Kentucky Law Survey: Torts

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Torts

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INTRODUCTION

The Survey will discuss two significant decisions[1] handed down by the Kentucky appellate courts during the Survey period.[2] In the first case to be discussed, the Kentucky Court of Appeals recognized the tort of outrage as an independent cause of action.[3] The Kentucky Supreme Court, in the other case this Survey will analyze,

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[1] Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Craft v. Rice, No. 82-CA-1346-MR (Ky. Ct. App. Apr. 22, 1983), *reported at* 30 KY. L. SUMM. 11, at 2 (Ky. Ct. App. May 12, 1983) [hereinafter cited as KLS], *discretionary rev. granted*, 30 KLS 11, at 24 (Ky. Aug. 14, 1983).

[2] The Survey period runs from July 1, 1982, through June 30, 1983. Other cases of interest decided during this period but not discussed in this Survey include: Lexington Herald-Leader Co. v. Graves, No. 81-SC-575-TG (Ky. Dec. 28, 1982) (reversing a libel award, the Court applied the "actual malice" standard announced by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and found no actual malice on the somewhat convoluted facts); Carney v. Moody, 646 S.W.2d 40 (Ky. 1982) (unanimously upholding the Kentucky statutes of limitations, KRS §§ 413.120 and 413.135); Reans v. Stutler, 642 S.W.2d 586 (Ky. 1982) (reversing on evidentiary grounds a $75,000 medical malpractice award for plaintiff and remanding the case for trial de novo. The Court held: (l) it was reversible error to allow plaintiff's attorney to use leading questions with medical experts to present evidence in chief where witnesses were not shown to have "a strong allegiance of interest" with plaintiff nor to be unwilling to testify; and (2) it was abuse of the trial judge's discretion to prevent defense counsel from conferring with his own witness during a break in the trial); Clements v. Ashland Oil, Inc., 657 S.W.2d 223 (Ky. 1983) (in litigation stemming from a gasoline fire, the Court, reversing an award in a wrongful death action against all defendants except the immediately negligent party, held that the duty of care does not require equipment to be the safest available, provided such equipment is safe and would have prevented the injury complained of had it been used); Paducah Area Pub. Library v. Terry, 655 S.W.2d 19 (Ky. Ct. App. 1983) (affirming a personal injury award for $983,456.57 against defendant Library, the court held: (l) "sudden emergency" instruction not available where the emergency was caused by defendant's own negligence; (2) admission of photographs taken soon after the accident was proper where the pictures were of significant probative value in determining the extent of injuries; and (3) tax impact is irrelevant to a jury considering the amount of damages to be awarded); Johnson v. Lexington Herald-Leader Co., No. 82-CA-944-MR (Ky. Ct. App. Feb. 4, 1983) (inaccurate newspaper report indicating that plaintiff was arrested for trafficking in cocaine would not support a claim for false light invasion of privacy where plaintiff was actually arrested for possession of cocaine).

[3] Craft v. Rice, No. 82-CA-1346-MR, slip op. at 5-8.

ruled that the parents of a healthy child born after an unsuccessful sterilization operation could not recover from the physician the costs of rearing the child.[4]

I. OUTRAGE

More than forty years ago, Dean Prosser heralded the new tort of intentional infliction of emotional distress,[5] but at the same time noted: "[T]he law has been reluctant, and very slow indeed, to accept the interest in peace of mind as entitled to independent legal protection."[6] Kentucky has finally recognized this tort as an independent cause of action in the case of *Craft v. Rice*.[7] This new tort has been designated "outrage,"[8] and its parameters are defined by section 46(1) of the Restatement (Second) of Torts [Restatement].[9]

Whether, and to what extent, to redress damages for emotional distress has been the subject of much debate.[10] Emotional distress goes by many names,[11] and includes "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea."[12] Only under extreme circumstances, however, may liability arise.[13]

For many years, courts denied recovery for emotional distress as an independent tort.[14] This reluctance was due to the difficulty of proving and measuring damages.[15] Damages stemming from

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[4] Schork v. Huber, 648 S.W.2d at 863.

[5] *See* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

[6] *Id.* at 874.

[7] No. 82-CA-1346-MR, slip op. at 5-8.

[8] *Id.* at 5.

[9] *See id.* at 7; RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

[10] *See, e.g.*, Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Prosser, *supra* note 5; Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

[11] These include mental distress, mental anguish, shock, fright and mental suffering. RESTATEMENT (SECOND) OF TORTS § 46(1) comment j (1965).

[12] *Id.*

[13] *Id.*

[14] Ausness, *Kentucky Law Survey—Torts*, 65 KY. L.J. 301, 312 (1976-77); *see also* Prosser, *supra* note 5, at 874-75.

[15] "[T]he law cannot value, and does not pretend to redress [mental pain or anxiety] when the unlawful act causes that alone . . . though . . . it is impossible a jury . . . should

emotional distress were thought to be too speculative,[16] and courts feared that recognition of such an ephemeral cause of action would bring a deluge of trivial litigation.[17] These fears have proved groundless, and courts have gradually come to recognize emotional distress as the basis for an independent cause of action.[18]

The *Craft* case arose from events surrounding the criminal trial of one of the plaintiffs, Albert Craft, who was accused of falsifying weigh tickets.[19] Pending Albert's trial, Roy Rice, a former Boyd County Sheriff, embarked upon a course of harassment directed primarily at Albert's wife, Irene Craft.[20] Rice kept Irene under surveillance, following her from home to work. He used the citizen's band radio to threaten her, saying he would put Albert in prison. On one occasion, Rice even used his own vehicle to force Irene's car into oncoming lanes of traffic. About the same time, the Crafts began to receive anonymous telephone calls. However, Rice at no time physically touched Irene.[21] Irene claimed that, as a result of this harassment, she suffered chronic diarrhea, colitis, a nervous condition and mental anguish.[22]

The Boyd County Circuit Court dismissed the Crafts' claim on the basis of the statute of limitations since it was filed more than

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altogether overlook the feelings of the party." Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861).

[16] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971). However, courts have never hesitated to award damages for physical pain, which can be equally speculative. *Id.* Further, recovery has long been allowed for emotional distress when accompanied by even slight physical injury, or when based on another tort, such as assault. *See, e.g.,* Brown v. Crawford, 177 S.W.2d 1 (Ky. 1943). "A lusty hug and a kiss were priced at $700 . . . ." Magruder, *supra* note 10, at 1034, n.5 (citing Ragsale v. Ezell, 49 S.W. 775, 775 (Ky. 1899)). *See also* Interstate Life & Accident Co. v. Brewer, 193 S.E. 458 (Ga. Ct. App. 1937) (being struck by a coin constituted sufficient injury to support recovery); Liljegren v. United Rys., 227 S.W. 925 (Mo. Ct. App. 1921) (a kiss by a drunken railroad passenger resulted in liability). It is difficult to see how damages in such cases would be less speculative than damages based on outrage.

[17] See W. PROSSER, *supra* note 16, at § 12, for a discussion of the arguments against the tort of outrage.

[18] *See id.*

[19] Craft v. Rice, No. 82-CA-1346-MR, slip op. at 2. Craft was later acquitted of the charges. *Id.*

[20] *Id.* This behavior was continued for three months, May through July, 1978. *Id.*

[21] *Id.*

[22] *Id.* The court dismissed a claim by Albert Craft as "trivial," because only one incident was alleged in which Rice had had contact with Albert Craft during the period, and that contact had only been over a citizen's band radio. *Id.*

a year after the alleged occurrences.[23] The Kentucky Court of Appeals found that plaintiffs had established a "right to be left alone and free from outrageous conduct."[24] The court went on to state that since the "criminal law provides penalties for harassment in Kentucky Revised Statute [(KRS) section] 525.70 . . . there should be a corresponding tort for this type of conduct."[25] The court concluded that the Crafts' claim was barred by the one year statute of limitations set forth in KRS section 413.140,[26] because outrage is a personal injury.[27] The court could have avoided recognition of outrage as a cause of action simply by affirming the trial court's finding that the statute of limitations had run against the plaintiffs. However, the court of appeals was careful to recognize the tort, adopting the language of the Restatement and defining the type of injury involved before dismissing the claim.[28] This strongly suggests that a future plaintiff with a timely claim meeting the requirements set forth by the court will be able to recover.

With the *Craft* decision, Kentucky joined an increasing majority of jurisdictions in recognizing the tort of outrage,[29] and

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[23] *Id.*, slip op. at 3.

[24] *Id.*, slip op. at 7.

[25] *Id.* KY. REV. STAT. ANN. § 525.070 (Bobbs-Merrill 1975) [hereinafter cited as KRS] provides:

> Harassment.—(1) A person is guilty of harassment when with intent to harass, annoy or alarm another person he:
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> (a) Strikes, shoves, kicks or otherwise subjects him to physical contact or attempts or threatens to do the same; or
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> (b) In a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
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> (c) Follows a person in or about a public place or places; or
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> (d) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such person and which serve no legitimate purpose.
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> (2) Harassment is a violation.

[26] KRS § 413.140 (Bobbs-Merrill 1974).

[27] Craft v. Rice, No. 82-CA-1346-MR, slip op. at 8 (citing Carr v. Texas E. Transmission Corp., 344 S.W.2d 619 (Ky. 1961); Columbia Mining Co. v. Walker, 271 S.W.2d 276 (Ky. 1954)).

[28] *See* Craft v. Rice, No. 82-CA-1346-MR, slip op. at 5-8.

[29] To date at least 36 states, including Kentucky, have recognized intentional infliction of emotional distress as an independent tort. *See* American Road Serv. Co. v. Inmon, 394 So. 2d 361 (Ala. 1980); Watts v. Golden Age Nursing Home, 619 P.2d 1032 (Ariz. 1980); Counce v. M.B.M. Co., 597 S.W.2d 92 (Ark. 1979); State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282 (Cal. 1952); Rugg v. McCarty, 476 P.2d 753 (Colo. 1970); Urban v. Hartford Gas Co., 93 A.2d 292 (Conn. 1952); Waldon v. Covington, 415 A.2d 1070

departed from the position historically taken by Kentucky courts.[30] Previously, plaintiffs were denied recovery for emotional distress except where "accompanied by a direct, contemporaneous physical contact or injury."[31] This requirement, known as the impact rule, has been much criticized by commentators and the courts.[32] It has been rejected by most jurisdictions in cases of intentionally caused emotional distress[33] and is being eroded in cases of negligently inflicted emotional distress.[34] Application of the impact rule has led

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(D.C. 1980); Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. Dist. Ct. App. 1979); Whitmire v. Woodbury, 267 S.E.2d 783 (Ga. Ct. App.), *rev'd on other grounds*, 271 S.E.2d 491 (1980); Hatfield v. Max Rouse & Sons Northwest, 606 P.2d 944 (Idaho 1980); Public Fin. Corp. v. Davis, 360 N.E.2d 765 (Ill. 1976); Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976); Wiehe v. Kukal, 592 P.2d 860 (Kan. 1979); Steadman v. South Cent. Bell Tel. Co., 362 So. 2d 1144 (La. Ct. App. 1978); Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979); Richey v. American Auto Ass'n, 406 N.E.2d 675 (Mass. 1980); Fry v. Ionia Sentinel-Standard, 300 N.W.2d 687 (Mich. Ct. App. 1980); LaBrier v. Anheuser Ford, Inc., 612 S.W.2d 790 (Mo. Ct. App. 1981); Paasch v. Brown, 227 N.W.2d 402 (Neb. 1975); Star v. Rabello, 625 P.2d 90 (Nev. 1981); Hume v. Bayer, 428 A.2d 966 (N.J. Super. Ct. Law Div. 1981); Fischer v. Maloney, 373 N.E.2d 1215 (N.Y. 1978); Dickens v. Puryear, 276 S.E.2d 325 (N.C. 1981); Breeden v. League Servs. Corp., 575 P.2d 1374 (Okla. 1978); Turman v. Central Billing Bureau, Inc., 568 P.2d 1382 (Or. 1977); Mullen v. Suchko, 421 A.2d 310 (Pa. Super. Ct. 1980); Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981); First Nat'l Bank v. Bragdon, 167 N.W.2d 381 (S.D. 1969); Moorhead v. J.C. Penney Co., 555 S.W.2d 713 (Tenn. 1977); Samms v. Eccles, 358 P.2d 344 (Utah 1961); Sheltra v. Smith, 392 A.2d 431 (Vt. 1978); Womack v. Eldridge, 210 S.E.2d 145 (Va. 1974); Phillips v. Hardwick, 628 P.2d 506 (Wash. Ct. App. 1981); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978); Scarpaci v. Milwaukee County, 292 N.W.2d 816 (Wis. 1980).

[30] For a plenary discussion of the history of recovery for infliction of emotional distress in Kentucky, see Ausness, *supra* note 14, at 311-21.

[31] *Id.* at 317. Recovery was generally contingent upon the finding of some other tort, to which emotional distress damages were then appended. *See, e.g.*, Southern Express Co. v. Byers, 240 U.S. 612, 615 (1916) ("[M]ere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation."). *See also* Brown v. Crawford, 177 S.W.2d at 1 (recovery based on assault). Most decisions insisted on the presence of a recognized cause of action, although it was obvious that damage from that source was minor, and that the emotional damages were the primary reason for bringing the action.

[32] *See, e.g.*, American Road Serv. Co. v. Inmon, 394 So. 2d at 362-65; W. PROSSER, *supra* note 16, at § 55; Ausness, *supra* note 14, at 318-21.

[33] *See* American Road Serv. Co. v. Inmon, 394 So. 2d at 365; M.B.M. Co. v. Counce, 596 S.W.2d 681, 687 (Ark. 1980); George v. Jordan Marsh Co., 268 N.E.2d 915, 921 (Mass. 1971); Monteleone v. Co-Operative Transit Co., 36 S.E.2d 475, 480 (W. Va. 1945); Lambert, *Tort Liability for Psychic Injuries: Overview and Update*, PERS. INJ. ANNUAL 539, 544-54 (1979), *reprinted from* 37 J.A. TRIAL L. AM. (1978); 38 AM. JUR. 2d *Fright, Shock and Mental Disturbance* § 5 (1968).

[34] *See, e.g.*, Dziokowski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983); Niederman v. Brodsky, 261 A.2d 84 (Pa. 1970).

to some anomalous results. In one case, a plaintiff who witnessed two men beat her husband was able to recover against the one who pushed her aside, but not against the other, who did not touch her.[35] The Kentucky Court of Appeals, in adopting the language of Restatement section 46(1), has found a more intelligent solution to the problem of when to allow emotional distress recovery.[36] Section 46(1) recognizes the right to be free from emotional distress, identifies the interest protected, and defines the conduct which will violate that interest and expose defendant to liability.[37] To be actionable, there must be extreme and outrageous conduct[38] which intentionally or recklessly[39] causes severe emotional distress[40] to the plaintiff.[41]

Not all conduct which is intended to cause emotional distress will subject the actor to liability. Only that conduct which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"[42] will be actionable. Thus, no liability will lie for petty insults or indignities. The law cannot, and should not, redress all "the slings and arrows of outrageous fortune."[43]

The Kentucky Court of Appeals found that Roy Rice's conduct[44] toward Irene Craft fit the Restatement definition.[45] Other courts have found a sufficient showing of outrageous conduct[46] in

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[35] *See* McGee v. Vanover, 147 S.W. 742 (Ky. 1912).

[36] *See* Ausness, *supra* note 14, at 320-21.

[37] RESTATEMENT (SECOND) OF TORTS § 46(1) (1965), states: "Outrageous Conduct Causing Severe Emotional Distress (1) One who by *extreme and outrageous conduct intentionally or recklessly causes severe emotional distress* to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." (emphasis added).

[38] RESTATEMENT (SECOND) OF TORTS § 46(1) comments d-g (1965).

[39] RESTATEMENT (SECOND) OF TORTS § 46(1) comments a, i (1965).

[40] RESTATEMENT (SECOND) OF TORTS § 46(1) comments j, k (1965).

[41] RESTATEMENT (SECOND) OF TORTS § 46(2) (1965) concerns conduct directed at a third person. This portion was not adopted by the Kentucky Court of Appeals. *See* Craft v. Rice, No. 82-CA-1346-MR, slip op. at 7-8.

[42] RESTATEMENT (SECOND) OF TORTS § 46(1) comment d.

[43] Shakespeare, *Hamlet*, Act III, scene 1.

[44] *See* text accompanying notes 20-21 *supra*.

[45] *See* Craft v. Rice, No. 82-CA-1346-MR, slip op. at 2.

[46] For a collection of cases see Annot., 86 A.L.R.3d 454 (1978); Annot., 46 A.L.R.3d 772 (1972).

instances of extreme and continuous verbal abuse toward plaintiff,[47] threats to beat up plaintiff if he did not give up his business,[48] and threatening a woman with the murder of her husband, and then carrying out the threat.[49] The outrageous character of the conduct may arise from or be amplified by abuse of position[50] or from knowledge of plaintiff's peculiar susceptibility to emotional distress.[51] However, a defendant will not be liable for insisting upon his legal rights in a permissible manner.[52]

Section 46 of the Restatement applies only to emotional distress which is inflicted intentionally or recklessly.[53] Thus, a defendant will only be liable where he or she "desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct."[54] Rice's conduct was found by the court of appeals to be an intentional effort to inflict emotional distress on Irene Craft.[55]

To support recovery, the emotional distress inflicted must be

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[47] *See* Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977).

[48] *See* State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d at 282, *noted in* Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189, 194-96 (1965).

[49] *See* Knierim v. Izzo, 174 N.E.2d 157 (Ill. 1961).

[50] RESTATEMENT (SECOND) OF TORTS 46(1) comment e. *See also* Johnson v. Sampson, 208 N.W.814 (Minn. 1926); Note, *Torts: An Analysis of Mental Distress as an Element of Damages and as a Basis of an Independent Cause of Action When Intentionally Caused*, 20 WASHBURN L.J. 106, 114 (1980).

[51] RESTATEMENT (SECOND) OF TORTS § 46 comment f (1965). *See also* Nickerson v. Hodges, 84 So. 37 (La. 1920) (defendants preyed on the peculiarities of a mentally deficient elderly woman).

[52] RESTATEMENT (SECOND) OF TORTS § 46 comment g (1965).

[53] RESTATEMENT (SECOND) OF TORTS § 46 comments a, i (1965). *See also* RESTATEMENT (SECOND) OF TORTS § 500 (1965) (definition of reckless). Recklessness may be found either from the defendant's knowledge of potential harm to another or from the failure to appreciate the potential harm where a reasonable person would. RESTATEMENT (SECOND) OF TORTS § 500 comment a (1965).

[54] RESTATEMENT (SECOND) OF TORTS § 46 comment i (1965).

[55] Craft v. Rice, No. 82-CA-1346-MR, slip op. at 5. Because the Crafts appealed from a directed verdict, their allegations must be taken as true. *Id.*, slip op. at 3. An example of reckless conduct was found where defendant circulated a false report that plaintiff's son had hanged himself, knowing that plaintiff was likely to hear the rumor. *See* Bielitski v. Obadiak, 61 D.L.R. 494 (Sask. 1921). *See also* Anderson v. Knox, 297 F.2d 702 (9th Cir. 1961) (reckless advice concerning insurance), *cert. denied*, 370 U.S. 915 (1962); Savage v. Boies, 272 P.2d 349 (Ariz. 1954) (false representation, for the purpose of accomplishing an arrest, that plaintiff's child was hurt); Delta Fin. Co. v. Ganakas, 91 S.E.2d 383 (Ga. 1956) (collection agent threatened child, who was home alone, with arrest and jail if she did not open the door).

severe.[56] Although the Restatement does not require bodily harm or injury,[57] physical manifestations may afford evidence that the distress indeed exists and that it is severe.[58] The emotional trauma experienced by Irene Craft, resulting as it did in medically verifiable manifestations, was found to be of a sufficient severity to satisfy this requirement.[59] The degree of outrageousness will also be considered evidence of mental anguish,[60] as where a mother and her severely injured ten month old baby were sent out into subfreezing weather,[61] or where a premature infant who had died shortly after birth was placed in a gallon jar of formaldehyde and displayed to the mother.[62] These fact situations would almost certainly cause emotional distress "so severe that no reasonable man could be expected to endure it."[63]

In recognizing outrage, the court of appeals has taken a step toward a more fair resolution of emotional distress claims. The sensible guidelines of the Restatement, strictly adhered to, should prevent recovery on meritless claims.[64] The Supreme Court has granted discretionary review in *Craft v. Rice*.[65] However, because the decision of the court of appeals is conceptually sound, the Kentucky Supreme Court should approve it.

II. WRONGFUL BIRTH

A. Schork v. Huber

In *Schork v. Huber*,[66] the Kentucky Supreme Court held that the parents of a normal, healthy child born after an unsuccessful sterilization operation could not recover from the physician the

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[56] *See* RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

[57] *See* RESTATEMENT (SECOND) OF TORTS § 46 comment k (1965).

[58] *Id.*

[59] *See* Craft v. Rice, No. 82-CA-1346-MR, slip op. at 5.

[60] RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

[61] *See* Rockhill v. Pollard, 485 P.2d 28 (Or. 1971).

[62] *See* Johnson v. Woman's Hosp., 527 S.W.2d 133 (Tenn. Ct. App. 1975).

[63] RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

[64] *See* RESTATEMENT (SECOND) OF TORTS §§ 312, 313, 436, 436A (1965). In addition, a clear and convincing proof standard might be imposed upon plaintiffs to discourage specious claims.

[65] 30 KLS 11, at 24.

[66] 648 S.W.2d 861 (Ky. 1982).

costs of rearing the child.[67] In 1977, plaintiff Sharon Schork underwent a sterilization procedure which her physician, defendant Dr. Charles Huber, assured her was "99 percent effective in preventing pregnancy."[68] On a follow-up visit, Huber advised Sharon that she was indeed sterile. Shortly after this, Sharon experienced what she thought was a miscarriage and returned to Huber. He reassured her that the sterilization had been successful,[69] although he performed no tests at this time to determine whether Sharon was in fact sterile.[70] Some months later Schork discovered that she was pregnant. She delivered a normal, healthy baby boy in 1978.[71]

Following the birth of this unplanned son, the Schorks brought a malpractice suit against Huber. They claimed damages for the direct birth costs of pain and suffering, medical expenses and lost wages.[72] This portion of the complaint was not dismissed.[73] The plaintiffs also sought to recover damages for the cost of raising the child, for disruption of family life and for mental suffering. The trial court granted a partial summary judgment dismissing this latter part of the complaint,[74] and the court of appeals affirmed.[75]

In affirming the decision of the court of appeals, the Supreme Court stated that "parents cannot recover damages based on the costs of raising a healthy but unexpected child from a doctor following an unsuccessful sterilization procedure."[76] The Court stated five reasons for its position. First, the parents of a normal,

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[67] *Id.* at 863.

[68] *Id.* at 862.

[69] *Id.*

[70] *Id.* at 863 (Liebson, J., dissenting).

[71] *Id.* at 862.

[72] *Id.* at 864 (Liebson, J., dissenting). The elements of pain and suffering, medical expenses and lost wages will be referred to collectively as direct birth costs throughout the balance of this discussion.

[73] *Id.*

[74] *Id.* at 863-64.

[75] *Id.* at 864.

[76] *Id.* at 862. Justices Liebson and Vance dissented. Justice Liebson, in a lengthy dissent, stated that the costs of raising an unwanted child born after a negligent sterilization should be recoverable in damages "as a natural and probable consequence of the act of negligence." *Id.* at 865 (Liebson, J., dissenting). He further disagreed with the majority's assessment of public policy. "The duty of this court is to follow public policy, not to formulate it." *Id.* at 864 (Liebson, J., dissenting). Justice Vance, also dissenting, would in addition have awarded the damages sought for mental distress, which Justice Liebson would have denied due to a lack of impact on the plaintiff. *Id.* at 867 (Vance, J., dissenting).

healthy child have not suffered any injury or damage.[77] Second, the benefits of parenthood outweigh any economic burden.[78] Third, the Court believed that the injury claimed was too remote and speculative to support an award of damages.[79] Fourth, the Court found that the parents in *Schork* failed to mitigate their alleged damages.[80] Finally, the Court concluded that recovery for such damages contravenes public policy.[81]

Although causes of action for wrongful birth have been maintained as a type of medical malpractice in Kentucky,[82] the issue of whether child rearing costs are recoverable as an element of damages in wrongful birth cases had not, prior to the *Schork* case, been before the Kentucky Supreme Court. This issue, however, had been decided by the Kentucky Court of Appeals in *Maggard v. McKelvey*.[83] The *Maggard* court held that, although an unwanted child was a foreseeable consequence of a negligently-performed sterilization:[84]

> [I]t 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. But to hold a doctor responsible for the support of a mistakenly conceived child takes him well beyond the scope of his duty to his patient, as commonly

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[77] *Id.* at 862.

[78] *Id.*

[79] *Id.* at 862, 863.

[80] *Id.* at 862 ("[I]n a *pure legal sense* the parents have failed to mitigate the damages which they charge.")(emphasis added). The Court failed to state exactly how the parents might have mitigated their damages. *See* text accompanying note 158 *infra*.

[81] *Id.*

[82] *See, e.g.*, Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971) (directed verdict in favor of a defendant physician who performed allegedly negligent vasectomy held erroneous, on grounds that a jury question was presented on the issue of negligence); Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970) (dismissal of complaint reversed; held that statute of limitations did not begin to run until the discovery of the pregnancy); Maggard v. McKelvey, 627 S.W.2d 44 (Ky. Ct. App. 1981) (holding that if negligence could be proven physician would be liable for direct birth costs). *See also* Bennett v. Graves, 557 S.W.2d 893 (Ky. Ct. App. 1977) (no recovery allowed for birth of ninth child following unsuccessful sterilization where no negligence was found).

[83] 627 S.W.2d at 44. The facts in *Maggard* were less favorable to the plaintiff than the facts of *Schork*. In *Maggard*, the plaintiff Jerry Maggard failed to return after a vasectomy for the complete series of semen tests which defendant Dr. McKelvey had ordered. *Id.* at 46.

[84] *Id.* at 47.

> thought of by both the lay public and the medical profession. Public policy can, and in this instance does, cut off the legal responsibility of the physician, even though he may have been negligent and the injured be innocent. Without a clear expression of public opinion, some indication from the legislature or an interpretation by our Supreme Court to the contrary, we conclude that our public policy prohibits the extension of liability to include these damages.[85]

Therefore, damages were limited to those "incidental to the pregnancy and birth, such as pain and suffering, loss of consortium, medical and hospital expenses, and loss of wages."[86] *Maggard* was cited with approval by the Kentucky Supreme Court in *Schork*.[87]

B. *Wrongful Birth in Other Jurisdictions*

Wrongful birth and its disfavored counterpart, wrongful life, although similar in nature, are distinct torts.[88] Wrongful birth claims brought under contractual theories have met with limited success.[89] Courts have been reluctant to impose implied warranties of success on the physician, because even a non-negligent pro-

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[85] *Id.* at 48.

[86] *Id.* at 49.

[87] Schork v. Huber, 648 S.W.2d at 862.

[88] For comparisons of these torts, see Hold, *Wrongful Pregnancy*, 33 S.C.L. REV. 759 (1982); Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713 (1982); Comment, *Wrongful Birth and Wrongful Life: Questions of Public Policy*, 88 LOY. L. REV. 77 (1982) [hereinafter cited as *Wrongful Birth*]; Comment, *Wrongful Life and Wrongful Birth Causes of Action--Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611 (1980) [hereinafter cited as *Suggestions for a Consistent Analysis*]. For a complete discussion of the terminology, see Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L. REV. 480, 483-85 (1980) [hereinafter cited as *"Wrongful Life"*].

[89] *See, e.g.*, Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982) (cause of action based on expressed and implied warranties had acceptable legal theory which would allow plaintiff to recover if allegations were proven). *Cf.* Coleman v. Garrison, 349 A.2d 8 (Del. 1975) (any warranty must be supported by independent consideration).

For other cases in which plaintiffs have alleged breach of warranty, see Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970); Rogala v. Silva, 305 N.E.2d 571 (Ill. App. Ct. 1973); Hackworth v. Hart, 474 S.W.2d at 377; Green v. Sudakin, 265 N.W.2d 411 (Mich. Ct. App. 1978); Sala v. Tomlinson, 422 N.Y.S.2d 506 (App. Div. 1979); Baldwin v. Sanders, 223 S.E.2d 602 (S.C. 1976).

cedure does not guarantee sterility.[90] At least one court has refused to recognize a wrongful birth cause of action based on breach of an express or implied warranty.[91]

In wrongful birth actions, recognized in many jurisdictions,[92] the parents claim that the child should not have been born at all, and that they are damaged because a doctor's negligence caused a child to be born.[93] A wrongful life action is brought by the infant claiming that its very existence is wrongful and that had defendant not been negligent plaintiff would not exist.[94] The overwhelm-

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[90] *See, e.g.,* Coleman v. Garrison, 349 A.2d at 8; Hackworth v. Hart, 474 S.W.2d at 377.

Pregnancy occurs after sterilization procedures once in 2,000 cases following ligation, and once in 50 cases following the Pomeroy method used when sterilization is done at Caesarean section. Spontaneous recanalization occurs in less than 1% of vasectomized males. R. BENSON, HANDBOOK OF OBSTETRICS & GYNECOLOGY 445 (5th ed. 1974).

[91] *See* Sala v. Tomlinson, 422 N.Y.S.2d at 508 ("New York does not recognize a cause of action based upon breach of warranty arising out of the performance of services.").

[92] *See, e.g.,* Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982); Custodio v. Bauer, 59 Cal. Rptr. 463 (Ct. App. 1967); Anonymous v. Hospital, 366 A.2d 204 (Conn. 1976); Jackson v. Anderson, 230 So. 2d at 503; Maggard v. McKelvey, 627 S.W.2d at 44; Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Kingsbury v. Smith, 442 A.2d 1003 (N.H. 1982); Berman v. Allan, 404 A.2d 8 (N.J. 1979); Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976); Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App. 1974); Hickman v. Myers, 632 S.W.2d 869 (Tex. Civ. App. 1982); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

[93] *See* Robertson, *Damages for the Birth of a Child—Some Possible Policy Barriers,* 23 MEDICINE, SCIENCE & THE LAW 2 (1983); Annot., 83 A.L.R.3d 15, 19 n.4 (1978).

[94] A full discussion of the wrongful life concept is plainly beyond the confines of this Survey. However, the question of whether a cause of action should be allowed for wrongful life is a fascinating one which, due in part to its emotion charged nature, has inspired much comment. *See, e.g.,* Tedeschi, *Tort Liability for "Wrongful Life,"* 7 J. FAM. L. 465 (1967); Trotzig, *The Defective Child and The Actions for Wrongful Life and Wrongful Birth,* 14 FAM. L.Q. 15 (1980); Comment, Park v. Chessin: *The Continuing Judicial Development of the Theory of "Wrongful Life,"* 4 AM. J. OF LAW & MED. 211 (1978-79); Comment, *Wrongful Life: Should The Cause of Action be Recognized?* 70 KY. L.J. 163 (1981-82).

The concept of wrongful life has also been a fertile source of litigation. *See, e.g.,* Turpin v. Sortini, 643 P.2d 954 (Cal. 1982); Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477 (Ct. App. 1980); Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App. 1982); Berman v. Allan, 404 A.2d at 8; Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967). At least one commentator has noted that the same fact situation can produce a case wherein the parents are allowed a cause of action while the child is not. *See Wrongful Birth, supra* note 88, at 88-89. In this context, *compare* Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980) (Phillips I) *with* Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1980) (Phillips II).

ing majority of courts have rejected wrongful life as a viable cause of action.[95]

The wrongful birth cause of action has a relatively brief history.[96] Until recently, such cases were rather rare.[97] However, these suits are fast reaching epidemic proportions. Approximately sixty wrongful birth decisions have been published, with roughly one-third of that number occurring in the last five years.[98] This dramatic increase is attributable at least in part to the growing number of contraceptive sterilization procedures being performed each year.[99] Obstetricians and gynecologists, the members of the medical profession who perform sterilization surgery, are ten times more likely to be sued than most other physicians.[100] Although complete assurance of permanent sterility is virtually impossible,[101] when a healthy child[102] arrives unexpectedly the parents may seek redress against an allegedly negligent physician.[103]

The large volume of wrongful birth litigation has unfortunately

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[95] California and Washington have recognized limited actions for wrongful life. *See* Turpin v. Sortini, 643 P.2d at 954; Harbeson v. Parke-Davis, Inc., 656 P.2d at 483.

[96] The first wrongful birth case was Christensen v. Thornby, 255 N.W. 620 (Minn. 1934).

[97] For a good historical development of the wrongful birth cause of action, see Comment, *Suggestions for a Consistent Analysis*, *supra*, note 88 at 623-30.

[98] *See* Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 65 (1981).

[99] Appelson, *"Wrongful Birth" Suits on the Rise*, 67 A.B.A. J. 1255, 1255 (1981).

[100] *Id.*

[101] *See* BENSON, *supra* note 90, at 445; Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AMERICAN J. LAW & MED. 131, 139 (1978-79).

[102] This Survey is limited to a discussion of what damages are available for the birth of a healthy child, the fact situation presented by *Schork*. However, the issues are substantially the same whether the child is born healthy or handicapped, since the negligent sterilization procedure leads only to the birth and not the handicap. In this context, care must be taken to distinguish wrongful birth cases (child should not have been born) from cases which seek damages for tortious prenatal injury.

[103] Most wrongful birth actions name the physician who performed the sterilization procedure as a defendant. A notable exception to this trend is Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971), in which an action was brought against a pharmacist who negligently filled plaintiff's prescription for birth control pills with a tranquilizer. In addition to negligent sterilization and negligent dispensation of oral contraceptives, the question of liability for the birth of a child has arisen in at least three other factual contexts: (1) denial of an abortion, either by misdiagnosis of pregnancy or failure to reveal facts which would have led one to seek an abortion; (2) unsuccessful abortion; and (3) negligent genetic counseling. *See* Robertson, *supra* note 101, at 134-35.

failed to produce any sort of judicial consensus.[104] As the New Hampshire Supreme Court observed: "[T]he outlines of the duty are much more apparent than the remedy which society chooses to provide."[105] Most courts recognize a cause of action, but disagree sharply on the question of damages.[106] Some courts allow damages for raising the child because child rearing costs are a foreseeable result of defendant's negligence,[107] while other courts deny this recovery for reasons of public policy or deference to the legislature.[108] As one court has noted, no present method of awarding damages is completely satisfactory.[109]

Wrongful birth is a malpractice action, requiring the familiar tort elements of duty, a breach of duty which is the proximate cause of the injury and an actual loss or injury.[110] Plaintiff must prove all of these elements in order to recover.[111] Thus, if the physician is negligent in performing the sterilization,[112] and because of this negligence the plaintiff is injured by an unwelcome pregnancy,[113] the physician must pay the damages occasioned by the pregnancy, unless sufficient policy reasons exist to deny those damages.[114] The complicating factor in computing damages in a wrongful birth cause of action is that damages have been occasioned by the creation of a new human life.[115]

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[104] *See* Wilbur v. Kerr, 628 S.W.2d at 569.

[105] Kingsbury v. Smith, 442 A.2d at 1004.

[106] For a lively debate on damages among the justices of one court, see Mason v. Western Pa. Hosp., 453 A.2d at 974.

[107] *See, e.g.,* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174 (Minn. 1977) ("[A] growing majority of courts have allowed recovery for all damages proximately caused by the physician's negligence, including the cost of rearing the child during his minority.").

[108] *See, e.g.,* Maggard v. McKelvey, 627 S.W.2d at 47-48.

[109] Wilbur v. Kerr, 628 S.W.2d at 570.

[110] *See* Boone v. Mullendore, 416 So. 2d at 720; Turpin v. Sortini, 643 P.2d at 960; W. PROSSER, *supra* note 16, § 30, at 143.

[111] W. PROSSER, *supra* note 16, § 38, at 208-09.

[112] Four possible occasions where negligence might occur in sterilization cases are: (1) preoperative counseling, obtaining informed consent; (2) performance of operation; (3) postoperative testing; and (4) postoperative counseling. Robertson, *supra* note 101, at 139-44.

[113] Sexual intercourse is foreseeable and should not be considered a bar to recovery as an intervening cause. *See* Bishop v. Byrne, 265 F. Supp. 460, 463-64 (S.D.W.Va. 1967) ("The part played by Mr. Bishop in bringing about this condition does not, in our opinion, amount to an intervening cause.").

[114] *See, e.g.,* Rieck v. Medical Protective Co., 219 N.W.2d 242, 244-45 (Wis. 1974); Comment, *Suggestions for a Consistent Analysis, supra* note 88, at 623-30.

[115] It may prove helpful for purposes of analysis to mentally separate the child from the costs of rearing the child. Quite apart from the costs of his or her raising, the fact that

In the struggle to reach a just measure of damages, courts have arrived at four different positions: (1) allowing no damages;[116] (2) allowing recovery only for the direct birth costs;[117] (3) allowing recovery for the direct birth costs plus child rearing costs offset by an allowance for the benefits of parenthood;[118] and (4) complete recovery of child rearing costs with no offset.[119] The discussion which follows will address the reasoning and compare the beneficial and detrimental aspects of each of these positions.

1. *No Damages*

A few courts have held that a plaintiff is not entitled to damages for wrongful birth in the case of an unsuccessful sterilization.[120] The rationale is that the birth of a child is a blessing, and as such cannot be the occasion for damages. "[T]he plaintiff has been blessed with the [birth] of another child. The expenses alleged are incident to the bearing of a child" and therefore can not be recovered.[121] *Ball v. Mudge*[122] affirmed a jury decision that

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the child exists harms no one. This is the factor with which the courts are struggling. *See, e.g.*, Wilbur v. Kerr, 628 S.W.2d at 571. As a practical matter one cannot separate the child from the costs.

[116] *See, e.g.*, Christensen v. Thornby, 255 N.W. at 620.

[117] These would include pain and suffering, medical expenses and lost wages. *See* Kingsbury v. Smith, 442 A.2d 1003. Some courts also allow damages for emotional distress. *See, e.g.*, Boone v. Mullendore, 416 So. 2d at 721. *But see* Speck v. Finegold, 408 A.2d 496, 509 (Pa. Super. Ct. 1979) ("the emotional anguish that [the parents] suffer may be a normal, uncompensable price one pays for being a parent").

[118] *See, e.g.*, Troppi v. Scarf, 187 N.W.2d at 517-18; Sherlock v. Stillwater Clinic, 260 N.W.2d at 176.

[119] *See, e.g.*, Custodio v. Bauer, 59 Cal. Rptr. at 477; Cockrum v. Baumgartner, 425 N.E.2d 968, 970 (Ill. Ct. App. 1981), *rev'd*, 447 N.E.2d 385 (Ill. 1983), *cert. denied sub nom.* Raja v. Michael Reese Hosp., 52 U.S.L.W. 3248 (U.S. Oct. 3, 1983) (No. 83-17). In reversing the appellate court, the Illinois Supreme Court took the position that the birth of a normal, healthy child could not be considered a compensable wrong and so child rearing costs should be disallowed. Cockrum v. Baumgartner, 447 N.E.2d at 389. The dissent, however, pointed out: "It is not at all that human life or the state of parenthood are inherently injurious, rather it is an unplanned parenthood and an unwanted birth . . . attributable to the physician's negligence for which the plaintiffs seek compensation." *Id.* at 392 (Clark, J., dissenting).

[120] *See* Christensen v. Thornby, 255 N.W. at 620; Ball v. Mudge, 391 P.2d 201 (Wash. 1964). *See also* Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187, 1197 (1976).

[121] Christensen v. Thornby, 255 N.W. at 622.

[122] 391 P.2d at 201.

the parents were not damaged by the birth of the healthy infant, who they would neither consider placing for adoption, nor "sell for $50,000," even though the child was unplanned and unwanted.[123]

That no damages should be awarded in cases of wrongful birth appears unrealistic and indefensible. Pregnancy and childbirth, even absent complications, are painful and expensive, both in terms of actual medical costs incurred and in terms of the mother's lost earnings. The average cost of a normal pregnancy and delivery, including a two day hospital stay, is approximately $2,250. Should a Caesarean section be required or should other complications develop, that figure could rise to $10,000 or more.[124] Obviously, such costs could be devastating to a family with limited means and without medical insurance. Further, failure to recognize the cause of action would not serve to encourage a high standard of professional conduct and expertise in the family planning area.[125]

2. *Recovery for Direct Birth Costs Only*

A number of courts allow the parents of a healthy child born after a negligent sterilization procedure to recover the direct birth costs,[126] but will not allow recovery of child rearing costs for policy reasons.[127] This approach is founded on the premise that a normal, healthy life would not be considered a wrong.[128] "Courts denying recovery [of child rearing costs] because of 'public policy'

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[123] *Id.* at 204.

[124] Figures courtesy of Dr. Carey T. Vinson, Fayette County Health Department. While the figures represent only approximate costs of pregnancies and deliveries in Lexington, Kentucky, Dr. Vinson stated that the figures are comparable to costs in most other regions of the country.

[125] *See* Kingsbury v. Smith, 442 A.2d at 1005.

[126] *See, e.g.,* Boone v. Mullendore, 416 So. 2d at 718; Wilbur v. Kerr, 628 S.W.2d at 568; Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974) (costs awarded for "wrongful pregnancy"), *aff'd*, 349 A.2d at 8; Wilczynski v. Goodman, 391 N.E.2d 479 (Ill. App. Ct. 1979); Beardsley v. Wierdsma, 650 P.2d at 288. Jurisdictions differ as to what may be included in birth costs. Aside from medical and hospital expenses, courts have allowed damages for medical expenses associated with the unsuccessful sterilization operation, lost wages due to pregnancy and childbirth, mental anguish and pain and suffering. *See generally* Coleman v. Garrison, 327 A.2d 757; Kingsbury v. Smith, 442 A.2d 1003.

[127] *See, e.g.,* Coleman v. Garrison, 349 A.2d at 12.

[128] *See* Boone v. Mullendore, 416 So. 2d at 721; Wilczynski v. Goodman, 391 N.E.2d at 487.

are bothered by the idea that a normal, healthy life should be the basis for a compensable wrong."[129]

A public policy issue has been raised in almost every wrongful birth action.[130] Courts denying child rearing costs state that the benefits of having a healthy child should, as a matter of law, outweigh any economic loss caused by raising the child;[131] such damages would impose an unreasonable burden on defendant physicians and are out of proportion to their culpability;[132] allowing such damages would encourage fraudulent claims;[133] and, such damages create the possibility of future emotional harm to the child involved.[134]

Courts which espouse the overriding benefits theory[135] hold, as a matter of law, that an additional child is always a net benefit to its parents.[136] However, in today's society children are a considerable added expense to the family. According to the United States Department of Agriculture figures, a baby born in 1982 will cost his or her parents $89,720 by the time he or she reaches 18 years of age.[137] The benefits of child rearing, on the other hand, are intangible.[138] "[A] child's smile or the parental pride in a child's achievement"[139] are wonderful indeed. Thus, although the costs of raising a child may be an economic injury to the parent, some

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[129] Wilbur v. Kerr, 628 S.W.2d at 571.

[130] Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127, 138-45 (1978).

[131] This is sometimes referred to as the "overriding benefit" theory. *See* Robertson, *supra* note 101, at 149-50. This is not to be confused with the so called "benefits rule" of the RESTATEMENT (SECOND) OF TORTS § 921 (1979), discussed in text accompanying notes 149-54 *infra*.

[132] *See* White v. United States, 510 F. Supp. 146, 149 (D. Kan. 1981); Note, *Judicial Limitations on Damages Recoverable For the Wrongful Birth of a Healthy Infant*, 60 VA. L. REV. 1311, 1318 (1982).

[133] *See* Rieck v. Medical Protective Co., 219 N.W.2d at 244.

[134] This has been termed the "emotional bastard" theory. *See* Boone v. Mullendore, 416 So. 2d at 722; Wilbur v. Kerr, 628 S.W.2d at 570; Note, *supra* note 132, at 1329.

[135] *See* Note, *supra* note 132, at 1316. "The birth of a healthy child and the joy and pride in rearing that child are benefits which carry no price tag. This joy far outweighs any economic loss that might be suffered by the parents." Boone v. Mullendore, 416 So. 2d at 722.

[136] *See* Note, *supra* note 132, at 1316.

[137] *Bringing Up A Child Now Costs $80,000*, N.Y. Times, May 27, 1982, at B4, col. 10.

[138] *See* Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

[139] *Id.*

courts have concluded that policy considerations require the denial of child rearing costs.[140]

The strongest consideration for rejecting the award of child rearing costs is that an award for damages to raise a child would impose an unreasonable burden on the defendant physician, which is wholly out of proportion to his or her culpability.[141] Although allowing recovery of child rearing costs as an element of damages encourages risk spreading through increased use of medical malpractice insurance, the cost to all consumers of medical services would be increased if such damages were allowed. Further, "recognizing such 'a tort' and the damages urged would . . . discourage the legitimate practitioners from performing these [sterilization] procedures for fear they may be inundated by such claims."[142] Since states have evinced an interest both in keeping medical costs at an affordable level[143] and in assuring that contraceptive services are available to the public,[144] these policy considerations appear to be legitimate.

Another policy consideration cited by courts for denying recovery of child rearing costs is the fear that the child will suffer future emotional damage.[145] This theory, sometimes referred to as the "emotional bastard" theory,[146] suggests that the child will be emotionally damaged upon learning of the wrongful birth action by his or her parents.[147] On the other hand, in wrongful birth suits, as in cases involving the family in general, protecting the welfare

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[140] *See* Note, *supra* note 130, at 129 (citing Rieck v. Medical Protective Co., 219 N.W.2d at 244).

[141] *See* Beardsley v. Wierdsma, 650 P.2d at 291.

[142] Speck v. Finegold, 439 A.2d 110, 121 (Pa. 1981) (Nix, J., concurring). In this context it is important to note that some courts have recognized a cause of action for wrongful birth and limited recovery to direct birth costs, *e.g.*, Boone v. Mullendore, 416 So. 2d at 718, while others, like the court in *Speck*, speak of "denying" a cause of action for wrongful birth but allowing recovery for the direct birth costs. 439 A.2d at 121. *See also* Schork v. Huber, 648 S.W.2d at 861. The practical effect is the same.

[143] *See* Note, *supra* note 130, at 139.

[144] *See* Custodio v. Bauer, 59 Cal. Rptr. at 477.

[145] *See* Sherlock v. Stillwater Clinic, 260 N.W.2d at 173.

[146] *See* Boone v. Mullendore, 416 So. 2d at 722; Wilbur v. Kerr, 628 S.W.2d at 570; Robertson, *supra* note 101, at 153.

[147] *See, e.g.*, Boone v. Mullendore, 416 So. 2d at 722. "[A] child is less likely to become an 'emotional bastard' when he may have some vague notion that his parents' family planning scheme went astray, than when he discovers that he is a 50,000 dollar judicially declared burden." Bryan, *Damages—The Not So "Blessed Event,"* 46 N.C.L. REV. 948, 952 (1968).

of the child is of paramount importance, and it may be better to provide means for the parents to raise an unplanned child, even if this runs the risk of emotional damage to the child at a later date.[148] Thus, viable arguments exist both for and against allowing such damages.

3. *The Offset Approach*

A third approach, apparently an effort to mitigate the unfairness of placing the whole burden of raising the child upon the physician, permits recovery of only those child rearing costs which are in excess of the benefits of parenthood.[149] In *Sherlock v. Stillwater Clinic*,[150] the court felt

> compelled to conclude that where the parents of an unplanned, healthy child choose to include this item of damages in their claim, hopefully after being advised to the psychological consequences which could result from litigating such claim, we will permit them to recover the reasonably foreseeable costs of rearing, subject to an offset for the value of the benefits conferred to them by the child.[151]

This approach is based on the "benefits" rule of the Restatement (Second) of Torts section 920, which provides that a court may reduce the plaintiff's recovery if the defendant can show that his conduct "has conferred a special benefit to the interest of the plaintiff that was harmed."[152] The purpose of the rule is to prevent a "windfall" recovery by the plaintiff.[153]

Clearly, the valuation problems attendant on this approach are overwhelming.[154] Damages occasioned by the rearing of an unplanned

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[148] *See* Robertson, *supra* note 101, at 153.

[149] *See* Anonymous v. State, 366 A.2d 204 (Conn. Super. Ct. 1976); Troppi v. Scarf, 187 N.W.2d at 517-18.

[150] 260 N.W.2d at 169.

[151] *Id.* at 176.

[152] RESTATEMENT (SECOND) OF TORTS § 920 (1979) states:

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

[153] Note, *supra* note 132, at 1324.

[154] [A]doption of the 'benefits rule' . . . would present insurmountable problems of proof . . . . Proof could undoubtedly be offered regarding the cost

child are extremely speculative.[155] Problems exist as to what standard of living should be used: the community's average standard of living, the parents' accustomed standard of living, or some other benchmark.[156] The valuation of the benefits derived as a result of parenthood are even more difficult.[157]

Another argument often raised in this context concerns the mitigation of damages.[158] In the strict legal sense the plaintiff must mitigate damages in order to recover, but the idea of requiring a plaintiff to mitigate the damages caused by bearing a child by aborting the pregnancy or by placing the child for adoption is repugnant, and contradicts an evinced interest in family stability. It would clearly be unreasonable to require the plaintiff to take steps which might cause additional physical or emotional injury.

4. *Complete Recovery*

The fourth approach taken by courts is to allow recovery for all the costs of raising the child but without the offset of benefits.[159] This approach views the purpose of compensation "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 just share of the family income."[160]

> of care and maintenance for a hypothetical child, although the standard of living and extent of education to be provided such child would undoubtedly require considerable conjecture and speculation by the trier of facts.
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> . . . .
>
> . . . . [T]he satisfaction, joy and companionship which normal parents have in rearing a child . . . [are] impossible to value in dollars and cents.

Terrell v. Garcia, 496 S.W.2d at 127-28. *But see* Robertson, *supra* note 101, at 153 (objective cost standard should be employed).

[155] *See* Terrell v. Garcia, 496 S.W.2d at 127-28. Some courts have considered this fact as sufficient grounds to deny recovery. *See* Coleman v. Garrison, 349 A.2d at 12.

[156] *See* Robertson, *supra* note 101, at 153. *See also* note 154 *supra*.

[157] The question of valuing damages in a wrongful birth action is also discussed in Note, *Sterilization and Family Planning: The Physician's Civil Liability*, 56 GA. L. REV. 976 (1967-68); Comment, *Busting the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221 (1974-75); Comment, *Pregnancy After Sterilization: Causes of Action for Parent and Child*, 12 J. FAM. L. 635 (1972-73).

[158] *See, e.g.*, Schork v. Huber, 648 S.W.2d at 867.

[159] *See, e.g.*, Custodio v. Bauer, 59 Cal. Rptr. at 463.

[160] *Id.* at 477.

Of the four options considered, the first and fourth seem so unfair to either plaintiff or defendant that they are undesirable. Of the remaining options, recovery of direct birth costs only, the approach taken by the Kentucky Supreme Court in *Schork v. Huber*[161] best serves considerations of law and policy.[162]

Although the Court stated that "[t]he establishment of a cause of action . . . [for] wrongful birth is clearly within the purview of the legislature only,"[163] a second statement to the effect that the injured party could recover subject to policy consideration,[164] leads to the conclusion that the Court would have allowed recovery for the direct birth costs had the question been presented.

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[161] 648 S.W.2d at 861.

[162] The third option, allowing recovery of child raising costs with an offset for damages, is less desirable than the approach used in *Shork* because the policy considerations are not adequately considered. *See* text accompanying notes 141-48 *supra*.

[163] Schork v. Huber, 648 S.W.2d at 863.

[164] *Id.*