

WRONGFUL BIRTH: THE COURTS' DILEMMA IN DETERMINING A REMEDY
FOR A "BLESSED EVENT"

Michael T. Murtaugh*

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* Attorney and Counselor at Law. J.D., Catholic University of America, 1984; A.B., College of the Holy Cross, 1981. Admitted to practice in New York, District of Columbia and Texas. The author practiced law in Houston, Texas and New York, New York, and was an assistant professor at Widener University School of Law. He currently consults for law firms. The author thanks Robert E. Mensel, J.D., Ph.D. Nancy J. Ross and Charles A. Eckert for their advice and comments on drafts of this article, and Paula Heider for her word-processing assistance.

Wrongful birth¹ is an action sounding in tort² brought by the parents of an unplanned child against a physician who performs an unsuccessful sterilization operation or abortion, or who improperly diagnoses the fact of pregnancy or the physical condition of the fetus during pregnancy.³ The plaintiffs' complaint most typically alleges that the physician's negligence caused the parents to suffer the conception or birth of the child.⁴

¹Wrongful birth actions must be distinguished from actions for wrongful life. A suit for wrongful life is brought by parents on behalf of the child himself to recover damages for having been allowed to be born. For example, in *Berman v. Allen*, 404 A.2d 8 (N.J. 1979), a Downs syndrome child alleged that had the defendant informed her mother of the availability of amniocentesis, and performed that test, her mother would have terminated the pregnancy and she would never have come into existence.

Wrongful life actions have not met with favor in the courts. The reason most frequently offered for denying the claim is the impossibility of calculating damages. Since the purpose in awarding damages is compensation, the child bringing the wrongful life action is actually demanding the court to measure the difference between the value of his existence (caused by the negligence) and that of his nonexistence (that is, his value if the negligent act had not occurred). The courts have responded that the value of life as opposed to nonlife is incapable of measurement. *Gleitman v. Cosgrove*, 49 N.J. 22, 30, 227 A.2d 689, 692 (1967).

Only three states recognize a cause of action for wrongful life: California, New Jersey and Washington. See *Curlender v. Bio-Science Labs*, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980), *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984), *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983).

For a discussion of wrongful life, see Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 *Harvard Civil Rights-Civil Liberties Law Review* 141 (2005); Comment, *WRONGFUL LIFE AND WRONGFUL BIRTH CAUSES OF ACTION - SUGGESTIONS FOR A CONSISTENT ANALYSIS*, 63 *Marq. Law Rev.* 612-21 (1980).

²Actions for wrongful birth have also sounded in contract and warranty. *E.g.*, see *Burke v. Rivo*, 406 Mass. 764, 551 N.E. 2d 1 (1990), *Ball v. Mudge*, 391 P. 2d 201 (Wash. 1964) (Parents brought suit alleging that the physician breached his implied warranty in failing to render the father sterile). These suits usually have not met with success because courts will dismiss the action unless the plaintiff can prove separate consideration for the fee for the sterilization operation. *Clegg v. Chase*, 89 Misc. 2d 510. *But see Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (court infers that through physician's failure to warn the patient of the possibility of failure of treatment, he guaranteed success without qualifications).

Because of the prevalence of suits brought in tort for negligence, and their rate of success, this Article will deal only with that cause of action for wrongful birth.

³*Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977) (unsuccessful vasectomy); and *Bowman v. Davis*, 356 N.E. 2d 496 (Ohio, 1976) (unsuccessful tubal ligation).

One court has also allowed parents of an unplanned child to bring an action for wrongful birth against a pharmacist who negligently substituted a tranquilizer while filling a prescription for an oral contraceptive. See *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

⁴See, *e.g.*, *Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990); *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d 1003 (1982) (physician's negligent performance of sterilization of plaintiff mother caused her to give birth to unplanned child), See *infra*, notes 100-112 and accompanying text; *Wilbur v. Kerr*, 275 Ark. .239, 628 S.W. 2d 568 (1982) (physician's negligent performance of sterilization on plaintiff father caused plaintiffs to parent an unwanted child). See, *infra* notes 113-125 and accompanying text; *Speck v.*

The parents of the wrongfully born infant pray for compensation for the losses they have sustained as a result of the birth.

Originally, claims for wrongful birth were categorically denied.⁵ In the first wrongful birth suit, *Christensen v. Thornby*,⁶ the Minnesota Supreme Court denied the parents' claim, maintaining that the birth of any child was a "blessed" event.⁷ And, twenty-three years later, a Pennsylvania court, in *Shaheen v. Knight*,⁸ reasoned that since procreation was the chief purpose of marriage, it could not sustain the married plaintiff's action for wrongful birth.⁹ Thus, adherence to these deeply rooted sentiments grounded in public policy caused the injured parents of an unwanted child to be deprived of a legal remedy.

Three decades after the first wrongful birth case was decided, it became apparent that a shift in this once pervasive social policy was emerging.¹⁰ This transition was evidenced by two United States Supreme Court cases. In 1965, in *Griswold v. Connecticut*,¹¹ the Court held that the decision of a man and woman to procreate or use some form of birth control fell within their constitutionally protected right to privacy.¹²

Finegold, 497 Pa. 77, 439 A.2d 110 (1982) (physicians' negligent performance of both sterilization and abortion procedures caused parents to give birth to a genetically defective child), *See, infra* notes 158-170 and accompanying text; *Naccash v. Burger*, 233 Va. 406, 290 S.E. 2d 825 (1982) (physician's negligent diagnosis of parents' hereditary disease caused parents to forego abortion of affected child). *See, infra* notes 171-180 and accompanying text.

⁵ *See, e.g., Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934); *Shaheen v. Knight*, 11 Pa. D. & C. 2d 41, 45 (Lycoming Cty. 1957).

⁶ 192 Minn. 123, 255 N.W. 620 (1934).

⁷ *Id.*

⁸ 11 Pa. D. & C. 2d 41, 45 (Lycoming Cty. 1957).

⁹ *Id.*

¹⁰ *See, e.g., Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964). Although the Washington court denied the parent's claim for summary judgment in a wrongful birth action, it opined, "Our holding for the physician should not be construed as an expression of opinion by this court on physician's contention that the case should . . . have been resolved in his favor as a matter of law." 391 P.2d at 203.

¹¹ 381 U.S. 479.

¹² The *Griswold* court reasoned, *inter alia*, that "specific guaranties in the Bill of Rights have penumbras, formed by emanations from those guaranties that help give them life and substance. Those various guaranties create zones of privacy." *Id.* at 484. After discussing the specific amendments to the

Eight years later, in *Roe v. Wade*,¹³ the Court extended this protection to a woman's decision to abort a fetus within the first trimester of pregnancy.¹⁴ Having been afforded these new constitutional protections, parents were secured against having their claims for wrongful birth denied based on the policy arguments advanced by the courts in *Christensen* and *Shaheen*. As a result of *Griswold* and *Roe*, parties claiming injury as a result of wrongful birth should no longer be denied a remedy at law.¹⁵

The rationale of the *Griswold* case contradicts the policy reasons advanced in *Shaheen* for denying a cause of action for wrongful birth. In recognizing a couple's right to use contraception, the Court abrogated, as a matter of constitutional law, the concept that procreation is the chief purpose of marriage. Furthermore, in its holding in *Roe*, the Court, at least impliedly, recognized that not all women believe that the birth of a child is a blessed event. It follows, therefore, that the "blessing" doctrine of *Christensen* can no longer be maintained as a *per se* rule.

Constitution that give rise to this right of privacy, the Court stated that the intimate relation of husband and wife is one lying within that zone. *Id.* at 486. It concluded that a law which forbids the "use of contraceptives . . . has a maximum destructive impact upon that relationship" and cannot be upheld. *Id.* 410 U.S. 113 (1973).

¹⁴ The *Roe* court introduced the issue by recognizing "the sensitive and emotional nature of the abortion controversy and of the deep and seemingly absolute convictions that the subject inspires." *Id.* at 116. It continued: "One's philosophy, one's experience . . . one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and color one's thinking and conclusions about abortion . . . our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection." *Id.*

Realizing that the Constitution does not explicitly recognize a right to privacy, the Court cited *Griswold* (see *supra* note 12) as having established one and maintained that "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 151. (The remainder of the Court's opinion deals with the competing interests of the woman and the state regarding the lawfulness of abortion during the three trimesters of pregnancy.) For a full discussion and analysis of the *Roe* decision and its subsequent impact, see HEYMANN AND BARZELAY, THE FOREST AND THE TREES: ROE V. WADE AND ITS CRITICS," 53 B.U.L. Rev. 765 (1963).

¹⁵ 192 Minn. 123, 255 N.W. 620 (1934); 11 Pa.D. & C. 2d 41 (Lycoming Cty. 1957). See also, *supra* note 5 and accompanying text. In adopting the right of privacy and applying it to contraception and abortion, the Supreme Court did not discuss, nor did it intimate the relevance of its decision to the action for wrongful birth..

Since the early 1970's, claims for wrongful birth have met with increasing success in the state courts.¹⁶ The litigation has arisen from a variety of factual situations. Many of the successful actions have been brought by parents alleging that the physician's negligence prior to the conception of their child caused the injury.¹⁷ For instance,

¹⁶ See, e.g., *Simmerer v. Dabbas*, 733 N.E.2d 1169 (Ohio 2000); *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1977); *Williams v. Univ. of Chicago Hosps.*, 688 N.E.2d 130 (Ill. 1977) (parents sought damages for the birth of their child following a failed tubal ligation); *Robak v. U.S.*, 658 F.2d 846 (7th Cir. 1981) (parents of rubella syndrome child brought wrongful birth action against physician who negligently failed to diagnose mother's rubella and inform her of possible damages to the fetus, and received damages for the costs of raising and supporting the child); *Maggard v. McKelvey*, 627 S.W. 2d 44 (Ky. App. 1981) (parents of unwanted, healthy child brought wrongful birth action against physician for negligent performance of vasectomy on father and were denied costs for rearing the child); *Hartke v. McKelway*, 526 F. Supp. 97 (D.D.C. 1982) (mother of unplanned child brought wrongful birth action against physician who negligently performed a laproscopic cauterization and was denied recovery for the costs of raising healthy child); *Public Health Trust v. Brown*, 388 So. 2d 1084 (Fla. 1980) (mother of unplanned, healthy child, brought wrongful birth action against physician who negligently performed tubal ligation and was denied rearing costs); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E. 2d 479 (1970) (parents brought action against physician who negligently performed abortion and were precluded from recovering damages for costs incurred in raising and educating the child); *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977) (parents of wrongfully born, healthy child, brought action against physician who negligently performed sterilization operation and were awarded damages for the prenatal and postnatal expenses, mother's pain and suffering during pregnancy and delivery, loss of consortium and reasonable cost of rearing the unplanned child subject to offset by the value of child's aid, comfort and society); *Bowman v. Davis*, 356 N.E. 2d 496 (Ohio 1976) (parents of healthy child born as result of physician's negligent performance of tubal ligation brought suit and recovered costs for rearing); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W. 2d 372 (1975) (parents of child born with rubella syndrome brought wrongful birth action against physician for negligently failing to diagnose mother's condition and warn her of probable effects on fetus, and recovered damages limited to expenses which parents had reasonably and necessarily suffered and would suffer in the future due to the child's deformities); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (parents of healthy child brought wrongful birth action against physician for negligence in performing a sterilization operation on mother and recovered damages for emotional upset, physical inconvenience and costs incurred in rearing the child offset by any benefits that they might receive as a result of the child's birth); *Jacobs v. Theimer*, 519 S.W. 2d 846 (Tex. 1975) (suit for recovery of expenses reasonably necessary for care and treatment of child who was born physically impaired because of mother's having contracted rubella is not barred by considerations of public policy); *Ziemba v. Sternberg*, 45 A.D. 2d 230, 357 N.Y.S. 2d 265 (1974) (action in malpractice lies by parents against physician for his negligent failure to diagnose a pregnancy so that mother was prevented from aborting the child); *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971) (benefits of an unwanted, healthy, child may be weighed against all elements of damage claims by plaintiffs who had unplanned child as a result of pharmacist's negligently supplying tranquilizer rather than birth control pill).

¹⁷ In this type of situation, the claims have often been entitled "wrongful conception" or "wrongful pregnancy" by the courts. See *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169, 176 (Minn. 1977) and *Coleman v. Garrison*, 327 A. 2d 747 (Del. Super. Ct. 1974), *aff'd.*, 349 A. 2d 8 (Del. 1975). Although some commentators believe that the distinction in nomenclature is vital to a proper assessment of the issues involved. See, e.g., Podewils, Lisa A, 73 B.U.Law Rev. 407 (May, 1993), n. 2 ("Wrongful conception or wrongful pregnancy lawsuits may be distinguished from wrongful birth...actions. In wrongful birth lawsuits, the parents of unhealthy infants seek to recover the cost of caring for the disabled infant. 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...."), Note,

physicians have been held liable for incorrectly performing a vasectomy¹⁸ or tubal ligation.¹⁹ The action may also arise after a child has been conceived. Claims have been brought against physicians for failing to diagnose a pregnancy or for failing to test for, or diagnose, fetal defects in time for the mother to obtain a legal abortion.²⁰

The spectrum of damages that have been claimed, awarded or denied is even broader than that of the various forms of wrongful birth actions.²¹ Every court that has heard a wrongful birth claim has discussed the multiple elements of possible damage and the controversy over the proper calculation of damages.²² Although courts often purport

TORTS - CAUSE OF ACTION RECOGNIZED FOR WRONGFUL PREGNANCY - MEASURE OF DAMAGES TO BE APPLIED, 25 Wayne L. Rev. 961 (March 1979)). Because the underlying issue involves ordinary common law negligence, the distinction is of little or no value. It serves only to identify the temporary quality of the negligence and is not relevant to a disposition of the underlying issue. As Dean Prosser has espoused, the particular name a tort bears is of little relevance to the real issue of whether "the plaintiff's interests are entitled to legal protection against the conduct of the defendant." W. Prosser, HANDBOOK ON THE LAW OF TORTS §1 at 3 (4th ed. 1971).

Additionally, unlike the characterization given to the different nomenclature by Podewils, causes of action based on the concept of wrongful birth of a child born healthy, are abundant. *See infra* notes 100-133 and accompanying text.

¹⁸ *See, e.g., Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977). A vasectomy is a sterilization procedure performed on a man, by which a section of the vas deferens, a tube which carries spermatozoa, is cut, and the severed ends sutured, thus preventing escape of sperm to a point where a male may impregnate the female.

¹⁹ *See, e.g., Bowman v. Davis*, 356 N.E. 2d 496 (Ohio 1976). A tubal ligation is a sterilization procedure by which a woman's fallopian tubes are cut and tied off as a means of preventing the union of sperm and egg.

²⁰ *See, e.g., Reick v. Medical Protective Co.* 64 Wis. 2d 514, 219 N.W. 2d 242 (1974); *Jacobs v. Theimer*, 519 S.W. 2d 846 (Tex. 1975).

²¹ *See, e.g., infra* note 24 and accompanying text.

²² *See, e.g., Hartke v. McKelway*, 526 F. Supp. 97 (D.D.C. 1981) (parents of unwanted, healthy child brought wrongful birth action against physician for negligent performance of vasectomy on father and were denied costs of rearing the child); *Maggard v. McKelvey*, 627 S.W. 2d 44 (Ky. App. 1981) (parents of unwanted, healthy child brought wrongful birth action against physician for negligent performance of vasectomy on father and were denied the costs of rearing the child); *Moore v. Lucas*, 405 So. 2d 1022 (Fla. 1981) (parents of deformed child brought action against physician based on negligent failure to diagnose and warn of inheritable disease and recovered damages for medical expenses and extraordinary care involved in treatment of child); *Robak v. U.S.*, 658 F. 2d 471 (7th Cir. 1981) (parents of rubella syndrome child brought wrongful birth action against physician who negligently failed to diagnose mother's rubella and inform her of possible dangers to the fetus, and received damages for the costs of raising and supporting the child); *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E. 2d 968 (1981) (parents of child wrongfully born as a result of negligent sterilization allowed to recover full costs of raising and educating unplanned child); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W. 2d 209 (1981) (parents of child born with genetic defect were entitled to seek damages for both medical expenses and mental distress from physician who negligently failed to inform plaintiffs of fetus' condition at stage where abortion was legal); *Sorkin v. Lee*, 78 A.D. 2d 180, 434 N.Y.S. 2d 300 (1980) (parents of wrongfully born,

to allow recovery for those elements of damage that are a direct and probable result of the defendant physician's negligence,²³ in actuality, most awards are not that far-reaching.²⁴ The most controversial question concerning damages is whether to award the injured parents costs of raising the unwanted child.²⁵ In determining the extent of the parents' injury, courts have focused on the health of the wrongfully born child. When the child is born diseased or with an abnormality, courts have shown an increasing willingness to award the plaintiff parents full compensation for the financial loss they will suffer for raising a physically or mentally challenged child.²⁶ However, in cases arising from the unplanned birth of a healthy child, courts generally have refused to recognize the full costs of rearing as a proper element of damages.²⁷

healthy child can recover medical expenses as well as pain and suffering from physician or negligently performed vasectomy, but costs for rearing denied as speculative and beyond reasonable measurement).

²³ See, e.g., *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d 1003 (1982) and *infra* notes 100-112 and accompanying text; *Ochs v. Borrelli*, 187 Conn. 253, 495 A.2d 883 (1982) and *infra* notes 134-149; *Robak v. U.S.*, 658 F.2d 471 (7th Cir. 1981).

²⁴ Costs arising from the unsuccessful medical procedure and from the birth itself are most frequently awarded. See, e.g., *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d 1003 (1982) and *infra* notes 100-112; *Wilbur v. Kerr*, 275 Ark.239, 628 S.W.2d 568 (1982) and *infra* notes 113-125 and accompanying text; *Maggard v. McKelvey*, 627 S.W.2d 44 (Ky. App. 1981). In addition, damages for pain and suffering connected with the pregnancy, see, e.g., *Bishop v. Byrne*, 265 F. Supp. 460 (S.D.W.Va. 1967), loss of the mother's wages due to the pregnancy. *Id.*, and for the father's loss of consortium during the wife's absence have also been allowed. See, e.g., *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Bowman v. Davis*, 356 N.E.2d 496 (Ohio 1976). One court has held that the parents of a child born with birth defects have a valid claim for damages resulting from emotional injury sustained as a result of the birth. See, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) (mental and emotional anguish parents have suffered and will continue to suffer as the result of their Downs syndrome child is appropriate measure of damage).

²⁵ See, e.g., *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479, 487 (the principal controversy in negligent birth control actions revolves around the damage question).

²⁶ See, e.g., *Naccash v. Burger*, 223 Va. 406 (1982); *Speck v. Finegold*, 497 Pa. 77 (1982) and *infra* notes 158-180 and accompanying text.

²⁷ See, e.g., *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d 1003 (1982) (no damages awarded for rearing); *Wilbur v. Kerr*, 275 S.W.2d 568 (1982) (public policy bars the awarding of damages for rearing); *Public Health Trust v. Brown*, 388 So.2d 1084 (Fla. 1980) (cost of raising a previously unwanted but healthy, normal child is not recoverable element in wrongful birth cases). *But, contra*, see *Cockrum v. Baumgartner*, 425 N.E.2d 968 (Illinois, 1981) (costs of raising and educating unplanned child are proper element of damages and rewards of parenthood should not be allowed in mitigation of rearing costs); *Bowman v. Davis*, 356 N.E.2d 496 (Ohio 1976) (recovery for expense due to change in family status and economic costs of rearing is not against public policy).

Entering its adolescence as a cause of action, the wrongful birth claims' validity was recognized by an increasing number of courts.²⁸ The courts were generally unable to

²⁸ Successful wrongful birth cases since 1967 include *Kingsbury v. Smith*, 122 N.H. 237, 442 A. 2d 1003 (1982) (parents of healthy child wrongfully born after negligent vasectomy recovered damages from defendant physician for hospital and medical expenses, cost of sterilization, pain and suffering, loss of mother's wages and father's consortium, but were denied costs for rearing); *Wilbur v. Kerr*, 275 Ark.239, 628 S.W. 2d 568 (1982) (parents of an unwanted, healthy child brought suit against physician who negligently and unsuccessfully performed vasectomy on father and were denied rearing costs on the basis of public policy); *Ochs v. Borrelli*, 187 Conn. 253,445 A. 2d 883 (1982) (parents of unplanned, healthy child, recovered costs of rearing offset by value of child's aid and comfort from physician who negligently performed a tubal ligation); *Speck v. Finegold*, 497 Pa. 77. 439 A. 2d 110 (1982) (parents of a genetically defective child brought action against physician who negligently performed vasectomy and abortion procedures and were awarded damages for expenses attributable to the birth and rearing of the child, mental distress and physical inconvenience attributable to the child's birth); *Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825 (1982) (parents of child born with Tay-Sach's disease brought wrongful birth action against physician who negligently failed to discover that fetus was affected with the disease, causing mother to forego abortion, and recovered damages for care and treatment of child, and emotional distress); *Robak v. U.S.*, 658 F. 2d 8476 (7th Cir. 1981) (parents of rubella syndrome child brought wrongful birth action against physician who negligently failed to diagnose mother's rubella and inform her of possible damages to the fetus, and received damages for the costs of raising and supporting the child); *Maggard v. McKelvey*, 627 S.W. 2d 44 (Ky. App. 1981) (parents of unwanted, healthy child brought wrongful birth action against physician for negligent performance of vasectomy on father and were denied costs for rearing); *Harke v. McKelway*, 526 F. Supp. 97 (D.D.C. 1981) (mother of unplanned child brought wrongful birth action against physician who negligently performed a laparoscopic cauterization and was denied recovery for the costs of raising healthy child); *Public Health Trust v. Brown*, 388 so. 2d 1084 (Fla. 1980) (mother of unplanned, healthy child brought wrongful birth action against physician who negligently performed tubal ligation and was denied rearing costs); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E. 2d 479 (1979) (parents brought action against physician who negligently performed abortion and were precluded from recovering damages for costs incurred in raising and educating the child); *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977) (parents of wrongfully born, healthy, child brought action against physician who negligently performed sterilization operation and were awarded damages for the prenatal and postnatal expenses, mother's pain and suffering during pregnancy and delivery, loss of consortium and reasonable cost of rearing the unplanned child subject to offset by the value of child's aid, comfort and society); *Bowman v. Davis*, 356 N.E. 2d 496 (Ohio 1976) (parents of healthy child born as result of physician's negligent performance of tubal ligation recovered costs for rearing); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W. 2d 372 (1975) (parents of child born with rubella syndrome brought wrongful birth action against physician for negligently failing to diagnose mother's condition and warn her of probable effects on fetus, and recovered damages limited to expenses which parents had reasonably and necessarily suffered and would suffer in the future due to the child's deformities); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (parents of healthy child brought wrongful birth action against physician for negligence in performing a sterilization operation on mother and recovered damages for emotional upset, physical inconvenience and costs incurred in rearing the child offset by any benefits that they might receive as a result of the child's birth); *Jacobs v. Theimer*, 519 S.W. 2d 846 (Tex. 1975) (suit for recovery of expenses reasonably necessary for care and treatment of child who was born physically impaired because of mother's having contracted rubella is not barred by considerations of public policy); *Ziemba v. Sternberg*, 45 A.D. 2d 230, 357 N.Y.S. 2d 265 (1974) (action in malpractice lies by parents against physician for his negligent failure to diagnose a pregnancy so that mother was prevented from aborting the child); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971) (benefits of an unwanted, healthy, child may be weighed against all elements of damage claimed by plaintiffs who had unplanned child as result of pharmacist's negligently supplying tranquilizer rather than birth control pill); *Custodio v. Bauer*, 251 Cal. App. 303, 59 Cal. Rptr. 463 (1967) (in action to recover damages for the birth of a normal, healthy child following failure of sterilization procedure, plaintiffs entitled to recover more than nominal damages);

dismiss the suits on the grounds of public policy because of the decisions in *Griswold* and *Roe*.²⁹ However, in their lingering reluctance to recognize wrongful birth as a typical negligence action, the courts continued to deny claimants complete recovery for the injuries they suffered. In so doing, the courts left the parents of unwanted children with an incomplete remedy and an echo of the resounding admonition of *Christensen* ringing in their ear—instead of suffering an injury, you have been “blessed with the fatherhood of another child.”³⁰

This Article will trace the evolution of the cause of action for wrongful birth. It will then study the development that wrongful birth has experienced, focusing first on five successful wrongful birth cases handed down by state high courts during a seminal year in the tort’s development.³¹ The stunted development of the cause of action since then, including a number of state legislatures’ enacting laws denying the availability of the tort to the citizens of their jurisdictions, and the continued misapplication of basic principles of tort law by courts in states that do recognize this controversial cause of action will be discussed. The legislative history of the Pennsylvania statute abrogating the common law action for the tort of wrongful birth for its citizens will be analyzed. Finally, the holdings and rationales of cases in the jurisdictions that do recognize the cause of action shall be discussed, with an emphasis on the measure of damages. It will

Bishop v. Byrne, 265 F. Supp. 460 (S.D.W.Va. 1967) (in an action brought by parents of child born as result of negligently performed sterilization, whether wife suffered mental or physical pain from pregnancy and subsequent Caesarean section presented disputed issues of fact which precluded grant of summary judgment).

See infra, note 206 for additional cases.

²⁹*See supra* note 15 and accompanying text.

³⁰ 192 Minn. 123, 255 N.W. 620 (1934). *See supra* notes 6-9 and accompanying text.

³¹ *Ochs v. Borelli*, 187 Conn. 253, 445 A. 2d 883 (1982) *see infra* notes 134-149 and accompanying text; *Kingsbury v. Smith*, 122 N.H. 237, 442 A. 2d 1003 (1982) *see infra* notes 100-112 and accompanying text; *Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825 (1982), *see infra* notes 171-180 and accompanying text; *Speck v. Finegold*, 497 Pa. 77, 439 A. 2d 110 (1981) (note that this case was actually handed down on 31 December 1981), *see infra* notes 158-170 and accompanying text; *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W. 2d 568 (1982), *see infra* notes 113-125 and accompanying text.

be demonstrated that though many courts have recognized the traditional tort nature of wrongful birth, through indiscriminate application of basic postulates of damages rules or under the guise of public policy, injured plaintiffs are nevertheless left with an incomplete remedy or awarded damages beyond the scope of the defendant's culpability.

This Article will conclude that although the cause of action for wrongful birth has been denied both by some governors' pens and the pens of some ultra-conservative courts, it remains a valid cause of action in the majority of states. The courts that do hear wrongful birth claims should shift the focus of their inquiry from the health of the wrongfully born child to the plaintiffs' reasons for deciding not to parent a child, in order to award a remedy that is commensurate with the extent of the injury suffered.

I. THE GENESIS AND DEVELOPMENT OF THE CAUSE OF ACTION FOR WRONGFUL BIRTH: A BLESSING EVOLVES INTO A BURDEN

The earliest claims for wrongful birth did not meet with success in the state courts.³² In the first wrongful birth case on record, *Christensen v. Thornby*,³³ the Supreme Court of Minnesota was asked to hold a physician who failed to render the plaintiff sterile after a vasectomy operation responsible for costs resulting from the plaintiff's wife's subsequent pregnancy.³⁴ The plaintiff in *Christensen* sought sterilization because his wife had been advised to avoid a second pregnancy after having experienced "great difficulty with the birth of her first child."³⁵ Recognizing that an operation to sterilize a man whose wife may not have a child without grave hazard to her

³² See, e.g., *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934) and *Shaheen v. Knight*, 11 Pa. D. and C. 2d 41 (Lycoming Cty. 1957). See, also, *supra* notes 6-9 and accompanying text.

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

³⁴ 192 Minn. 123, 255 N.W. at 621 (cause of action based not on medical malpractice but on deceit in the representation by the physician to the effect that a sterilization operation would prevent conception by the wife).

³⁵ *Id.*

life, is consistent with public policy, the court looked to the purpose for which the plaintiff underwent the surgery.³⁶ It found that the purpose of the operation was “to save the wife from the hazards to her life which were incident to childbirth,” and was not the alleged purpose of saving the expenses incident to pregnancy and delivery.³⁷ The court reasoned that because the wife had survived, the husband had not been injured; rather, he had been “blessed with the fatherhood of another child.”³⁸ Furthermore, it maintained that the “expenses alleged were incident to bearing the child, and their avoidance [was] remote from the avowed purpose of the operation.”³⁹

The issue of wrongful birth did not arise again (in a reported case) until 1957. In *Shaheen v. Knight*,⁴⁰ a Pennsylvania court voiced its agreement with *Christensen* that sterilization procedures were not against public policy.⁴¹ However, the *Shaheen* court held that where sterilization was ineffective, no compensable damage occurred when a healthy child was subsequently born. The court denied the cause of action, asserting that “to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people.”⁴²

³⁶ 192 Minn. 123, 255 N.W. at 621-22. Inquiring into the purpose for which the sterilization was sought is a valid method of determining the existence and extent of injury in wrongful birth actions. Unfortunately, this method of inquiry was not employed again in a wrongful birth suit until it was adopted by the United States District Court for the District of Columbia in 1981, in *Hartke v. McKelway*, 526 F. Supp. 97. For a discussion of *Hartke* and of the importance of ascertaining the plaintiff’s purpose in seeking sterilization when awarding damages for wrongful birth, see *infra* notes 78-84 and 191-193 and accompanying text.

³⁷ 192 Minn. 123, 255 N.W. at 622.

³⁸ *Id.*

³⁹ 192 Minn. 123, 255 N.W. at 622 (court denied plaintiff’s action for deceit because plaintiff failed to prove fraudulent intent). The Minnesota court later read *Christensen* as standing for the proposition that although the plaintiff’s claim failed, a cause of action does exist for an improperly performed sterilization. See *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169, 172 (Minn. 1977), and *infra* notes 62-70 and accompanying text.

⁴⁰ 11 Pa. D. & C. 2d 41 (1957).

⁴¹ *Id.* at 43.

⁴² *Id.* at 45.

Thus, at this point, there were two views on the cause of action for wrongful birth. First, a cause of action existed, but unless the plaintiff could prove that his purpose in seeking sterilization was frustrated by the subsequent birth, then as a matter of law no damages were suffered, and indeed, a benefit accrued to the parents.⁴³ The second position was that no cause of action existed because the recognition of one would be contrary to public policy because the birth of a child is a blessed event.⁴⁴

Ten years after the *Shaheen* case was decided, a California appeals court declined to adopt either of the two previously recognized views on wrongful birth, and espoused a third view of what constituted an appropriate remedy in such actions. In *Custodio v. Bauer*,⁴⁵ the court held that if the plaintiffs could prove that sterilization was negligently performed, and that the physician had breached his duty to them, they could recover all damages proximately caused by the defendant physician's negligence.⁴⁶

The *Custodio* court's departure from the persuasive authority of *Christensen* and *Shaheen* must be examined in light of two intervening United States Supreme Court cases. In *Griswold v. Connecticut*⁴⁷ and *Roe v. Wade*,⁴⁸ the Court implicitly recognized society's changing attitude toward contraception and abortion. In *Griswold*, the Court asserted that the decision to use contraception is one of individual conscience, "clothed in a cloak of constitutional protection."⁴⁹ Thus, the *Custodio* court had substantial support for its rejection of *Shaheen's* premise that procreation was the chief purpose of

⁴³ See discussion of *Christensen*, *infra* notes 33-39 and accompanying text.

⁴⁴ See discussion of *Shaheen*, *infra* notes 40-42 and accompanying text and *Christensen* *supra* note 30 and accompanying text.

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

⁴⁶ *Id.* at 322, 59 Cal. Rptr. at 476.

⁴⁷ 381 U.S. 479 (1965). See *supra* notes 11-12 and accompanying text for discussion of *Griswold*.

⁴⁸ 410 U.S. 113 (1973). See *supra* notes 13-14 and accompanying text for discussion of *Roe*.

⁴⁹ 381 U.S. 470. This language was quoted in *Custodio*, 251 Cal. App. 2d at 317-18, 59 Cal. Rptr. at 472-73.

marriage.⁵⁰ The Supreme Court’s ruling in *Roe* clearly vitiated *Christensen*’s rationale that the birth of a child is always a “blessed” event and illustrated that the *Custodio* court was prescient. In *dicta*, the *Roe* court maintained

Maternity or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it.⁵¹

Therefore, the California court in *Custodio* had every reason to not mimic the positions of other state courts that had dealt with the issue.⁵²

In awarding plaintiff parents damages for all foreseeable consequences of a negligently performed sterilization, including the costs of rearing the unplanned child, *Custodio* added substance to the rights recognized by the Supreme Court in *Griswold* and *Roe*.⁵³ However, *Custodio* has been criticized as representing the “extreme edge or frontier” of allowable damages in a wrongful birth action.⁵⁴ To prevent the plaintiff parents from obtaining a financial windfall as a result of awarding them costs for raising a healthy child, some courts have taken a fourth approach to wrongful birth and completely denied that element of damages.⁵⁵

⁵⁰ See *supra* notes 12 and 14.

⁵¹ 410 U.S. at 135.

⁵² See *supra* notes 10-15 and accompanying text.

⁵³ *Custodio* suggested that other foreseeable damages included the costs of the unsuccessful surgery, mental distress and pain and suffering. 251 Cal App. 2d at 322, 59 Cal. Rptr. at 476.

⁵⁴ *Kingsbury v. Smith*, 122 N. H. 237, 442 A. 2d 1003, 1005 (1982).

⁵⁵ See, e.g., *Maggard v. McKelvey*, 627 S.W. 2d 44 (KY. App. 1981); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E. 2d 479 (1979); *Bushman v. Burns Clinic*, 83 Mich. App. 453, 268 N.W. 2d 683 (1978); *Public Health Trust v. Brown*, 388 So. 2d 1084 (Fla. 1980).

Two years after *Custodio* was decided, an Illinois appeals court, in *Wilczynski v. Goodman*,⁵⁶ allowed plaintiff parents to recover hospital and medical costs resulting from a negligently performed abortion, but held that awarding costs for raising and educating a normal, healthy child was against the legislatively declared policy of favoring childbirth over abortion.⁵⁷ Other courts have proffered different justifications in reaching that result. For instance, the Wisconsin Supreme Court held that rearing costs are not an appropriate element of damages because such an award would exceed the negligent physician's culpability,⁵⁸ and a Florida appeals court, in *Public Health Trust v. Brown*,⁵⁹ resurrected the moribund argument of *Shaheen v. Knight*,⁶⁰ maintaining that "a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child."⁶¹

The Supreme Court of Minnesota, however, was unpersuaded that such public policy considerations could properly be employed to deny parents of an unplanned child recovery for wrongful birth.⁶² In *Sherlock v. Stillwater Clinic*,⁶³ the Minnesota court reasoned that an action for wrongful birth was analytically indistinguishable from an ordinary medical malpractice action, and stated that, "[w]here the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred."⁶⁴

⁵⁶ 73 Ill. App. 3d 51, 391 N.E. 2d 479 (1979).

⁵⁷ 73 Ill. App. 3d 51, 391 N.E. 2d at 487. The court reasoned that since the Illinois Abortion Law of 1975 (Ill. Rev. Stat., 1977, ch. 38, par. 81-21) strongly condemned abortion, "[t]he existence of a normal, healthy life is an esteemed right under our laws rather than a compensable wrong." *Id.*

⁵⁸ *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

⁵⁹ *Public Health Trust v. Brown*, 388 So. 2d 1084 (Fla. 1980).

⁶⁰ 11 Pa. D. & C. 2d 41 (1957).

⁶¹ *Brown* at 1085.

⁶² *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169, 174 (Minn. 1977).

⁶³ *Id.*

⁶⁴ *Id.* at 174.

Recognizing that it is “troublesome” to allow recovery of the costs of rearing a normal, healthy child, the court nevertheless maintained that such costs are “a direct financial injury to the parents.”⁶⁵ It maintained that “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.”⁶⁶

To effect its goal of compensating the plaintiff parents, the Minnesota court adopted a fifth position with respect to damages for wrongful birth. The court allowed damages for rearing the unplanned child, but offset the award by an amount equal to the benefits conferred upon the parents as a result of the child’s birth.⁶⁷ The court asserted that a computation of rearing costs would include an assessment of projected expenses for maintaining, supporting and educating the child during its minority.⁶⁸ This amount would then be reduced by the value of the benefits the parents would receive as a result of the child’s aid, comfort and society.⁶⁹ The court concluded that this procedure should be coupled with “strict judicial scrutiny of verdicts” in order to prevent excessive awards.⁷⁰

⁶⁵ *Id.* at 175.

⁶⁶ *Id.* The court recognized that family planning is not only an “integral aspect of the modern marital relationship,” but that decisions such as *Roe* and *Griswold* have clothed the right to limit procreation with constitutional protection. *Id.*

⁶⁷ *Id.* at 176. The court did not discuss its reasons for declining to follow the *Custodio* approach (*see supra* note 45 and accompanying text), but merely concluded that the position it adopted was more “refined.” 260 N.W. 2d at 173).

⁶⁸ *Id.* at 176. The court noted that “[s]hould the unplanned child be born with congenital deformities, the parental support obligation could extend beyond the date that the child reaches his majority.” *Id.*

⁶⁹ *Id.* The court recognized that the dollar value of these benefits would be difficult to measure, but analogized this situation to wrongful death, in which damages for loss of aid, comfort and society are routinely awarded. *Id.*

⁷⁰ *Id.* The court also mandated that all actions for wrongful birth be submitted to the jury with a special verdict form with explanatory instructions, to assist them in measuring the complex elements of damage. *Id.*

Six years prior to the Minnesota court's decision in *Sherlock*, a Michigan appeals court developed this reduction method with the goal of preventing excessive awards to plaintiff parents.⁷¹ In contrast to *Sherlock's* position, however, the Michigan court in *Troppi v. Scarf*,⁷² maintained that the reduction method itself would obviate the possibility of creating windfall verdicts. It posited that because there was a diversity of purposes for which women employ contraception, and the consequences arising from negligent interference with such use vary widely from case to case,⁷³ "[a] rational legal system must award damages that correspond with these different injuries."⁷⁴ The court concluded that a system that allows parents of a wrongfully born child to recover rearing costs, offset by the value of benefits conferred upon them as a consequence of the birth, and life, of a healthy child would serve to accomplish that purpose.⁷⁵

The Michigan court's decision in *Troppi* has been praised by other courts as the most logical means to achieve an equitable result when the parents seek the costs of rearing an unplanned child.⁷⁶ However, ten years after *Troppi*, the United States District

⁷¹ *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

⁷² *Id.* The plaintiffs in *Troppi* brought suit against a pharmacist who negligently substituted tranquilizers for birth control pills when filling the plaintiff's prescription.

⁷³ 31 Mich. App. 240, 187 N.W. 2d at 518. The court offered as examples of contraceptive users the "unmarried women who seek the pleasure of sexual intercourse without the perils of unwed motherhood, married women who wish to delay slightly the start of a family in order to retain the career flexibility which many young couples treasure, and married women for whom the birth of a child would pose a threat to their own health or the financial security of their families." *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* The court queried: "Is it not likely that an unwed college student who becomes pregnant due to a pharmacist's failure to fill properly her prescription for oral contraceptives has suffered far greater damage than the young newlywed who, although her pregnancy arose from the same sort of negligence had planned the use of contraception only temporarily, say, while she and her husband took an extended honeymoon trip?" It concluded that without this reduction method, "both plaintiffs would be entitled to recover substantially the same damages." *Id.* The court stressed that the "trier of fact must have the power to evaluate the benefit according to all the circumstances of the case presented." It suggested that family size and income, parental age and marital status were some of the factors that should be considered "in determining the extent to which the birth of a particular child represents a benefit to its parents." *Id.*

⁷⁶ See, e.g., *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975); *Anonymous v. Hospital*, 33 Conn. Supp. 125, 366 A.2d 204 (1976).

Court for the District of Columbia declined to employ that rationale.⁷⁷ In *Hartke v. McKelway*,⁷⁸ the district court was asked to determine whether a woman who gave birth to an unplanned, healthy child as the result of a negligently performed sterilization, could recover costs for raising the child.⁷⁹ To ascertain the extent of injury resulting from the child's birth, the *Hartke* court also looked to the purpose for which the plaintiff had sought sterilization.⁸⁰ However, in contrast to the *Troppe* court's approach, the *Hartke* court did not employ the reduction method in calculating damages. Rather, it maintained that a determination of the purpose itself should be the controlling factor in awarding damages commensurate with the injury suffered.⁸¹ The court found that the plaintiff had undergone sterilization for the purpose of avoiding possible medical complications from delivering another child;⁸² it was not her purpose to avoid the expenses of raising a child.⁸³ The court held that the defendant's "wrong against the plaintiff consisted [only] in imposing the pain, suffering and mental anguish of pregnancy on her, not in imposing the [financial] costs of a healthy child," and thus denied the plaintiff's claim for rearing costs.⁸⁴

Hartke provides a rational method for determining damages as a function of the specific injury the parents had attempted to avoid. Its approach had not been used

⁷⁷ *Hartke v. McKelway*, 526 F. Supp. 97 (D.D.C. 1981).

⁷⁸ *Id.*

⁷⁹ *Id.* at 104.

⁸⁰ In making this determination, the court followed the analysis offered by the Minnesota court in *Christensen v. Thornby*, the first wrongful birth case. See *supra* notes 32-39 and accompanying text. The plaintiff in *Hartke* sought sterilization because she had previously suffered an ectopic pregnancy (a pregnancy in which gestation occurs elsewhere than in the uterus) and "feared for her life should she become pregnant again." 526 F. Supp. at 99.

⁸¹ *Hartke* at 105. For a similar viewpoint, see *Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

before.⁸⁵ Instead, other courts had concentrated on the result of the wrongful birth, rather than on the purpose the plaintiffs sought to protect in their decision not to bear and parent a child.

The issue that has proved determinative in this outcome-oriented approach is the physical health of the child. When the child is born normal and healthy, the courts have engaged in discussions of the “blessings”⁸⁶ and “benefits”⁸⁷ of parenthood, and have allowed those concepts either to abrogate the plaintiff’s claim or reduce an award of damages for rearing.⁸⁸ However, if the wrongfully born infant is born with a congenital defect, courts have generally rejected these arguments.⁸⁹ For example, in 1981, in *Robak v. U.S.*,⁹⁰ the parents of a child born with rubella brought a wrongful birth action against their physician, alleging that he had negligently failed to diagnose the pregnant mother’s rubella and inform her of possible injury to the fetus.⁹¹ The parents, claiming that they would have terminated the pregnancy had they known of the effects of the mother’s rubella, sought damages for past and future maintenance and care of the child.⁹² The court ruled that an action for wrongful birth is governed by ordinary tort principles. Since it is a fundamental tenet of tort law that a negligent tortfeasor is liable for all

⁸⁵ The single exception is *Christensen v. Thornby*. See, *supra* note 80.

⁸⁶ See, *supra* notes 32-44 and accompanying text.

⁸⁷ *Id.*.

⁸⁸ See *infra* notes 100-114 and accompanying text.

⁸⁹ See, e.g., *Eisenbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W. 2d 209 (1981) (parents of child born with genetic defects brought wrongful birth action against physician who negligently deprived them of information which would have led them to terminate pregnancy); *Moore v. Lucas*, 405 So. 2d 1022 (Fla. 1981) (parents brought wrongful birth action against obstetrician for failure to diagnose or warn of inheritable disease which resulted in birth of deformed child); *Dumer v. St. Michael’s Hospital*, 69 Wis. 2d 766, 233 N.W. 2d 372 (1975) (parents of child born with rubella syndrome brought wrongful birth action against physician who negligently failed to diagnose mother’s rubella so that she could obtain an abortion during first trimester of pregnancy).

⁹⁰ 658 F.2d 471 (7th Cir. 1981). The court noted that this was a case of first impression for a federal court of appeals.

⁹¹ *Id.*.

⁹² *Id.*

damages that are the proximate result of his negligence,”⁹³ the court held that the plaintiffs could recover damages for rearing the child, and that the award was not subject to any reduction.⁹⁴

Thus, it is apparent that wrongful birth had experienced two separate and independent paths of development. By 1981, the parents of a child wrongfully born with a congenital disease were generally secure in establishing rearing costs as a proper element of damages.⁹⁵ At the same time, however, the parents of a child wrongfully born, normal and healthy, were more likely to have that element of damages denied.⁹⁶

II. A SEMINAL YEAR FOR THE BLEMISHED ADOLESCENCE OF A MATURING TORT: CONTINUING A TRADITION OF CONTROVERSY AND CONFUSION

Five wrongful birth cases, each of first impression, were decided by state courts of last resort in 1982,⁹⁷ the most important period in the development of this controversial cause of action. The factual scenarios presented by these cases typify those that had been encountered by other state courts.⁹⁸ It is apparent that the courts have continued the tradition of focusing the inquiry in wrongful birth actions on the health of the child, rather than inquiring into the reasons behind the plaintiffs’ decision not to parent a child.⁹⁹ The

⁹³ *Id.* at 478 (emphasis by the court).

⁹⁴ *Id.* at 479.

⁹⁵ *See, supra* notes 89-94 and accompanying text.

⁹⁶ *See, infra* notes 100-133 and accompanying text.

⁹⁷ *Ochs v. Borrelli*, 187 Conn. 253, 256-7, 445 A.2d 883 (1982), *see infra* notes 134-149 and accompanying text; *Kingsbury v. Smith*, 122 N.H.237, 442 A. 2d 1003 (1982) *see infra* notes 104-112 and accompanying text; *Wilbur v. Kerr*, 275 Ark.239, 628 S.W. 2d 568 (1982), *see infra* notes 113-117 and accompanying text; *Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825 (1982), *see infra* notes 171-180 and accompanying text; *Speck v. Finegold*, 497 Pa. 77, 439 A. 2d 110 (1981), *see infra* notes 158-170 and accompanying text.

⁹⁸ *See, e.g., Maggard v. McKelvey*, 627 S.W. 2d 44 (Ky. Am. 1981) (child born as a result of negligently performed bilateral vasectomy); *Pierce v. Piver*, 262 S.E. 2d 320 (N.C. App. 1980) (child born after negligent performance of a tubal ligation); *Moore v. Lucas*, 405 So. 2d 1022 (Fla. App. 1981) (physician’s failure to diagnose or warn of inheritable disease caused mother to forego abortion).

⁹⁹ *See, e.g., Kingsbury v. Smith*: “The ruling today is limited to the facts of this case, involving a faulty sterilization procedure that resulted in the birth of a healthy child. Other and differing circumstances,

five cases of 1982 illustrate the controversy among and confusion among the courts concerning the proper measurement of damages for wrongful birth.

A. Denial of Damages for Rearing A Healthy Child

In *Kingsbury v. Smith*¹⁰⁰ and *Wilbur v. Kerr*,¹⁰¹ the Supreme Courts of New Hampshire and Arkansas, respectively, were asked to recognize claims for wrongful birth and award damages resulting therefrom. Both cases involved the birth of a normal, healthy child following unsuccessful sterilization procedures.¹⁰² In determining that the plaintiff parents had stated a cause of action, both courts adopted rationales previously espoused by other state courts that had dealt with the issue of wrongful birth.¹⁰³

In *Kingsbury v. Smith*, the defendant, Dr. Thompson, performed a tubal ligation on the plaintiff mother, Mrs. Kingsbury, after she gave birth to her third child. Eighteen months following that surgery, Mrs. Kingsbury gave birth to her fourth healthy child. In response to this unplanned birth, the Kingsburys filed a wrongful birth action against the defendant.¹⁰⁴

including but not limited to the birth of an abnormal or injured child might lead us to a different conclusion.” 122 N.H. 237 at 243 (1982).

¹⁰⁰ 122 N.H.237 (1982).

¹⁰¹ 628 S.W. 2d 568 (1982).

¹⁰²In *Kingsbury*, the plaintiff mother had undergone surgery for a tubal ligation, 122 N.H. at 238, and in *Wilbur*, the plaintiff father suffered two unsuccessful vasectomies. 628 S.W. 2d at 569.

¹⁰³ See notes 100-112 for the approach taken by the *Kingsbury* court, and notes 113-125 for that taken in *Wilbur*.

¹⁰⁴ 122 N.H. at 240. After the birth of her fourth child, Dr. Thompson was again requested to undertake further sterilization procedures and did so. The parents then filed this diversity action in the United States District Court of New Hampshire. This case came to the Supreme Court of New Hampshire from a certification of questions concerning whether New Hampshire recognizes a claim for wrongful birth, and if so, what damages may be considered by the trier of fact.

The Supreme Court of New Hampshire first elected to construe this action for wrongful birth as an action for wrongful conception.¹⁰⁵ The court recognized, implicitly, that the case presented a cause of action based on negligence.¹⁰⁶ The justices reiterated that at common law, remedies are provided for persons injured by conduct of another that breaches a duty owed them.¹⁰⁷ Realizing that the issue of damages is often problematic in suits for wrongful birth, the court opined: “[T]he outlines of the duty are [often] more apparent than the remedy that society chooses to provide. Such is the case at hand.”¹⁰⁸

The court surveyed the different legal positions advanced by other state courts when confronted with the wrongful birth issue,¹⁰⁹ and ultimately held that the proper

¹⁰⁵ 122 N.H. at 240. The court provided no rationale for this distinction. *See supra* note 17 for a definition of wrongful conception.

¹⁰⁶ The court did not mention the word **negligence** at the outset of its opinion. However, in its discussion of risk, duty and injury, it introduced the concept of negligently inflicted harm. For a discussion of these elements, *see infra* notes 107 and 255.

¹⁰⁷ 122 N.H. at 238.

As with any cause of action based on negligence, a successful wrongful birth claim requires an initial demonstration by the parent plaintiffs that the defendant physician owed them a legal duty. Duty is a legally recognized obligation to conform to a specific standard of conduct toward another. W. Prosser, *HANDBOOK ON THE LAW OF TORTS*, §53, 324 (4TH ED., 1971). A physician is under a duty to provide his patients with professional medical care, *Becker v. Schwartz*, 400 N.Y.S. 2d 110 (1979), a standard that is defined as that “degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality.” *Custodio v. Bauer*, 59 Cal. Rptr. 463, 468 (1967). Although the degree of learning and skill often varies from one locality to another, all physicians are required to exercise ordinary care in applying those skills that they do possess. In the context of a wrongful birth action, the physician is charged with using due care when performing a sterilization operation, an abortion, or when diagnosing a mother or her fetus for disease or abnormalities. If the physician fails to conform to the applicable standard of due care, the duty owed the patient is breached. Thus, in failing to successfully perform a tubal ligation or in misdiagnosing the health of a fetus, a physician commits such a breach.

¹⁰⁸ 122 N.H. 237, 442 A. 2d at 1004.

¹⁰⁹ The court cited *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934), for the propositions that a recovery for wrongful birth is unwarranted because the damages are unforeseeable and remote and that the birth of a child is always a “blessing.” However, the New Hampshire court ultimately rejected this position, stressing that “nonrecognition of any cause of action for wrongful conception leaves a void in the area of recovery for medical malpractice and dilutes the standard of professional conduct and expertise in the area of family planning.” 122 N.H.237, 442 A.2d at 1005.

The *Kingsbury* court viewed *Custodio v. Bauer*, *see supra* notes 45-55 and accompanying text, as presenting the “extreme edge or frontier” of the different positions courts have taken with respect to wrongful birth claims. 122 N.H. 237, 442 A.2d at 1005. The *Custodio* court awarded the plaintiffs the costs of raising a child, thereby fully compensating them for the injury they suffered as a result of the physician’s negligence. *See supra* notes 45-55 and *infra* notes 328-331 and accompanying text. The New Hampshire court discredited *Custodio*’s rationale that wrongful birth was “analytically indistinguishable

elements of damage were those that were a direct and probable result of the defendant's negligence. Nevertheless, the court limited the recovery to the cost of sterilization and the medical expenses, pain and suffering, and lost wages caused by the pregnancy, and denied the plaintiffs costs for rearing.¹¹⁰ It concluded that this was the most logical and humane view because it allowed parents to recover without granting them a windfall or placing an unreasonable burden on the negligent physician.¹¹¹

Curiously, the *Kingsbury* court did not set forth a rationale in support of its position that allowing rearing costs would grant a windfall to the defendant; nor did it proffer any justification for its desire to insulate the negligent physician from liability coextensive with his culpability. The court merely concluded that rearing costs were not a proper element of damage in a wrongful birth action.¹¹² The Supreme Court of Arkansas reached the same conclusion as *Kingsbury*, but was less reticent in its reasoning

from an ordinary medical malpractice action." *Custodio*, 251 Cal. App. 2d 303, 59 Cal. Rptr. at 472, on the basis that "in no other situation is a new human life created." *Kingsbury*, 122 N.H. 237, 442 2d at 1006.

The third position the *Kingsbury* court studied was that first taken by the Michigan Supreme Court in 1971 in *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971), *see supra* 71-76 and accompanying text. The *Kingsbury* court strenuously rejected the theory that recovery for the reasonably foreseeable costs of raising the child should be allowed, but offset by an amount equal to the value of the benefits conferred to the parents as a result of the child's birth, 31 Mich. App. 240, 187 N.W. 2d at ?, as an illogical attempt to "reduce the magnitude of verdicts and lessen the monetary shock to the medical tortfeasor." 122 N.H. 237, 442, A.2d at 1006. The New Hampshire court reasoned that a benefit cannot be reaped "from the total failure of the medical service or treatment giving rise to the action." *Id.* (Note that the benefits rule is actually section 920, *Restatement of the Law*, Second, *Torts*. For a discussion of section 920 as it relates to the cause of action for wrongful birth, *see infra* notes 319-343 and accompanying text.)

The *Kingsbury* court completed its survey by adopting the approach pronounced by the Illinois court in *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E. 2d 479 (1979), *see supra* notes 56-57 and accompanying text. In *Wilczynski*, the parents of an unplanned child brought a wrongful birth action against their physician alleging that he negligently failed to perform a successful abortion. 73 Ill. App. 3d 51, 391 N.E. 2d at 481. They sought, *inter alia*, compensation for the costs they would incur in raising the child. The Illinois court denied the plaintiff parents the costs of rearing for reasons of public policy. (The court based its argument on the state legislature's policy favoring birth over abortion. The Illinois Abortion Act of 1975 sanctions abortions "where necessary to preserve the life of the mother." Il. Rev. Stat. 1977, ch. 38, par. 81-21. The court construed this statute as a "strong condemnation of abortion and support of the right to life." 73 Ill. App. 3d 51, 391 N.E. 2d at 487.)

¹¹⁰ 122 N.H. 237, 442 A.2d at 1006.

¹¹¹ *Id.*

¹¹² *Id.*

than was the New Hampshire court. In *Wilbur v. Kerr*,¹¹³ the Arkansas court was asked to determine whether the parents of a healthy child born following the negligent performance of a vasectomy on the plaintiff, could recover the expenses of raising the child from the tort-feasing physician.¹¹⁴

Recognizing that most courts agree that wrongful birth is a valid cause of action grounded in tort, but disagreeing on the appropriate remedy,¹¹⁵ the *Wilbur* court surveyed the various policy reasons advanced for denying recovery for the expenses of raising the unwanted child.¹¹⁶ It was persuaded by the Wisconsin Supreme Court's rationale in its first disposition of a wrongful birth case.¹¹⁷ In *Rieck v. Medical Protective Co.*,¹¹⁸ the Wisconsin court, presented with a claim that the defendant physician had failed to determine that the plaintiff mother was pregnant in time for her to obtain a lawful abortion, denied damages for raising the unplanned child based on the rationale that such an award would shift the financial responsibility of the child to the physician, while all other responsibilities remained with the natural parents. This, the courts concurred, would create a new and unwarranted category of surrogate parents.¹¹⁹ The *Wilbur* court maintained also that shifting the costs of rearing would have damaging effects on the child himself. According to the Arkansas court, the child would be made to feel, like an

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

¹¹⁴ 275 Ark. 239, 628 S.W. 2d at 569.

¹¹⁵ *Id.*

¹¹⁶ The court was unpersuaded by a Texas appeals court's rationale, in *Terrel v. Garcia*, 496 S.W. 2d 124 (Tex. Civ. App. 1973) (negligent sterilization wrongful birth suit), that the benefits of raising a healthy child completely outweigh the financial burden suffered by the parents. *Wilbur*, 275 Ark. 239-, 628 S.W. 2d at 670, *citing Terrell* at 126. (The *Terrel* court based its reasoning on the "blessing" doctrine of *Christensen v. Thornby*. It declared: "Who can place a price tag on a child's smile or the parental pride in a child's achievements? Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child." 496 S.W. 2d. at 128.).

¹¹⁷ *Wilbur*, 275 Ark.239, 628 S.W. 2d at 570.

¹¹⁸ 64 Wis. 2d 514, 219 N.W. 2d 568 (1974).

¹¹⁹ *Id.*

“emotional bastard” -- a child who will someday learn that he was unwanted because his rearing was paid for by another.¹²⁰ Realizing that several courts had awarded plaintiff parents expenses for rearing the unplanned child, the *Wilbur* court maintained that in treating the issue as one of ordinary damages, the recovery was logical.¹²¹ It queried: “Should parents in this sophisticated day and time not have a right to plan their family and avoid the economic hardship of raising a child they chose not to have? Should the doctor not pay for all the damages occasioned by his negligent act?”¹²² However, the Arkansas court declined to answer these questions in the affirmative and consequently denied the parent’s claim for damages for the expenses incurred in raising the wrongfully born child, asserting that such a recovery would “undermine society’s need for a strong and healthy family relationship.”¹²³ The *Wilbur* court held that the negligent physician was responsible for his act, but limited that responsibility to “any and all proper damages connected with the operation and . . . the pregnancy.”¹²⁴ Thus, Arkansas joined a majority of jurisdictions that do not recognize rearing costs as an element of damages in a wrongful birth action.¹²⁵

¹²⁰ *Wilbur*, 275 Ark.239, 628 S.W. 2d. at 570.

¹²¹ See, e.g., *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E. 2d 968 (1981); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976).

¹²² *Id.*

¹²³ *Id.* at 571.

¹²⁴ *Id.* The *Wilbur* court also raised the issue of whether a parent should be asked to mitigate damages by aborting or offering the child for adoption. However, the court dismissed this issue, stating that most courts have rejected the application of the principle of mitigation in wrongful birth actions. *Id.*

¹²⁵ Other jurisdictions that have denied parent plaintiffs recovery for rearing costs include Kentucky, *Maggard v. McKelvey*, 627 S.W. 2d 44 (1981) (parents of unwanted, healthy, child brought wrongful birth action against physician for negligent performance of vasectomy); Florida, *Public Health Trust v. Brown*, 388 So. 2d 1084 (1980) (mother of unplanned, healthy child brought wrongful birth action against physician who negligently performed tubal ligation); New York, *Sorkin v. Lee*, 78 A.D. 2d 180, 434 N.Y.S. 2d 300 (1980) (parents of unplanned, healthy, child born as the result of a negligently performed vasectomy brought wrongful birth action against physician); Michigan, *Bushman v. Burns Clinic*, 83 Mich. App. 453, 268 N.W. 2d 683 (1978) (Patient and wife brought action against physician to recover for wrongful birth resulting from negligence in performing vasectomy).

Focusing on this issue of damages, two members of the Arkansas court in *Wilbur* dissented, asserting that they disagreed with the majority’s invocation of public policy for the purpose of denying

Both the *Kingsbury* and *Wilbur* courts relied substantially on policy reasons for their ultimate conclusions that rearing costs were not a proper element of damages in wrongful birth actions. While the *Wilbur* court mentioned the interests it was attempting to promote¹²⁶ and the *Kingsbury* court made a cryptic reference to the policy that it believed outweighed the parents' right to be compensated for raising the unplanned child,¹²⁷ neither court focused attention directly on the economic loss that plaintiff parents in wrongful birth actions would sustain as a result of these narrow rulings. Through an invocation of public policy, both courts indirectly reasoned that costs for rearing were not a proper remedy because of the possibility of burdening the physician¹²⁸ or emotionally damaging the child,¹²⁹ but evaded the basic question of why the parents of the unplanned child, instead of the negligent physician, should sustain the financial burden of raising that child. The dissent in *Wilbur* realized that this economic issue deserved greater attention.¹³⁰ It, therefore, suggested that rather than invoking public policy, the court should allow a jury to award rearing costs, but offset that award by an amount equal to the benefits the parents would derive as a result of raising the child.¹³¹

proper application of the common law rules of tort damages. 275 Ark.239 at 244, 628 S.W. 2d at 572. The dissent argued that the court was subtly promoting a public policy that encourages abortion or adoption by disallowing damages for raising the child. *Id.* It concluded by concurring with those courts that have adopted the theory of full recovery offset by any benefits though the parents derived from raising the unplanned child. *Id.* See, e.g.,, *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977). See also *infra* notes 319-331 and accompanying text.

¹²⁶ See, *supra* note 123 and accompanying text.

¹²⁷ See, *supra* note 109.

¹²⁸ *Kingsbury*, 122 N.H.237, 442 A. 2d at 1003.

¹²⁹ *Wilbur*, 275 Ark. 239, 628 S.W. 2d at 571.

¹³⁰ 628 S.W. 2d at 572. The dissent stated, in part: "The compensation is not for the so-called unwanted child or 'emotional bastard' but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their fair share of the family income." *Id.*, citing *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

¹³¹ 628 S.W. 2d at 572.

This offsetting benefits rule has been met with judicial approval in other states,¹³² and was adopted by the Supreme Court of Connecticut three months after the Arkansas court decided *Wilbur*.¹³³

B. The Benefits Rule: A Balancing Test to Offset an Award of Rearing Costs

In *Ochs v. Borrelli*,¹³⁴ the Connecticut Supreme Court was confronted with the wrongful birth issue and was asked to determine, *inter alia*, whether the parents of a child conceived after a negligently performed sterilization may be compensated by the negligent physician for the costs of rearing.¹³⁵ The defendant, having admitted to being negligent,¹³⁶ argued that public policy required the court to hold that a child is always a blessing to its parents, and that this benefit must as a matter of law totally offset any concomitant financial burden.¹³⁷ The court, noting that this was a case of first impression, began reviewing the state of the law by citing various other courts that had dealt with this issue.¹³⁸ Determined that public policy should not create an exception “to

¹³² See, e.g., *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977); *Stills vs. Gratton*, 127 Cal. Rptr. 652 (1976); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

¹³³ The Connecticut Supreme Court adopted this rule in *Ochs v. Borrelli*, 187 Conn. 253, 445 A.2d .883, in June of 1982.

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

¹³⁵ The issue of whether the trial court’s award of damages for medical expenses and pain and suffering occasioned by the unsuccessful sterilization was excessive, was also raised on appeal. The court discussed the plaintiff mother’s claim that she suffered months of severe physical discomfort, numerous painful medical procedures and serious emotional distress throughout her pregnancy, and determined that the award was not excessive. *Id.* at 261.

¹³⁶ The defendant physician, Dr. Borrelli, admitted his negligence and limited his appeal to the proper measurement of damages. *Id.* at 255.

¹³⁷ *Id.* at 256.

¹³⁸ The court cited *Wilbur v. Kerr*, 628 S.W. 2d 568 (1982); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975); *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E. 2d 479 (1979); and *Reick v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 242 (1974), as courts that have completely denied rearing costs when awarding damages in wrongful birth actions. It cites *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E. 2d 968 (1981); and *Sherlock v.*

the normal duty of a tortfeasor to assume liability for all the damages that he has proximately caused,”¹³⁹ and intent upon protecting the exercise of the rights of privacy adopted in *Griswold* and *Roe*,¹⁴⁰ the *Ochs* court awarded the parents the expenses of rearing the unplanned child offset by the value of the benefits conferred on the parents by having the child.¹⁴¹ The court, however, did not provide any guidelines for the trier of fact to employ when attempting to determine the value of those benefits.

The defendant argued that allowing any recovery for the costs of raising the child would “erroneously equate the birth of a child with an injury to its parents.”¹⁴² The Connecticut court rejected this assertion. Maintaining that parents are often recompensed for their economic expenditures incurred in raising a child through the intangible rewards that the experience brings, the court nevertheless emphasized that the expense of rearing is often injurious because of the financial burden it imposes. It stated: “parental pleasure softens, but does not eradicate economic reality.”¹⁴³

The *Ochs* court emphasized that it was not shifting the entire economic burden of parenthood to the negligent physician.¹⁴⁴ Specifically, the ruling in *Ochs* requires the trier of fact to weigh the intangible benefits of having a child against the financial costs that are incurred in raising that child. Once the benefits are calculated, they are to be used to offset the expenses and, therefore, to reduce the negligent physician’s liability.¹⁴⁵

Stillwater Clinic, 260 N.W. 2d 169 (Minn. 1977) as courts that have allowed parents to recover child rearing expenses.

¹³⁹ 187 Conn. at 258.

¹⁴⁰ For a discussion of the holdings in *Griswold* and *Roe*, see *supra* notes 11-14 and accompanying text.

¹⁴¹ *Ochs* at 259. See also, *Burke v. Rivo*, 406 Mass. 764, 551 N.E.3d 1 (1990) and *infra* notes 218-225 and accompanying text.

¹⁴² *Id.*

¹⁴³ *Ochs* at 259.

¹⁴⁴ *Id.* See also *infra* notes 314-348 and accompanying text for a discussion of the rule of offsetting benefits.

¹⁴⁵ 187 Conn. at 260.

The Connecticut court declined to offer any methodology to assist the jury in balancing these factors.¹⁴⁶ It did, though, defend its balancing test against the defendant's contention that it involved impermissible speculation.¹⁴⁷ Realizing that this test required the jury to balance economic factors against non-economic factors, the court maintained that the weighing was no more speculative than the process used by courts in determining damages for wrongful death.¹⁴⁸ Thus, the court asserted that the balancing test was not impermissibly speculative.¹⁴⁹

The *Ochs* court's adoption of a balancing test to offset the award of rearing costs to parents of an unplanned child aligned Connecticut with the minority of jurisdictions that had dealt with wrongful birth claims.¹⁵⁰ This approach, unlike that taken by the New Hampshire court in *Kingsbury*¹⁵¹ and the Arkansas court in *Wilbur*,¹⁵² focuses on the economic factors involved in wrongful birth. However, irrespective of its more equitable approach, the Connecticut court failed to completely compensate the plaintiff parents for the financial burden incurred as a direct and proximate result of the defendant physician's negligence. In so doing Connecticut joined the majority of jurisdictions that have been challenged by wrongful birth claims involving the birth of a healthy child.¹⁵³

¹⁴⁶ For a discussion of this balancing test, *see infra* notes 314-338 and accompanying text.

¹⁴⁷ *Ochs* at 259-60.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ The majority of courts that have adjudicated wrongful birth claims have denied recovery for costs of rearing. *See supra* note 78 and accompanying text. Other jurisdictions that have recognized the offsetting balancing test include Michigan, *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971); Minnesota, *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977); and California, *Stills v. Gratton*, 127 Cal. Rptr. 652 (1976).

¹⁵¹ *See, supra* notes 100-112 and accompanying text.

¹⁵² *See supra* notes 113-125 and accompanying text.

¹⁵³ *See supra* notes 125 and 150 for other jurisdictions in accord.

Courts deciding wrongful birth claims involving infants born with a disease or abnormality, however, have shown a greater willingness to award the parent plaintiffs costs for raising an unplanned or unwanted child.¹⁵⁴

C. Awarding Full Compensation: Rearing Costs Allowed For Abnormal Children

In cases of first impression, the Supreme Courts of Pennsylvania and Virginia, in *Speck v. Finegold*¹⁵⁵ and *Naccash v. Burger*,¹⁵⁶ respectively, allowed the parents of wrongfully born and genetically defective children to recover child rearing costs from the physician whose negligence caused the birth.¹⁵⁷

In *Speck v. Finegold*, the Supreme Court of Pennsylvania was introduced to the wrongful birth cause of action under a compelling set of facts.¹⁵⁸ The plaintiffs were the parents of two children who inherited a defect of the genes that caused them to be born with neurofibromatosis.¹⁵⁹ For genetic and economic reasons, the plaintiffs decided not

¹⁵⁴ See, e.g., *Robak v. U.S.*, 658 F. 2d 471 (1981). See also *infra* notes 158-180 and accompanying text for a discussion of the rationales proffered by the Pennsylvania and Virginia courts in holding the defendant physician liable for rearing costs.

¹⁵⁵ 497 Pa.77, 438 A.2d 117 (1981)

¹⁵⁶ 223 Va. 406, 290 S.E. 2d 825 (1982)

¹⁵⁷ 497 Pa. 77, 439 A. 2d 117; 223 Va. 406, 290 S.E. 2d 825. (Note that the *Speck* decision from the Pennsylvania Supreme Court has since been rendered moot by the Pennsylvania legislature's enactment of a statute disallowing any cause of action for wrongful birth. See 42 Pa.C.S. sec. 8305(a) and *infra* notes 199-205 and accompanying text.

¹⁵⁸ The court was also asked to determine whether Pennsylvania would recognize a cause of action for wrongful life. The court, evenly divided on the issue, affirmed the Order of the Superior Court that the infant plaintiff's cause of action was not legally cognizable. 497 Pa. 77, 439 A. 2d 117. For a discussion of wrongful life and why it has met with judicial disfavor, see *supra* note 1.

¹⁵⁹ Neurofibromatosis (von Ricklinghausen's Disease) is a disease resulting from a hereditary defect, due to an autosomal dominant gene, characterized by developmental changes in the nervous system, muscles, bones and skin. Skin changes vary from trivial (Café au lait spots) to extremely disfiguring. The condition is marked superficially by the formation of many pedunculated sort tumors (neurofibromas); however, neurofibromas are also found on cranial nerves and nerve roots. Bilateral acoustic (organs of hearing) neurofibromata (tumors on tumors) occasionally complicate neurofibromatosis in children. Bone changes often result. Neurofibromata are benign and malignant change is rare. Yet, in the central nervous system malignant tumors may appear, the most common of which is glioma of the optic nerve. The condition is both congenital and hereditary (inherited by more than one member of a family). The clinical course is

to parent other children. Mr. Speck engaged the defendant, Dr. Finegold, to perform a vasectomy on him. However, after the operation was performed, Mrs. Speck became pregnant. Mrs. Speck then requested the other defendant, Dr. Schwartz, to terminate her pregnancy. After the operation, Mrs. Speck informed Dr. Schwartz of her belief that she was still pregnant, but she was assured that the pregnancy had been aborted. Four months after her surgery, Mrs. Speck gave birth to a daughter who also inherited neurofibromatosis. One year later, the Specks filed their suit.¹⁶⁰

In addressing the issue of wrongful birth, the Pennsylvania court asserted that a disposition of the claim requires “the extension of existing principles of tort law to new facts.”¹⁶¹ Based on this premise the *Speck* court maintained that common law principles of damage apply and that the physician is responsible for the “natural and probable consequences of his misconduct.”¹⁶²

The defendants, however, asserted that “because the public policy of the Commonwealth favors birth over abortion, the approval of such a cause of action would be in contravention of legislatively declared policy.”¹⁶³ The court rejected this argument, holding that recognition of this cause of action merely affords the victims of negligently performed sterilization or abortion procedures the same legal protection guaranteed to victims of other forms of medical malpractice, without having affecting abortion activity within Pennsylvania.¹⁶⁴

variable, making prognosis at any given time difficult. There is no known treatment or cure for the disease. 497 Pa. 77, 438 A. 2d at 112. (Footnote by the court; citations omitted.).

¹⁶⁰ 497 Pa. 77, 439 A. 2d at 112..

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* In addition, the *Speck* court argued that the denial of a wrongful birth cause of action would vitiate the constitutional protection afforded abortion by the United States Supreme Court in *Roe v. Wade*, 410

The court maintained that if no duty were imposed on physicians in this area, the fundamental principles of tort law—compensating the victim, deterring negligence and encouraging due care, would be frustrated.¹⁶⁵ Unwilling to grant an “unjustifiable and unfair windfall to the defendants” and allow them to escape liability for the substantial injuries they negligently caused the plaintiffs, the court held that the plaintiffs could recover expenses resulting from the birth of and raising of their daughter.¹⁶⁶ In addition, the court allowed recovery for the mental distress and physical inconvenience suffered by the parents as a result of their daughter’s wrongful birth.¹⁶⁷

In its determination that the parents of a wrongfully born and abnormal child can recover rearing costs from the negligent physician, the *Speck* court denied the defendant’s argument that public policy contravened such an award.¹⁶⁸ In refusing to invoke public policy to insulate the negligent physician from liability for his tort, the *Speck* court resolved the wrongful birth issue solely on the basis of common law principles of damages.¹⁶⁹ In so doing, the Pennsylvania court joined a growing minority of jurisdictions that fully compensate the plaintiff parent in wrongful birth actions.¹⁷⁰

U.S. 113 (1973), by denying a remedy to a victim who is injured as a result of fulfilling her right. (See *supra* note 14 for a discussion of *Roe*.)

¹⁶⁵ *Speck*, 439 A. 2d at 112.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* In a concurring opinion, one justice agreed that public policy had absolutely no relevance to the question of wrongful birth. He stated that “nothing about sterilization or abortion requires the application of legal principles different from those controlling in other medical malpractice actions.” (Kauffman, J., concurring). *Id.* The sole dissenter insisted that because wrongful birth was an action that involved the creation of a new human life, the court could not recognize it as a tort and must defer the issue to the legislature. (Nix, J., dissenting). *Id.*

¹⁶⁸ See *supra* notes 163-165 and accompanying text for the court’s rationale.

¹⁶⁹ 497 Pa. 77, 439 A. 2d at 118 (concurring opinion of Kauffman, J.).

¹⁷⁰ See, e.g., *Robak v. U.S.*, 658 F. 2d 471 (1981); and *Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825. See also *infra* notes 171-180 and accompanying text for a discussion of *Naccash*.

In 1982, the Supreme Court of Virginia also joined this growing minority. In *Naccash v. Burger*,¹⁷¹ Virginia recognized a cause of action for wrongful birth on behalf of the parents of a child born with a disease that a physician negligently failed to diagnose during the mother's pregnancy.¹⁷² The plaintiffs brought suit against the defendant physician and testified that, had they known they were carriers, they would have insisted upon amniocentesis.¹⁷³ Had the test had indicated that the fetus was afflicted with the disease, Mrs. Burger would have had an abortion.¹⁷⁴ The Burgers sued the physician for the expenses incurred in caring for their daughter during her short life, and for the mental anguish and suffering that they experienced as a result of the wrongful birth.¹⁷⁵

The physician in *Naccash* argued that the parents had no cause of action because it was unknown to the common law and the legislature had not created it.¹⁷⁶ The court, however, responded that recognition of such a claim should be based on traditional tort law principles, and, because the determination of the scope of the common law doctrine of negligence is within the province of the judiciary, the issue was not open to legislative

¹⁷¹ 223 Va. 406, 290 S.E. 2d at 827.

¹⁷² *Id.* The plaintiff's daughter, born with Tay-Sachs disease, died two years after her birth. (Tay-Sach's disease is an invariably fatal disease of the brain and spinal cord that occurs in Jewish infants of European ancestry. A diseased child appears normal at birth, but, at four to six months, its central nervous system begins to degenerate, and it suffers eventual blindness, deafness, paralysis, seizures and mental retardation. The life expectancy of an afflicted child is two to four years.) During her mother's pregnancy, her father was tested for Tay-Sach's and was told that he was not a carrier. However, after being retested, Mr. Burger was informed that he was in fact a Tay-Sach's carrier. During Mrs. Burger's fourth month of pregnancy, she began to exhibit abnormalities. An examination revealed that she too was a carrier of Tay-Sach's disease. *Id.* at 827.

¹⁷³ Amniocentesis is a procedure in which fluid from the amniotic sac of the pregnant woman is withdrawn and studied to determine bio-chemical make-up. An analysis of the chromosomes present in the fluid enables physicians to determine if the fetus is developing normally.

¹⁷⁴ 223 Va. 406, 290 S.E. 2d. at 827.

¹⁷⁵ 223 Va. 406, 290 S.E. 2d. at 828.

¹⁷⁶ *Id.* See *supra* note 167 for the same argument espoused by the dissent in *Speck*.

sanction.¹⁷⁷ After discussing the elements of negligence that must be present in order to hold a defendant liable,¹⁷⁸ the Virginia court concluded that Dr. Naccash breached a legal duty owed to the Burgers. In so doing, the court asserted he caused them a direct injury, thereby allowing them to recover any damages which were the reasonable and proximate consequences of the defendant's negligent act.¹⁷⁹ The court held that since a reasonable person could have foreseen the financial and emotional loss that resulted from the physician's negligence, the parents were entitled to recover damages for those injuries.¹⁸⁰

In allowing the plaintiff parents to recover all damages that were the foreseeable result of the physician's negligence, the *Naccash* court fully compensated the plaintiffs for the loss they suffered as a result of the birth of their genetically defective child.¹⁸¹ The Virginia court premised its position on the common law rules of negligence and damages, as had the Pennsylvania court in *Speck v. Finegold*.¹⁸² As opposed to the positions taken by the supreme courts of New Hampshire,¹⁸³ Arkansas,¹⁸⁴ and Connecticut¹⁸⁵ in the same year, neither the Pennsylvania nor the Virginia court allowed claims of public policy to abrogate those principles.¹⁸⁶ While the New Hampshire court, in *Kingsbury v. Smith*,¹⁸⁷ denied the plaintiffs costs for raising the wrongfully born child

¹⁷⁷ 223 Va. 406, 290 S.E. 2d at 828.

¹⁷⁸ *Id.* See *supra* note 107 and *infra* note 255 for a discussion of these elements.

¹⁷⁹ 223 Va 406, 290 S.E. 2d at 829.

¹⁸⁰ 223 Va. 406, 290 S.E. 2d at 830. The final award granted to the Burgers was \$178,673.00.

¹⁸¹ 223 Va. 406, 290 S.E. 2d at 825.

¹⁸² 497 Pa. 77, 439 A. 2d 110.

¹⁸³ *Kingsbury v. Smith*, 122 N.H. 237, 442 A. 2d 1003 (1982). See *supra* notes 100-112 and accompanying text.

¹⁸⁴ *Wilbur v. Kerr*, 275 Ark.239, 628 S.W. 2d 568 (1982). See *supra* notes 113-125 and accompanying text.

¹⁸⁵ *Ochs v. Borrelli*, 187 Conn. 253, 442 A 2d 883 (1982). See *supra* notes 134-149 and accompanying text.

¹⁸⁶ See *supra* notes 161-167 and accompanying text for the Pennsylvania court's discussion of public policy.

¹⁸⁷ 122 N.H. 239, 442 A.2d 1003 (1982).

partly because of its concern that such an award would create a windfall to the parents,¹⁸⁸ the Pennsylvania court, in *Speck v. Finegold*,¹⁸⁹ allowed that element of damage in order to avoid granting an unjustifiable and unfair windfall to the physician.¹⁹⁰ The *sine qua non* of this inconsistency centers on the health of the wrongful birth child.¹⁹¹ Focusing on this particularity rather than on the interests that the plaintiffs were attempting to protect through their desire not to parent a child, a knowledgeable or accurate determination of the extent of damage plaintiff parents have suffered, is impracticable.¹⁹² This interest can be determined easily through application of fundamental principles of tort law,¹⁹³ and the extent of the injury can be ascertained by employing basic principles of common law damages.¹⁹⁴

Although they failed to define this interest, the five courts that recognized the wrongful birth cause of action during the seminal year of 1982 determined liability by applying the traditional negligence framework to new facts.¹⁹⁵ Since that time, there has

¹⁸⁸ 122 N.H. 239, 442 A.2d 1006. (1982)

¹⁸⁹ 497 Pa. 77, 438 A.2d 110 (1982).

¹⁹⁰ 497 Pa.77, 439 A. 2d at 115.

¹⁹¹ The position is evidenced by the New Hampshire court's statement in *Kingsbury v. Smith*: "The ruling today is limited to the facts of this case, involving a faulty sterilization procedure that resulted in the birth of a healthy child. Other and differing circumstances, including and not limited to the birth of an abnormal or injured child, might lead us to a different conclusion." 122 N.H. 237, 442 A. 2d at 1006.

¹⁹² *E.g.*, the *Speck* court did ascertain the parents' interest. It determined that the plaintiff parents decided not to have other children "for genetic and *economic* reasons." 497 Pa. at 83 (emphasis added). Therefore, in its awarding of rearing costs, the Pennsylvania court cannot be criticized for creating a windfall to the parents. *See, infra*, notes 348-355 and accompanying text for a full discussion of this argument. (The *Speck* decision was indirectly overturned by the Pennsylvania legislature in 1998 when it enacted 42 Pa.C.S.A. sec. 8305 that denies claims for "wrongful birth." However, *see* *Butler v. Rolling Hill Hospital and Maria Limberakis, D.O., K. Niki Cole, M.D.*, 400 Pa. Super. 141, 582 A.2d 1384 (1990) and *infra* note 208 and accompanying text.

Also *see* *Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990) and *infra* notes 218-225 and accompanying text.

¹⁹³ *See, infra* notes 348-355 and accompanying text for a discussion of this approach.

¹⁹⁴ *Id.*

¹⁹⁵ As one earlier court maintained: "Contraception, conjugal relations, and childbirth are highly charged subjects. It is all the more important, then, to emphasize that resolution of the case before us requires no intrusion into the domain of moral philosophy. At issue here is simply the extent to which defendant is

been very little deviation from those decisions.¹⁹⁶ In ascertaining the extent of that liability, however, these courts generally either failed to apply or misapplied fundamental rules of common law damages, thereby further diminishing the possibility of an accurate damage determination and increasing the likelihood of awarding a windfall to one of the parties.¹⁹⁷

III. WRONGFUL BIRTH ATTEMPTS TO GROW UP

A. Legislatures Interfere and Deny The Cause Of Action

Beginning in the early twenty-first century, nine state legislatures relieved the courts of their states from deciding cases regarding this troublesome tort.¹⁹⁸ In doing so, those legislatures also deprived injured plaintiffs of redress from an entire sector of the population: physicians and other health care providers for these potential defendants' having engaged in the basic and centuries-old tort of negligently inflicted harm.

The Pennsylvania statute,¹⁹⁹ enacted in 1988, is typical, and states, *inter alia*, “(a) Wrongful Birth. There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.”

liable for the consequences of his negligence. In reversing and remanding for trial, we go no further than to apply settled common law principles.” *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

¹⁹⁶ See *infra* notes 212-235 and accompanying text.

¹⁹⁷ See *infra* notes 227-355 and accompanying text for a discussion of damages within the context of wrongful birth.

¹⁹⁸ See Idaho Code section 5-334; Ind. Code Ann. Section 34-12-1-1; Mich. Comp. Laws. Ann. Section 600-2971; Minn. Stat. Ann. Section 145-424; Mo. Ann. Stat. section 188.130; N.D. Cent. Code section 32-03-43; 42 Pa. Cons. Stat. Ann. Section 8305(b); S.D. Codified Laws section 21-55-1; Utah Code Ann. section 78-11-24.

¹⁹⁹ 42 Pa.C.S.A. Sec 8305 (2005). (The second part of this statute prohibits an action for “wrongful life.”) For a discussion of wrongful life, see *supra* note 1.

Somewhat ironically, Pennsylvania had been, at least through its courts, a supporter of the basic right of its citizens to recover for negligently inflicted harm.²⁰⁰ The legislature’s determination to relieve physicians and other health care providers from acting with due care had little to do with tort reform or lobbying by physicians; it had everything to do with abortion.²⁰¹

The legislative history of the Pennsylvania statute²⁰² is replete with indications that it was not proposed, drafted and passed for the purpose of fundamental tort reform; it was enacted to deter women from having abortions. The legislature intended to accomplish this purpose by encouraging physicians to withhold information from women about the health of their fetuses—information that might lead women to seek abortions.”²⁰³

One commentator has argued that the Pennsylvania statute is unconstitutional because it infringes upon the right of a woman to make an informed consent based on her right to terminate her pregnancy.²⁰⁴ According to this argument, although the statute may appear neutral on its face, the legislative history is replete with evidence of a desire by the legislators to discourage abortions.²⁰⁵

Irrespective of such arguments, the Pennsylvania courts (as well as courts in the eight other states that have enacted basically identical statutes) have consistently upheld the constitutionality (under both the State and Federal Constitutions) of such statutes.

²⁰⁰ See *Speck v. Finegold*, 490 Pa. 77, 239 A.2d 110 (Pa. 1982).

²⁰¹ For a discussion of the difficulty courts have had regarding a plaintiff’s mitigating her damages when faced with an unplanned or unwanted pregnancy through terminating her pregnancy, see *infra* notes 272-313 and accompanying text.

²⁰² See Pa. House Leg. J. 1509 (June 20, 1984).

²⁰³ See Note, “Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth are Unconstitutional Under the Purpose Prong of *Planned Parenthood v. Casey*,” 61 *Brook. Law. Rev.* 235 (Spring 1995).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 239.

Facing challenges to such statutes, the courts have (more often than not) opined that the statute in question does not deny a woman's right to terminate her pregnancy; it merely prevents her from suing a health-care professional for his or her medical malpractice.²⁰⁶

One federal court, interpreting the Pennsylvania statute, made this extremely clear when it stated that Pennsylvania's wrongful birth statute merely immunizes the health care provider from liability should he or she be negligent.²⁰⁷

Arguably, the only rational decision handed down by a Pennsylvania court since the enactment of its statute barring claims for wrongful birth, was that in *Butler v. Rolling Hill Hospital and Maria Limberakis, D.O., K. Niki Cole, M.D.*²⁰⁸ In *Butler*, the court stated that an action by a patient against a doctor for damages because of the doctor's failure to timely order a pregnancy test and diagnose the pregnancy of a patient, thus preventing the patient from being able to legally abort the child, was proscribed by the Pennsylvania wrongful birth statute. However, importantly and wisely, it held that the plaintiff was entitled to recover damages for "medical expenses, lost wages related to

²⁰⁶ See *Dansby v. Thomas Jefferson University Hosp.*, 424 Pa. Super 549, 623 A.2d 816, (1993) (Pennsylvania statute prohibiting any cause of action for wrongful birth did not violate the pregnant woman's constitutional right to choose abortion over child birth by preventing her from recovering any damages for the doctor's negligent failure to diagnose profound defects with which the child would be born if he were carried to term; the statute neither regulated nor directly affected the woman's right to abortion); *Dansby v. Thomas Jefferson University Hosp.*, 424 Pa. Super. 549, 623 A.2d 816 (1993) (Pennsylvania statute prohibiting any cause of action for wrongful birth did not violate a pregnant woman's equal protection rights, by arbitrarily distinguishing between victims of doctor's preconception and post conception negligence; the statute was rationally related to the state's legitimate interest in protecting fetal life, in reducing the number of medical malpractice actions, and in keeping the cost of medical malpractice insurance low); *Flickinger v. Wanczyk*, 843 F. Supp. 32 (E.D. Pa. 1994) (neither Pennsylvania's wrongful birth statute nor Pennsylvania's denial of a cause of action for wrongful birth encourages negligent behavior by doctors or laboratories providing fetal screening diagnostic services as needed, to convert physicians and laboratories into state actors for purposes of a Section 1983 civil rights claim by parents of a child born with undiagnosed spin bifida; Pennsylvania law did not provide significant encouragement to private doctors and laboratories to infringe on a woman's right to make an informed choice regarding her pregnancy); *Bianchini v. N.K.D.S. Associates Ltd.*, 420 Pa. Super. 294, 616 A.2d 700 (Pa. Super. 1992) (statute precluding recovery for wrongful birth applied to suit seeking damages on grounds that untimely diagnosis of fetal abnormalities precluded mother from having an abortion and subjected her to physical and emotional traumas involved in carrying the child to term).

²⁰⁷ *Flickinger v. Wanczyk*, 843 F. Supp. 32 (E.D. Pa. 1994).

²⁰⁸ 400 Pa. Super. 141, 582 A.2d 1384 (1990).

prenatal care, delivery, and post-natal care, as well as compensation for pain and suffering incurred during the pre-natal through post-natal periods” from the doctor who had previously performed an unsuccessful tubal ligation and laparoscopic procedure.²⁰⁹

The *Butler* court, in casting the plaintiff’s cause of action in the terms of negligence, instead of “wrongful birth,” allowed the damaged plaintiff a remedy for her financial loss. The potential hegemony of the Pennsylvania statute was vitiated by the court’s rational, fair and logical approach.

In the states that do not statutorily bar actions for wrongful birth, the remedy the *Butler* court chose is the remedy applied by the majority of courts.²¹⁰ Therefore, it is obvious that although the term “wrongful birth” has been burdened by the rhetoric of some legislatures that to allow such a cause of action would seem to condone the potential plaintiff’s right to legally terminate her pregnancy (one of a plaintiff’s potentially mitigating options the defense might raise with respect to abrogating or reducing the extent of his financial liability), an astute plaintiff not seeking rearing costs for the unplanned or unwanted child can bypass these draconian statutes by simply pleading traditional, time-honored, negligently inflicted harm.

The absurdity of this situation is palpable. As Dean Prosser astutely observed, the particular name a tort bears is of little relevance to the real issue, of whether “the plaintiff’s interests are entitled to legal protection against the conduct of the defendant.”²¹¹ Outside of the nine states that legislatively bar actions for “wrongful birth,” the courts have heeded Dean Prosser’s sage commentary, but not without struggling with the proper measure of damages.

²⁰⁹ 400 Pa. Super. at 144.

²¹⁰ See, *infra*, notes 213-226 and accompanying text.

²¹¹ See, *supra*, note 17.

B. Courts Continue To Struggle Unnecessarily

Today, 32 jurisdictions in the United States allow a cause of action for the wrongful birth of a healthy child.²¹² Only a handful of states allow an award to an injured plaintiff for rearing costs.²¹³ Twenty-nine jurisdictions have ruled that the costs of rearing the unplanned or unwanted child are absolutely not recoverable based on a number of different rationales.²¹⁴

²¹² See *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); *Univ. of Ariz. Health Sci. Ctr. v. Superior Ct. of Maricopa*, 667 P.2d 1294 (Ariz. 1983); *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982); *Foy v. Greenblott*, 191 Cal. Rptr. 84 (Cal. Ct. App. 1983); *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982); *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984); *Ramey v. Fassoulas*, 414 So. 2d. 198 (Fla. Dist. Ct. App. 1982); *Fulton-DeKalb Hospital Authority v. Graves*, 314 S.E. 2d 653 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983); *Garrison v. Foy*, 486 N.E.2d 5 (Ind. Ct. App. 1985); *Johnston v. Elkins*, 736 P.2d 935 (Kan. 1987); *Maggard v. McKelvey*, 627 S.W.2d. 44 (Ky. Ct. App. 1981); *Macomber v. Dillman*, 505 A.2d. 810 (Me. 1986); *Jones v. Malinowski*, 473 A. 2d 429 (Md. 1984); *Clevenger v. Haling*, 394 N.E.2d 1119 (Mass. 1979); *Clapham v. Yanga*, 300 N.W.2d 727 (Mich. Ct. App. 1981); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Miller v. Duhart*, 637 S.W.2d 183 (Mo. Ct. App. 1982); *Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982); *P. v. Portadin*, 432 A.2d. 556 (N.J. Super. Ct. App. Div. 1981); *Hardin v. Farris*, 530 P.2d. 407 (N.M. Ct. App. 1974); *Mears v. Alhadeff*, 451 N.Y.S. 2d 133 (N.Y. App. Div. 1982); *Pierce v. Piver*, 262 S.E.2d 320 (N.C. Ct. App. 1980); *Bowman v. Davis*, 356 N.E.2d 496 (Ohio 1976); *Mason v. W. Pa. Hosp.*, 453 A.2d 974 (Pa. 1982); *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987); *Garwood v. Locke*, 552 S.W.2d 892 (Tex. App. 1977); *McKernan v. Aasheim*, 687 P.2d 850 (Wash. 1984); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990); *Beardsley v. Wierdma*, 650 P.2d 288 (Wyo. 1982).

²¹³ See *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Cal. Ct. App. 1967); *Lovelace Med. Ctr. v. Mendez*, 111 N. M. 336, 805 P.2d 603 (N.M. 1991); *Zehr v. Haugen*, 318 Ore. 647, 871 P.2d 1006 (1994); *Marciniak v. Lundborg*, 153 Wis. 2d 59, 450 N.W.2d 243 (1990), *Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990); *Speck v. Finegold*, 497 Pa. 77, 438 A.2d 110 (1982), *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 802 (1982); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *University of Arizona Health Sciences Center v. Superior Court Of the State of Arizona*, 136 Ariz. 579, 667 P.2d 1294 (1983).

²¹⁴ The Seslar court provided the following listing of jurisdictions that deny a plaintiff recovery for rearing costs : Alabama: *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); Alaska: *M.A. v. United States*, 951 P.2d 851 (Alaska 1998); Arkansas: *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W. 2d 568 (1982); D.C.: *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984); Florida: *Fassoulas v. Ramey*, 450 So.2d 822 (Fla. 1984); Georgia: *Altanta Obstetrics & Gynecology Group v. Ableson*, 260 Ga. 711, 398 S.E. 2d 557 (1990); Illinois: *Cockrum v. Baumgartner*, 95 Ill. 2d. 193, 69 Ill. Dec. 168, 447 N.E. 2d 385 (1983), *cert. denied*, 464 U.S. 846, 104 S.Ct. 149, 78 L.Ed. 2d. 139 (1983); Iowa: *Nanke v. Napier*, 346 N.W. 2d. 520 (Iowa 1984); Kansas: *Johnston v. Elkins*, 241 Kan. 407, 736 P.2d 935 (1987); Kentucky: *Schorck v. Huber*, 648 S.W. 2d 861 (Ky. 1983); Louisiana: *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988); Maine: *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986); Michigan: *Rouse v. Wesley* 196 Mich. App. 624, 494 N.W. 2d 7 (1992); Missouri: *Girdley v. Coats*, 825 S.W. 2d 295 (Mo. 1992); Nebraska: *Hitzemann v. Adam*, 246 Neb. 201, 518 N.W. 2d 102 (1994); Nevada: *Szekeres v. Robinson*, 102 Nev. 93. 715 P. 2d 1076 (1985); New Hampshire: *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d. 1003 (1982);

The most recent reported decision that denied recovery for child-rearing expenses, *Charree, M.D. v. Seslar*,²¹⁵ held that “the costs involved in raising and educating a normal, healthy child conceived subsequent to an allegedly negligent sterilization procedure are not cognizable as damages in an action for medical negligence.” The Supreme Court of Indiana based its decision on its opinion that “regardless of the circumstance of birth [a child] does not constitute a ‘harm’ to the parents so as to permit recovery for the costs associated with raising and educating the child...the value of a child’s life to the parents outweighs the associated pecuniary burdens as a matter of law.”²¹⁶

Employing this facile and ill-advised line of reasoning, the *Seslar* court joined the majority of jurisdictions in denying rearing costs based on medical malpractice resulting from a physician’s incompetence.²¹⁷

Conversely, one court chose to apply the traditional and time-honored principles of tort law to the issue of negligently inflicted harm with respect to damage calculation.

In *Burke v. Rivo*,²¹⁸ the Supreme Judicial Court of Massachusetts was petitioned to

New Jersey: *Garcia v. Meiselman*, 220 N.J. Super. 317, 531 A.2d 1373 (1987); New York: *O’Tolle v. Greenberg*, 64 N.Y.2d 427; 488 N.Y.Supp.2d 143, 477 N.E. 2d 445 (1985); North Carolina: *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E. 2d 743 (1986); Ohio: *Johnson v. Univ. Hosps. of Cleveland*, 44 Ohio St. 3d 49, 540 N.E.2d 1370 (Oh. 1989); Oklahoma: *Wofford v. Davis*, 764 P.2d 161 (Okla. 1988); Pennsylvania: *Butler v. Rolling Hill Hosp*, 400 Pa.Super. 141, 582 A.2d 1384 (1990); Rhode Island: *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997); Tennessee: *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987); Texas: *Terrell v. Garcia*, 496 S.W. 2d 124 (Tex. Civ.App. 1973); Utah: *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988); Virginia: *Miller v. Johnson*, 231 Va. 177, 343 S.E.2d 301 (1986); Washington: *McKernan v. Aasheim*, 102 Wash.2d 411, 687 P.2d 850 (1984); West Virginia: *James G. v. Caserta*, 175 W.Va. 406, 332 S.E. 2d 872 (1985); Wyoming: *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

See infra, notes 215 - and accompanying text.

²¹⁵ 786 N.E. 2d 705 (Ind. 2003).

²¹⁶ *Id.* at 708.

²¹⁷ *See supra*, note 199.

²¹⁸ 406 Mass. 764, 551 N.E.2d 1 (1990). The procedural posture of this opinion is somewhat byzantine. However, it was essentially a certified question from the lower court asking for guidance on the following: “What is the measure of damages in an action claiming (a) breach of a guarantee that a surgical procedure would forever prevent pregnancy; and (b) negligence in performing that procedure, where the child born as a result of the pregnancy was in every way normal and healthy?” *Burke* at 765, footnote 2.

resolve the issue of rearing costs when a woman whose physician negligently performed a sterilization procedure led to the woman's giving birth to a healthy child.

The plaintiff wife, Carole Burke, sought the sterilization procedure from the defendant for the sole reason that the "Burke family was experiencing financial difficulties. She wanted to return to work to support her family and to fulfil [sic] her career goals."²¹⁹ The defendant physician recommended and performed a bipolar cauterization procedure and guaranteed the plaintiff she would not again become pregnant; nevertheless, Burke gave birth to another child.

The Massachusetts court recognized that "the great weight of authority permits the parents of a normal child born as a result of a physician's negligence to recover damages directly associated with the birth...but courts are divided on whether the parents may recover the economic expense of rearing the child."²²⁰ The court agreed with the

²¹⁹ *Burke* at 765.

²²⁰ *Id.* at 766. The Court's laundry listing of cases provides: "Boone v. Mullendore, 416 So.2d 718, 721 (Ala. 1982) (damages include physical pain and suffering and mental anguish of mother, husband's loss of consortium, and medical expenses of pregnancy, but not child-rearing expenses); Wilbur v. Kerr, 275 Ark. 239, 244, 628 S.W.2d 568 (1982) (all "proper damages" connected with failed vasectomy and unwanted pregnancy recoverable, but for reasons of public policy not expenses of rearing child); Coleman v. Garrison, 349 A.2d 8, 11 n. 5, 13-14 (Del. 1975) (pregnancy-related damage allowed below and not challenged on appeal; no liability for rearing and educating child); Flowers v. District of Columbia, 478 A.2d 1073, 1074, 1077-1078 (D.C. 1984) (recovery of medical expenses, pain and suffering, and lost wages during pregnancy; wages lost after birth until mother returned to work; and cost of a properly performed tubal ligation, allowed below and not challenged on appeal; child-rearing costs not recoverable); Public Health Trust v. Brown, 388 So.2d 1084, 1085 (Fla. Dist. Ct. App. 1980) (damages for medical expenses, lost wages, and pain and suffering caused by unwanted pregnancy not appealed; reasonable cost of rearing child offset by the value of the child's companionship not recognized); Cockrum v. Baumgartner, 95 Ill.2d 193, 200-201, 69 Ill. Dec. 168, 447 N.E.2d 385, cert. denied, 464 U.S. 846, 104 S.Ct. 149, 78 L.Ed.2d. 139 (1983) (child-rearing expenses not recoverable); Nanke v. Napier, 345 N.W.2d 520, 522 (Iowa 1984) (same); Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983) (same); Macomber v. Dillman, 505 A.2d 810, 813 (Me. 1986) (medical expenses of pregnancy and sterilization, mother's pain and suffering, mothers lost earnings, husband's loss of consortium, recoverable, but child-rearing costs not recoverable); Kingsbury v. Smith, 122 N.H. 237, 242-243, 442 A.2d 1003 (1982) (recovery limited to medical expenses, cost of sterilization, pain and suffering of the pregnancy, mother's lost wages, husband's loss of consortium); Mason v. Western Pa. Hosp., 499 Pa. 484, 486-487, 453 A.2d 974 (1982) (tort and contract recovery for medical expenses and lost wages related to prenatal care, delivery, and postnatal care, and associated pain and suffering; no recovery for financial and emotional costs of child-rearing); Smith v. Gore, 728 S.W.2d 738, 751 (Tenn. 1987) (allowing recovery for medical expenses, recovery, delivery, pain and suffering, and emotional distress during pregnancy but not child-rearing costs); McKernan v.

lower court that proper damages would include, at a minimum,” the cost of the unsuccessful sterilization procedure and costs directly flowing from the pregnancy, the wife’s lost earning capacity; medical expenses of the delivery and care following the birth; the cost of care for the other children while the wife was incapacitated; the cost of the second sterilization procedure and any expenses flowing from that operation; and the husband’s loss of consortium [and the emotional distress associated with the unwanted pregnancy].”²²¹

Recognizing that the “principal issue” before it “[was] whether the plaintiffs were entitled, if they establish[ed] liability, to the cost of raising their child,” the court made it clear that under both contract and tort principles, the expenses associated with rearing the unplanned child were “a reasonably foreseeable and a natural and probable consequence of the wrongs that the plaintiffs allege.”²²² The court queried whether there were any public policy considerations that should limit “**traditional tort and contract damages,**” and concluded that “there [were] none as to parents who have elected sterilization for economic reasons.”²²³

The Massachusetts court concluded that the parents of a healthy but (at least initially) unwanted child may recover the cost of rearing that child if their “reason for

Aasheim, 102 Wash.2d 411, 419-421, 687 P.2d 850 (1984) (pain and suffering, loss of consortium, expenses of failed sterilization procedure and child birth, but not child-rearing expenses, recoverable); James G. Caserta, 332 S.E.2d 872, 876-878 (W.Va. 1985) (medical expenses of unsuccessful sterilization, childbirth, subsequent sterilization operation; wife’s pain and suffering; loss of consortium recoverable, but not child-rearing expenses); Rieck v. Medical Protective Co., 64 Wis.2d 514, 518-519, 219 N.W.2d 242 (1974) (no recovery for child-rearing costs); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982) (various pregnancy and sterilization related expenses, but not child-rearing expenses, recoverable). Contrast Szekeres v. Robinison, 102 Nev. 93, 95, 715 P.2d 1076 (1986) (no tort liability for any expenses incurred as result of allegedly negligent sterilization operation; contract liability for, at least, cost of failed surgery, recognized.” *Id.* at 767-768.

²²¹ *Burke at 768.*

²²² *Id. at 769.*

²²³ *Id.* (emphasis added)

seeking sterilization was founded on economic or financial considerations.”²²⁴

Nevertheless, it also stated that “the trier of fact should offset against the cost of rearing the child the benefit, if any, the parents receive and will receive from having their child.”²²⁵

Thus, the Massachusetts court joined the five other jurisdictions that allow recovery of the cost of rearing a normal child to adulthood, more often than not offset by the benefits that the parents receive in giving birth to and raising a normal, healthy child.²²⁶ Although this approach is preferable to an outright denial of damages to the injured plaintiff, it still misses the basic point of the cause of action for negligently inflicted harm.

IV. THE OBFUSCATION OF PRINCIPLES AND POLICIES OF COMMON LAW DAMAGES FOR NEGLIGENCE IN THE CONTEXT OF WRONGFUL BIRTH: FREQUENT MISAPPLICATION AND NON-APPLICATION

The primary purpose of tort law in awarding damages to injured parties is to return plaintiffs to the positions they were in prior to the negligent conduct of the tortfeasor.²²⁷ The law attempts to compensate the victim for the loss he has suffered by awarding money damages.²²⁸ A secondary, though significant goal of the damages

²²⁴ *Burke at 772.*

²²⁵ *Id. See infra* notes 314-343 and accompanying text.

²²⁶ *See* University of Arizona. Health Sciences Center v. Superior Court, 136 Ariz. 579, 584-585, 667 P.2d 1294 (1983); Ochs v. Borrelli, 187 Conn. 253, 259-260, 445 A.2d 883 (1982); Jones v. Malinowski, 299 Md. 257, 270-271, 473 A.2d 429 (1984); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175-176 (Minn. 1977); Hartke v. MeKelway, 707 F.2d 1544, 1557-1558 (D.C. Cir. 1983) (because the benefit conferred did not affect the economic interest that was harmed, no mitigation of the cost of child-rearing should be recognized on the facts of this case).

²²⁷ *See generally*, 2 F. Harper and F. James, THE LAW OF TORTS § 25.1 at 1299 (1956).

²²⁸ One exception is punitive damages. C. McCormick, DAMAGES, §77 at 275 (1935). Punitive damages have been claimed in only one wrongful birth case. *See Custodio v. Bauer*, 251 Cal. App. 303, 59 Cal. Rptr. 463 (1967), in which the court allowed the plaintiff parents to plead fraud and deceit after the

remedy is the prophylactic factor -- the attempt to deter negligence and promote the exercise of due care on the part of a defendant and his peers.²²⁹

To properly effect these objectives, courts have developed principles to employ in determining the fact or extent of a recovery. Thus, damages in tort may be denied on the basis of public policy,²³⁰ or because of the impossibility of calculation without speculation.²³¹ In addition, damage awards may be offset by the plaintiff's failure to mitigate the loss,²³² or by the plaintiff's receipt of a benefit through the loss he suffered.²³³

Each of these firmly established damage principles has been used in the disposition of wrongful birth cases.²³⁴ However, as applied to this area of the law, these principles have often served to insulate members of the medical profession from full liability for the losses they have occasioned.²³⁵ For instance, a Kentucky court of appeals, when faced with a claim for rearing costs in a wrongful birth case, admitted that it would defy logic and the concepts of causation to propose that such damages should

physician represented to the plaintiff mother that a sterilization operation was necessary for her physical and mental well-being.

²²⁹ See Prosser, HANDBOOK ON THE LAW OF TORTS, (4th ed. 1971): "The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive."

²³⁰ *Coleman v. Garrison*, 347 A. 2d 8 (Del. 1975) (plaintiff could not recover from surgeon for alleged improper performance of sterilization operation because the value of a human life outweighs any damage which might be said to follow the fact of birth).

²³¹ See *Terrell v. Garcia*, 496 S.W. 2d 124 (Tex. Civ. App. 1973) (damages in a negligent sterilization wrongful birth case denied partly because of impossibility of proper calculation without speculation).

²³² See *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 242 (1974) (the absence of steps to terminate parental rights is material as reflecting parental intent to keep and raise child).

See also *infra* notes 272-313 and accompanying text for a discussion of damage mitigation in wrongful birth suits.

²³³ See, *infra* notes 314-343 and accompanying text for a discussion of the benefits rule.

²³⁴ See notes 230-23339 and accompanying text.

²³⁵ See *infra* notes 240-255 and accompanying text for a discussion of the often spurious manners with which courts have employed these postulates.

not be submitted to a jury for assessment.²³⁶ It continued: “Common sense tells us that it is in society’s best interests to hold physicians to a standard of professional competence and impose liability when they are negligent in treating their patients.”²³⁷ Nevertheless, the court resorted to an undefined public policy in denying the parent plaintiffs recovery for the costs of raising the unwanted child.²³⁸ Other courts, although misapplying these principles and policies, have been more generous in defining their rationales for limiting recovery.²³⁹

A. The Invocation of Public Policy To Defeat An Award Of Rearing Costs

The most frequently cited policy argument used in denying parent plaintiffs recovery for the costs of rearing the unplanned child is that the child would suffer irreparable harm by forever shouldering the burden of having been born an “emotional bastard.”²⁴⁰ The Arkansas court, in *Wilbur v. Kerr*,²⁴¹ maintained that the child would someday learn that he was unwanted by his family because someone other than his parents had paid for his rearing.²⁴² Reasoning that our society has not become so sophisticated as to ignore such an emotional trauma, the court denied damages for the costs of raising the child.²⁴³

²³⁶ *Maggard v. McKelvy*, 627 S.W. 2d 44 (Ky. App. 1981) (parents brought action in tort against physician for the birth of an unwanted child, alleging negligence in the performance of a bilateral vasectomy upon husband).

²³⁷ *Id.* at 48.

²³⁸ *Id.* (without a clear expression of public opinion to the contrary, public policy prohibits the extension of liability to include damages for rearing an unwanted child).

²³⁹ See *infra* notes 240-313 and accompanying text for a discussion of these rationales.

²⁴⁰ 628 S.W. 2d 568 (1982). See *supra* notes 113-125 and accompanying text for a discussion of *Wilbur*.

²⁴¹ 628 S.W. 2d at 570.

²⁴² *Id.*

²⁴³ *Id.* at 571. The rationale of the *Wilbur* court has not gained wide acceptance. One court, in recognizing the concern raised by the Arkansas Supreme court, suggested the use of a pseudonym in place of the parents’ name in the case style. See *Anonymous v. Hospital*, 33 Conn. Supp. 126, 366 A. 2d 204 (1976) (the Connecticut court asserted that the use of the pseudonym would lessen the chance of personal publicity

In emphasizing the emotional effect that the parents' damage claim may have on the child, the *Wilbur* court failed to recognize that such an effect is more likely to result not from the awarding of rearing costs, but from the litigation process leading to such an award and the child's ultimately learning of the suit. Furthermore, a resolution of this problem is better left to the individual parents than to the courts.

Citing *Wilbur*, the *Burke* court stated bluntly: "We are ...unimpressed with the reasoning that child rearing expenses should not be allowed because some day the child could be adversely affected by learning that he or she was unwanted and that someone else had paid for the expense of rearing the child..... Courts expressing concern about the effect on the child nevertheless allow the parents to recover certain direct expenses from the negligent physician without expressing concern about harm to the child when the child learns that he or she was unwanted."²⁴⁴ Additionally, the *Burke* court maintained that "it is for the parents, not the courts to decide whether a lawsuit would adversely affect the child and should not be maintained."²⁴⁵

Because it is generally accepted that the parents and not the courts are charged with the responsibility for the care and well being of their children,²⁴⁶ the parents, therefore, should be allowed to make the decision whether the potential emotional impact on a child warrants refraining from bringing a wrongful birth action. If the plaintiffs' original decision not to parent another child was based on economic inability to finance the rearing of another child, then, irrespective of the possible trauma it may cause, the

for the parent plaintiffs and the wrongful birth infant). Attempting to rebut the "emotional bastard" contention, a Florida court suggested that the child should not be thought of as unloved, but merely as unplanned. *See Jackson v. Anderson*, 230 So. 2d 503 (Fla. 1936).

²⁴⁴ *Burke*, 551 N.E.2d at 4.

²⁴⁵ *Id.* at 5.

²⁴⁶ *See infra* note 299 and accompanying text.

parents may feel compelled to bring a wrongful birth suit in order to financially secure the child's future. Therefore, the bare allegation that there may be negative emotional affects on a child simply because his parents were awarded rearing costs rather than only medical and hospital expenses in an action for wrongful birth, simply should not prove strong enough to persuade a court to insulate the defendant and disallow a proper recovery to the plaintiffs.

A second contention that is also based on considerations of public policy and frequently employed by courts in denying rearing costs is the "surrogate parent" argument, introduced by the Wisconsin Supreme Court in *Reick v. Medical Protective Co.*²⁴⁷ The Wisconsin court decided that public policy does not permit imposing the burden of child rearing costs on physicians while allowing the parents to retain the child.²⁴⁸ The court asserted that while the intangible benefits of raising a child would remain with the parents,²⁴⁹ every financial cost or detriment would be shifted to the defendant physician.²⁵⁰ Thus, it was concluded that such a result would place an unreasonable burden upon physicians.²⁵¹

The *Reick* court's reasoning is unsound for two reasons. First, without ascertaining the plaintiff's interest in seeking to avoid having another child, it is impossible to determine the extent of the injury that he or she has suffered as a result of the birth, and therefore irresponsible to claim that damages are unreasonable. Secondly, if the parents conclude that it is in the best interest of the child to raise him with money

²⁴⁷ 64 Wis. 2d 514, 219 N.W. 2d 242 (1974). See *supra* notes 118-119 and accompanying text for a discussion of *Reick*.

²⁴⁸ *Id.* at 244.

²⁴⁹ *Id.* The intangible benefits included the child's smile and pride in the child's achievement. *Id.*

²⁵⁰ *Id.* The court defined financial costs or detriments as food, clothing and education. *Id.*

²⁵¹ *Id.*

obtained through a wrongful birth suit, this decision should be upheld²⁵² regardless of any negative connotations possibly arising from arbitrarily placing upon the physician the title of surrogate parent.²⁵³

Finally, it has been held that the awarding of rearing costs is unjust because such a recovery is out of proportion to the physician's culpability.²⁵⁴ This position is untenable under the fundamental concept of causation in tort law.²⁵⁵ When a woman undergoes surgery for sterilization or abortion, regardless of the purpose motivating the decision, she does so because she desires not to give birth to another child. If the operation is

²⁵² See *infra* note 299 and accompanying text for an expansion of this argument.

²⁵³ *Id.*

²⁵⁴ *Sorkin v. Lee*, 78 A.D. 2d 180, 184 (1980) (in action against physician based upon a negligently performed vasectomy, plaintiffs denied damages for the normal expenses of rearing and educating a healthy but unwanted child because exposure to such damages could result in substantial verdicts against which potential defendants cannot readily insure themselves).

²⁵⁵ The principle of causation in tort law can be broken down into two components --- the cause-in-fact and the legal, or proximate, cause. First, it must be determined that a casual connection exists between the claimed injury and the negligence. *Naccash v. Burger*, 223 Va. 406 (1982). If it can be proved that "but for" the negligence of the defendant, the plaintiff would not have suffered injury, then the initial inquiry of causation is satisfied. For example, in *Naccash*, Mrs. Burger clearly established that but for the negligence of Dr. Naccash, she would have terminated her pregnancy and been denied the painful experience of bringing a child affected with an incurable genetic disease into the world. 223 Va. 406. However, tort law dictates that although the breach of duty may be the cause-in-fact of the harm suffered by the plaintiff, liability will not be imposed unless the breach is also the proximate cause of the harm. W. Prosser, *HANDBOOK OF THE LAW OF TORTS* § 41 at 238-39 (4th ed. 1971). In essence, the question of proximate cause is whether a court, realizing that there is a causal connection between the defendant's negligence and the plaintiff's injury is willing to hold the defendant legally responsible for the harm that was suffered. *Id.* Whether disguised under such terms as "foreseeable," *Naccash v. Burger*, 223 Va. 406 (1982), "direct or indirect," *Id.*, or "natural and probable" consequences, *Speck v. Finegold*, 497 Pa. (1982), proximate cause is a vehicle by which the court is allowed to determine the defendant's liability based on concepts of public policy and justice. (See, e.g., the Wisconsin court's comments in *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 242, 244 (1974) and the argument advanced by the defendant physician in *Ochs*, 187 Conn. 253, 258. The proximate cause argument has also been carried to extremes. For example, in *Bishop v. Byrne*, 265 F. Supp. 460, 464 (S.D.W.Va. 1967), the defendant physician claimed that the act of sexual intercourse was an "intervening cause" that should cut off his liability. The defendant's argument proved unsuccessful.)

The cause of action for wrongful birth has been denied on the basis of proximate cause. In *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 242, the Supreme Court of Wisconsin held that "even where the claim of causation is complete and direct, recovery may sometimes be denied on the grounds of public policy." *Id.* at 244. The court's list of reasons for denying a claim on the basis of policy included the injury being too out of proportion to the culpability of the negligent tortfeasor, and the problem of placing too unreasonable a burden upon physicians in allowing recovery. *Id.* Similar reasons also led the Delaware court in *Coleman v. Garrison*, 349 A. 2d 8 (1975), to deny the cause of action, while a federal court in Texas refused the claim because it was simply not foreseeable that a "pregnancy may result in the birthing of an abnormal child." See *Lapoint v. Shirly*, 409 F. Supp. 118 (Texas 1976).

negligently performed and the mother does give birth, then she must prove that the physician's negligence was the cause of the birth. Assuming she does so, then the physician should be held responsible for all proximate consequences of his tort. The courts that have disallowed the plaintiff parent's costs for rearing have overlooked the fact that the foreseeable consequences of the physician's negligence do not stop at the maternity ward door.

B. Surmounting the Barrier of Damage Speculation

Another issue that has concerned the courts in deciding cases of wrongful birth is the problem of speculative damages. While the arguments for denying parents the costs of rearing based on public policy are often nebulous and incapable of legal justification,²⁵⁶ it is a well established principle of damages that a plaintiff must not only establish the existence of an injury, but also the amount of loss he has suffered.²⁵⁷ In wrongful birth cases where the fact of damage is clearly established some courts have denied recovery because of the difficulty in measuring damages.²⁵⁸

Adhering to this view, courts have misconstrued and misapplied the rule of certainty in the context of wrongful birth. The Supreme Court has interpreted this rule as requiring only proof of the fact of damages from which the jury may infer a just and reasonable estimate of the extent of damage.²⁵⁹ Although an estimation of the costs of

²⁵⁶ *Wilbur v. Kerr*, 628 S.W. 2d at 572 (dissenting opinion).

²⁵⁷ D. Dobbs, REMEDIES §33 (1973).

²⁵⁸ *Coleman v. Garrison*, 349 A. 2d 8 (Del. 1975) (plaintiff could not recover from surgeon for alleged improper performance of sterilization operation because of the impossibility in measuring the value of human life); *Terrell v. Garcia*, 496 S.W. 2d 124 (Tex. Civ. App. 1973) (damages in a negligent sterilization wrongful birth case denied partly because of impossibility of properly calculating damages for future expenditure on behalf of the child); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967) (parents of an impaired child, claiming the impossibility of damage calculation).

²⁵⁹ *Bigelow v. RKO Pictures, Inc.* 327 U.S. 251 (1946).

rearing a child will often involve methods of proof more complicated and sophisticated than those used to determine medical and hospital costs,²⁶⁰ many courts have properly concluded that this difficulty is not tantamount to denying the plaintiff the opportunity to present evidence of the expected costs.²⁶¹ In *Berman v. Allan*, for instance, the Supreme Court of New Jersey stated that “to deny the plaintiffs redress for their injuries merely because damages cannot be measured with precise exactitude would constitute a perversion of fundamental principles of justice.”²⁶² The Connecticut Supreme Court, in *Ochs v. Borelli*,²⁶³ properly met the question of certainty in stating that it has “no basis for distinguishing this case from other tort cases in which the trier of fact fixes damages for wrongful death . . . or for loss of consortium.”²⁶⁴ In correctly formulating and accurately applying the rule of certainty, the *Ochs* court²⁶⁵ followed the majority of jurisdictions that allow claims for wrongful birth.²⁶⁶

The Wisconsin Supreme Court, in *Marciniak v Lundborg*,²⁶⁷ stated without doubt that the issue of damage speculation in wrongful birth cases is a non-issue. The “[d]efendants . . . argue that child rearing costs are too speculative and that it is impossible to establish with reasonable certainty the damages to the parents. We do not agree . . . similar calculations are routinely performed in countless other malpractice

²⁶⁰ Methods such as statistics on the general costs of raising a child in the plaintiff’s geographical area, the income level of the parents, and the amount of money spent or being spent by the parents on other children in the family, must be employed.

²⁶¹ See, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

²⁶² 80 N.J. 421, 433, 404 A. 2d 8, 15 (1979). (The *Berman* court was addressing the issue of emotional damages.)

²⁶³ 187 Conn. 253 (1982).

²⁶⁴ *Id.* at 260.

²⁶⁵ It is noted that the *Wilbur* court also briefly mentioned the problem of speculation. However, that issue was not determinative in its ruling. The Pennsylvania, New Hampshire and Virginia courts did not raise the issue of speculation.

²⁶⁶ See, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

²⁶⁷ 153 Wis. 2d 59, 450 N.W.2d 243 (1990).

situations.”²⁶⁸ The court continued by recognizing that “[j]uries are frequently called on to make far more complex damage assessments in other tort cases” and [p]opulation studies are readily available to provide figures for the costs of raising a child.”²⁶⁹ The court ruled against the defendants with respect to this claim. Similarly, the Supreme Judicial Court of Massachusetts, in *Burke v. Rivo*,²⁷⁰ stated that the “determination of the anticipated costs of child-rearing is no more complicated or fanciful than many calculations of future losses made every day in tort cases.”²⁷¹

It is clear, therefore, that the issue of a potentially speculative damage calculation for the birth of a healthy, yet unplanned or unwanted child merely is a futile attempt by negligent physicians to avoid the consequences of their wrongdoing. Thus, the malfeasant defendants turn to yet another potential argument.

C. The Troublesome Issue of Damage Mitigation

The doctrine of damage mitigation generally has not been applied to wrongful birth cases.²⁷² The courts that have recognized a claim for wrongful birth²⁷³ have conformed to the majority position by not analyzing whether the plaintiffs could have limited their damages. The doctrine of damage mitigation requires a plaintiff to take reasonable measures to minimize the financial consequences of the defendant’s

²⁶⁸ 153 Wis. at 66.

²⁶⁹ *Id.*

²⁷⁰ 406 Mass. 764, 551 N.E.2d 1 (1990).

²⁷¹ *Id.* at 771. The Court continued: “If a physician is negligent in caring for a newborn child, damage calculations would be made concerning the newborn’s earning capacity and expected medial expenses over an entire lifetime. The expenses of rearing a child are far more easily determined.” *Id.*

²⁷² See *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E. 2d 968, 970-71 (1981); *Troppi v. Scarf*, 31 Mich. App. 240, 258, 187 N.W. 2d 511 (1971).

²⁷³ See, *supra*, note 212.

negligence.²⁷⁴ Also known as the rule of avoidable consequences,²⁷⁵ it denies recovery for any damages that could have been reasonably avoided after the tortfeasor committed the wrong.²⁷⁶ Application of this rule to mitigation in wrongful birth claims would require that the child be aborted or put up for adoption.²⁷⁷ If either abortion or adoption were determined to be reasonable conduct, and the plaintiff failed to employ such measures, recovery of damages for the costs of rearing could be denied.²⁷⁸

Considering the zeal with which courts have applied other rules of damages²⁷⁹ to protect the medical profession from the financial burden of wrongful birth claims,²⁸⁰ it is anomalous that these same courts have neglected to require defendants to mitigate their damages. In fact, it has generally been held, as a *per se* rule of law, that such efforts on the part of the claimants are unnecessary.²⁸¹

While courts purport to treat the wrongful birth action within the framework of negligence,²⁸² they nevertheless decline to apply the firmly established tort principle of damage mitigation.²⁸³ In so doing, the courts have increased the likelihood of imposing

²⁷⁴ D. Dobbs, REMEDIES, § 3.7 (1973).

²⁷⁵ *Id.*

²⁷⁶ W. Prosser, Law of Torts 65 at 422. *See, infra* notes 272-313 and accompanying text for a discussion of reasonableness within the context of wrongful birth.

²⁷⁷ *See, e.g., Reick v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

²⁷⁸ *Id.*

²⁷⁹ *See, supra* notes 256-271 for a sampling of courts that have denied claims for wrongful birth because of the problem of speculation in calculating damages.

²⁸⁰ *See, supra* notes 240-265 and accompanying text for a discussion of public policy reasons promulgated by courts in denying wrongful birth claims.

²⁸¹ *See, e.g., Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971); *Wilbur v. Kerr*, 628 S.W. 2d 568 (Ark. 1982); *Ochs v. Borrelli*, 187 Conn. 253 (1982).

²⁸² *See, e.g., Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825 (1982).

²⁸³ The Pennsylvania and Virginia courts, in *Speck v. Finegold*, 497 Pa. 77, 439 A. 2d 110 (1982), and *Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825 (1982), were not guilty of neglecting the mitigation doctrine. In both cases, the plaintiff mothers had attempted to terminate their pregnancies. *See supra* notes 158-180 and accompanying text for a discussion of these cases. The Arkansas and Connecticut courts, in *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W. 2d 568 (1982), and *Ochs v. Borrelli*, 187 Conn. 253, 445 A. 2d 883 (1982), only briefly mentioned the question of mitigation. Both opined that, as a matter of law, abortion or adoption were not reasonable conduct and therefore not required of the plaintiff. *Wilburn*, 628

an unjust ruling on the parties to the wrongful birth suit. As opposed to the other situations in which the courts have failed to apply or have misapplied common law rules of damages in the wrongful birth setting,²⁸⁴ the error here is not the possible creation of a windfall to the defendant physician through a denial of rearing costs,²⁸⁵ but the chance of erroneously compensating the parent plaintiffs with those costs.

In not deferring these questions to the jury, the courts that have dealt with wrongful birth claims have also, arguably, contravened two principles of law. First, it is a well established postulate of tort law that the negligent tortfeasor takes his victim as he finds him.²⁸⁶ That is, the victim's individual nature will often determine the extent of the wrongdoer's liability. Second, the United States Supreme Court, in *Roe v. Wade*, established an unqualified right for any woman to obtain an abortion during the first trimester of her pregnancy.²⁸⁷ While courts have been willing to use this holding for purposes of finding injury in wrongful birth cases,²⁸⁸ it has been ignored with respect to mitigation. This result has been justified on the basis of an overriding public policy and on the reasonableness corollary to the rule of mitigation.

The primary policy argument against mitigating damages through abortion is premised on the public controversy surrounding that issue. For many people, abortion involves a profound moral and religious question. For instance, the Court of Claims of

S.W. 2d at 570; *Ochs*, 187 Conn. at 253. The New Hampshire court, in *Kingsbury vs. Smith*, 122 N.H.237-, 442 A. 2d 1003, made no reference to the mitigation doctrine.

²⁸⁴ See, e.g., *supra* notes 240-255 and accompanying text and *infra* notes 314-331 and accompanying text for a discussion of those situations.

²⁸⁵ The fear of such a windfall led the New Hampshire court in *Kingsbury* to deny the plaintiff parents the costs of rearing. See, *supra* notes 110-112 and accompanying text for discussion of this rationale in *Kingsbury*.

²⁸⁶ *Troppe*, 31 Mich. App. 240, 187 N.W. 2d at 520.

²⁸⁷ 410 U.S. 113 (1973).

²⁸⁸ See, e.g., *Speck v. Finegold*, 497 Pa. 77, 439 A. 2d 110 (1982).

New York, in *Rivera v. State*,²⁸⁹ held that a “rule of law which required the claimant to have an abortion would constitute an invasion of privacy of the grossest and most pernicious kind.”²⁹⁰ The court asserted that a decision regarding abortion is for the individual to make based upon her own religious, philosophical or moral principles; while abortion is a right, it is not an obligation.²⁹¹ On the basis of these considerations, the *Rivera* court concluded that the failure of the plaintiff to obtain an abortion would not affect her cause of action.²⁹² The Michigan Supreme Court, in *Troppi v. Scarf*,²⁹³ reached the same result and held that the jury could not “take into consideration the fact that the plaintiff might have aborted the fetus.”²⁹⁴

Additionally, *Roe* (and its progeny) has been construed as to not only allow abortion (under its requirements), but to prohibit any governmental interference with a woman’s right to choose not to have an abortion. In *Arnold v. Board of Education of Escambia County, Alabama*, the United States Court of Appeals for the Eleventh Circuit opined that: “[i]t is freedom in the decision making process which receives constitutional protection.... Resolution of the childbearing decision embraces two alternatives, those of aborting the child or carrying the child to term. Both alternatives enjoy constitutional

²⁸⁹ 94 Misc. 2d 157, 404 N.Y.S. 2d 950, N.Y.Ct.Cl. (1978) (plaintiffs awarded damages for the anticipated cost of rearing an unplanned child, offset by any benefits conferred to them by the birth, as a result of a negligent sterilization wrongful birth).

Whether this position is constitutionally sound is arguable, because it is not certain that a state court’s disposition of a wrongful birth claim constitutes state action within the meaning of the Fourteenth Amendment to the federal Constitution. Although the Supreme Court declared, in *Shelley v. Kramer*, 334 U.S. 1 (1948), that “the action of state courts and judicial officers in their official capacity is to be regarded as action of the state,” *Id.* at 13, *Shelley* dealt with a racially discriminatory covenant and has been criticized as being over-broad. See, e.g., Henkin, “Shelley v. Kraemer: Notes for a Revised Opinion,” 110 U. Pa. L. Rev. 473 (1962). Therefore, until a definitive ruling is made on the issue, it is possible that a state court could require the trier of fact to reduce the plaintiff’s damage award on the basis of failure to mitigate, without violating the plaintiff’s constitutional right to privacy. See *supra* note 12.

²⁹⁰ 94 Misc. 2d 157, 404 N.Y.S. 2d at 953.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

²⁹⁴ 187 N.W. 2d at 520.

protection from unwarranted governmental interference.”²⁹⁵ The court continued by stating that there simply is no difference between choosing to abort a fetus or to carry it; both choices are legal under the constitutional right of privacy.²⁹⁶

Although adoption does not possess the same religious, philosophical or moral questions inherent in the problem of abortion, courts have treated the two options identically.²⁹⁷ In *Troppi*, the Michigan court stated that a determination of reasonableness is actually a determination of that which is in the child’s best interest.²⁹⁸ The court held that the law had long recognized the desirability of allowing a child to be reared by his natural parents.²⁹⁹ Thus, it was concluded that the parents may have reasonably believed that the child would be damaged by the “hazards of adoption,” and as a “matter of personal conscience and choice” wished to keep their once unwanted child.³⁰⁰

The legal rationale most frequently asserted for these conclusions is that the procedures of abortion or adoption are not within the scope of reasonable conduct.³⁰¹

Quoting from McCormick on *Damages*,³⁰² an Illinois appeals court, in *Cockrum v. Baumgartner*,³⁰³ declared

²⁹⁵ 880 F.2d 305 at 311 (1989).

²⁹⁶ *Id.*

²⁹⁷ *See, e.g., Wilbur v. Kerr*, 628 S.W. 2d 568 (1982).

²⁹⁸ 41 Mich. App. 240, 187 N.W. 2d at 520.

²⁹⁹ *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971), *citing, In Re Fenst*, 373 Mich. 337, 362-371, 129 N.W. 2d 420 (1964); *In Re Mathers*, 371 Mich. 516, 534, 124 N.W. 2d 878 (1963); *Herbstran v. Shifftan*, 363 Mich. 64, 67, 108 N.W. 2d 869 (1961); *In Re Mark T.*, 8 Mich. App. 122, 154 N.W. 2d 27 (1967).

In further substantiating its position, the *Troppi* court posited that “[a] child will not be taken from his mother without her consent, without regard to whether the child was conceived or born in wedlock, unless the child is neglected or the mother is unfit. The mother’s right to keep the child is not dependent on whether she desired the conception of the child.” 31 Mich. App. 240, 187 N. W. 2d at 520.

³⁰⁰ 31 Mich. App. 240, 187 N.W. 2d at 520.

³⁰¹ *Id.*

³⁰² Section 35 at 133 (1935).

³⁰³ 99 Ill. App. 3d 271, 425 N.E. 2d 968 (1981).

If the effort, risk, sacrifice or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages.³⁰⁴

The Illinois court concluded that as a matter of law, no mother can be reasonably asked to abort or to place her child up for adoption.³⁰⁵

The Wisconsin Supreme Court, in *Marciniak v. Lundborg*³⁰⁶ was of the same mindset. In considering the issue, it stated that the refusal of the defendants “to abort the unplanned child or give it up for adoption should be considered as a failure...to mitigate ...damages. The rules requiring mitigation of damages require only that reasonable measures be taken” and it is not “reasonable to expect parents to essentially choose between the child and the cause of action.”³⁰⁷ Recognizing that such a decision would be a “Hobson’s choice,” the court declined to impose the mitigation principle to cases of wrongful birth for fear that it would be involving itself in “highly personal matters [that] involve deeply held moral or religious convictions.”³⁰⁸

Although it could be argued that while abortion or adoption may be unreasonable conduct for many parents, as a matter of fact, they should not be considered, as a matter of law, unreasonable for all parents. Therefore, since the decision whether to have an abortion is a legal right, and the plaintiff must take the victim as he finds him, the trier of fact in a wrongful birth suit should be allowed to determine on a case by case basis what

³⁰⁴ 425 N.E. 2d at 971.

³⁰⁵ *Id.*

³⁰⁶ 153 Wis.2d 59, 450 N.W.2d 243 (1990).

³⁰⁷ 153 Wis. 2d 69.

³⁰⁸ *Id.* Also see *Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990) in which the court stated clearly: “[W]e ... firmly reject any suggestion that the availability of abortion or of adoption furnishes a basis for limiting damages payable by a physician but for whose negligence the child would not have been conceived.” 406 Mass., 764 at 770.

is to be considered reasonable conduct regarding mitigation of damages. If the plaintiffs were unable to justify their failure to mitigate, the court would reduce their recovery. Such a determination would also serve the purpose of preventing fraudulent claims for rearing costs.³⁰⁹ For example, in *Hartke v. McKelway*,³¹⁰ the court determined that the plaintiff's decision to keep a child born following a negligent sterilization was not the result of principled objections to abortion, since she had chosen to terminate her previous pregnancy.³¹¹ It, therefore, denied the plaintiff's claim of damages for raising the wrongfully born child.³¹²

However, in balancing the competing values involved in the issue of damage mitigation for wrongful birth, the courts have weighed the question of reasonableness heavily and determined that it is *per se* unreasonable to hold parents responsible for choosing not to abort the unplanned fetus, or, once born, place the child up for adoption.³¹³ In not holding parents to the rule of mitigation, courts have increased the possibility of creating windfall verdicts to the plaintiffs and presenting practitioners in the medical profession with unreasonable financial burdens. However, other, less controversial, arguments have been utilized in seeking to avoid those consequences. The foremost arguments that have been put forth to prevent windfalls and limit liability are the theories of the overriding or offsetting benefits of parenthood.

³⁰⁹ The problem of fraudulent claims, although not raised generally by the courts hearing wrongful birth claims is noted. With the goal of preventing fraudulent claims, some courts have refused to award parents the costs of rearing. In completely denying a cause of action for wrongful birth, a Wisconsin court objected to the subjective and unprovable nature of a wrongful birth claim. Since the action involves the pleading of a state of mind or intention, the court opined that the "temptation would be great for parents, where a diagnosis of pregnancy is not timely made, if not to invent an intent to prevent pregnancy, at least to deny any possibility of change of mind or attitude before the action contemplated was taken." *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 242, 245 (1974).

³¹⁰ 526 F. Supp. 97 (D.D.C. 1981).

³¹¹ *Id.* at 105.

³¹² *Id.*

³¹³ *See, e.g., Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d at 520.

D. The Overriding or Offsetting Benefits of Parenting

In the earliest litigation over claims for wrongful birth, the plaintiff parents were denied recovery based on the rationale that the joys of parenthood far exceed any injury suffered from the birth of a child.³¹⁴ One court asserted that “as reasonable persons the jury may well have concluded that appellants have suffered no injury in the birth of a normal, healthy child.”³¹⁵ The benefits that were considered to outweigh the possible injury included the fun, the joy and the affection received in raising and educating a child.³¹⁶

The theory that birth is a blessing which overrides any concurrent detriment has been employed by many courts over the years. In 1973, a Texas court of appeals held that the plaintiff’s cause of action for wrongful birth must fail because a price tag cannot be placed on a “child’s smile.”³¹⁷ Similarly, in 1980, a Florida court of appeals maintained that “[i]t is a universally shared emotion and sentiment that the intangible but all-important, incalculable but invaluable ‘benefits’ of parenthood far outweigh any of the mere monetary burdens involved.”³¹⁸

Conversely, many courts have concluded that the wrongful birth of a child inflicts financial injury on the parents.³¹⁹ A Minnesota court declared that it would be “myopic

³¹⁴ See, e.g., *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934).

³¹⁵ *Bally. Mudge*, 64 Wash. 2d 247, 391 A. 2d 201 (Wash. 1969).

³¹⁶ *Shaheen v. Knight*, 11 Pa. D. & C. 2d 41 (Lycoming Cty. 1957).

³¹⁷ *Terrell v. Garcia*, 496 S.W. 2d at 128.

³¹⁸ *Public Health Trust v. Brown*, 388 So. 2d 1084 (Fla. App. 1980). The court commented that “it is a rare, but happy instance in which a specific judicial decision can be based solely upon a reflection of one of the humane ideals which form the foundation of our entire legal system. This, we believe, is just such a case.” *Id.* at 1086.

³¹⁹ See, e.g., *Burke v. Rivo*, 406 Mass. 764, 551 N.E. 2d 1 (1990); *Ochs v. Borelli*, 187 Conn. 253 (1982); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977).

to declare today that the benefits exceed the costs as a matter of law.”³²⁰ However, the “overriding benefits theory” has not been completely abandoned. Instead, the courts have given it new life in conjunction with section 920 of the Restatement of Torts, Second, and have applied it to offset, rather than override a recovery for wrongful birth.³²¹

As defined in the Restatement, the rule states:

When the defendant’s tortious conduct has caused harm to the plaintiff or to his property and in doing so 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.³²²

The courts that have applied the offsetting benefits rule have done so in two different ways. The first method of application, the majority approach, was employed by the Supreme Court of Connecticut in *Ochs v. Borrelli*.³²³ The court evaluated the various benefits of parenthood and weighed them against the financial detriments the plaintiffs suffered.³²⁴

The Connecticut court suggested that such benefits include the “satisfaction, the fun, the joy and the companionship . . . which the plaintiffs as parents have had and will have in the rearing of the child.”³²⁵ The court went on to suggest that these benefits will make economic expenditures worthwhile.³²⁶

³²⁰ 260 Minn. 169, 260 N.W. 2d 169, 175 (1977).

³²¹ See, e.g., *Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990); *Ochs v. Borrelli*, 187 Conn. 253 (1982); *Tropi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977).

³²² *Restatement of the Law, Second, Torts* 920 at 509.

³²³ 187 Conn. 253. Other cases which have employed this method include *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977) and *Stills v. Gratton*, 127 Cal. Rptr. 652 (1976). See, *supra* notes 134-149 and accompanying text for discussion of *Ochs*.

³²⁴ 187 Conn. 253. The *Ochs* court, however, did not indicate how these benefits were to be measured.

³²⁵ 187 Conn. at 259.

³²⁶ *Id.*

The Connecticut Supreme Court’s balancing-of-interests approach should be recognized as superior to the overriding benefits theory or to a *per se* denial of expenses of child rearing, because the injured parents are at least partially compensated for the financial loss they have suffered as a result of the wrongful birth. However, the Connecticut court’s analysis is flawed in that it ignores the “same interest” limitation of the Restatement. A careful reading of section 920³²⁷ reveals that it is not the plaintiff who must benefit through the defendant’s tort in order to fall within the parameters of the rule; rather, it is the “interest” or purpose that the plaintiff was seeking to secure at the time of the defendant’s wrongdoing.

The interest sought to be protected by an individual who seeks to avoid parenting a child is paramount because even if it is argued that a child is always a blessing, that argument is patently spurious when the potential parent does not want that blessing. Applying the “off-setting” benefits limitation to wrongful birth cases therefore requires the courts to determine the purpose for which the potential parents attempted to avoid the birth of a child.

Only two courts have applied the theory of offsetting benefits by considering the purpose behind the plaintiff’s attempt at birth control. These cases illustrate the second approach to the benefits rule. In *Custodio v. Bauer*,³²⁸ a woman sought a sterilization operation to preclude further aggravation of a bladder and kidney condition. The defendant physician negligently performed the operation and the woman eventually gave birth. Applying the benefits rule literally, the California court concluded that the “interest” the plaintiff was seeking to protect was her bladder and kidney condition. The

³²⁷ See *supra* note 322 and accompanying text.

³²⁸ 251 Cal. App. 303, 59 Cal. Rptr. 463 (1967).

court reasoned that if the failure of the sterilization operation in any way benefited the plaintiff's bladder and kidney condition, then the value of that benefit should be subtracted from the award.³²⁹ In addition, the court asserted that any benefits that the plaintiff received from having the child, such as love and affection, have no relevance to the interest she sought to protect and therefore should not serve to offset the award. Since the plaintiff's damages were not capable of being offset, the plaintiff was awarded full costs for raising the child.³³⁰

Although the California court of appeals in *Custodio* correctly applied the rule of offsetting benefits in determining that the intangible benefits of parenthood often are not coextensive with the purpose for which a party submits to a sterilization procedure, the court's holding nevertheless suffers from a flaw in reasoning. Specifically, in determining that the interest the plaintiff sought to protect was her kidney and bladder condition, the court implicitly determined that the financial burden of raising another child did not enter into the plaintiff's decision to be sterilized. Regardless of the court's having awarded the plaintiff rearing costs, it did not do so based on its findings regarding the benefits rule, but because of an unrelated rationale.³³¹ Thus, the question still remains as to whether in holding the physician financially responsible for rearing, the court has placed an undue financial burden on the physician or created a windfall to the parents.

The *Custodio* court's application of section 920 of the Restatement is both logical and appropriate, yet it fails to provide any justification for the purpose it purports to serve -- that is, allowing the parent plaintiffs recovery for the costs of raising the child. The

³²⁹ 59 Cal. Rptr. at 466.

³³⁰ *Id.* at 477.

³³¹ The court based its holding on the family's need to "replenish its exchequer so that the new arrival would not deprive the other members of the family of what was planned as their just share of the family income." *Id.*

California court's reasoning leaves open the opportunity to hold that although the plaintiff's interest was not benefited by the tortfeasor's wrong and hence damages cannot be offset, rearing costs can be denied on other, yet to be articulated, grounds.

Two courts in 1990 made it clear that in their jurisdictions, the purpose for which the plaintiff(s) sought recovery from the negligent physician should override the "overriding" benefits rule.

Substantially agreeing with the *Ochs* court, the Supreme Judicial Court of Massachusetts in *Burke v. Rivo*³³² concluded that when parents decide to not procreate and the physician to whom they turn to assist them with their decision negligently fails to grant them their objective, the misfeasor should be held responsible for the costs resulting from the unwanted birth.³³³ In addressing the issue of the benefits a child might bring to the parents, the court stated that "[t]he judicial declaration that the joy and pride in raising a child always outweigh any economic loss the parents may suffer, thus precluding recovery for the cost of raising the child simply lacks verisimilitude, [and] [t]he very fact that a person has sought medical intervention to prevent him or her from having a child demonstrates that, for that person, the benefits of parenthood did not outweigh the burdens, economic and otherwise, of having a child."³³⁴ The court held that in addition to other damages recoverable from the negligent physician (such as the cost of the unsuccessful procedure), the tortfeasor is liable for the costs of rearing the (at least initially) unwanted child, offset by "the benefit, if any, the parents receive and will receive from having their child."³³⁵

³³² 406 Mass. 764, 551 N.E.2d 1 (1990).

³³³ *Id.* (The plaintiffs in *Burke* framed their cause of action as basic medical malpractice.)

³³⁴ 406 Mass. at 769.

³³⁵ *Id.* at 772.

Thus, as did the *Ochs* court, the *Burke* court chose to not completely compensate the plaintiff parents for the financial burden incurred as a direct and proximate result of the defendant physician's negligence. Unfortunately, regardless of the economic hardships suffered by the parents of an unplanned, but healthy child, the parents continue to be deprived of full redress for the consequences of the defendant's wrongdoing.³³⁶

In contrast to the Connecticut court's decision in *Ochs*, and the Massachusetts court's decision in *Burke*, the Supreme Court of Wisconsin, in *Marciniak v. Lundborg*,³³⁷ posited that the "application of the [benefits rule] would require the jury to place a monetary value on the benefits that would accrue to the parents as a result of the child being with them, and offset those benefits against the interest that was harmed."³³⁸

Understanding the true meaning of Section 920 of the Restatement (Second) of Torts,³³⁹ the court continued: "The Restatement places two limitations on the application of the benefits rule. The first...is that the circumstances to be considered in mitigation must benefit the same interest that was harmed by the defendant's tortious act. The second...is that the benefit can offset the damage only to the extent that it is equitable."³⁴⁰

Ultimately, the court concluded that it would be inequitable "to apply the benefit rule in the context of the tort of [wrongful birth]" when the parents made a decision not to have a child for the precise reason to avoid that benefit "that the parents went to the physician in

³³⁶ See *infra*, notes 344-356 and accompanying text for a more logical approach to damage calculation.

³³⁷ 153 Wis. 2d 59, 450 N.W.2d 243 (1990). (The actual cause of action in this case was couched in the term "negligent sterilization"; nevertheless, the ultimate harm alleged by the plaintiffs was a wrongful birth.)

³³⁸ *Id.* at 72.

³³⁹ See, *supra*, note 322 and accompanying text.

³⁴⁰ *Id.* (citations omitted). The court continued: "Section 920...specifically states that for a benefit to be considered in mitigation of damages it must be 'a special benefit to the interest of the plaintiff that was harmed....' Comments to Section 920 demonstrate that the drafters of the Restatement felt that the 'same interest' limitation contemplates a narrow definition of interest." *Id.* at 72-73.

the first place.”³⁴¹ The court held that “the costs of raising the child to the age of majority may not be offset by the benefits conferred upon the parents by virtue of the presence of the child in their lives.”³⁴²

In its decisive and often emotional rationale, the court proposed that “[w]hen parents make the decision to forego” the birth of another child, especially for economic reasons, it would be ridiculous to allow the tortfeasor to avoid the consequences of his negligence, regardless of any potential economic benefits the child might ultimately provide to the injured plaintiffs.³⁴³

V. ASCERTAINING JUST COMPENSATION: A SUGGESTED APPROACH FOR AWARDED CHILD-REARING COSTS

The soundest approach to resolving claims for rearing costs in actions for wrongful birth is the methodology used by the *Custodio*,³⁴⁴ *Hartke*,³⁴⁵ *Burke*³⁴⁶ and *Marciniak*³⁴⁷ courts in their application or non-application of section 920 of the Restatement. A trier of fact, when faced with a wrongful birth claim should ascertain the purpose for which the plaintiff underwent the medical procedure in question to prevent the birth of a child. This determination will provide a court with the information necessary to accurately divine the type and extent of injury the plaintiff sustained as a result of the negligent physician’s action or inaction. Such information, combined with proper application of both negligence and common law damage principles is essential to a just determination of questions of injury, culpability and liability in a wrongful birth

³⁴¹ *Id.*

³⁴² *Id.* at 74.

³⁴³ *Id.*

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

³⁴⁵ 526 F. Supp. 97 (D.D.C. 1981).

³⁴⁶ 406 Mass. 764, 551 N.E.2d 1 (1990).

³⁴⁷ 153 Wis.2d 59, 450 N.W.2d 243 (1990).

action. Unfortunately, many courts deciding the issue of wrongful birth have not realized the judicial efficacy of this approach. Only seven courts have specifically stated that the purpose for which the parents who had a procedure to avoid the birth of an unplanned or unwanted child should be determinative (or at least considered) in ascertaining the negligent doctor's monetary culpability.

In *Custodio*, the court did not look to purpose; it simply stated that if the plaintiffs could prove that a sterilization procedure was negligently performed, and that the physician had breached his duty to them, they could recover all damages proximately caused by the defendant physician's negligence.³⁴⁸ Writing with this broad brush, the *Custodio* court introduced the understanding that wrongful birth is a simple cause of action for negligence and that the rules for recovery of damages for a defendant's negligence should not be altered simply because a child is born. Nevertheless, because the *Custodio* opinion was harshly criticized for potentially providing the plaintiff parents a financial windfall as a result of awarding them costs for raising a healthy child,³⁴⁹ later courts began to consider the purpose of the plaintiff in deciding to avoid giving birth to a child.

In *Hartke v. McKelway*,³⁵⁰ the United States District Court for the District of Columbia determined that the plaintiff sought sterilization not for economic reasons, but because she had previously suffered an ectopic pregnancy and "feared for her life should

³⁴⁸ It is noted, however, that under this reasoning, it is likely that the plaintiff in *Custodio* would not have been allowed to recover the costs of raising her child, since the interest she was attempting to protect was her kidney and bladder condition and not her financial security.

³⁴⁹ See *supra* note 54 and accompanying text.

³⁵⁰ 526 F. Supp. 97 (D.D.C. 1980). The case was before the district court on the defendant's motions for judgment notwithstanding the verdict and for a new trial. *Id.* at 99. See *supra* notes 77-84 and accompanying text.

she become pregnant again.”³⁵¹ In allowing her to recover damages for the physical and mental anguish she suffered as a result of the defendant physician’s negligence and in denying her claim for rearing costs, the court stated: “There is no evidence to support the view that she sought to avoid the expenses of raising another child. To allow her to recover the costs of raising this child would be to give her a windfall.”³⁵² Thus, through determining the purposes for which the plaintiff sought the physician’s services and awarding damages based upon the injury that the plaintiff sought to avoid, the court was able to dispose of the case without unduly burdening the negligent physician or unjustly enriching the new mother.³⁵³

This reasoning is equally appropriate to a case in which the plaintiff proves to have undergone the medical procedure solely for economic reasons. Aligning itself with the *Hartke* court regarding the purpose for which the parents employed the ultimately negligent physician, the court in *Burke* held that when the parents’ desire to avoid the birth of a child was premised on economic or financial reasons and not an eugenic (avoidance of a feared defect) the plaintiff parents should recover the costs of rearing from the negligent physician.

However, in a situation involving an attempted avoidance of birth for economic or financial reasons does not require a balancing of interests test as employed in *Burke*.³⁵⁴ Although diligent and correct in awarding rearing costs, the *Burke* court and others that have preceded and followed it in its reasoning and conclusion have erroneously bowed to the fallacy that the birth of a healthy child is always a blessed event. Courts that rule that

³⁵¹ 526 F. Supp. at 99.

³⁵² *Id.* The court also concluded that “the case where sterilization is sought for economic reasons is not before this court.” *Id.*

³⁵³ *Terrell v. Garcia*, 496 S.W. 2d 124 (Tex. Civ. App. 1973).

³⁵⁴ *See, also*, *Ochs v. Borelli*, that earlier applied the same reasoning as *Burke*.

rearing costs are appropriate but nevertheless adopt the off-setting benefits rule of section 920 of the Restatement are misguided. Any court that treats wrongful birth causes of action differently from any other cause of action for negligently inflicted harm deviates from the essential postulate of the law of torts.

When a plaintiff parent proves that the purpose of child avoidance was purely for financial reasons, the court must recognize that the question is not “whether a doctor should be forced to pay for the satisfaction and joy and affection which normal parents would ordinarily have in the rearing and education of a healthy child, the question is whether the court should hold the negligent physician liable for the consequences of his tort.”³⁵⁵ The only court that has achieved total success in applying the common law of torts to a cause of action for wrongful birth is *Marciniak*. That court made it perfectly clear that the costs of raising the child to the age of majority may not be offset by the benefits conferred upon the parents by virtue of the presence of the child in their lives.³⁵⁶

If relevant at all, the intangible notions of satisfaction and joy arguably awarded to the parents because of the birth of an unplanned or unwanted child should be considered only by the parents in offsetting their own disposition against having a child and not by a court. While a child’s smile may ease the burden of rearing, it does nothing to mitigate the financial expenditures that necessarily will be made on the child’s behalf.

The courts that have failed to realize the difference between these values have done so erroneously. In completely denying the costs of rearing, or in offsetting those costs when the plaintiff proves that the medical procedure was undergone for financial reasons, the courts have failed to fulfill their responsibility of compensating the injured

³⁵⁵ *Id.*

³⁵⁶ 153 Wis.2d 59, 450 N.W.2d 243 (1990).

party in a negligence action and have insulated members of the medical profession from liability for the injuries the negligent physicians have caused.

VI. CONCLUSION

The history of the cause of action for wrongful birth has been replete with the non-application or misapplication of the fundamentals of the tort for negligently inflicted harm. Even in the jurisdictions that do recognize the validity of the tort of wrongful birth, the courts have been incomprehensibly conflicted over the proper measurement of damages to the parents of an unplanned or unwanted child based on a doctor's (or other health-care provider's) negligence that was the cause in fact of the child's birth.

Today, there are five approaches courts take regarding the birth of a child that was sought to be avoided by its parents. First, no compensation is available at all for the tortfeasors' malpractice, because the birth of a child is always a "blessed event." Second, compensation for basic negligence with respect to the physician's misfeasance is limited to the costs of the botched procedure and possibly other elements such as pain and suffering to the parent who underwent that procedure. Third, some courts have held that if a child is born with an abnormality after an unsuccessful sterilization or abortion procedure, the plaintiff parents deserve the full costs of rearing that child because of the doctor's negligence. Fourth, other courts have held that even when a child is born healthy and without abnormalities, rearing costs may be awarded to the parents of the child they sought to avoid, but must be offset by the benefits the parents will derive by having that child in their lives. Last, an extremely small minority of courts has held that full rearing costs for an unplanned or unwanted child must be awarded if the parents'

purpose of avoiding the birth of a child was based on financial reasons and not for eugenic reasons.

The absurdity of these distinctions is palpable. Courts that have held that the birth of a child is always a blessing are ignorant of the plaintiff parents' reasons for avoiding having the child; often having the child is not a blessing, it is a burden. Additionally, there is no justification for treating an award of rearing costs differently for a healthy child and an unhealthy child; neither was wanted, which is why the parent underwent the sterilization or abortion procedure in the first place. The same is true with respect to the application of the offsetting benefits rule: if the parents did not want a child, there is no benefit, there is only a burden.

It is patently disingenuous to treat the tort of wrongful birth differently from any other claim for holding a defendant liable for the costs of his having negligently inflicted harm. The interest sought to be protected by an individual who seeks to avoid parenting a child is paramount because even if it is argued that a child is always a blessing, that argument is manifestly spurious when the potential parent does not want that blessing.

While the inconsistency of these results may find support in the frailty of human emotion and sympathy, the disposition of wrongful birth claims should not be based on such standards. Nor should it be guided by policy-ridden arguments that serve to insulate negligent physicians from liability for the consequences of their wrongdoing and often result in denying parents just compensation for the injuries they have suffered. To properly effect the elementary premise of tort law and the purpose of the damages remedy, courts hearing claims for wrongful birth should shift their focus away from the health of the wrongfully born child or the alleged benefits that child may or may not

provide to the plaintiff parents who were attempting to avoid that child's birth. Emphasis should be placed, instead, on the interest the plaintiffs were seeking to protect in originally deciding not to parent the child. Inquiring into the parents' motivation for attempting sterilization or abortion will allow the trier of fact to determine the extent of the plaintiff's injury and thereby award them damages commensurate with that injury. This method of analysis will serve to facilitate rather than frustrate the judiciary's goal of compensating the plaintiffs and deterring medical malpractice, while preventing the possibility of creating windfall verdicts to either party.