Girdley*, the court in *Flax* held that upon a proper showing of medical negligence, the plaintiffs were entitled to recover damages based on permanent scars, pain, suffering, physical impairment during and immediately after pregnancy, mental pain and suffering, and medical expenses.⁵⁴ However, the court qualified its holding by indicating that the damages the plaintiff alleged were not “exclusive damages recoverable in this type of medical malpractice suit.”⁵⁵ As a result, *Flax* stands for the proposition that if a plaintiff makes a proper showing of negligence she can recover an unlimited or unspecified number of damages from the negligent physician.⁵⁶

In *Naugle v. Theard*,⁵⁷ the plaintiff brought a medical malpractice action based on the physician’s failure to ligate both fallopian tubes during a requested bilateral tubal ligation.⁵⁸ In an opinion dealing strictly with a statute of limitations issue, the court cited *Flax* and *Garwood* for the proposition that damages in excess of medical expenses had been recoverable upon a proper showing of medical negligence.⁵⁹ In addition, the court referred to a federal district court case that cited *Garwood* as Texas precedent in allowing a claim in tort for negligent failure of a physician to sterilize effectively.⁶⁰ Although not ruling directly on the validity of a wrongful pregnancy claim, *Naugle* can be cited for the proposition that at least one Texas court recognizes an award of damages in excess of medical expenses since they specifically approved of the possibility for recovery of damages.

It appears that *Garwood*, *Flax*, and *Naugle* have created a trend in granting damages in excess of medical expenses for negligent steriliza-

52. *Id.* at 843 (quoting *Girdley v. Coats*, 825 S.W.2d 295, 296 (Mo. 1992)).

53. 825 S.W.2d 295, 296 (Mo. 1992) (noting that as of 1992, more than twenty-five states have adopted the Limited Recovery Rule).

54. *See Flax*, 896 S.W.2d at 845 (citing *Girdley*, 825 S.W.2d at 298-99 for a list of possible elements of damage: (1) prenatal and postnatal medical expenses; (2) the mother’s pain and suffering during the pregnancy and delivery; (3) loss of consortium; (4) the cost of a second corrective sterilization procedure; (5) emotional distress; (6) lost wages; (7) pain and suffering associated with the corrective procedure; and (8) any permanent impairment suffered by the parents as a result of the pregnancy, delivery, or the corrective procedure).

55. *Id.* at 845 (referring to damages listed in *Girdley*, 825 S.W.2d at 298-99; *Smith v. Gore*, 728 S.W.2d 738, 751 (Tenn. 1987); *McKernan v. Aasheim*, 687 P.2d 850, 856 (Wash. 1984); *Mason v. Western Pa. Hosp.*, 453 A.2d 974, 976 (Pa. 1982); *Beardsley v. Wierdsma*, 650 P.2d 288, 289 (Wyo. 1982)).

56. *See id.*

57. 917 S.W.2d 287 (Tex. App.—El Paso 1995, writ denied).

58. *See id.*

59. *See id.* at 291.

60. *See id.* (citing *Hartke v. McKelway*, 526 F. Supp. 97, 100 (D.C.C. 1981)).

tions. However, the 1996 case of *Crawford v. Kirk*⁶¹ broke any such trend, and now limits the recovery of the parents of a healthy, but unwanted, child to medical expenses associated with the pregnancy and birth.

b. *Crawford v. Kirk—Awarding Only Minimal Compensatory Damages*

On September 6, 1988, after delivering her second child, Mrs. Tammy Crawford underwent a tubal ligation to prevent the possibility of having more children.⁶² The Crawfords did not want additional children due to the family's poor financial circumstances.⁶³ Dr. John Kirk performed the tubal ligation.⁶⁴ After completing the procedure, he informed the Crawfords that Mrs. Crawford was sterile and that the further use of contraceptives was not necessary.⁶⁵

In January of 1989, Mrs. Crawford discovered that she was pregnant.⁶⁶ Throughout her pregnancy she experienced various medical problems and was finally hospitalized until delivery of her healthy twins on August 14, 1989.⁶⁷ The Crawfords brought an action against Dr. Kirk in 1990, seeking damages for all medical expenses associated with the pregnancy, physical and mental pain and suffering, and the costs of raising the twins to the age of majority.⁶⁸

The trial court granted summary judgment for Dr. Kirk concluding that there is no cause of action in Texas for wrongful pregnancy.⁶⁹ The Texarkana Court of Appeals remanded the cause for a new trial.⁷⁰ The intermediate court concluded that a wrongful pregnancy claim was maintainable in Texas.⁷¹ However, the court held that parents of a normal, healthy child born after a failed sterilization procedure may only recover damages for their actual medical expenses associated with the pregnancy.⁷² The court specifically ruled out the possibility of collecting damages in excess of medical expenses for the failed medical procedure.⁷³

61. 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied).

62. *See id.* at 635.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* at 638.

71. *See id.* at 637.

72. *See id.* at 637 (“[I]n light of those cases in which the Texas Supreme Court has either written an opinion or denied writ of error, it is concluded that at the present time the parents of a normal, healthy child born after a failed sterilization procedure may recover damages for their actual medical expenses as a result of the failed procedure.”).

73. *See id.*

The court concluded that *Garwood* approved of recovery only for medical expenses and that *Flax's* expansion of the type of damages recoverable in a wrongful pregnancy suit contradicted existing Texas authority.⁷⁴ The court indicated that *Flax* today stands as an anomaly, rather than as a landmark, in Texas jurisprudence.⁷⁵

Crawford validly pointed out that the Texas Supreme Court in *Jacobs v. Theimer*⁷⁶ limited recovery of damages to the expenses for care and treatment of the child's physical impairment, rejecting as speculative the parent's claim for emotional suffering.⁷⁷ *Crawford* emphasized that *Flax* failed even to mention the holding in *Jacobs* and thus failed to explain why the parents of a healthy child could recover for emotional suffering while the parents of a disabled child in *Jacobs* could not.⁷⁸ Although *Crawford* clearly points out that *Flax* erred in allowing recovery of damages for emotional suffering, *Flax* still stands as valid Texas precedent in allowing recovery of damages in excess of medical expenses for a wrongful pregnancy claim based on traditional tort law principles.⁷⁹

c. *Recognition of the Limited Recovery Rule in Other States*

Courts in various states have allowed recovery on the basis of traditional tort principles for wrongful pregnancy of a healthy baby.⁸⁰ For example, Wyoming allows damages in excess of medical expenses but rejects claims for child-rearing expenses.⁸¹ In *Beardsley v. Wierdsma*, the Wyoming Supreme Court rejected post-birth expenses as too speculative.⁸² The court found such expenses out of proportion to the culpability of the doctor and recognized they would open the legal flood gates to fraudulent claims.⁸³ Missouri considers the claim of wrongful pregnancy as a form of medical malpractice, and when damages are measurable and proven, they should be awarded.⁸⁴ Tennessee views wrongful pregnancy as an ordinary common law tort, indicating that a plaintiff may recover damages for the foreseeable consequences "di-

74. *See id.*

75. *See id.*

76. 519 S.W.2d 846 (Tex. 1975).

77. *See Crawford*, 929 S.W.2d at 637.

78. *See id.*

79. *See id.*

80. *See, e.g., Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *Mason v. Western Pa. Hosp.*, 453 A.2d 974 (Pa. 1982); *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987); *McKernan v. Aasheim*, 687 P.2d 850 (Wash. 1984); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

81. *See Beardsley*, 650 P.2d at 292.

82. *See id.*

83. *See id.*

84. *See Girdley*, 825 S.W.2d at 298 (indicating that measurable damages might include: prenatal and postnatal medical expenses; the mother's pain and suffering during the pregnancy and delivery; loss of wages; loss of consortium; and any permanent impairment suffered by the parents as a result of the pregnancy, the delivery, or the second corrective procedure).

rectly related to the pregnancy and delivery.”⁸⁵ New Mexico also considers wrongful pregnancy as an ordinary claim for negligence or medical malpractice and follows ordinary principles of tort law in compensating the aggrieved plaintiff.⁸⁶

Recovery of damages in excess of medical expenses represents the better reasoned position because such recovery allows the plaintiffs to be placed as nearly as possible in the position they would have been in had there been no negligent act. To allow recovery of only medical expenses associated with the birth of the child leaves the plaintiff to bear the burden of lost wages and to suffer the pains of an unwanted pregnancy without compensation. Many families rely on two incomes to meet their financial needs. Yet, Texas courts allow families to financially suffer when one of the wage earners loses her ability to contribute—by being required to stay home and care for the unplanned, although healthy, baby—through no fault of her own.

2. Full Recovery Rule

a. *Texas Approach to Full Recovery Rule*

One area of a wrongful pregnancy action in which Texas courts *are* uniform is in the denial of compensatory damages for the maintenance and education of a child conceived after a failed sterilization. All ten intermediate courts that have addressed a wrongful pregnancy claim have concluded that recovery of financial expenses for education and maintenance of a normal, healthy child should be barred by reasons of public policy.⁸⁷ The Texas courts, however, continue to base their legal reasoning and decisions largely on antiquated public policy considerations that were established and developed by cases prior to 1970. Texas courts continue to deny the award of child rearing damages despite other states’ awarding such costs.

85. *Smith*, 728 S.W.2d at 750-51 (indicating damages may include: costs of prenatal care; medical expenses; pain and suffering; loss of wages during pregnancy; and damages for emotional distress).

86. *See Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 609 (N.M. 1991) (indicating plaintiff’s damages undisputably include pain and suffering associated with the pregnancy and birth, the cost of a subsequent sterilization, and other expenses, such as lost wages associated with the pregnancy and birth). In this case, New Mexico also adopted the Full Recovery rule discussed further at Part II.B.2. *See id.* at 612.

87. *See Crawford v. Kirk*, 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied); *Naugle v. Theard*, 917 S.W.2d 287 (Tex. App.—El Paso 1995, writ denied); *Flax v. McNew*, 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ); *Zapata v. Rosenfeld*, 811 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Hickman v. Myers*, 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.); *Sutkin v. Beck*, 629 S.W.2d 131 (Tex. App.—Dallas 1982, writ ref’d n.r.e.); *Silva v. Howe*, 608 S.W.2d 840 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.); *Garwood v. Locke*, 522 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.); *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref’d n.r.e.); *Hays v. Hall*, 477 S.W.2d 402 (Tex. Civ. App.—Eastland), *rev’d*, 488 S.W.2d 412 (Tex. 1972).

The uniformly recognized rule prior to 1967 was that no damages resulted from the birth of a normal child when there was no permanent harm to the mother.⁸⁸ The birth of a normal child was considered a gift to the parents rather than an injury, and awarding damages on such grounds would violate public policy. In other words, if parents were to be given monetary damages as well as the love and affection received from their newborn child, they would be unjustly enriched while the doctor would be unduly burdened. However, what the Texas courts and many other state courts never considered is that parents have a constitutional right to limit the size of their families and a corresponding right to financial security.⁸⁹ These rights should not be frustrated by the negligent act of a third party doctor. Often, parents in today's society plan the size of their family based on their available financial resources. In an effort to limit family growth, many parents consciously choose sterilization as an attractive alternative to other forms of contraception.⁹⁰ However, when a sterilization procedure fails, they are left with another child to feed, house, clothe, and educate.

It is not to say that the parents do not love the unexpected child or do not want to nurture the newborn child; it is simply that families should not have a child thrust upon them by a negligent doctor. Texas courts are reluctant to allow child-rearing damages because of a social policy which argues that the benefits of a child far outweigh the economic burdens of the child's maintenance and education. Texas's public policy, however, should be changed to reflect the reality of today's society. Texas courts need to take into consideration that society has evolved from an agricultural one, where children worked on farms and contributed to their family's economic stability, to an industrial society where children do not contribute to the economic well-being of the family.

Texas courts also need to take into consideration that "[t]he basic rule of tort compensation is that the plaintiff is to be put in the posi-

88. See, e.g., *Christensen v. Thornby* 255 N.W. 620, 622 (Minn. 1934) (holding that a husband could not collect damages for anxiety and expenses associated with his wife's pregnancy even though the attempted sterilization was performed out of fear the wife might lose her life because both mother and child were healthy after the birth). See also *Ball v. Mudge*, 391 P.2d 201 (Wash. 1964) (stating a reasonable jury could conclude the costs incidental to the birth of a normal, healthy child from an unwanted pregnancy were far outweighed by the blessing such a child would be).

89. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that state laws prohibiting the use of contraceptives violates the constitutional right to marital privacy). See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis added by the Court).

90. See *Podewils*, *supra* note 3, at 407 n.1.

tion that he would have been in absent the defendant's negligence."⁹¹ "In a personal injury case, that standard requires a comparison of the condition that the plaintiff would have been in without the negligence with the plaintiff's actual condition as a result of the defendant's negligence."⁹²

Instead, Texas courts continue to follow the proposition that a child is a gift rather than a detriment.⁹³ In fact, many parents of unexpected children would agree that a child is a gift. However, Texas courts need to realize that the harm or injury to the parents is not in the birth of the child, but is instead in the invasion of the parents' legally protected interest in the financial security of their family. Therefore, the harm suffered by the parents as a result of the negligent operation is not the birth itself, but the economic burden placed on the family who chose not to procreate. None of the Texas cases addressing wrongful pregnancy have evaluated this approach and erroneously continue to deny compensation for an ordinary negligence tort.

The first Texas appellate court to rule directly on the issue of child-rearing damages in a wrongful pregnancy claim was *Terrell v. Garcia*.⁹⁴ *Terrell* is a leading case in Texas on wrongful pregnancy and has established a legal foundation upon which subsequent Texas cases have been built. In *Terrell*, the plaintiff parents brought an action seeking to recover the economic loss they would undergo in rearing and educating an undesired child.⁹⁵ The issue on appeal was whether the parents of an unwanted, but normal, healthy child conceived after an unsuccessful sterilization operation on the mother, may recover from the doctor for the financial expenses of the care and maintenance of a newborn child.⁹⁶ All other items of damage, such as medical expense, as well as pain and mental anguish of the mother incident to the birth of the child, were waived by the plaintiffs.⁹⁷

The court held that even if negligence on the part of the physician in performance of the sterilization operation was assumed, the plaintiffs were not entitled to recover damages for care and maintenance of a healthy child.⁹⁸ The court reasoned that "the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile."⁹⁹ In addition, the court stated that

91. *Nelson v. Krusen*, 678 S.W.2d 918, 924-25 (Tex. 1984).

92. *Id.*

93. *See Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

94. 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

95. *See id.* at 125.

96. *See id.*

97. *See id.*

98. *See id.* at 128.

99. *Id.*

these “intangible benefits, while impossible to value in dollars and cents are undoubtedly the things that make life worthwhile.”¹⁰⁰

Chief Justice Barrow, writing the majority opinion, stated that “[r]ather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child. We see no compelling reason to change such a rule at this time.”¹⁰¹ In conclusion, the court posed the following question: “[w]ho can place a price tag on a child’s smile or parental pride in a child’s achievement?”¹⁰²

One key fact that must be pointed out, however, is that *Terrell* based its reasoning and public policy views—the denial of child rearing expenses—on *Hays*, which was ultimately reversed and remanded to trial by the Texas Supreme Court.¹⁰³ As a result, *Terrell*—the leading case in Texas in denying child-rearing damages—based its reasoning and conclusions on a case that was ultimately disapproved of by the Texas Supreme Court.

Following the legal precedent established by *Terrell*, subsequent intermediate courts have ruled that the expenses of rearing a child are not recoverable. In *Silva v. Howe*,¹⁰⁴ the court simply cited to *Terrell* and remarked that “[a] parent is not entitled to recover damages from a physician for the projected expenses of rearing and educating an unwanted child.”¹⁰⁵

In *Sutkin v. Beck*,¹⁰⁶ the court concluded that the Texas Supreme Court does not recognize child rearing damages and held that parents could not recover anticipated expenses of rearing a healthy child conceived after an unsuccessful sterilization operation.¹⁰⁷ The court stated,

In *Jacobs*, the [Texas] supreme court expressly recognizes the distinction made by the courts of civil appeals between damages resulting from birth of a physically deformed child, which are recoverable, and damages resulting from the expenses of rearing a healthy child, which are subject to an objection “based on speculation as to the quality of life and as to pluses and minuses of parental mind and emotion.”¹⁰⁸

In addition, the court in *Sutkin* pointed out that the Texas Supreme Court in *Jacobs* made reference to *Terrell*—the intermediate court

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 130 (Cadena, J., dissenting) (discussing *Hays v. Hall*, 488 S.W.2d 412 (Tex. 1972)).

104. 608 S.W.2d 840 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.).

105. *Id.* at 842.

106. 629 S.W.2d 131 (Tex. App.—Dallas 1982, writ ref’d n.r.e.).

107. *See id.* at 132.

108. *Id.* (quoting *Jacobs v. Theimer*, 519 S.W.2d 846, 849-50 (Tex. 1975)).

that denied child-rearing damages—without any suggestion of approval or disapproval.¹⁰⁹ Thus, the *Sutkin* court believed that silence on the part of the Texas Supreme Court in merely citing *Terrell* indicated that Texas would not award child-rearing damages in a wrongful pregnancy claim. The mere cite to *Terrell* in the Texas Supreme Court opinion may or may not indicate approval of *Terrell* and its denial of child-rearing damages. However, a more direct ruling from the Texas Supreme Court is needed before it can be definitively or conclusively stated that Texas denies recovery of child rearing damages.

Other courts citing *Terrell* elaborated on its conclusions. For instance, in *Hickman v. Myers*,¹¹⁰ the appellate court held that child-rearing damages are not allowed by Texas courts.¹¹¹ The court indicated that *Terrell* was accurate Texas precedent and should be followed, stating “the cost of raising a healthy child born as a result of the negligent performance of a sterilization operation on the mother is not recoverable from the physician.”¹¹²

The public policy view as established in *Terrell vis-à-vis Hays* has formed the basis for Texas jurisprudence on the issue of wrongful pregnancy. However, reacting to the majority opinion in *Terrell*, Justice Cadena, in dissent, wrote, “It should not be overlooked that, however persuasive may be the reasoning of the [*Hay’s* court], that judgment was reversed by the Supreme Court of Texas.”¹¹³ Justice Cadena added, “The reversal of the judgment of the Court of Civil Appeals was unqualified, and the Supreme Court remanded the case to the trial court for trial on the merits.”¹¹⁴ The remand to trial on the merits is important because it suggests that the Texas Supreme Court did not want *Hays* to carry any impressive precedential weight.¹¹⁵ However, despite the reversal, many courts, including *Terrell*, have built upon *Hays’* reasoning¹¹⁶ even though it is “open to question whether that reversed opinion deserves the designation ‘law of the case.’”¹¹⁷

Furthermore, Justice Cadena stressed, “Even if the opinion of the Court of Civil Appeals in *Hays* be regarded as the law of That case, it is not law of This case.”¹¹⁸ In other words, each wrongful pregnancy culminating in the birth of a healthy child needs to be evaluated on

109. *See id.*

110. 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.).

111. *See id.* at 872.

112. *Id.*

113. *Terrell*, 496 S.W.2d at 130 (Cadena, J., dissenting).

114. *Id.*

115. *See id.*

116. *See* *Silva v. Howe*, 608 S.W. 2d 840 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.); *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref’d n.r.e.).

117. *Id.*

118. *Terrell*, 496 S.W.2d at 130 (Cadena, J., dissenting).

the merits to determine if a claim for negligence can be maintained. If the claim for negligence can be maintained, the plaintiffs should be compensated for the increased economic burden thrust upon them through no fault of their own.

In *Terrell*, the majority's reliance on *Hays* appears to be misplaced.¹¹⁹ *Hays* simply "[b]egs the question by assuming that a man and woman who want no children will derive joy and satisfaction, that is, they will receive a 'benefit,' by having the obligation of raising a child thrust upon them as a result of a doctor's negligence."¹²⁰ "There is no basis for the assumption that [parents] will derive any joy and satisfaction from raising an unwanted child."¹²¹ In fact, parents of an unwanted child made a conscious decision to become permanently sterile and relied on the doctor's expertise to accomplish that end. Thus, one might conclude that the parents would not derive joy from raising the child but instead would incur hardship.

In *Hays*, the intermediate court stated that to "[a]llow damages for the birth and upbringing of a normal child would mean that the doctor would have to pay for the satisfaction, joy, and affection which normal parents would ordinarily have in the rearing and education of a healthy child."¹²² However,

[t]he question is not whether a doctor should be forced 'to pay for the satisfaction, and joy, and affection which . . . parents would ordinarily have in the rearing and education of a healthy child.' The question [should be instead,] whether a negligent doctor should be held responsible for the consequences of his negligence.¹²³

Lower standards of care for doctors in sterilization operations collides with the right of the parents of a family to choose its size, a right given to the parents by the United States Constitution.¹²⁴

Prior United States Supreme Court decisions have established the legal right of a person to resort to procedures which will prevent conception and, within certain limits, to terminate an existing pregnancy.¹²⁵ In *Doe v. Bolton*,¹²⁶ Justice Douglas, concurring, concluded that freedom of choice to procreate is a basic decision of one's life.¹²⁷

119. *See id.* at 129.

120. *Id.*

121. *Id.*

122. *Hays v. Hall*, 477 S.W.2d 402, 406 (Tex. Civ. App.—Eastland), *rev'd*, 488 S.W.2d 412 (Tex. 1972).

123. *Terrell*, 496 S.W.2d at 129 (Cadena, J., dissenting) (quoting *Hays*, 477 S.W.2d at 406).

124. *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that state laws prohibiting the use of contraceptives violate the constitutional right to marital privacy). *See also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) (indicating that parents should be allowed to limit the size of their family without governmental intrusion).

125. *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

126. 410 U.S. 179 (1973).

127. *See id.* at 211 (Douglas, J., concurring).

In *Eisenstadt v. Baird*,¹²⁸ the Court stated that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child.”¹²⁹ Therefore, it should be impermissible to say that social policy should require that a husband and wife be denied the right to limit the number of children which they will bring into the world. Furthermore, it is inconsistent with United States Supreme Court precedent to say that a negligent, third party doctor should be allowed to frustrate the realization of the married couple’s aim to limit the size of their family.¹³⁰

A social policy assuring that doctors may, without fear of incurring liability, negligently perform sterilization operations does nothing to increase the importance of the family unit in our society.¹³¹ In fact, the added economic stress in raising and educating an unexpected child may weaken the family unit. The burden may lead parents to divorce and cause the child to be the product of a broken home. Texas courts are reluctant to award damages because they are considered speculative and difficult to determine.¹³² However, as Justice Cadena stated, “[i]t may, indeed, be difficult to ‘place a price tag on a child’s smile.’ But there is no support for the conclusion that the task cannot be performed.”¹³³ For example, “[i]n [loss of consortium] suits, [Texas] courts have awarded the injured spouse damages for . . . loss of ‘affection, society, comforts and assistance of’ the spouse whose affections have been alienated.”¹³⁴ Therefore, if the courts in a loss of consortium case can place a price tag on the value of a spouse’s smile, there is no reason why the courts cannot do the same in calculating the price of maintaining a child’s smile in a wrongful pregnancy action.¹³⁵ Just because “the extent of damages may be difficult to ascertain should not cause the courts to throw up their hands in frustration”¹³⁶ and deny recovery of financial damages for child maintenance and education.

In the conclusion to his dissenting opinion, Justice Cadena notes,

[there is] no reason for departing from the rule that a negligent person is liable for the foreseeable consequences of his negligence. There is no justification for holding, as a matter of law, that the birth of an ‘unwanted’ child is a ‘blessing.’ The birth of such a child may be a catastrophe not only for the parents and the child itself,

128. 405 U.S. 438 (1972).

129. *Id.* at 453.

130. *See id.*

131. *See Terrell*, 496 S.W.2d at 128 (Cadena, J., dissenting).

132. *See id.*

133. *Id.* at 129.

134. *Id.*

135. *See id.*

136. *Id.*

but also for previously born siblings. The doctor whose negligence brings about such an undesired birth should not be allowed to say 'I did you a favor,' secure in the knowledge that the courts will give to this claim the effect of an irrebuttable presumption.¹³⁷

Justice Cadena's 1973 dissent in *Terrell* expresses legitimate points of concern for today's society. The idea that a doctor cannot be held responsible for his negligent acts associated with a wrongful pregnancy flies blatantly in the face of a couple's constitutional right to marry and limit the size of their family. On the one hand, parents are given the power as derived from the United States Constitution to decide whether to procreate. However, Texas courts disallow them control over that power and further frustrate the process by exposing the negligent doctor to only limited liability. In other words, doctors in Texas are given the right to interfere with parents' constitutional rights with fear of only minimal reprisal.

How blatant does a negligent sterilization have to be before the courts will award parents damages for child-rearing expenses? For example, what if the doctor after a sterilization procedure informs the mother that she is sterile. If a baby is subsequently conceived, will the Texas courts award damages to the parents for the added economic burden on their family unit? According to the view taken by Texas courts, the answer would probably be no. Texas courts have created a doctrine that does not hold doctors fully liable for negligent sterilizations.

What might happen if a single, indigent female becomes pregnant after a failed sterilization procedure and dies while giving birth? When the state takes custody of the unwanted child, assuming there are no living relatives, should not the state be reimbursed for child support and educational expenses incurred as a result of the doctor's negligent act? Furthermore, should the taxpayers be reimbursed since they are ultimately paying for the rearing and education of the unwanted, but healthy, child?

The Texas legislature has mandated that the "best interest" of the child be at the forefront of all issues and decisions involving child custody¹³⁸ and support.¹³⁹ Yet, the Texas courts are willing to allow a child and that child's family to financially suffer because of the unwanted child's birth. The best interest of the child is not protected when the family cannot adequately afford to provide for the unwanted child. Not only will the unwanted child suffer, but so will the unwanted child's siblings as a result of his or her birth.

137. *Terrell*, 496 S.W.2d at 131 (Cadena, J., dissenting).

138. See TEX. FAM. CODE ANN. § 153.002 (Vernon's 1996) (stating that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.").

139. See *id.* § 154.122.

Allowing doctors to negligently perform sterilization operations without fear of incurring liability does not further social policy. Tort law is designed to deter wrongs and protect the public.¹⁴⁰ A policy against protecting the public flies blatantly in the face of basic negligent tort actions. Negligent sterilization should not be considered differently from any other medical malpractice claim. Instead, Texas courts should look at a wrongful pregnancy claim just like any other negligent tort or medical malpractice cause of action.¹⁴¹ Therefore, if the elements of negligence can be established, damages for that claim should be awarded without restrictions.

b. *Recognition of the Full Recovery Rule in Other States*

Several states have indicated that a wrongful pregnancy cause of action is nothing more than a medical malpractice claim.¹⁴² *Lovelace Medical Center v. Mendez*¹⁴³ is representative of the reasoning used by courts in upholding the Full Recovery Rule. In *Lovelace*, the court held that parents of a normal, healthy baby conceived as a result of a negligently performed sterilization could recover costs of raising the child from birth to adulthood.¹⁴⁴ The New Mexico Supreme Court focused on factors that Texas courts have given little or no consideration.

Texas courts are reluctant to award financial compensation to the parents because they do not consider a healthy child a detriment. The *Lovelace* court, however, concluded that an unsuccessful sterilization operation results in two forms of “harm.”¹⁴⁵ First, the wife or husband remains fertile “despite their desire to be infertile.”¹⁴⁶ Second, the couple’s interest in financial security and in the economic stability of their family will be impaired.¹⁴⁷ The undesired costs of raising a child to adulthood, costs which couples desiring infertility strive to avoid, would suddenly be “thrust upon them.”¹⁴⁸ The court considered these undesired costs as a detriment to the couple’s pecuniary

140. See RESTATEMENT (SECOND) OF TORTS § 901 (1979).

141. See *Flax v. McNew*, 839 S.W.2d 839, 843 (Tex. App.—Waco 1995, no writ) (stating “[i]n our view, the question is not whether Texas will recognize a new cause of action for ‘wrongful pregnancy’ or ‘wrongful conception.’ Texas has long allowed recovery for negligence by medical practitioners. Wrongful pregnancy is ‘merely a descriptive label for a form of malpractice.’”).

142. See, e.g., *University of Ariz. Health Servs. Ctr. v. Superior Court*, 667 P.2d 1294 (Ariz. 1983); *Custodio v. Bauer*, 59 Cal. Rptr. 463 (Cal. Ct. App. 1967); *Ochs v. Borelli*, 445 A.2d 883 (Conn. 1982); *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984); *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603 (N.M. 1991); *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990).

143. 805 P.2d 603 (N.M. 1991).

144. See *id.* at 612.

145. See *id.* at 609-10 (citing RESTATEMENT (SECOND) OF TORTS § 7(1)-(2) (1965)).

146. *Id.* at 610.

147. See *id.*

148. *Id.*

interests because such costs constituted a harm.¹⁴⁹ Therefore, the harm resulting from conceiving a normal, healthy baby as a result of a negligently performed sterilization is not the actual birth of the child. The harm is the frustration stemming from the parents' desire to limit the size of their family and the unlawful invasion of the parents' legally protected interest in financial security of their family.

Recovery of financial damages in tort actions should be grounded on policy reasons. Tort actions are designed to put plaintiffs as nearly as possible in the position they would have been absent the defendant's negligence.¹⁵⁰ As a result, tort actions are designed to protect the plaintiff against financial expenses or losses that are the result of a defendant's negligence. The court in *Lovelace* recognized this by stating that compensatory damages, awarded to the plaintiff, "are also designed to deter negligence, by insuring that a negligent act has consequences for the actor."¹⁵¹ Recovery of child-rearing expenses will serve both of these purposes.¹⁵²

A number of [Texas] courts have held that the birth of a child does not constitute a harm to the parents. . . . There appear to be several notions encompassed in this policy judgment. First, at least one commentator has suggested that this view is rooted in a time when society was largely agricultural, and children were actively involved in those activities, thereby generating an economic benefit for their parents. [However, the underlying premise for this] policy has long since vanished. In a post-industrial society, the cost of raising a child usually exceeds the economic benefit, if any, the family derives from the child.

Second, it appears that some [Texas] courts have adopted this position because they are concerned that allowing plaintiffs to recover the expenses of raising a child is inconsistent with society's acknowledgment of the sanctity of life and the high value place[d] on it.¹⁵³

Sanctity of human life, however, should not justify the denial of an award of child-rearing expenses.¹⁵⁴ The justification for denying expenses is apparent: "[T]wo people who have already decided that they cannot afford to raise another child will be left to find a way to do so."¹⁵⁵ Society's respect for human life "should not be allowed to obscure the fact that children need to be fed, clothed, housed, educated, and provided with medical care and other necessities."¹⁵⁶

149. *See id.*

150. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979).

151. *Lovelace*, 805 P.2d at 618-19 (N.M. 1991) (Alarid, J., appendix opinion of the court of appeals adopted by New Mexico Supreme Court).

152. *See id.* at 619.

153. *Id.* at 619 (citation omitted).

154. *See id.*

155. *Id.*

156. *Id.*

Proper respect for human life does not require a court to reach a decision that is inconsistent with the needs of the parents and the children.¹⁵⁷ Families are literally torn apart by divorce as a result of financial burdens.¹⁵⁸ To adopt a policy that increases the financial burden on families who have chosen not to procreate would further diminish the family unit.¹⁵⁹ In conclusion, a decision to award damages for raising children would strengthen, rather than weaken, family life.¹⁶⁰

An award of child-rearing damages under the Full Recovery Rule is the most reasoned approach. First, it will allow the best interest of the child to be protected. Second, it will strengthen the family unit. Third, it will advance the goal of tort law. Finally, it will advance the goals of social justice.

3. Benefits Rule—Rejected by Texas Courts

The third approach evaluated by the Texas courts in the awarding of wrongful pregnancy damages involves the Benefits Rule. The Benefits Rule allows for the recovery of child-rearing expenses, but the expenses are offset by the benefits the parents will receive by having a normal, healthy child.¹⁶¹ The Benefits Rule is derived from the equitable principle of unjust enrichment and attempts to balance the Limited Recovery and the Full Recovery rules of just compensation.¹⁶² The trier of fact, usually the jury, is required to balance the benefits to the parents of the healthy child with the detriment incurred and determine the damages award.¹⁶³

The Texas cases to evaluate the Benefits approach include *Terrell v. Garcia*,¹⁶⁴ *Hickman v. Myers*,¹⁶⁵ and *Flax v. McNew*.¹⁶⁶ In all three of these opinions the courts have rejected the Benefits approach.¹⁶⁷

In *Terrell*, the first Texas case to evaluate the Benefits Rule, the court evaluated the approach taken by a 1971 Michigan appellate court in *Troppi v. Scarf*.¹⁶⁸ In *Troppi*, the appeal was from the dismissal of a complaint brought against a pharmacist by parents of a normal, healthy child conceived after the pharmacist supplied the mother with tranquilizers instead of birth control pills.¹⁶⁹ Damages were

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See Flax v. McNew*, 896 S.W.2d 839, 843 (Tex. App.—Waco 1995, no writ).

162. *See id.*

163. *See id.*

164. 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

165. 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

166. 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ).

167. *See Hickman*, 632 S.W.2d at 871; *Terrell*, 496 S.W.2d at 128; *Flax*, 896 S.W.2d at 843.

168. 187 N.W.2d 511 (Mich. Ct. App. 1971).

169. *See id.* at 512.

sought for several items of expenses: (1) the mother's lost wages; (2) medical and hospital expenses; (3) pain and mental anguish of the mother incident to the birth; and (4) economic costs of rearing such an unwanted child.¹⁷⁰ The court in *Troppe* held "there is no valid reason why the trier of fact should not be free to assess damages as it would in any other negligence case."¹⁷¹ In addition, the court rejected the argument that this type of suit was against public policy noting recognition of the use of contraceptives by the legislature of Michigan and the United States Supreme Court.¹⁷²

The court in *Troppe* adopted the "Benefits Rule" from the Restatement Second of Torts.¹⁷³ Section 920 of the Restatement Second of Torts states that

[w]hen 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.¹⁷⁴

The court in *Terrell*, however, disagreed with the theory behind the Benefits approach as established in *Troppe*. The court in *Terrell* stated that the Benefits approach

[would] present insurmountable problems of proof under our present standards for proof of damages. Proof could undoubtedly be offered regarding the cost of care and maintenance for a hypothetical child, although the standard of living and extent of education to be provided such child would undoubtedly require considerable conjecture and speculation by the trier of fact.¹⁷⁵

In addition, the court in *Terrell* acknowledged that "the rearing of a child would not be a profitable undertaking if considered from the economic loss alone."¹⁷⁶ The court justified this disparity by concluding that, with respect to public policy, "the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile."¹⁷⁷ As stated above, the court reasoned that instead of attempting to place value on the intangible benefits derived from rearing children, public sentiment dictates that the benefits to the parents outweigh any economic harm suffered in raising and educating a healthy, normal child.¹⁷⁸ Therefore, *Terrell* stands for the proposition that even though children are an economic burden on the

170. See *id.*

171. *Id.* at 516.

172. See *id.*

173. See *id.* at 517-18 (citing RESTATEMENT (SECOND) OF TORTS § 920 (1979)).

174. RESTATEMENT (SECOND) OF TORTS § 920 (1979).

175. *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

176. *Id.*

177. *Id.*

178. See *id.*

family unit, parents should not be compensated beyond the intangible benefits they receive from raising a healthy child. *Terrell* also stands for the proposition that the Benefits approach would be speculative and “present insurmountable problems of proof.”¹⁷⁹

In *Hickman v. Myers*,¹⁸⁰ the plaintiffs sued the physician for the cost of rearing a child after the alleged negligent performance of a tubal ligation.¹⁸¹ The plaintiff parents argued “that the birth of a healthy, unplanned child is not a benefit which equals or exceeds the cost of the child’s upbringing as a matter of law.”¹⁸² In arriving at its decision, the court reasoned that “a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child.”¹⁸³

The *Hickman* court based its reasoning on the proposition established in *Terrell* and held that “the benefit of having a child cannot be equated with or diminished by the economic burden of rearing that child.”¹⁸⁴ The court added that “[t]he intangible, but all important, incalculable but invaluable ‘benefits’ of parenthood far outweigh any of the mere monetary burdens involved.”¹⁸⁵ In addition, the court stated that “[p]ublic policy deems the birth of a healthy child a precious gift rather than a compensable wrong.”¹⁸⁶ Therefore, the court concluded that it would be an impossible task to determine or place a dollar figure on the benefits received from a child in order to offset the recovery of child-rearing damages.

The Benefits approach has been rejected by all the Texas courts that have evaluated the rule. The courts addressing this claim have all concluded that the intangible benefits derived from raising a healthy child outweigh any economic burdens placed on the family. This reasoning, as discussed previously, should not stand. The approach that should ultimately be adopted is the Full Recovery Rule.

CONCLUSION

The Texas Supreme Court has not ruled directly on the issue of wrongful pregnancy. However, several Texas Supreme Court opinions, on closely related matters, have lead most intermediate courts to conclude that Texas would recognize a wrongful pregnancy claim. All but one Texas intermediate court explicitly recognizes a wrongful pregnancy cause of action. The primary controversy in Texas over wrongful pregnancy is in the award of damages. Texas courts have

179. *Id.* at 127.

180. 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.).

181. *See id.*

182. *Id.* at 870.

183. *Id.*

184. *Id.* at 871.

185. *Id.* at 870 (citing *Public Health Trust v. Brown*, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980)).

186. *Id.* (citing *Wilczynski v. Goodman*, 391 N.E.2d 479 (Ill. App. Ct. 1979)).

evaluated the three common approaches to classifying and awarding damages: (1) Limited Recovery Rule; (2) Full Recovery Rule; and (3) Benefits Rule.

Texas has rejected the Full Recovery and Benefits approaches to compensating the parents for the birth of the unwanted, but healthy, child. Texas, instead, follows the Limited Recovery Rule. Texas views the birth of a healthy child as a benefit rather than an injury because the child's smile and affection outweigh the economic burden of child maintenance and education. However, Texas courts are not uniform in awarding damages to the parents of a healthy, but unwanted, child. Most Texas courts have indicated their willingness to reimburse the parents only for medical costs associated with the pregnancy and birth of the healthy child. However, some recent opinions indicated that expenses in excess of medical expenses may be maintained if properly established. Despite the recent trend in awarding damages in excess of medical costs, *Crawford v. Kirk*¹⁸⁷ now indicates that parents should only be compensated for their medical expenses associated with the unwanted pregnancy. *Crawford* specifically ruled out the ability of parents to collect child-rearing and maintenance costs because a child is not considered a damage and calculating damages are too speculative. To date, no Texas courts allow recovery of child-rearing expenses.

However, Texas needs to re-evaluate its public policy view in assuming that the intangible benefits to the parents outweigh the economic burden on the family. Texas courts, as courts in other states have done, should consider wrongful pregnancy as a normal medical malpractice claim. The damage when a normal healthy child is conceived as a result of a negligently performed sterilization is not the birth of the child. Rather, it is the invasion of the parents' legally protected interest in financial security of their family and the frustration of their desire to limit the size of their family. Parents should not have the economic burden of raising an unwanted child thrust upon them due to the negligence of a third party doctor.

Medical malpractice claims, like other tort actions, are created to place the injured person in the position they would have been absent the harmful act. However, by denying the parents the costs associated with child-rearing and education, the parents will never be made whole and the goal of tort compensation will not be achieved. Furthermore, each family has the constitutional right to have total control over its procreational decisions. When a child is conceived after a negligent sterilization procedure, the negligent doctor has frustrated the parents' constitutionally protected interest in limiting the size of their family.

187. 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied).

A policy that allows doctors to perform negligent operations without being held legally responsible in tort actions does not further the public's interests, but instead leads to the demise of the family unit. In today's society, the intangible benefit of a child's smile does not outweigh the economic burden thrust upon the family.

If the Texas Supreme Court were to deny recovery of child rearing expenses, the court as an alternative should, at a minimum, award damages to the parents in excess of medical expenses. Such damages may not include damages for emotional distress, as barred by the Texas Supreme Court, but should include damages such as: (1) prenatal and postnatal medical expense; (2) mother's lost wages; (3) mother's pain and suffering during the pregnancy and delivery; (4) loss of consortium; (5) the cost of a second corrective sterilization procedure; and (6) mother's pain and suffering associated with the corrective procedure. All of these damages are readily proveable and are not subject to speculation. Allowing parents to prove and recover child-rearing damages strengthens the family unit, maintains the best interest of the child, and best advances the goals of tort law and Texas public policy.

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